No. _____

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

Three women active in the Free the Nipple Movement were convicted of violating a Laconia, N.H. Ordinance prohibiting public exposure of "the female breast with less than a fully opaque covering of any part of the nipple." Laconia, N.H., Code of Ordinances ch. 180, art. I, §§180-2(3), 180-4. The Supreme Court of New Hampshire affirmed their convictions in a published opinion rejecting state and federal Equal Protection Clause defenses. Contrary to federal appellate decisions, New Hampshire's high court held an ordinance punishing only females for exposure of their areolas does not classify on the basis of gender. Alternatively, New Hampshire's high court held the Ordinance would survive intermediate scrutiny anyway—a holding directly at odds with a recent Tenth Circuit decision, which in turn conflicts with decisions of the Seventh and Eighth Circuits.

The questions presented are:

1. Does an ordinance expressly punishing only women, but not men, for identical conduct—being topless in public—classify on the basis of gender?

2. Does an ordinance criminalizing exposure of "the female breast," under which only women are prosecuted for public exposure of their areolas, violate the Fourteenth Amendment's Equal Protection Clause?

## PARTIES TO THE PROCEEDINGS

Petitioners Heidi C. Lilley, Kia Sinclair, and Ginger M. Pierro were defendants before the trial court, and appellants before the Supreme Court of New Hampshire.

Respondent the State of New Hampshire prosecuted the matter before the trial court, and was appellee before the Supreme Court of New Hampshire.

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## REPORTS OF THE OPINIONS BELOW

The Supreme Court of New Hampshire's opinion is reported as *New Hampshire v. Lilley,* __N.H.__, 204 A.3d 198 (N.H. 2019), and is reproduced in the Appendix hereto at Pet.App. 1a-51a.

The decision of New Hampshire's Fourth Circuit Court-Laconia District Division, denying Petitioners' motion to dismiss the charges against them is not published, but is reproduced in the Appendix hereto at Pet.App. 52a-63a.

## JURISDICTION

The Supreme Court of New Hampshire's decision was entered on February 8, 2019. No petition for rehearing was filed. On April 19, 2019, Justice Stephen Breyer granted Petitioners' application for an extension to July 8, 2019, to file this Petition for a Writ of Certiorari. *See Lilley v. New Hampshire,* No. 18A1074 (April 19, 2019).

This Court has jurisdiction under 28 U.S.C. §1257(a) to review the decision of New Hampshire's highest court in a case drawing Laconia's public-indecency ordinance—which is a "state statute" for jurisdictional purposes—into question on the ground of its being repugnant to the Constitution of the United States. *See City of New Orleans v. Dukes,* 427 U.S. 297, 301 (1976) (for jurisdictional purposes "[a] municipal ordinance is a 'State statute'"); *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 927 n.2 (1975) (for jurisdictional purposes "local ordinances are treated as state statutes"); *Erzoznik v. City of Jacksonville,* 422 U.S. 205, 207 & n.3 (1975) ("A local ordinance is deemed a state statute for purposes of invoking this Court's jurisdiction under 28 U.S.C. §1257."); *John P.*

*King Mfg. Co. v. City Council of Augusta,* 277 U.S. 100, 102-14 (1928).

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the Constitution of the United States, Section 1, clause 2, provides that no state may "deny to any person within its jurisdiction the equal protection of the laws":

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Amend. XIV, §1, cl.2.

Laconia, N.H., Code of Ordinances ch. 180, article I, §§180-1 through 180-6, is set forth in full in the Appendix to this Petition. Pet.App. 71a-74a. Section 180-2 provides that "it shall be unlawful for any person to knowingly or intentionally, in a public place: ... (3) Appear in a state of nudity." Section 180-4 defines "nudity" to include "the showing of the female breast with less than a fully opaque covering of any part of the nipple." Section 180-5 provides that "[a]ny person who violates this article shall be fined $250 for the first offense, $500 for the second offense and $1,000 for the third and each successive offense." *See* Pet.App. 71a-74a.

## STATEMENT OF THE CASE

Petitioners Heidi C. Lilley, Kia Sinclair, and Ginger M. Pierro are members of the Free the Nipple movement, who publicly oppose the sexualized

objectification of women that is reinforced by discriminatory laws punishing women but not men for being topless in public. They were arrested and prosecuted *as women* for doing what any man may lawfully do in Laconia, New Hampshire, under an Ordinance that by its terms expressly classifies on the basis of gender. For being both topless and female in public, each was convicted of violating an ordinance criminalizing the public exposure of her "female breast." Laconia, N.H., Code of Ordinances ch. 180, art. I, §§180-2(3), 180-4 (1998); *see* Pet.App. 64a-69a. Sustaining their convictions over Petitioners' objections that the Ordinance denies them equal protection of the laws in violation of both state and federal constitutions, the Supreme Court of New Hampshire held that an ordinance criminalizing being topless and female does not classify on the basis of gender, and that even if it did so classify, the Ordinance would survive "intermediate scrutiny" anyway. *See* Pet.App. 11a-12a, 14a n.3.

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Laconia, New Hampshire specifically defines the offense of "public indecency" to include any public exposure of "the female breast," thereby criminalizing women but not men for being topless in public. Laconia, N.H., Code of Ordinances ch. 180, art. I, §§180-2(3), 180-4 (1998); *see* Pet.App. 71a-73a. Section 180-2(3), makes it "unlawful for *any person* to knowingly or intentionally, in a public place ... [a]ppear in a state of nudity." But §184-4 then defines "nudity" to include "the showing of *the female breast*," but not the male breast, "with less than a fully opaque covering of any part of the nipple." Laconia, "Any person who violates this article shall be fined $250 for the first offense, $500 for the second offense

and $1,000 for the third and each successive offense." *Id.* §180-5; *see* Pet.App. 73a.

Petitioner Ginger M. Pierro was arrested by Laconia police for being topless and female in public on May 28, 2016, while she was doing yoga at Weirs Beach in Endicott Park. Pet.App. 99a-101a, 68a-69a. Three days later, on May 31, 2016, Petitioners Heidi Lilley and Kia Sinclair each went to Weirs Beach in Endicott Park to publicly protest Pierro's arrest. Pet.App. 94a-96a (Sinclair), 107a-108a (Lilley). They too were arrested, charged, and prosecuted *as women* for being topless and female in public. Each was charged with the crime of exposing her "female breast ...with less than a fully opaque covering of any part of the nipple." Laconia, N.H., Code of Ordinances ch. 180, art. I, §§180-2(3), 180-4 (1998); *see* Pet.App. 64a-67a.

Petitioners jointly moved to dismiss the charges against them arguing, *inter alia,* that the Ordinance violates the state and federal constitutions' Equal Protection Clauses, because it classifies on the basis of gender, applying unequally to men and women by criminalizing women alone for the public exposure of their areolas. Pet.App. 75a, 80a.

The trial court conducted an evidentiary hearing on Petitioners' motion to dismiss. Pet.App. 88a-169a. Petitioners Lilley and Sinclair testified at the October 15, 2016, hearing that they are active in the Free the Nipple movement, which opposes the sexualized objectification of women's breasts promoted by discriminatory laws punishing women but not men for public exposure of their breasts or nipples. Pet.App. 92a-93a (Sinclair), 105a-107a, 111a (Lilley). Sinclair testified that she was among those who started the movement in New Hampshire having

realized, as a new mother, "that there was a very big stigma on breastfeeding." Pet.App. 92a-93a. She explained that she believed that women's breasts, and especially their nipples, have been "hypersexualize[d]" and "consider[ed] pornographic and taboo," with laws like Laconia's public-indecency Ordinance reinforcing a stigma that "contributes to the low breastfeeding rates that the United States has compared to the rest of the world." Pet.App. 93a. Lilley testified that she is a feminist who joined the movement because she "believe[s] in the equality of the male and female." Pet.App. 105a. She has testified before a committee of the state legislature, Pet.App. 105a-106a, and before the Laconia City Council, Pet.App. 107a-108a, opposing the criminalization of women's breasts.

Sinclair and Lilley testified that they exposed their breasts at Weirs Beach on May 31 in public protest against Laconia's Ordinance and Pierro's arrest two days before. Pet.App. 94a-96a (Sinclair), 107a-108a (Lilley). Lilley explained to the arresting officer why she was protesting. Pet.App. 108a.

The State called Sandra Smith, a beachgoer who testified that on seeing Sinclair "with no shirt on ... I knew it wasn't proper ... And I just called the police because I don't think it was right. And the police responded." Pet.App. 133a. Asked if her objection was "based on religious belief?" Smith averred: "Yes, it is." Pet.App. 137a.

The trial judge denied Petitioners' motion to dismiss the charges against them, ruling that although it specifically criminalizes exposure of "the female breast," §180-4, the

> subject ordinance creates no violation of the Equal Protection clause as it treats all females

> equally. There is, albeit, an omission of males to the ordinance; however, the ordinance on its face creates no classification as to the female body.

Pet.App. 58a. The trial judge accordingly ruled that "the ordinance satisfies both the deferral [he meant federal] and state tests for equal protection." Pet.App. 58a-59a (citing *United States v. Morrison,* 529 U.S. 598, 620 (2000), and *State v. Vogt,* 341 N.J. Super. 407, 417-18, 775 A.2d 551, 557 (N.J. Super. 2001)).

The trial judge also rejected Petitioners' contentions that Lilley and Sinclair's public protest was protected by the state and federal constitutions' free-speech clauses, Pet App. 59a-63a, explaining that "[t]he ordinance does not attack the content of the message and thereby restrict the expressions of the Defendants." Pet.App. 61a.

Following a bench trial on February 7, 2017, the trial court found all three women guilty as charged and fined each of them $100, with the fines suspended on condition of "good behavior" for one year. Pet.App. 64a-65a (Sinclair), 66a-67a (Lilley, 68a-69a (Pierro).

Petitioners timely appealed from the judgment, but the Supreme Court of New Hampshire affirmed their convictions, with two of five justices dissenting in part. The majority opinion confirms that Petitioners timely and properly raised the federal questions presented by this Petition. Pet.App. 2a-4a. As the majority opinion recites:

> The defendants jointly moved to dismiss the charges against them. They argued that the ordinance violates the guarantee of equal protection ... under the State and Federal Constitutions. ... Following a hearing, the court

> denied the defendants' motion. The court subsequently found the defendants guilty of violating the ordinance. This appeal followed.
>
> On appeal, the defendants argue that the trial court erred by denying their motion to dismiss because the ordinance: (1) violates their right to equal protection under the State and Federal Constitutions ....

Pet.App. 4a.

The New Hampshire Supreme Court's majority opinion then proceeded to reject Petitioners' Equal Protection Clause argument's central foundational contention:

> They argue that "the ordinance makes a gender-based classification on its face." We construe their claim to be a facial challenge to the portion of the ordinance that prohibits "the showing of the female breast with less than a fully opaque covering of any part of the nipple" in a public place. *See* Laconia, N.H., Code of Ordinances ch. 180, art. I, §§180-2, 180-4.

Pet.App. 6a.

The majority opinion acknowledged: "Under federal equal protection law, pursuant to the Fourteenth Amendment, a classification based on gender triggers intermediate scrutiny." Pet.App. 7a (citing *United States v. Virginia,* 518 U.S. 515, 532-33 (1996)). Under the Constitution of the State of New Hampshire, moreover, a classification based on gender would trigger even higher "strict scrutiny," requiring a "compelling justification." Pet.App. 7a-8a.

The majority opinion concluded, however, that an ordinance specifically punishing exposure of "the

female breast" does not classify on the basis of gender:

> We conclude that the Laconia ordinance does not classify on the basis of gender. The ordinance prohibits both men and women from being nude in a public place. See Laconia, N.H., Code of Ordinances ch.180, art. 1, §§ 180-2, 180-4. "[T]he ordinance here does not prevent exposure by one sex only." [Seattle v.] Buchanan, 584 P.2d [918] at 922 [(Wash. 1978)]. That the ordinance defines nudity to include exposure of the female but not male breast does not mean that it classifies based upon a suspect class. See id.; Gonya [v. Comm'r, N.H. Ins. Dept.], 153 N.H. [521] at 532 (2006)]. "Unlike the situation with respect to men, nudity in the case of women is commonly understood to include the uncovering of the breasts." Eckl [v. Davis], 124 Cal. Rptr. [685] at 696 [(Cal. Ct. App. 1975)]. The ordinance merely reflects the fact that men and women are not fungible with respect to the traditional understanding of what constitutes nudity. See id.; [City of Albuquerque v.] Sachs, 92 P.3d [24] at 29 [(N.M. Ct. App. 2004)]; see also [United States v.] Biocic, 928 F.2d [112] at 115-16 [(4th Cir. 1991)] (noting that female breasts have traditionally been regarded by society as an erogenous zone); Buzzetti [v. New York], 140 F.3d [134] at 143 [(2d Cir. 1998)] (noting that, unlike the male breast, "public exposure of the female breast is rare under the conventions of our society, and almost invariably conveys sexual overtones"); cf. Virginia, 518 U.S. at 533 [(1996)] ("The two sexes are not fungible; a community made up exclusively of one sex is different from a

> community composed of both." (quotation and brackets omitted)).

Pet.App. 11a-12a.

Writing that "[c]ourts in other jurisdictions have generally upheld laws that prohibit women but not men from exposing their breasts against equal protection challenges," the court's majority noted that a federal district court had concluded otherwise in *Free the Nipple—Fort Collins v. City of Fort Collins, Colorado,* 237 F.Supp. 3d 1126, 1133 (D. Colo. 2017). Pet.App. 8a. In a footnote, the majority opinion added that "we are aware of no court with precedent-setting authority that has held such an ordinance unconstitutional. But cf. Free the Nipple Fort Collins, 237 F.Supp. 3d at 1133."[1]

Rejecting the dissenting justices' view that Laconia's Ordinance against exposure of "the female breast" obviously classifies on the basis of gender, the majority opinion explained that "nudity is simply different for men than for women," and that "based on the unique way in which men and women differ with respect to nudity, we conclude that the ordinance does not afford different treatment for men and women." Pet.App. 16a. The three-justice majority opinion chided the two dissenting justices for "assum[ing] that, because the ordinance does not allow men and women to engage in precisely the same mode of dress, it must contain a gender-based classification. Respectfully, we find this approach deceptively simplistic." Pet.App. 17a. "For the reasons already

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[1] Pet.App. 10a n.2. The Tenth Circuit has, however, since affirmed the *Fort Collins* district court opinion. *See Free the Nipple—Fort Collins v. City of Fort Collins,* 916 F.3d 792 (10th Cir. 2019); *see infra* at 17, 19.

discussed, we find no gender-based classification in the ordinance." Pet.App. 17a.

Having thus rejected contentions that Laconia's Ordinance could have violated their equal-protection rights under its state constitution by classifying on the basis of gender, the Supreme Court of New Hampshire majority disposed of Petitioners' federal Equal Protection arguments with a footnote stating: "We reach the same result under the Federal Constitution as we do under the State Constitution." Pet.App. 14a n.3.

Perhaps recognizing that this Court would likely question its holding that the Laconia Ordinance is gender-neutral, majority opinion added:

> Federal courts applying federal equal protection analysis have near-uniformly upheld ordinances similar to Laconia's even when subjecting them to intermediate scrutiny. See Tagami [v. City of Chicago], 875 F.3d [375] at 379-80 [(7th Cir. 2017)]; Ways [v. City of Lincoln], 331 F.3d [596] at 599-600 [(8th Cir. 2003)]; Buzzetti [v. City of New York], 140 F.3d [134] at 144 [(2d Cir. 1998)]; [United States v.] Biocic, 928 F.2d [112] at 115-16 [(4th Cir. 1991)]; J&B Soc. Club No. 1, [Inc. v. City of Mobile], 966 F.Supp. [1131] at 1139-40 [(S.D. Ala. 1996)]; Craft [v. Hodel], 683 F.Supp. [289] at 299-301 [(D.Mass. 1988)]. But see Free the Nipple Fort Collins, 237 F.Supp. 3d at 1133.

Pet.App. 14a n.3.

The New Hampshire Supreme Court filed its decision on February 8, 2019. Pet.App. 1a. Petitioners sought, and Justice Breyer granted on April 19, 2019, an extension to July 8, 2019, for Petitioners to file

this Petition for a Writ of Certiorari. *Lilley v. New Hampshire,* No. 18A1074 (April 19, 2019).

## REASONS FOR GRANTING THE WRIT

This case presents fundamental constitutional equal-protection questions, on which federal appellate circuits and state high courts are in clear and well-entrenched conflict—both on whether a public-indecency ordinance expressly applying different standards to men and women classifies on the basis of gender, and on whether such a classification survives the heightened scrutiny that this Court's post-1971 decisions mandate for gender-based classifications.

Faced in this case with an Ordinance that on its face differentiates between men and women by expressly punishing public exposure of "the female breast," the Supreme Court of New Hampshire held that the Ordinance "does not classify on the basis of gender." Pet.App. 11a-12a, 17a. It then held in a conclusory footnote and string cite of federal lower-court decisions that the Ordinance survives federal intermediate scrutiny anyway, though without troubling itself how or why. Pet.App. 14a n.3.

The majority opinion's holding that Laconia's public-indecency law "does not classify on the basis of gender," Pet.App. 11a-12a, conflicts not only with the Ordinance's plain text, but also with decisions of the Seventh and Tenth Circuits holding that similar regulations obviously do classify on the basis of gender. *Compare* Pet.App. 11a-12a ("the Laconia ordinance does not classify on the basis of gender"), *with Tagami v. Chicago,* 875 F.3d 375, 380 (7th Cir. 2017) ("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.'") *and with*

*Free the Nipple—Fort Collins v. City of Fort Collins,* 916 F.3d 792 (10th Cir. 2019) ("a public-nudity ordinance that prescribes one rule for women, requiring them to cover their breasts below the areola, and a different rule for men, allowing them to go topless as they please ... creates a gender classification on its face").

The conflict on this point, among federal appellate circuit courts and state high courts, is both well developed and entrenched, since the holdings of the Seventh Circuit in *Tagami* and the Tenth Circuit in *Fort Collins* themselves conflict with decisions of the Supreme Court of Washington and the Fifth Circuit which—like the Supreme Court of New Hampshire in this case—hold that laws punishing only women for exposure of their breasts do not classify or discriminate on the basis of gender. *Infra* 14-18.

The second question on which state high courts and federal appellate circuits are in conflict is whether such a classification survives the heightened "intermediate" scrutiny demanded by this Court's currently controlling Equal Protection Clause decisions. With two conclusory sentences and a string cite of federal lower-court decisions, New Hampshire's Supreme Court holds that Laconia's Ordinance survives intermediate scrutiny. Pet.App. 14a n.3. But beyond the bare string cite, it offers no analysis for its holding, never acknowledging that this Court's "case law evolving since 1971 'reveal[s] a strong presumption that gender classifications are invalid,'" *United States v. Virginia,* 518 U.S. 515, 532 (1996) (quoting *J.E.B. v. Alabama ex rel. T. B.,* 511 U.S. 127, 152 (1994) (Kennedy, J., concurring)).

The federal appellate circuit courts have irreconcilably split on whether ordinances like Laconia's are

constitutional. The New Hampshire Supreme Court's decision in this case directly conflicts with the Tenth Circuit's *Fort Collins* decision a week later, which holds that a similar public-nudity ordinance's "gender disparity violates the Equal Protection Clause." *Fort Collins,* 916 F.3d at 806. The Tenth Circuit, moreover, allows that its own holding conflicts with "a sizeable majority of other courts," *id.* at 800, including both the New Hampshire Supreme Court's decision in this case, *see id.* at 804 & n.8 (citing this case), and the Seventh Circuit's decision in *Tagami,* 875 F.3d at 379-80. The Tenth Circuit boldly declares: "None of these decisions binds us, though; nor does their sheer volume sway our analysis." *Fort Collins,* 916 F.3d at 804. For the Tenth Circuit chooses instead to follow this Court's precedents applying the Equal Protection clause: "As we interpret the arc of the Court's equal-protection jurisprudence, ours is the constitutionally sound result." *Id.* at 805.

The Eighth Circuit swiftly deepened the resulting conflict by rejecting the Tenth Circuit's *Fort Collins* decision. *See Free the Nipple-Springfield Residents Promoting Equality v. City of Springfield, Missouri,* 923 F.3d 508, 510-12 (8th Cir. 2019) ("*Springfield*"). The Eighth Circuit's *Springfield* decision adheres to its own prior holding in *Ways v. Lincoln,* 331 F.3d 596 (8th Cir. 2003), that states may enforce public-indecency statutes outlawing conduct by women that is wholly lawful when engaged in by men. *See Springfield,* 923 F.3d at 510-11 (following *Ways*). Legal news media have duly noted the clear conflict. *See, e.g.,* Debra Cassens Weiss, *8th and 10th Circuits Split Over Female Topless Ban,* ABA JOURNAL May 8,

2019[2]; Elura Nanos, *Two Federal Courts are Feuding Over Legalities of Toplessness in "Free the Nipple" Cases,* LAW & CRIME, May 7, 2019.[3] This Court should grant the writ of certiorari in order to resolve this recent but already well-entrenched conflict. *Infra* 18-21.

This Court's attention is particularly warranted as the New Hampshire Supreme Court, Seventh Circuit, Eighth Circuit, and numerous other courts holding that states are free to enforce laws punishing only women for being topless in public, all are wrong on the merits. The Tenth Circuit's boldness in forthrightly rejecting the great weight of authority sustaining gender-biased public indecency laws is entirely justified. Gender classifications grounded in obsolescent norms that sexually objectify and shame women cannot survive this Court's heightened scrutiny. *Infra* 21-28.

## I. State High Courts and the Federal Appellate Circuits are in Conflict on Whether Ordinances Expressly Punishing Women, But Not Men, for Being Topless in Public Classify on the Basis of Gender

The Fourteenth Amendment's Equal Protection Clause provides: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. Though some earlier decisions readily sustained gender-based classifications grounded in traditional attitudes about

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[2] Online: http://www.abajournal.com/news/article/8th-circuit-upholds-female-topless-ban-10th-circuit-ruled-the-other-way

[3] Online: https://lawandcrime.com/high-profile/two-federal-courts-are-feuding-over-legalities-of-toplessness-in-free-the-nipple-cases/

proper gender roles for men and women, "[t]oday, laws of this kind are subject to review under the heightened scrutiny that now attends '*all* gender-based classifications.'" *Sessions v. Morales-Santana,* 137 S.Ct. 1678, 1689 (2017) (quoting *J.E.B.,* 511 U.S. at 136) (emphasis added). This Court's post-1971 decisions "reveal[] a strong presumption that gender classifications are invalid." *Virginia,* 518 U.S. at 532 (quoting *J.E.B.,* 511 U.S. at 152 (Kennedy, J., concurring)). "Successful defense of legislation that differentiates on the basis of gender, we have reiterated, requires an 'exceedingly persuasive justification.'" *Morales-Santana,* 137 S.Ct. at 1690 (quoting *Virginia*, 518 U.S. at 531 (internal quotation marks omitted) (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981) (internal quotation marks omitted)); *accord J.E.B.,* 511 U.S. at 136.

The decision below acknowledges: "Under federal equal protection law, pursuant to the Fourteenth Amendment, a classification based on gender triggers intermediate scrutiny." Pet.App. 7a (citing *Virginia,* 518 U.S. at 532-33). Yet it holds that an ordinance, expressly punishing women but not men for engaging in identical conduct, "does not classify on the basis of gender." Pet.App. 11a-12a. Although this holding appears initially in a portion of the majority opinion sustaining the Ordinance against an equal-protection challenge under New Hampshire's state constitution, the Court concludes in a footnote: "We reach the same result under the Federal Constitution as we do under the State Constitution."[4]

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[4] Pet.App. 14a n.3. Likely recognizing the vulnerability of its holding that the Ordinance does not classify on the basis of gender, the majority adds that "[f]ederal courts applying federal equal protection analysis have near-uniformly upheld ordinances

The majority opinion's holding that Laconia's Ordinance does not classify on the basis of gender places it in direct conflict with federal appellate precedents that the decision below itself acknowledges 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. The majority opinion cites for example the Seventh Circuit's decision in *Tagami, see* Pet.App. 9a, which 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,* 875 F.3d at 380 (citation omitted). Many federal decisions hold similarly.[5] So do many state-court decisions.[6]

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similar to Laconia's even when subjecting them to intermediate scrutiny." Pet.App. 14a n.3. This, however, presents a second question on which the federal appellate circuits irreconcilably conflict. *See infra* 18-21.

[5] *See, e.g., Buzzetti v. New York,* 140 F.3d 134, 141-42 (2d Cir. 1998) (a zoning ordinance for adult-entertainment establishments is subject to intermediate scrutiny because it does "classify female toplessness differently from the exhibition of the male chest"); *Craft v. Hodel,* 683 F.Supp. 289, 299 (D. Mass. 1988) ("The Regulation does, of course, distinguish between males and females and accords a 'freedom' to males that it denies to females.").

[6] *See, e.g., City of Jackson v. Lakeland Lounge,* 688 So.2d 742, 752 (Miss. 1996) ("'female breasts are a justifiable basis for a gender-based classification'") (citation omitted); *City of Tucson v. Wolfe,* 185 Ariz. 563, 564, 917 P.2d 706, 707 (Ct. App. 1995) ("Because this ordinance creates a different standard of conduct for each gender, to withstand constitutional challenge the city must show (1) that the ordinance serves an important governmental objective and (2) that the gender-based

One week after the New Hampshire Supreme Court issued its opinion, moreover, the Tenth Circuit held in *Fort Collins* that "a public-nudity ordinance that prescribes one rule for women, requiring them to cover their breasts below the areola, and a different rule for men, allowing them to go topless as they please ... creates a gender classification on its face." *Id.* at 800. The Tenth Circuit "concluded that this gender disparity violates the Equal Protection Clause." *Id.* at 806.

Yet *Tagami* and *Fort Collins* themselves conflict with decisions of the Supreme Court of Washington and the Fifth Circuit which—like the Supreme Court of New Hampshire in this case—hold that ordinances punishing only women for exposure of their breasts do not classify or discriminate on the basis of gender. *See City of Seattle v. Buchanan,* 90 Wash.2d 584, 592-93, 584 P.2d 918, 921 (Wash. 1978) (holding that a law punishing exposure of females' breasts "does not classify or discriminate on the basis of sex"); *Hang On, Inc. v. Arlington,* 65 F.3d 1248, 1256-57 (5th Cir. 1995) (an ordinance requiring women, but not men, to cover their areolas, obviously "was not motivated by gender animus").

Thus, the conflict on this point, among federal appellate circuit courts and state high courts, is both well-developed and entrenched, warranting this

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classification is substantially related to the achievement of that objective."); *State v. Vogt,* 341 N.J. Super. 407, 417, 775 A.2d 551, 557 (App. Div. 2001) (ordinance requiring women but not men to cover their breasts presents a "gender-based distinction" subject to intermediate scrutiny); *People v. David,* 152 Misc. 2d 66, 68, 585 N.Y.S.2d 149, 151 (N.Y. County Ct. 1991) (New York statute prohibiting public exposure of female breasts held an unconstitutional "gender based classification").

Court's review to determine whether or not public-indecency laws criminalizing exposure of the female breast or areola classify on the basis of gender, making them subject to the heightened scrutiny that "attends 'all gender-based classifications.'" *Morales-Santana,* 137 S.Ct. at 1689 (quoting *J.E.B.,* 511 U.S. at 136).

## II. State High Courts and the Federal Appellate Circuits Are in Conflict on Whether Statutes Punishing Women Alone for Exposure of their Breasts Can Survive Heightened Scrutiny

This case presents a further question, on which the federal appellate circuits and state high courts are in conflict: Whether an ordinance punishing women, but not men, for the public exposure of their breasts or nipples, survives the heightened scrutiny to which this Court subjects laws that classify on the basis of gender. The New Hampshire Supreme Court's majority opinion follows a string cite of federal decisions that it says have "near-uniformly upheld ordinances similar to Laconia's even when subjecting them to intermediate scrutiny."[7] But this places the decision below in direct conflict with the Tenth Circuit's *Fort Collins* decision, which by instead following "the arc of the Court's equal-protection jurisprudence," itself conflicts irreconcilably with the law of several other circuits on this point. *Fort Collins,* 916 F.3d at 805.

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[7] Pet.App. 14a n.3 (favorably citing *Tagami*, 875 F.3d at 379-80; *Ways,* 331 F.3d at 599-600; *Buzzetti,* 140 F.3d at 144; *Biocic,* 928 F.2d at 115-16; *J&B Social Club No. 1,* 966 F.Supp. at 1139-40; *Craft*, 683 F.Supp. at 299-301).

Over a dissent by Judge Hartz, the *Fort Collins* majority sustains a preliminary injunction barring enforcement of a City of Fort Collins public-indecency ordinance "'to the extent that it prohibits women, but not men, from knowingly exposing their breasts in public.'" *Id.* at 795 (citation omitted). The *Fort Collins* majority opinion holds that "this gender disparity violates the Equal Protection Clause." *Id.* at 806. And though past practice was otherwise, "[t]oday, heightened scrutiny 'attends "all gender-based classifications."'" *Id.* at 800 (quoting *Morales-Santana,* 137 S.Ct. at 1689 (quoting *J.E.B.,* 511 U.S. at 136))).

The *Fort Collins* majority firmly rejects contentions "that, 'in light of differences between male and female breasts,' prohibiting only female toplessness is substantially related to an important governmental object, as a sizable majority of other courts have found." *Fort Collins,* 916 F.3d at 800. It faithfully follows this Court's decisions holding that "laws grounded in stereotypes about the way women are serve no important government interest." *Id.* at 803 (citing *Morales-Santana,* 137 S.Ct. at 1692-93 and *Virginia,* 518 U.S. at 550). "To the contrary, legislatively reinforced stereotypes tend to 'create[] a self-fulfilling cycle of discrimination.'" *Id.* (quoting *Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721, 736 (2003)).

Citing both the decision below in this case and the Seventh Circuit's in *Tagami* as examples of the many contrary precedents sustaining such laws, the Tenth Circuit acknowledges: "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." *Fort Collins,* 916 F.3d at 805. "None of these

decisions binds us, though; nor does their sheer volume sway our analysis." *Id.* Bound instead by this Court's equal-protection precedents, the Tenth Circuit sustains a preliminary injunction, holding that "the City's public-nudity ordinance inflicts irreparable harm by violating the Plaintiff's right to equal protection under the law." *Id.* at 805-06. Such an ordinance "deprives [women] of a constitutional right, while the City has no interest in keeping an unconstitutional law on the books." *Id.* at 806.

State-court opinions reaching the same conclusion as the Tenth Circuit in *Fort Collins* can be found in *People v. Santorelli,* 80 N.Y.2d 875, 877-83, 587 N.Y.S.2d 601, 600 N.E.2d 232, 877-83 (1992) (Titone, J., joined by Simons, J., concurring), and *People v. David,* 152 Misc. 2d 66, 67-68, 585 N.Y.S.2d 149, 151 (N.Y. County Ct. 1991) (holding a "state statute which prohibits a female person from appearing at a public place with her breasts unclothed violates the equal protection clauses of the U.S. and N.Y.S. Constitutions").

Nonetheless, the Tenth Circuit's decision in *Fort Collins* directly conflicts with federal appellate decisions, which it explicitly rejects, and the Eighth Circuit has aggravated that conflict by refusing to follow *Fort Collins,* emphasizing in *Springfield* that a "majority of courts considering equal protection challenges have upheld similar laws prohibiting women, but not men, from exposing their breasts." *Springfield,* 923 F.3d at 509 (8th Cir. 2019). The *Springfield* panel would not budge from prior Eighth Circuit precedent, which "upheld an ordinance prohibiting 'the showing of the female breast with less than a fully opaque covering on any part of the areola and nipple' against an equal protection challenge." *Id.* at 510 (quoting *Ways,* 331 F.3d at 599).

Thus, state and federal courts are in clear and irreconcilable conflict on whether a public-nudity ordinance requiring women, but not men, to cover their breasts can survive the strong presumption of invalidity mandated by this Court's Equal Protection Clause precedents. The conflict is entrenched, moreover, with the Tenth Circuit's *Fort Collins* decision citing and rejecting both the majority opinion in this case and the decisions of several other circuits, *see Fort Collins,* 916 F.3d at 805 & n.8, while the Eighth Circuit's *Springfield* opinion acknowledges but refuses to follow *Fort Collins*. *See Springfield,* 923 F.3d at 510.

This Court's review clearly is needed to resolve this relatively recent but already deeply entrenched conflict.

## III. The Decision Below is Wrong on the Merits

The need for this Court's review in this case is particularly urgent as the Tenth Circuit's *Fort Collins* decision comports with this Court's equal-protection precedents, while the New Hampshire Supreme Court's decision below, and the many other decisions sustaining such statutes (including the Seventh Circuit's in *Tagami* and the Eighth Circuit's in *Springfield*), clearly do not. When the Fort Collins City Council voted on May 21, 2019, to forego seeking this Court's review of the Tenth Circuit's *Fort Collins* decision, Councilwoman Emily Gorgal explained: "It's really an equality issue for sex and gender, and (ending the ban) is the right thing to do."[8]

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[8] Nick Coltrain, *Fort Collins Won't Pursue Ban on Public Toplessness to U.S. Supreme Court,* THE COLORADOAN, May 21, 2019 (quoting Councilwoman Emily Gorgal)

Though the New Hampshire Supreme Court's majority opinion denies it, ordinances outlawing exposure of "the female breast" plainly classify on the basis of gender. Several federal appellate decisions quite correctly hold that they do. *See Fort Collins,* 916, F.3d at 792; *Tagami,* 875 F.3d at 380; *Buzzetti,* 140 F.3d 141-42. The Supreme Court of New Hampshire, the Supreme Court of Washington, and Fifth Circuit, are plainly mistaken in holding otherwise. *See* Pet.App. 11a-12a; *Buchanan*, 584 P.2d at 922; *Hang On,* 65 F.3d at 1256-57.

The Tenth Circuit's *Fort Collins* decision, moreover, faithfully hews to this Court's precedents by holding that "this gender disparity violates the Equal Protection Clause." *Fort Collins,* 916 F.3d at 806. Whatever their status in the past, "[t]oday, laws of this kind are subject to review under the heightened scrutiny that now attends 'all gender-based classifications.'" *Morales-Santana,* 137 S.Ct. at 1689 (quoting *J.E.B.,* 511 U.S. at 136). "The defender of legislation that differentiates on the basis of gender must show 'at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Id.* (quoting *Virginia,* 518 U.S. at 533 (quoting *Mississippi University for Women v. Hogan,* 458 U.S. 718, 724 (1982))).

Thus, this Court's "case law evolving since 1971 'reveal[s] a strong presumption that gender classifications are invalid.'" *Virginia,* 518 U.S. at 532 (quoting *J.E.B..,* 511 U.S. at 152 (Kennedy, J.,

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https://www.coloradoan.com/story/news/2019/05/21/free-nipple-victory-over-fort-collins-wont-go-u-s-supreme-court/3764097002/

concurring)). Litigants "seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Hogan,* 458 U.S. at 725 (quoting *Kirchberg,* 450 U.S. at 461).

*Fort Collins* correctly applies these principles to hold that an ordinance criminalizing exposure of the female breast is presumptively invalid, while the Supreme Court of New Hampshire's majority opinion below neither recognizes the mandated "strong presumption" that the Laconia Ordinance is invalid, *Virginia,* 518 U.S. at 532, nor puts the State to its "burden of showing an 'exceedingly persuasive justification'" to overcome the strong presumption of invalidity. *Hogan,* 458 U.S. at 461. Most decisions, sustaining such ordinances against federal equal-protection challenges—including the Eighth Circuit's decisions in *Springfield* and *Ways* and the Seventh Circuit majority in *Tagami*—likewise fail to mention this Court's "strong presumption" of invalidity or the proponents' burden of presenting an "exceedingly persuasive justification."[9] In *Tagami,* for example, only Judge Rovner's dissenting opinion acknowledges that the Chicago ordinance's "differential treatment must be grounded in an 'exceedingly persuasive justification.'" *Tagami,* 875 F.3d at 382-83 (Rovner, Cir. J., dissenting) (quoting *Morales-Santana,* 137 S.Ct. at 1690 (2017) (quoting *Virginia,* 518 U.S. at 524).

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[9] *See Springfield,* 923 F.3d at 510-12; *Ways,* 331 F.3d at 599-600; *Tagami,* 875 F.3d at 379-80; *see also, e.g., SDJ, Inc. v. City of Houston,* 837 F.2d 1268, 1279-80 (5th Cir. 1988); *Tolbert v. city of Memphis,* 568 F.Supp. 1285, 1290 (W.D. Tenn. 1983); City of *Tucson v. Wolfe,* 185 Ariz. 563, 564, 917 P.2d 706, 707 (Ct. App. 1995).

The *Fort Collins* majority correctly concludes that statutes punishing women, but not men, for being topless in public cannot meet this standard. *Fort Collins,* 916 F.3d at 798-807. As a matter of fact, Judge Hartz's dissenting opinion in *Fort Collins* concedes that this is so—inducing him instead to reject this Court's controlling standard and call for rational-basis review, so that discriminatory laws might survive. *See Fort Collins,* 916 F.3d at 808-09, 811-12, 814 (Hartz, Cir. J., dissenting). Because public-indecency ordinances punishing women but not men for exposure of their breasts or areolas cannot survive this Court's heightened scrutiny for gender classifications, Judge Hartz urges in dissent that "the rationales supporting heightened scrutiny of gender discrimination have no purchase in the context of indecency laws," and that "[t]he proper standard of review is the rational basis standard generally applied to economic and social regulation." *Id.* at 809 (Hartz, Cir. J., dissenting). If, "[u]nder heightened scrutiny, a distinction between the genders can be justified only by 'exceedingly persuasive evidence,'" as this Court holds, "it is hard to see how any such law could be upheld." *Id.* at 813-14 (Hartz, Cir. J., dissenting) (quoting *Morales-Santana,* 137 S.Ct. at 1690).

Nonetheless, Judge Hartz continues, "a number of courts, almost all that have considered the issue, have upheld against equal-protection challenges various indecency laws prohibiting women from exposing their breasts on the ground that they survive heightened scrutiny." *Id.* at 814 (Hartz, Cir. J., dissenting). Yet, like the decision below in this case, they do not really apply this Court's controlling equal-protection standard for gender classifications: "Because of the difficulty of obtaining proof of the

effects of indecency, I question whether the evidence supporting the laws provides 'an exceedingly persuasive justification' for them." *Id.* at 814 (Hartz, Cir. J., dissenting). Rejecting this Court's generally controlling equal-protection standard "because the Fort Collins ordinance should be subjected only to rational-basis review," Judge Hartz would have sustained the Fort Collins ordinance. *Id.* at 814 (Hartz, Cir. J., dissenting).

Yet this Court's decisions unequivocally hold that "heightened scrutiny ... now attends '*all* gender-based classifications.'" *Morales-Santana,* 137 S.Ct. 1689 (quoting *J.E.B.,* 511 U.S. at 136 (emphasis added). Judge Hartz is correct in recognizing discriminatory ordinances like Laconia's cannot meet that test.

The Laconia Ordinance's invalidity is made all the clearer by the Supreme Court of New Hampshire's reliance on its prefatory finding, that "'[t]he conduct prohibited ... is deemed to be contrary to the societal interest in order and morality.'" Pet.App. 13a (quoting Laconia, N.H., Code of Ordinances ch. 180, art. I, §180-1). Some federal courts, it notes, "have found these to be important or substantial interests under intermediate scrutiny, let alone legitimate ones under rational basis review." Pet.App. 13a. A divided Seventh Circuit panel held in *Tagami,* for example, that "promoting traditional moral norms and public order" is "important enough to survive [intermediate] scrutiny." 875 F.3d at 379; *accord, e.g., Biocic,* 928 F.2d at 115-16.

Yet this Court holds otherwise—that long-standing gendered norms of morality no longer can sustain laws that classify on the basis of gender. Rather, this Court holds, "the classification must substantially serve *an important governmental interest today*, for

'in interpreting the [e]qual [p]rotection [guarantee], [we have] recognized that new insights and societal understandings can reveal unjustified inequality ... that once passed unnoticed and unchallenged.'" *Morales-Santana,* 137 S.Ct. at 1690 (Court's brackets; emphasis added) (quoting *Obergefell v. Hodges,* 135 S.Ct. 2584, 2603 (2015)). "Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions." *Hogan,* 458 U.S. at 725. Statutes ostensibly based on "reasonable considerations" may actually (and impermissibly) reflect "archaic and overbroad generalizations about gender." *J.E.B.,* 511 U.S. at 135 (quoting *Schlesinger v. Ballard,* 419 U.S. 498, 508 (1975)).

Laconia's Ordinance regulating women's dress by proscribing exposure of their breasts clearly is grounded in such archaic, overbroad, and obsolescent notions about gender. New England's earliest local ordinances punishing women for going topless date to the mid-1600s, when Puritans imposed their gendered norms of proper dress on the Christianized indigenous population of "praying Indians." In the "Praying Towns" of Massachusetts and Connecticut Christianized Nipmuc Indians were expected to "renounce their native language, ceremonies, beliefs, traditional dress and customs."[10] Ordinances established for these communities set fines for violating the Puritans' gendered norms, including:

> 5. If any woman shall not have her haire tied up, but hang loose, or be cut as mens haire, she shall pay five shillings.

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[10] *The "Praying Towns,"* Nipmuc Indian Association of Connecticut, Historical Series, No. 2 (2d ed. 1995), http://www.nativetech.org/Nipmuc/praytown.html

> 6. If any woman shall goe with naked breasts, they shall pay two shillings.
>
> 7. All men that shall weare long locks, shall pay five shillings.[11]

Whatever their status in past centuries, such gendered norms of dress cannot survive the heightened scrutiny to which this Court now subjects all laws classifying on the basis of gender. Today there is nothing obscene, immoral, or disruptive about female breasts and nipples—as should be clear from the fact that even in the State of New Hampshire, women are free to expose their breasts when breastfeeding infants in public: "Breast-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." N.H. RSA 132:10-d provides. Whether they are lactating or not, women's breasts no longer can sensibly be deemed lewd or indecent or obscene. No important governmental interest exists today that compels their compulsory concealment.

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[11] *The Day-Breaking, If Not the Sun-Rising of the Gospell with the Indians in New-England* (originally London: Richard Cotes for Fulk Clifton, 1647), reprinted with original spellings in 4 *Collections of the Massachusetts Historical Society: Tracts Relating to the Attempts to Convert to Christianity the Indians of New England* 1, 20 (Cambridge, Mass.: Charles Folsom, 1834); and in *The Eliot Tracts* 79, 98 (Michael P. Clark, ed.; Westport, Connecticut & London: Praeger, 2003); *see Laws of the Praying Town Indians,* in *Documents of Native American Political Development: 1500s to 1933,* at 39 (David E. Wilkins, ed.; Oxford & New York: Oxford University Press, 2009) (excerpted with modernized spellings); Lisa Krissoff Boehm & Steven Hunt Corey, *America's Urban History* 34 (New York & London: Routledge, 2015) (same).

Applying this Court's precedents, classifications no longer can be defended on the basis of their "provenance in traditional notions of the way women and men are." *Morales-Santana,* 137 S.Ct. at 1694. For as this Court has "repeatedly emphasized, discrimination itself ... perpetuat[es] "archaic and stereotypic notions'" incompatible with the equal treatment guaranteed by the Constitution." *Morales-Santana,* 137 S.Ct. at 1698 (quoting *Heckler v. Mathews,* 465 U.S. 728, 739 (1984) (quoting *Hogan,* 458 U.S. at 725)). Citing *Morales-Santana,* Judge Rovner's *Tagami* dissent soundly concludes that "[a]ny 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." *Tagami,* 875 F.3d at 383 (Rovner, Cir. J., dissenting).

The decision below is wrong, and this Court's review is needed to correct it.

## CONCLUSION

This Court's review is needed to resolve deeply entrenched conflicts between and among the federal circuits and state high courts on the validity, under this Court's current Equal Protection Clause precedents, of public-indecency ordinances that criminalize being topless and female based on outdated norms.

DATED: July 8, 2019

Respectfully submitted,
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# APPENDIX

**APPENDIX A**

THE SUPREME COURT OF NEW HAMPSHIRE

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4th Circuit Court-Laconia District Division
No. 2017-0116

THE STATE OF NEW HAMPSHIRE

v.

HEIDI C. LILLEY

THE STATE OF NEW HAMPSHIRE

v.

KIA SINCLAIR

THE STATE OF NEW HAMPSHIRE

v.

GINGER M. PIERRO

Argued: February 1, 2018
Opinion Issued: February 8, 2019

Gordon J. MacDonald, attorney general (Susan P. McGinnis, senior assistant attorney general, on the brief and orally), for the State.

Liberty Legal Services, of Manchester (Dan Hynes on the brief and orally), for the defendants.

American Civil Liberties Union of New Hampshire, of Concord (Gilles R. Bissonnette on the brief), as amicus curiae.

HANTZ MARCONI, J. The defendants, Heidi Lilley, Kia Sinclair, and Ginger Pierro, appeal a ruling of the Circuit Court (Carroll, J.) that they violated a City of Laconia ordinance prohibiting them from appearing in a state of nudity in a public place. See Laconia, N.H., Code of Ordinances ch. 180, art. I, §180-2 (1998). We affirm.

I. Background

The following facts are drawn from the trial court's order on the defendants' motion to dismiss or are otherwise supported by the record. On May 28, 2016, Pierro went to Endicott Park Beach in Laconia. At the hearing on the defendants' motion to dismiss, Pierro testified that she "was topless" and was there "to enjoy the beach." She agreed with defense counsel that she was "performing yoga on the beach." She stated that she "was violently harassed" by "[s]everal citizens," but that "out of everybody on the beach, there were only actually a handful that were upset."

Sergeant Black of the Laconia Police Department testified that, on that same day, he and Officer Callanan responded to the beach because the department had "received several calls about a female ... doing nude yoga." Callanan testified that they approached a woman, later identified as Pierro, who was "not wearing any shirt and her breasts, as well as her nipples, were both exposed." Callanan stated that she "made attempts to speak to" Pierro, but that Pierro "continued to do her yoga poses." She explained that "after about a minute or so, [Pierro] looked up and acknowledged that we were, in fact, trying to speak to her." She testified that they "explained to [Pierro] that the reason [they] were making contact with her was in reference to a Laconia City

Ordinance, since her nipples were exposed on the beach in a public place." Callanan stated that they asked Pierro "multiple times to cover up, to put her bathing suit top back on, or put her shirt back on," but that Pierro "refused."

Callanan testified that Pierro was arrested for violating Laconia City Ordinance §180-2 (the ordinance), which states, in relevant part, that "it shall be unlawful for any person to knowingly or intentionally, in a public place: ... [a]ppear in a state of nudity." "Nudity" is defined 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." Laconia, N.H., Code of Ordinances ch. 180, art. I, §180-4 (1998).

In 2015, Sinclair became involved in the "Free the Nipple" movement. Sinclair testified that she was one of the people who "started" the movement in New Hampshire after having her son and realizing "that there was a very big stigma on breastfeeding." She explained that she believed that breasts, specifically nipples, are "hypersexualize[d]" and "consider[ed] pornographic and taboo," which she stated results "in that stigma" and "contributes to the low breastfeeding rates that the United States has compared to the rest of the world." Sinclair told Lilley about the movement, which Lilley then joined. Lilley testified that she is "a feminist" and joined the movement because she "believe[s] in the equality of the male and female."

On May 31, 2016, Sinclair and Lilley went topless to Weirs Beach in Laconia. While at the beach, they

were arrested for violating the ordinance. Sinclair testified that she "purposely engaged in civil disobedience knowing that the City of Laconia has an ordinance against the exposure of the female nipple and areola." She stated that she was "protesting [Pierro's] case where she had been arrested a few days prior." Lilley testified that she was also protesting Pierro's arrest and that she "announced to the arresting police officer that [she] was acting in a protest and that [she] did not believe that [she] could be arrested for protesting." She further agreed with the prosecutor that, on that day, she "chose to take it upon [herself] to violate the ordinance to give attention to [her] cause."

The defendants jointly moved to dismiss the charges against them. They argued that the ordinance violates the guarantee of equal protection and their right to free speech under the State and Federal Constitutions. They further contended that the City of Laconia lacked the authority to enact the ordinance and that the ordinance was preempted by RSA 645:1 (2016). Finally, the defendants maintained that the ordinance violates RSA chapter 354-A. See RSA ch. 354-A (2009 & Supp. 2017) (amended 2018). The State objected. Following a hearing, the court denied the defendants' motion. The court subsequently found the defendants guilty of violating the ordinance. This appeal followed.

On appeal, the defendants argue that the trial court erred by denying their motion to dismiss because the ordinance: (1) violates their right to equal protection under the State and Federal Constitutions; (2) violates their rights to free speech and expression under the State and Federal Constitutions; (3) does not fall within the regulatory authority granted to the

City of Laconia by the legislature; (4) is preempted by RSA 645:1; and (5) violates RSA chapter 354-A. We will address each of the defendants' arguments in turn.

II. Equal Protection

The defendants first argue that the ordinance violates their right to equal protection under Part I, Article 2 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution. See N.H. CONST. pt. I, art. 2; U.S. CONST. amend. XIV. We review the constitutionality of local ordinances de novo. McKenzie v. Town of Eaton Zoning Bd. of Adjustment, 154 N.H. 773, 777 (2007). We first address the defendants' arguments under the State Constitution and cite federal opinions for guidance only. State v. Ball, 124 N.H. 226, 231-33 (1983).

We begin by addressing the scope of the defendants' challenge to the ordinance. An appellant may challenge the constitutionality of a statute or an ordinance[1] by asserting a facial challenge, an as-applied challenge, or both. See State v. Hollenbeck, 164 N.H. 154, 158 (2012). A facial challenge is a head-on attack of a legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications. Id. To prevail on a facial challenge, the challenger must establish that no set of circumstances exist under which the challenged statute or ordinance would be valid. Id. On the other hand, an as-applied challenge concedes that the

[1] No party asserts that, for the purposes of considering their constitutional arguments, it makes any difference that we are dealing with an ordinance rather than a statute.

statute may be constitutional in many of its applications, but contends that it is not so under the particular circumstances of the case. Id.

Here, the defendants do not concede that the relevant portion of the ordinance is constitutional in any circumstance. They argue that "the ordinance makes a gender-based classification on its face." We construe their claim to be a facial challenge to the portion of the ordinance that prohibits "the showing of the female breast with less than a fully opaque covering of any part of the nipple" in a public place. See Laconia, N.H., Code of Ordinances ch. 180, art. I, §§180-2, 180-4. Thus, the defendants must demonstrate that there is no set of circumstances under which this ordinance might be valid. See Hollenbeck, 164 N.H. at 158.

Next, we must determine the appropriate standard of review to apply to the ordinance. In re Sandra H., 150 N.H. 634, 637 (2004). We do this by examining the purpose and scope of the State-created classification and the individual rights affected. Id. Classifications based upon suspect classes are subject to strict scrutiny: the government must show that the legislation is necessary to achieve a compelling government interest and is narrowly tailored. Cmty. Res. for Justice v. City of Manchester, 154 N.H. 748, 759 (2007). Classifications which affect a fundamental right may be subject to strict scrutiny depending on the nature of the right and the manner in which it is affected. See Estate of Cargill v. City of Rochester, 119 N.H. 661, 667 (1979); see also Bleiler v. Chief, Dover Police Dep't, 155 N.H. 693, 697-98 (2007); Lamarche v. McCarthy, 158 N.H. 197, 204 (2008). Below strict scrutiny is intermediate scrutiny, which is triggered when the challenged classification

involves important substantive rights, Sandra H., 150 N.H. at 637-38, and which requires the government to show that the challenged legislation is substantially related to an important government interest. Cmty. Res., 154 N.H. at 762. Finally, absent a classification based upon suspect classes, affecting fundamental rights, or involving important substantive rights, the constitutional standard of review is that of rationality. Sandra H., 150 N.H. at 638; cf. Gonya v. Comm'r, N.H. Ins. Dept., 153 N.H. 521, 532-33 (2006). Our rational basis test requires that legislation be rationally related to a legitimate government interest. Boulders at Strafford v. Town of Strafford, 153 N.H. 633, 639 (2006). Under this test, the party challenging the statute or ordinance must show that whatever classification is promulgated is arbitrary or without some reasonable justification. Id. at 640.

The defendants argue that the ordinance discriminates on the basis of gender and/or sex; thus, strict scrutiny is the appropriate standard of review. The State counters that the ordinance only distinguishes between men and women on the basis of their different physical characteristics; thus, the rational basis test applies.

Under federal equal protection law, pursuant to the Fourteenth Amendment, a classification based on gender triggers intermediate scrutiny. United States v. Virginia, 518 U.S. 515, 532-33 (1996). Part I, Article 2 of the New Hampshire Constitution states, however, "Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin." N.H. CONST. pt. I, art. 2. Thus, under the New Hampshire Constitution, gender is a suspect class and classifications based thereon trigger strict scrutiny.

See Cheshire Medical Center v. Holbrook, 140 N.H. 187, 189 (1995); see also LeClair v. LeClair, 137 N.H. 213, 222 (1993) ("We apply the strict scrutiny test ... when the classification involves a suspect class based on race, creed, color, gender, national origin, or legitimacy...." (quotation omitted)) (superseded by statute on other grounds). In Holbrook, we applied strict scrutiny to the common law doctrine of necessaries, which made husbands legally liable for essential goods or services provided to their wives by third parties. Holbrook, 140 N.H. at 189-90. We concluded that there was no compelling justification for the gender bias embodied in the traditional necessaries doctrine. Id. at 189. However, Holbrook did not address the type of legislation that is at issue here: a proscription that imposes requirements on both men and women, but applies to women somewhat differently. Thus, Holbrook, the only case in which we have applied strict scrutiny to a gender-based classification, does not necessarily establish that the Laconia ordinance triggers strict scrutiny.

Courts in other jurisdictions have generally upheld laws that prohibit women but not men from exposing their breasts against equal protection challenges. See generally Kimberly J. Winbush, Annotation, Regulation of Exposure of Female, but not Male, Breasts, 67 A.L.R.5th 431 (1999) (collecting cases). But see Free the Nipple Fort Collins v. City of Fort Collins, Colorado, 237 F. Supp. 3d 1126, 1133 (D. Colo. 2017) (concluding that equal protection challenge to ordinance prohibiting women but not men from exposing their breasts was likely to succeed on the merits). In so doing, however, they have often left unclear the applicable standard of review. See Tolbert v. City of Memphis, Tenn., 568 F. Supp. 1285,

1290 (W.D. Tenn. 1983); City of Jackson v. Lakeland Lounge, 688 So. 2d 742, 751-52 (Miss. 1996); State v. Turner, 382 N.W.2d 252, 255-56 (Minn. Ct. App. 1986); Free the Nipple–Springfield Residents Promoting Equality v. City of Springfield, Missouri, No. 15-3467-CV-S-BP, 2017 WL 6815041, at *2-3 (W.D. Mo. Oct. 4, 2017). Some courts have assumed without deciding that such laws are gender-based and thus trigger intermediate scrutiny under the Federal Constitution, and then upheld them on the grounds that the heightened requirements of intermediate scrutiny were satisfied. See Ways v. City of Lincoln, 331 F.3d 596, 600 (8th Cir. 2003); United States v. Biocic, 928 F.2d 112, 115 (4th Cir. 1991); J & B Soc. Club No. 1, Inc. v. City of Mobile, 966 F. Supp. 1131, 1139 (S.D. Ala. 1996). Others have explicitly held that laws which prohibit women but not men from exposing their breasts are gender-based and trigger intermediate scrutiny either under federal equal protection law or an analogous state constitutional provision. See Tagami v. City of Chicago, 875 F.3d 375, 380 (7th Cir. 2017), cert. denied, 138 S. Ct. 1577 (2018) (Federal Constitution); Buzzetti v. City of New York, 140 F.3d 134, 141-42 (2d Cir. 1998) (Federal Constitution); Craft v. Hodel, 683 F. Supp. 289, 299 (D. Mass. 1988) (Federal Constitution); City of Tucson v. Wolfe, 917 P.2d 706, 707 (Ariz. Ct. App. 1995) (state constitution); Dydyn v. Department of Liquor Control, 531 A.2d 170, 175 (Conn. App. Ct. 1987) (state constitution). Still others appear to have concluded that such laws do not trigger any form of heightened constitutional review. See Schleuter v. City of Fort Worth, 947 S.W.2d 920, 925-26 (Tex. App. 1997) (state constitution); City of Seattle v. Buchanan, 584 P.2d 918, 920-22 (Wash. 1978) (en banc) (state constitution); Eckl v. Davis, 124 Cal.

Rptr. 685, 695-96 (Ct. App. 1975); see also Hang On, Inc. v. City of Arlington, 65 F.3d 1248, 1256-57 (5th Cir. 1995).

Among states, like New Hampshire, that define gender as a suspect class under their respective state constitutions, we are aware of none that apply strict scrutiny to ordinances similar to Laconia's.[2] See Buchanan, 584 P.2d at 921; City of Albuquerque v. Sachs, 92 P.3d 24, 27, 29 (N.M. Ct. App. 2004). Compare Williams v. City of Fort Worth, 782 S.W.2d 290, 296 (Tex. App. 1989) (recognizing that sex is a suspect class under Texas Constitution), with Schleuter, 947 S.W.2d at 925-26 (applying no heightened scrutiny to ordinance that restricted locations of businesses featuring female topless dancers).

In Buchanan, for example, the Washington Supreme Court held that an ordinance which prohibited both men and women from being nude in public, but defined nudity for women to include exposure of the breast, "d[id] not ... impose unequal responsibilities on women" because the ordinance "applie[d] alike to men and women, requiring both to cover those parts of their bodies which are intimately associated with the procreation function." Buchanan, 584 P.2d at 921. The court noted, "It is true that [the ordinance] requires the draping of more parts of the female body than of the male, but only because there are more parts of the female body intimately associated with the procreative function. The fact that

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[2] Relatedly, we are aware of no court with precedent-setting authority that has held such an ordinance unconstitutional. But cf. Free the Nipple Fort Collins, 237 F. Supp. 3d at 1133.

the ordinance takes account of this fact does not render it discriminatory." Id. at 922. Thus the ordinance did not "classify ... on the basis of sex." Id. at 921.

The Eckl court reasoned similarly:

> Nature, not the legislative body, created the distinction between that portion of a woman's body and that of a man's torso. Unlike the situation with respect to men, nudity in the case of women is commonly understood to include the uncovering of the breasts. Consequently, in proscribing nudity on the part of women it was necessary to include express reference to that area of the body. The classification is reasonable, not arbitrary, and rests upon a ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike.

Eckl, 124 Cal. Rptr. at 696.

While Washington and California appear to address these considerations in the threshold analysis of the applicable standard of review, other courts that apply intermediate scrutiny to these types of laws have upheld them based on similar reasoning. See, e.g., Craft, 683 F. Supp. at 300 (quoting Eckl); see also Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 468-69 (1981) (plurality opinion) ("[T]his court has consistently upheld statutes where the gender classification ... realistically reflects the fact that the sexes are not similarly situated in certain circumstances.").

We conclude that the Laconia ordinance does not classify on the basis of gender. The ordinance

prohibits both men and women from being nude in a public place. See Laconia, N.H., Code of Ordinances ch.180, art. 1, §§180-2, 180-4. "[T]he ordinance here does not prevent exposure by one sex only." Buchanan, 584 P.2d at 922. That the ordinance defines nudity to include exposure of the female but not male breast does not mean that it classifies based upon a suspect class. See id.; Gonya, 153 N.H. at 532. "Unlike the situation with respect to men, nudity in the case of women is commonly understood to include the uncovering of the breasts." Eckl, 124 Cal. Rptr. at 696. The ordinance merely reflects the fact that men and women are not fungible with respect to the traditional understanding of what constitutes nudity. See id.; Sachs, 92 P.3d at 29; see also Biocic, 928 F.2d at 115-16 (noting that female breasts have traditionally been regarded by society as an erogenous zone); Buzzetti, 140 F.3d at 143 (noting that, unlike the male breast, "public exposure of the female breast is rare under the conventions of our society, and almost invariably conveys sexual overtones"); cf. Virginia, 518 U.S. at 533 ("The two sexes are not fungible; a community made up exclusively of one sex is different from a community composed of both." (quotation and brackets omitted)).

Nor do we find that the ordinance affects a fundamental right. See Eckl, 124 Cal. Rptr. at 695. Although freedom of speech is a fundamental right, see McGraw v. Exeter Region Coop. Sch. Dist., 145 N.H. 709, 713 (2001), "[b]eing in a state of nudity is not an inherently expressive condition," Erie v. Pap's A.M., 529 U.S. 277, 289 (2000). Even assuming without deciding that the defendants' nudity in this case was expressive, not every restriction of a right classified as fundamental incurs strict scrutiny.

Bleiler, 155 N.H. at 697-98. For limitations upon a fundamental right to be subject to strict scrutiny, there must be an actual deprivation of the right. Lamarche, 158 N.H. at 204; see also Estate of Cargill, 119 N.H. at 667. For the reasons discussed in Part III, infra, there was no such deprivation here. Similarly, intermediate scrutiny does not apply because the ordinance does not involve an important substantive right. Cf. LeClair, 137 N.H. at 222-23. Hence, rational basis is the appropriate standard of review for this ordinance.

Applying the standard, we have little trouble concluding that the defendants have not carried the heavy burden of mounting a successful facial attack to an ordinance analyzed only for rationality. The stated purpose of the ordinance is to uphold and support "public health, public safety, morals and public order." Laconia, N.H., Code of Ordinances ch. 180, art. I, §180-1 (1998). Under the terms of the ordinance, "[t]he conduct prohibited ... is deemed to be contrary to the societal interest in order and morality." Id. Federal courts have found these to be important or substantial interests under intermediate scrutiny, let alone legitimate ones under rational basis review. See Tagami, 875 F.3d at 379-80 (finding the purposes of "promoting traditional moral norms and public order" to be "important enough to survive [intermediate] scrutiny"); Biocic, 928 F.2d at 115-16 (finding "important" the "government interest ... [in] protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed" to parts of the body "that traditionally in this society have been regarded as erogenous zones"); Craft, 683 F. Supp. at 299-300 (finding a sufficient state interest in "protect[ing] the public from

invasions of its sensibilities"); see also Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991). We likewise conclude that they are legitimate government interests. "The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals." Barnes, 501 U.S. at 569. Furthermore, the ordinance is rationally related to advancing those interests. See id. at 571-72; Craft, 683 F. Supp. at 300-01. For these reasons, we hold that the ordinance does not violate Part I, Article 2 of the New Hampshire Constitution.[3]

The dissent faults us for seeking guidance from other courts in ascertaining whether Laconia's ordinance classifies based on gender. However, as demonstrated by the lack of any meaningful discussion of our precedent in the dissent, we have little in the way of help from our own cases in answering this question. Although we applied strict scrutiny to a gender-based classification in Holbrook, see Holbrook, 140 N.H. at 189-90, as already discussed, the law at issue in Holbrook did not impose requirements on both men and women. The dissent identifies no other instance, nor are we aware of any, in which we have concluded that a law challenged on equal protection grounds contained a gender-based classification and therefore was subject to strict

[3] We reach the same result under the Federal Constitution as we do under the State Constitution. Federal courts applying federal equal protection analysis have near-uniformly upheld ordinances similar to Laconia's even when subjecting them to intermediate scrutiny. See Tagami, 875 F.3d at 379-80; Ways, 331 F.3d at 599-600; Buzzetti, 140 F.3d at 144; Biocic, 928 F.2d at 115-16; J & B Soc. Club No. 1, 966 F. Supp. at 1139-40; Craft, 683 F. Supp. at 299-301. But see Free the Nipple Fort Collins, 237 F. Supp. 3d at 1133.

scrutiny. But cf. In re Certain Scholarship Funds, 133 N.H. 227, 231 (1990) (concluding that the "State's participation in the administration of" certain scholarships established by trust but expressly limited to one gender "cannot even withstand the lowest level of judicial scrutiny," and thus declining to "determine what level of review should be employed in cases of gender ... discrimination" under Part I, Article 2). Thus, our prior cases are not helpful in analyzing whether Laconia's ordinance is gender-based. In other words, to the extent the dissent contends that our precedent requires us to determine the standard of review in equal protection challenges by examining the purpose and scope of the State-created classification, we agree. The primary issue on which this case turns, however, is what that examination reveals when applied to the unique facts of this case.

We agree with the dissent, of course, that this court has a duty "to make an independent determination of the protections afforded in the New Hampshire Constitution." Ball, 124 N.H. at 231. However, where our previous cases have not had occasion to answer the question presented here, we fail to see how we depart from that duty by checking our work against other courts, many of them in states with equal protection provisions similar to our own. See TEX. CONST. art. 1, §3a ("Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin."); Schleuter, 947 S.W.2d at 925-26; WA. CONST. art. 31, §1 ("Equality of rights and responsibility under the law shall not be denied or abridged on account of sex."); Buchanan, 584 P.2d at 920-22; N.M. CONST. art. 2, §18 ("Equality of rights under law shall not be denied on account of the

sex of any person."); Sachs, 92 P.3d at 29. Indeed, the dissent itself relies on out-of-jurisdiction cases to support its contention that the Laconia ordinance contains a gender-based classification. To the extent the dissent simply finds those cases more persuasive, that is all the more reason for us, in fulfilling our obligation to independently interpret Part I, Article 2, to consider the full range of how courts have tackled this difficult question, lest we simply pick and choose from amongst courts whose holdings align with our own personal ideologies.

The dissent also contends that there is "no principled reason why" our approach to analyzing Laconia's ordinance "would not apply with equal force to other laws" that afford differing treatment to people of different races, religions, colors, or national origins. We disagree. The facts of this case, including the particular way in which men and women differ with respect to the traditional understanding of nudity, are unique. Indeed, the dissent does not even attempt to deny that nudity is simply different for men than for women. At the same time, it is undeniably true that classifications based on immutable characteristics have "long [been] recognized as in most circumstances irrelevant," Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (quotation omitted), and therefore are generally improper bases for differing treatment under the law. However, based on the unique way in which men and women differ with respect to nudity, we conclude that the ordinance does not afford different treatment for men and women based on gender. As for the dissent's assertion that, given our approach to analyzing Laconia's ordinance, we would not apply strict scrutiny in a case that concerned laws

imposing more onerous retirement benefit requirements for women than for men, it suffices to say that any such case would be controlled by our analysis in Holbrook. See Holbrook, 140 N.H. at 189-90.

At various points throughout its opinion, the dissent lumps the ordinance, and our analysis of it, together with "pervasive and perverse discrimination," "romantic paternalism," "unexamined stereotypes," and "archaic prejudice." The resort to such hyperbole reveals the flawed nature of its reasoning. It assumes that, because the ordinance does not allow men and women to engage in precisely the same mode of dress, it must contain a gender-based classification. Respectfully, we find this approach deceptively simplistic. For strict scrutiny to apply, it is not enough that men and women be treated differently: they must be treated differently based upon a gender-based classification. See Buchanan, 584 P.2d at 921-22. For the reasons already discussed, we find no gender-based classification in the ordinance. It is telling that the dissent has identified no case, nor are we aware of any, in which a court sitting in a jurisdiction with an Equal Rights Amendment analogous to our own has applied strict scrutiny to an ordinance like Laconia's. Neither can we ignore that no court with precedent-setting authority has held such an ordinance unconstitutional.

Nor should the siren call of "equal rights" lead us to forget our constitutional role. In the absence of a suspect classification or a fundamental right, courts will not second guess legislative bodies as to the wisdom of a specific law. Winnisquam Reg. Sch. Dist. v. Levine, 152 N.H. 537, 539 (2005). That the ordinance may or may not "reflect sociological insight,

or shifting social standards" is not determinative for our purposes. Buchanan, 584 P.2d at 921 (quotation omitted). "Our obligation" is to interpret and apply the law, "not to mandate our own moral code." Planned Parenthood of Southeastern PA v. Casey, 505 U.S. 833, 850 (1992). "We are told that concepts of morality and propriety are changing"; if so, then "it can reasonably be expected that public demand will soon make it imperative that this portion of the ordinance be repealed." Buchanan, 584 P.2d at 920-21. The people of Laconia may make such a decision, but this court will not make it for them.

III. Freedom of Speech

The defendants next argue that the ordinance violates their rights to freedom of speech and expression under Part I, Article 22 of the New Hampshire Constitution and the First Amendment to the United States Constitution. They contend that, "[b]y appearing topless in public, [the defendants] engaged in speech and expression ... to demonstrate to others [their] political viewpoint and message that the female nipple is not a sexual object." They further maintain that, by doing so, they sought "to bring attention to gender equality and how the female nipple is treated different[ly] than the male nipple," "to continue the advancement of women's rights[,] and to have the conduct of being topless be accepted and normalized."

We first address the defendants' claims under the State Constitution, and rely on federal law only to aid in our analysis. Ball, 124 N.H. at 231-33. Once again, our review of this constitutional question is de novo. McKenzie, 154 N.H. at 777.

Part I, Article 22 of the New Hampshire Constitution provides: "Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved." N.H. CONST. pt. I, art. 22. Similarly, the First Amendment prevents the passage of laws "abridging the freedom of speech." U.S. CONST. amend. I. It applies to the states through the Fourteenth Amendment to the United States Constitution. Lovell v. Griffin, 303 U.S. 444, 450 (1938).

When assessing whether government restrictions impermissibly infringe on free speech, we must first address whether the speech or conduct at issue is protected by the State Constitution. State v. Bailey, 166 N.H. 537, 540-41 (2014). The State and Federal Constitutions contain robust guarantees of free speech, but they do not offer absolute protection to all speech under all circumstances and in all places. State v. Biondolillo, 164 N.H. 370, 373 (2012). We do not accept "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea"; however, "we acknowledge that conduct may be sufficiently imbued with elements of communication to fall within the scope of constitutional protections." Bailey, 166 N.H. at 541 (quotation, brackets, and ellipsis omitted); see State v. Comley, 130 N.H. 688, 691 (1988) (noting that although statute did not specifically regulate speech, its application "may have such an effect where a prosecution under the statute concerns conduct encompassing expressive activity").

The State contends that the defendants' conduct did not constitute protected speech. Although "[b]eing in a state of nudity is not an inherently expressive

condition," Pap's A.M., 529 U.S. at 289, under the circumstances of this case we will assume, without deciding, that the defendants engaged in constitutionally protected expressive conduct. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (assuming, but not deciding, that overnight sleeping in connection with demonstration was constitutionally protected expressive conduct); Craft, 683 F. Supp. at 292 (assuming dubitante that plaintiffs' shirt-free appearances at Cape Cod National Seashore constituted "expressive conduct protected to some extent by the First Amendment" (quotation omitted)); see also Bailey, 166 N.H. at 541. We must, therefore, determine whether the ordinance violates their right to free speech.

"It is well settled that the government need not permit all forms of speech on property that it owns and controls." Bailey, 166 N.H. at 541 (quotation, brackets, and ellipsis omitted). "The standards by which limitations on speech must be evaluated differ depending on the character of the property." Id. at 542 (quotation and brackets omitted). Government property generally falls into three categories—traditional public forums, designated public forums, and limited public forums. Id. "A traditional public forum is government property which by long tradition or by government fiat has been devoted to assembly and debate." Id. (quotation omitted). In such forums, the government may impose reasonable time, place, and manner restrictions. Doyle v. Comm'r, N.H. Dep't of Resources & Economic Dev., 163 N.H. 215, 221 (2012). If a restriction is content-based, it must be narrowly tailored to serve a compelling government interest. Id.; Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2226 (2015) ("Content-based laws—those that

target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."). If a restriction is content-neutral, it must satisfy a slightly less stringent test—it must be narrowly tailored to serve a significant government interest. Doyle, 163 N.H. at 221; see Biondolillo, 164 N.H. at 373 (noting that federal precedent employs the same standard to assess constitutionality of restrictions on the time, place, and manner of expressive activities taking place in a public forum); see also Clark, 468 U.S. at 293.

The defendants suggest, and the State does not dispute, that the beaches at which the defendants were arrested constitute traditional public forums. Thus, for purposes of this appeal, we also will assume, without deciding, that the respective beaches constitute traditional public forums. Nonetheless, the defendants argue that "[t]ime, place, and manner analysis is not appropriate" because the ordinance regulates speech based upon its content and viewpoint. They contend, therefore, that we must subject the ordinance to strict scrutiny review. We disagree.

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." Reed, 135 S. Ct. at 2227; see also Biondolillo, 164 N.H. at 374. On the other hand, a law is a content-neutral speech regulation if it is "justified without reference to the content of the regulated speech." City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (quotation and emphasis omitted).

We agree with the trial court that the ordinance is not content-based. The ordinance is, on its face, a general prohibition on public nudity. See Pap's A.M., 529 U.S. at 290 (concluding that ordinance banning public nudity was not related to the suppression of expression). As the United States District Court for the District of Massachusetts ruled regarding a National Park Service regulation prohibiting public nudity at the seashore, the ordinance is "plainly not based upon either the content or subject matter of speech." Craft, 683 F. Supp. at 293 (quotations omitted). There is nothing in the text of the ordinance itself that suggests "that one group's viewpoint is to be preferred at the expense of others." Id. (quotation omitted). It does not target nudity meant to advance women's rights or desexualize the female nipple. Rather, it prohibits all nudity, regardless of whether the nudity is accompanied by expressive activity. See Pap's A.M., 529 U.S. at 290. In that sense, the ordinance merely regulates the manner in which activities may be carried out in that they cannot be carried out in the nude. We, therefore, conclude that the ordinance is content-neutral.

As we stated, if a restriction is content-neutral, it must be narrowly tailored to serve a significant government interest. Doyle, 163 N.H. at 221. Content-neutral restrictions must also leave open ample alternative channels for communication. Id. On appeal, the defendants do not challenge the trial court's rulings that the ordinance meets these requirements. Rather, their only argument is that the ordinance is content-based and viewpoint discriminatory and, thus, should be subject to strict scrutiny review. Because we necessarily reject that argument by concluding that the ordinance is content-neutral,

and the defendants have not otherwise demonstrated that the trial court's rulings were erroneous, we need not conduct a further constitutional analysis.

Finally, the defendants pose various scenarios in their brief regarding circumstances under which, they argue, the ordinance would be unlikely to be applied. For example, they state that "presumably Laconia would not be enforcing the ordinance against pre-pubescent females" and that it is "questionable if the City would be enforcing the ordinance against a female who had a double mastectomy who essentially lacks any breast tissue even if their nipples were exposed." Beyond these bare assertions, however, they do not develop a legal argument. Because a mere laundry list of complaints regarding adverse rulings by the trial court, without developed legal argument, is insufficient to warrant judicial review, we decline to respond to these assertions.[4] See State v. Ayer, 154 N.H. 500, 513 (2006) (declining to address defendant's due process argument as he had not explained how his rights were violated and had only argued in "conclusory terms").

Accordingly, for these reasons, we cannot say that the trial court erred by determining that the ordinance does not violate the defendants' rights to free speech and expression under the State

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[4] RSA 132:10-d (2015) provides: "Breast-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." Although noting that the ordinance does not make any exception for breast-feeding, the defendants specifically acknowledge that "they are not seeking to invalidate the ordinance for its failure to exempt breastfeeding." We therefore have no occasion to address this issue.

Constitution. As the Federal Constitution affords the defendants no greater protection than the State Constitution under the circumstances presented here, see Tagami, 875 F.3d at 379 (citing Barnes, 501 U.S. at 568-69), we also find no violation of the Federal Constitution.

IV. Authorization to Enact the Ordinance

The defendants next argue that the ordinance is invalid because the City of Laconia did not have the statutory authority to enact the ordinance. We find this argument unpersuasive.

"[W]hile general statutes must be enacted by the legislature, it is plain the power to make local regulations, having the force of law in limited localities, may be committed to other bodies representing the people in their local divisions, or to the people of those districts themselves." State v. Grant, 107 N.H. 1, 3 (1966) (quotation omitted). "Our whole system of local government in cities, villages, counties and towns, depends upon that distinction. The practice has existed from the foundation of the state, and has always been considered a prominent feature in the American system of government." Id. (quotation omitted). Indeed, as a subdivision of the state, the City of Laconia may exercise such powers as are expressly or impliedly granted to it by the legislature. See Dover News, Inc. v. City of Dover, 117 N.H. 1066, 1068 (1977).

Although there exists no express authority for a city to enact an ordinance prohibiting females from exposing their nipples, RSA 47:17, VII (2012) grants the city the power "[t]o regulate all streets and public ways, wharves, docks, and squares, and the use thereof." Further, RSA 47:17, XIII (2012) grants the

city the power "to regulate the times and places of bathing and swimming in the canals, rivers and other waters of the city, and the clothing to be worn by bathers and swimmers." In addition, RSA 47:17, XV (2012) gives the city the power to "make any other bylaws and regulations which may seem for the well-being of the city" so long as "no bylaw or ordinance" is "repugnant to the constitution or laws of the state."

Moreover, the governmental authority known as the police power is an inherent attribute of state sovereignty. Piper v. Meredith, 110 N.H. 291, 294 (1970). The police power is broad and "includes such varied interests as public health, safety, morals, comfort, the protection of prosperity, and the general welfare." Id. (quotation omitted). The express and implied powers granted to towns by the legislature must be interpreted and construed in light of the police powers of the state which grants them. Id. at 295.

We have held that towns are empowered under the authority granted by RSA 31:39 (Supp. 2017) to make bylaws for a variety of purposes which generally fall into the category of health, welfare, and public safety. See id. Specifically, RSA 31:39, I(a) empowers towns to make bylaws for "[t]he care, protection, preservation and use of the public cemeteries, parks, commons, libraries and other public institutions of the town."

We believe that these statutory provisions authorize the city to enact the ordinance. See Dover News, Inc., 117 N.H. at 1068. As we explained, the stated purpose of the ordinance is to uphold and support "public health, public safety, morals and public order." Laconia, N.H., Code of Ordinances ch.

180, art. 1, §180-1. We agree with the State that the ordinance's prohibition on public nudity is substantially related to this purpose. See Grant, 107 N.H. at 3. Furthermore, we have found that the ordinance does not violate the defendants' constitutional rights to equal protection or freedom of speech under the State and Federal Constitutions. As such, it does not unduly restrict the defendants' fundamental rights. Accordingly, we agree with the trial court that the City had the authority to enact the ordinance.

V. Preemption

The defendants next contend that the ordinance is preempted by RSA 645:1, I (2016). It is well settled that towns cannot regulate a field that has been preempted by the State. Town of Rye Bd. of Selectmen v. Town of Rye Zoning Bd. of Adjustment, 155 N.H. 622, 624 (2007). The preemption doctrine flows from the principle that municipal legislation is invalid if it is repugnant to, or inconsistent with, state law. Id. State law expressly preempts local law when there is an actual conflict between state and local regulation. Id. at 624-25. An actual conflict exists when a municipal ordinance or regulation permits that which a state statute prohibits, or vice versa. Id. at 625. Moreover, even when a local ordinance does not expressly conflict with a state statute, it will be preempted when it frustrates the statute's purpose. Forster v. Town of Henniker, 167 N.H. 745, 756 (2015). Because preemption "is essentially a matter of statutory interpretation and construction," whether a state statute preempts local regulation is a question of law, which we review de novo. Id. (quotation omitted).

RSA 645:1, I, provides that "[a] person is guilty of a misdemeanor if such person fornicates, exposes his or her genitals, or performs any other act of gross lewdness under circumstances which he or she should know will likely cause affront or alarm." The defendants do not—and could not—argue that this statute specifically authorizes the public display of breasts by females. On the contrary, although we need not decide the issue, this statute at least arguably can be read to prohibit such conduct as an act of gross lewdness. See, e.g., Com. v. Quinn, 789 N.E.2d 138, 146 (Mass. 2003). Nor can it be said that this statute represents the kind of comprehensive regulatory scheme that is indicative of legislative intent to occupy the field of regulation of public safety and morals. See Prolerized New England Co. v. City of Manchester, 166 N.H. 617, 623 (2014). Therefore, there is simply no basis for a claim that the ordinance either expressly conflicts with RSA 645:1, I, or that it frustrates the purpose of the statute.

The defendants point to an unsuccessful effort by legislators to enact legislation that would have specifically prohibited the public exposure of female breasts, see 2016 HB 1525-FN, arguing that the failure of that measure demonstrates legislative intent not to prohibit such conduct. As we have noted, however, "[w]e can discern no clear meaning from the legislature's failure to enact the proposed amendment." Dover News, Inc., 117 N.H. at 1069; see also Appeal of House Legislative Facilities Subcom., 141 N.H. 443, 449 (1996) (rejecting as misguided argument that failure of proposed amendment to Public Employee Labor Relations Act that would have expressly excluded legislative and judicial employees from its coverage demonstrated legislative intent that

such employees be covered, and observing that "the amendment's failure could as easily have resulted from the belief that those employees were not covered by the Act in the first place").

For these reasons, we find that the ordinance is not preempted by RSA 645:1, I.

VI. RSA Chapter 354-A

Finally, the defendants argue that the trial court erred by denying their motion to dismiss because the ordinance violates RSA chapter 354-A. Relying upon RSA 354-A:16 and :17, the defendants contend that by "mak[ing] it illegal to be a topless female in public while allowing a male to be topless in public," the ordinance discriminates by "exclud[ing] someone from being on public property based solely on that person's sex/gender."

This argument requires us to engage in statutory interpretation. We are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. EEOC v. Fred Fuller Oil Co., 168 N.H. 606, 608 (2016). "We first examine the language of the statute, and, when possible, we ascribe the plain and ordinary meanings to the words used." Eldridge v. Rolling Green at Whip-Poor-Will Condo. Owners' Association, 168 N.H. 87, 90 (2015) (quotation omitted).

RSA chapter 354-A, known as the "Law Against Discrimination," prohibits, as relevant here, unlawful discrimination based upon sex in places of public accommodation as provided therein. See RSA 354-A:1 (title and purposes of chapter), :16-:17 (public accommodation). RSA 354-A:16 provides, in pertinent part, that "[t]he opportunity for every individual to have

equal access to places of public accommodation without discrimination because of age, sex, race, creed, color, marital status, physical or mental disability or national origin is hereby recognized and declared to be a civil right." RSA 354-A:17 states:

> It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, because of the ... sex ... of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof; or, directly or indirectly, to publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of ... sex ... ; or that the patronage or custom thereat of any person belonging to or purporting to be of any particular ... sex ... is unwelcome, objectionable or acceptable, desired or solicited.

In advancing their statutory argument, the defendants do little more than rehash their constitutional equal protection argument that, by prohibiting the exposure of the female, but not the male, breast, the ordinance discriminates on the basis of sex. For the reasons already discussed, we do not find that the ordinance constitutes unlawful discrimination in violation of RSA 354-A:16 or :17. Rather, we agree with the trial court that the ordinance merely prohibits those who access public places from doing so in the nude, and makes a

permissible distinction between the areas of the body that must be covered by each gender.[5] See Sachs, 92 P.3d at 29 (holding that, in addition to not violating the New Mexico Constitution, the ordinance at issue in that case did not contravene the New Mexico Human Rights Act).

Affirmed.

LYNN, C.J., and DONOVAN, J., concurred; BASSETT, J., with whom HICKS, J., joined, concurred in part and dissented in part.

BASSETT, J., with whom HICKS, J., joins, concurring in part and dissenting in part. We agree with our colleagues in most respects: Laconia's ordinance does not violate the defendants' rights to freedom of speech and expression; it falls within the regulatory authority of the City of Laconia; it is not preempted by statute; and it does not violate RSA chapter 354-A. However, we part company with the majority when it rejects the defendants' equal protection claim. We

[5] The defendants cite cases from several jurisdictions that hold that various forms of preferences given to women, such as car wash discounts and discounted drink prices for women at a bar or racetrack, violated the respective jurisdiction's anti-discrimination laws or ordinances. See Koire v. Metro Car Wash, 707 P.2d 195, 204 (Cal. 1985); City of Clearwater v. Studebaker's D. Cl., 51 So. 2d 1106, 1108-09 (Fla. Dist. Ct. App. 1987); Ladd v. Iowa West Racing Ass'n., 438 N.W.2d 600, 602 (Iowa 1989); Peppin v. Woodside Delicatessen, 506 A.2d 263, 267 (Md. Ct. Spec. App. 1986); Com., Pa. Liquor Control Bd. v. Dobrinoff, 471 A.2d 941, 943 (Pa. Commw. Ct. 1984). These cases are readily distinguishable from the case at bar because, unlike in this case, they did not involve a distinction based upon the common understanding of what constitutes nudity.

strongly disagree that rational basis is the lens through which the defendants' equal protection challenge should be analyzed. Laconia's ordinance facially classifies on the basis of gender: if a woman and a man wear the exact same clothing on the beach, on Laconia's main street, or in a backyard "visible to the public," the woman is engaging in unlawful behavior—but the man is not. Laconia, N.H., Code of Ordinances ch. 180, art. I, §§180-2, 180-4 (1998). This is a gender-based classification. Accordingly, the court must apply strict scrutiny. See In re Sandra H., 150 N.H. 634, 637 (2004) ("Classifications based upon suspect classes or affecting a fundamental right are subject to the most exacting scrutiny...." (quotation omitted)); Cheshire Medical Center v. Holbrook, 140 N.H. 187, 189 (1995) ("Our constitution guarantees that 'equality of rights ... shall not be denied or abridged by this state on account of ... sex.' N.H. CONST. pt. I, art. 2. In order to withstand scrutiny under this provision, a common law rule that distributes benefits or burdens on the basis of gender must be necessary to serve a compelling State interest."); LeClair v. LeClair, 137 N.H. 213, 222 (1993) ("We apply the strict scrutiny test, in which the government must show a compelling State interest in order for its actions to be valid, when the classification involves a suspect class based on race, creed, color, gender, national origin, or legitimacy ...." (quotation omitted) (superseded by statute on other grounds). Were this court to subject Laconia's ordinance to this exacting standard, given that the government failed to present sufficient evidence in the trial court to satisfy its burden of proof, we would be compelled to find the ordinance unconstitutional.

Laconia's ordinance makes it "unlawful for any person to knowingly or intentionally, in a public place: ... [a]ppear in a state of nudity." Laconia, N.H., Code of Ordinances ch. 180, art. I, §180-2. Laconia defines "public place" to include "[a]ny public street, ... beach, or other property or public institution of the City"; "[a]ny outdoor location, whether publically or privately owned, which is visible to the public at the time the prohibited conduct occurs"; and "[a]ny area within any ... place of public accommodation or other private property which is generally frequented by the public." Laconia, N.H., Code of Ordinances ch. 180, art. I §180-4. It defines nudity as "the 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. The defendants argue that the latter portion of the ordinance violates their constitutional rights to equal protection because, even though both men and women have nipples, the ordinance does not treat men and women equally.

"In considering an equal protection challenge under our State Constitution, we must first determine the correct standard of review by examining the purpose and scope of the State-created classification and the individual rights affected." Cmty. Res. for Justice v. City of Manchester, 154 N.H. 748, 758 (2007) (quotation and brackets omitted). The significance of the threshold determination as to the proper standard of review cannot be overstated. Classifications based upon suspect classes or that affect fundamental rights are subject to strict scrutiny: the government must prove that the legislation is "necessary to serve a compelling State interest," Holbrook, 140 N.H. at 189,

and that it is "narrowly tailored to meet that end," Cmty. Res., 154 N.H. at 759 (quotation omitted). Below strict scrutiny is intermediate scrutiny, which is triggered when the challenged classification involves important substantive rights, Sandra H., 150 N.H. at 637-38, and which requires the government to show that the challenged legislation is substantially related to an important government interest. Cmty. Res., 154 N.H. at 762. Under either strict or intermediate scrutiny, the government bears the burden of proof, and "may not rely upon justifications that are hypothesized or invented post hoc in response to litigation, nor upon overbroad generalizations." Id. (quotations omitted); see also Fisher v. University of Texas at Austin, 570 U.S. 297, 310-12 (2013). On the other end of the spectrum, if legislation does not classify based on a suspect class, affect fundamental rights, or involve important substantive rights, the constitutional standard of review is rational basis. Sandra H., 150 N.H. at 638. "The rational basis test under the State Constitution requires that legislation be only rationally related to a legitimate government interest." Boulders at Strafford v. Town of Strafford, 153 N.H. 633, 641 (2006). The rational basis test puts the burden of proof on the party challenging the legislation and "contains no inquiry into whether legislation unduly restricts individual rights." Id. at 641-42.

The majority acknowledges—as it must—that under the New Hampshire Constitution, gender-based classifications trigger strict scrutiny. Yet the majority declines to apply strict scrutiny in this case, reasoning that, because "men and women are not fungible with respect to the traditional understanding of what constitutes nudity," the Laconia ordinance

does not classify on the basis of gender. The conclusion that the ordinance does not classify on the basis of gender, and therefore can be analyzed by applying the rational basis test, does not find support in the plain language of the ordinance, the New Hampshire Constitution, or our precedent.

That the ordinance classifies on the basis of gender is self-evident. The ordinance defines "nudity" differently for females and males. By the plain text of the ordinance, a person who appears in a public place showing "the female breast with less than a fully opaque covering of any part of the nipple" violates the ordinance; a male who appears in the same public place without such a covering does not. Laconia, N.H., Code of Ordinances ch. 180, art. I, §§180-2, 180-4 (emphasis added). The challenged portion of the ordinance creates a public dress code which only one gender can violate. This is a gender-based classification.

Indeed, the Seventh Circuit Court of Appeals recently held that a public nudity ordinance that defines nudity differently for men and women classifies on the basis of gender. Tagami v. City of Chicago, 875 F.3d 375, 379-80 (7th Cir. 2017), cert. denied, 138 S. Ct. 1577 (2018). In Tagami, a woman who had been found guilty of violating a public-nudity ordinance that criminalized public display of "the breast at or below the upper edge of the areola thereof of any female person" if "not covered by an opaque covering," sued the City alleging that the ordinance discriminates on the basis of sex in violation of the Federal Constitution. Id. at 377 (quotation omitted). The City asserted that the ordinance did not classify on the basis of sex because it "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." Id. at 379-80. The City contended that "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." Id. at 380. The Seventh Circuit summarily dismissed the City's contention, stating that the City's argument was "a justification for this classification rather than an argument that no sex-based classification is at work here at all." Id. The court concluded that, "[o]n its face, the ordinance plainly does impose different rules for women and men," and then proceeded to analyze the ordinance under the heightened scrutiny required by the Federal Constitution for gender-based classifications. Id.

The Seventh Circuit is not an outlier. Many courts have held that ordinances such as Laconia's do, in fact, classify on the basis of gender. See, e.g., Craft v. Hodel, 683 F. Supp. 289, 299 (D. Mass. 1988) (concluding that, under the Federal Constitution, a regulation prohibiting display of female but not male breasts "does, of course, distinguish between males and females" and thus was "subject to scrutiny under the Equal Protection Clause" (quotation omitted)); City of Tucson v. Wolfe, 917 P.2d 706, 707 (Ariz. Ct. App. 1995) (applying heightened scrutiny "[b]ecause this ordinance creates a different standard of conduct for each gender"); Dydyn v. Department of Liquor Control, 531 A.2d 170, 175 (Conn. App. Ct. 1987) ("We are not persuaded, however, by the argument that the regulation does not classify on the basis of sex. When a statute or regulation distinguishes between male and female anatomy, we hold that [the level of scrutiny required for gender-based classifications]

must be applied."). But see Eckl v. Davis, 124 Cal. Rptr. 685, 695-96 (Ct. App. 1975) (holding that the ordinance did not classify based on sex because "nudity in the case of women is commonly understood to include the uncovering of the breast"); City of Seattle v. Buchanan, 584 P.2d 918, 920-22 (Wash. 1978) (en banc) (same).

We agree with the reasoning of the Seventh Circuit. Public nudity ordinances such as the ordinances in Chicago and Laconia—i.e., those that use explicit, gendered language to make it unlawful for a female to engage in certain behavior, while the same behavior is lawful for a male—clearly classify by gender. The majority asserts that such reasoning is "flawed" and "deceptively simple." We fail to see the flaw or deception in our simple reasoning: when a law uses the word "female" to classify between those who can violate the ordinance — females — and those who cannot — males — it contains a gender-based classification. We freely acknowledge that the question of whether basic physiological differences between the sexes justify disparate treatment of men and women is a more nuanced and complicated question. But classification and justification present different questions. Respectfully, we find the reasoning of the majority—which obscures the simple threshold question—needlessly convoluted and artificially complex.

Indeed, a court upends the safeguards of equal protection if it reasons that, because a law is premised upon physiological or anatomical differences between the sexes, the law does not classify by gender and therefore it need not be analyzed under strict scrutiny. For example, because women have a longer life expectancy than men, by the majority's reasoning,

a hypothetical law that mandates that women work four years longer than men in order to qualify for a pension, or prevents women from retiring until age 70 as opposed to age 66 for men, or reduces a woman's social security benefits if she retires at the same age as a man, does not classify on the basis of gender. Such a law would be constitutional so long as it was "rationally related to a legitimate government interest." Boulders, 153 N.H. at 641. Analyzing whether a law comports with equal protection does not require that the court be blind to basic physiological or anatomical differences. In some cases, applying the constitutionally required level of scrutiny, this court might conclude that such differences justify disparate treatment under the law. However, a court subverts the basic guarantee of equal protection if it concludes that, because men and women have physiological or anatomical differences, a law that classifies on the basis of those differences does not trigger strict scrutiny.

The New Hampshire Constitution states: "Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin." N.H. CONST. pt. I, art. 2. This guarantee became part of our State Constitution in 1974 after the people of New Hampshire passed the Equal Rights Amendment by an overwhelming margin. There is no counterpart to New Hampshire's Equal Rights Amendment in the United States Constitution. Accordingly, we, like courts in other states whose citizens have adopted an Equal Rights Amendment, do not "equate our [Equal Rights Amendment] with the equal protection clause of the federal constitution" as doing so "would negate its meaning given that our state adopted an [Equal

Rights Amendment] while the federal government failed to do so." Doe v. Maher, 515 A.2d 134, 160-61 (Conn. Super. Ct. 1986). We "find inescapable the conclusion that [our Equal Rights Amendment] was intended to supplement and expand the guaranties of the equal protection provision ... and requires us to hold that a classification based on sex is a 'suspect classification' which, to be held valid, must withstand 'strict judicial scrutiny.'" People v. Ellis, 311 N.E.2d 98, 101 (Ill. 1974). "Any other view would mean the people intended to accomplish no change in the existing constitutional law governing sex discrimination" when they enacted the amendment. Darrin v. Gould, 540 P.2d 882, 889 (Wash. 1975) (en banc). Our amended Constitution, and subsequent precedent, now require the State to bear a heavy burden when it seeks to treat people differently under the law "on account of race, creed, color, sex or national origin." N.H. CONST. pt. I, art. 2; see, e.g., Sandra H., 150 N.H. at 637; Holbrook, 140 N.H. at 189; LeClair, 137 N.H. at 222. As we have previously observed:

> Part I, article 2 of the New Hampshire Constitution forbids the State to discriminate on the basis of ... gender. The New Hampshire voters, in ratifying this amendment, have firmly established public policy that demands equal protection for all, regardless of ... gender.

In re Certain Scholarship Funds, 133 N.H. 227, 232 (1990).

The majority's conclusion that a lesser standard applies turns the clock back to the era before the adoption of the Equal Rights Amendment—a bygone era when women were the victims of pervasive

discrimination and this court rejected challenges to laws that treated men and women differently. Indeed, the New Hampshire Supreme Court held more than sixty years ago—but within the lifetimes of judges now sitting on this court—that a regulation which banned women from playing golf on a municipal course during certain hours did not violate the New Hampshire Constitution's equal protection guarantee. See Allen v. Manchester, 99 N.H. 388, 390-92 (1955). We reasoned that because it was not "plainly mistaken or arbitrary" that "women golfers, on the average, progress about the course more slowly than men," and separating slow groups from fast groups might improve "the safety of players, and of women and children golfers in particular," the law did not create an "invalid classification." Id. at 391-92. "Women were separately classified with children, not because of sex, but because of a manner of playing golf thought to be characteristic of them as a group." Id. at 392. The majority's position in this case—that strict scrutiny is not required here because women are thought to be different from men with regard to nudity—harkens back to that bygone era.

The majority misconstrues the equal protection guarantee when it reasons that our precedent "does not necessarily establish that the Laconia ordinance triggers strict scrutiny" because it "does not address the type of legislation that is at issue here: a proscription that imposes requirements on both men and women, but applies to women somewhat differently." The threshold inquiry as to the proper level of review is not whether the law classifies by gender in all respects: it is whether the law classifies by gender in any respect. As the United States Supreme Court has explained: "Whenever the

government treats any person unequally because of [a suspect classification], that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 229-30 (1995). It is precisely because Laconia's ordinance "applies to women somewhat differently" that we must apply strict scrutiny.

The majority reasons that a lesser standard is applicable here in part because "[c]ourts in other jurisdictions have generally upheld laws that prohibit women but not men from exposing their breasts," but have "often left unclear the applicable standard of review." It observes that no court has held that an ordinance like Laconia's triggers strict scrutiny, and that no appellate court has held such an ordinance unconstitutional. However, "[t]he New Hampshire Constitution is the fundamental charter of our State." State v. Ball, 124 N.H. 226, 231 (1983). "Our constitution will often afford greater protection against the action of the State than does the Federal Constitution." State v. Settle, 122 N.H. 214, 217 (1982). Therefore, "this court has a responsibility to make an independent determination of the protections afforded under the New Hampshire Constitution." Ball, 124 N.H. at 231. "If we ignore this duty, we fail to live up to our oath to defend our constitution ...." Id.

We recognize that courts in other jurisdictions, applying less exacting levels of scrutiny, have upheld the constitutionality of ordinances similar to Laconia's. See, e.g., Tagami, 875 F.3d at 380. But see Free the Nipple Fort Collins v. City of Fort Collins, Colorado, 237 F. Supp. 3d 1126, 1130, 1133 (D. Colo. 2017) (concluding that equal protection challenge to

ordinance prohibiting women but not men from exposing their breasts was likely to succeed on the merits when analyzed under intermediate scrutiny, as required by the Federal Constitution, because the ordinance "is based on an impermissible gender stereotype that results in a form of gender-based discrimination"). However the Federal Constitution, and the majority of other state constitutions, materially differ from New Hampshire's Constitution because they do not explicitly provide that equal rights under the law shall not be denied because of sex. See Leslie W. Gladstone, Cong. Research Serv., RS20217, Equal Rights Amendments: State Provisions (2004) (discussing and listing state Equal Rights Amendments). In those jurisdictions, gender-based classifications never trigger strict scrutiny review. See, e.g., Tagami, 875 F.3d at 380 (Federal Constitution); Wolfe, 917 P.2d at 707 (state constitution). By contrast, in New Hampshire, gender-based classifications always trigger strict scrutiny review. Therefore, to the extent that the majority relies upon the outcome of cases decided through application of less rigorous standards to determine the issue central to this case—whether Laconia's ordinance contains a gender-based classification—it shrinks from the court's duty to ensure that "Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin." N.H. CONST. pt. I, art. 2.

For the reasons discussed above, we conclude that Laconia's ordinance classifies on the basis of gender. We recognize that a handful of courts, including two sitting in states that have adopted equal rights provisions similar to Part I, Article 2, have concluded

that ordinances like Laconia's do not classify on the basis of gender. See Eckl, 124 Cal. Rptr. at 696; Buchanan, 584 P.2d at 920-22. However, the reasoning employed by these courts is unsound and cannot withstand scrutiny.

In Eckl, the California Court of Appeal reasoned that a public nudity ordinance that defined nudity differently for men and women did not contain a gender-based classification because "[n]ature, not the legislative body, created the distinction between that portion of the woman's body and that of a man's torso," Eckl, 124 Cal. Rptr. at 696; see also Buchanan, 584 P.2d at 920 ("[C]ommon knowledge tells us ... that there is a real difference between the sexes with respect to breasts ...."). However, the fact that "nature" has created distinctions between men and women does not lessen the level of scrutiny demanded by our constitution. Our precedent is clear: in order to "determine the correct standard of review," the court must "examin[e] the purpose and scope of the State-created classification and the individual rights affected." Cmty. Res., 154 N.H. at 758 (quotations and brackets omitted). The critical threshold determination as to the proper standard of review should not—and does not—include a judicial inquiry into whether "nature" or "the legislative body" created distinctions among those classified.

Indeed, "natural" distinctions between people—including differences in skin color, gender, and country of origin—have historically served as justifications for pervasive and perverse discrimination. That is precisely why the constitution requires us to subject legislation that distinguishes between people on the basis of such differences to heightened scrutiny. The "basic concept of our system

[is] that legal burdens should bear some relationship to individual responsibility." Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion) (quotation omitted). Gender, skin color, and country of origin are "immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government." Fullilove v. Klutznick, 448 U.S. 448, 525 (1980) (Stewart, J., dissenting); see also Frontiero, 411 U.S. at 686. Accordingly, when a legislative body enacts a law that distributes benefits or burdens on the basis of any of these immutable characteristics, that legislation triggers strict scrutiny review. See Holbrook, 140 N.H. at 189. The Equal Rights Amendment was intended as a shield to protect people from disparate treatment under the law on the basis of "natural" or immutable characteristics. But here the majority concludes that because "nature, not the legislative body," has distinguished between men and women, Laconia's ordinance does not classify on the basis of gender. In so doing, the majority turns a constitutional shield into a sword: it wields "immutable characteristics" as a weapon to attack the very protections that the Equal Rights Amendment was intended to guarantee.

Perhaps recognizing this truth, the majority, quoting Buchanan and Eckl, attempts to further justify its conclusion by asserting that the ordinance "merely reflects the fact that men and women are not fungible with respect to the traditional understanding of what constitutes nudity." Buchanan, 584 P.2d at 920-22 ("It is true that [the ordinance] requires the draping of more parts of the female body than of the male, but only because there are more parts of the female body intimately associated with the

procreative function. The fact that the ordinance takes account of this fact does not render it discriminatory."); Eckl, 124 Cal. Rptr. at 696 ("Unlike the situation with respect to men, nudity in the case of women is commonly understood to include the uncovering of the breasts. Consequently, in proscribing nudity on the part of women it was necessary to include express reference to that area of the body."). However, "traditional" or "common" moral understandings do not determine constitutional guarantees.

"[O]ur Nation has had a long and unfortunate history of sex discrimination." Frontiero, 411 U.S. at 684. "Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." Id. The law no longer accepts stereotypical notions about women's abilities, interests, and proper place in the public sphere as justifications to treat men and women differently under the law with regard to their ability to serve on juries, see J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 130-31 (1994), administer estates, see Reed v. Reed, 404 U.S. 71, 76 (1971), or learn as military cadets, see United States v. Virginia, 518 U.S. 515, 557-58 (1996). A court would no longer say, as a Supreme Court Justice did over 100 years ago, that a woman did not have a right to practice law because "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman.... This is the law of the Creator.... [T]he rules of civil society must be adapted to the general constitution of things...." Bradwell v. The State, 83 U.S. 130, 141-42 (1872) (Bradley, J., concurring). We revisit that bygone era, and thwart

the very protections the Equal Rights Amendment was enacted to provide, if we allow stereotypical notions about women's bodies to alter our analysis of the straightforward question of whether Laconia's ordinance classifies on the basis of gender. This is precisely why the New Hampshire Constitution requires that legislation which discriminates on the basis of a suspect classification be subject to strict scrutiny.

The law has often been used to perpetuate discrimination based on "public sensibilities" or "common understandings" about individuals on the basis of immutable characteristics—however misinformed or ill-motivated those understandings might be. "One of the most important purposes to be served by the Equal Protection Clause is to ensure that 'public sensibilities' grounded in prejudice and unexamined stereotypes do not become enshrined as part of the official policy of government." People v. Santorelli, 600 N.E.2d 232, 236 (N.Y. 1992) (Titone, J., concurring). "Thus, 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." Id. When the majority takes judicial notice of a common moral understanding about an immutable physical characteristic, and allows it to alter and lessen a constitutional guarantee, it erodes the protections the Equal Rights Amendment was enacted to provide. We see no principled reason why the majority's approach would not apply with equal force to other laws that treat people differently "on account of race, creed, color, sex or national origin." N.H. CONST. pt. I, art.

2. This is a significant change to New Hampshire's equal protection guarantee that gives us great pause. As the United States Supreme Court has observed:

> The point of carefully examining the interest asserted by the government in support of a [suspect] classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of [immutable characteristics] in governmental decisionmaking.... [The fact that] some cases may be difficult to classify [is] all the more reason, in our view, to examine [suspect] classifications carefully.... By requiring strict scrutiny of [suspect] classifications, we require courts to make sure that a governmental classification based on [a suspect class] ... is legitimate, before permitting unequal treatment ... to proceed.

Adarand, 515 U.S. at 228 (quotation omitted).

We now analyze Laconia's ordinance under the applicable standard of review, strict scrutiny, to determine whether the State adduced sufficient evidence to meet its exacting burden. We have no choice but to conclude that it did not. During the hearing on the petitioners' motion to dismiss, the State argued that equal protection is not strictly applicable to this case, and that "the burden is on the petitioner to show that [the ordinance] is unconstitutional.... It's not on the State." In light of the State's position that the ordinance does not trigger strict scrutiny, it is not surprising that the State failed to introduce sufficient evidence to support a finding that the ordinance is "necessary to serve a compelling State interest," Holbrook, 140 N.H. at 189,

or that it is "narrowly tailored to meet that end." Cmty. Res., 154 N.H. at 759 (quotation omitted).

The ordinance's stated purpose is to uphold and support "public health, public safety, morals and public order." Laconia, N.H., Code of Ordinances ch. 180, art. I, §180-1 (1998). In the trial court, the City asserted that because the defendants were topless, they caused a "disturbance" which "has the potential for violence." The City also asserted that, because people think of "female breasts in a sexualized manner," topless women may present other beachgoers with "a mental health issue." Turning to the ordinance's other stated purposes, "morals and public order," the City argued to the trial court that women who do not cover their nipples act contrary to "the City's character" and "morals as determined by the city council."

However we, like the United States Supreme Court, "have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." Lawrence v. Texas, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring in the judgment). Indeed, the State has not cited—nor are we aware of—any case that holds that a government's interest in morality rises to the level of a compelling government interest. "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." Id. at 577 (quotation omitted) (majority opinion). Accordingly, we do not conclude that the State has met its burden of proving that the government's interests in morals and public order are, in fact,

compelling. "Our obligation is to define the liberty of all, not to mandate our own moral code." Planned Parenthood of Southern PA v. Casey, 505 U.S. 833, 850 (1992).

Even if we assume that the government's asserted interests are compelling, a review of the evidence presented to the trial court establishes that the State has not met its burden to prove that the ordinance is necessary and narrowly tailored. See Holbrook, 140 N.H. at 189; Cmty. Res., 154 N.H. at 759. "Although narrow tailoring does not require exhaustion of every conceivable [gender]-neutral alternative, ... [t]he reviewing court must ultimately be satisfied that no workable [gender]-neutral alternatives" would suffice. Fisher, 570 U.S. at 312 (quotation, citation, and brackets omitted). Here, there is no evidence that the City of Laconia considered gender-neutral alternatives and the State has made no argument and presented no evidence as to why gender-neutral alternatives would not suffice. At oral argument the State asserted that the ordinance was "fairly narrowly tailored" because a woman need only "wear pasties" including "pasties that look like nipples." However, it failed to explain why the ordinance was necessary in the first place or why a less restrictive ordinance, perhaps one more narrow in time or place, would be insufficient. By the ordinance's plain language, it is perfectly lawful for a post-pubescent female to wear pasties with tassels walking down Laconia's Main Street, even though a four-year-old girl playing on the beach wearing only shorts, or an adult woman sunbathing without a top in her own back yard, engages in unlawful behavior if her nipples are "visible to the public." Laconia, N.H., Code of Ordinances ch. 180, art. I, §180-4. Without

evidence that gender-neutral or less restrictive alternatives would be unworkable, we cannot conclude that the State has met its burden to prove that Laconia's ordinance is necessary and narrowly tailored to accomplish the government's asserted interests.

In sum, applying the strict scrutiny standard required by Part I, Article 2, we conclude that the State has not carried its burden to prove that its asserted interests are compelling and that Laconia's ordinance is necessary and narrowly tailored. We reach this conclusion after objectively applying strict scrutiny as required by our precedent and Part I, Article 2. In so concluding, we do not mean to imply that all legislation that classifies on the basis of gender would not survive the strict scrutiny test, nor that Laconia's ordinance might not have passed constitutional muster had the State accepted that it bore the burden of proof; rather, we find that the State's proof in this case falls far short of satisfying strict scrutiny.

Although laws that classify on the basis of gender are subject to strict scrutiny under the New Hampshire Constitution, it does not follow that all such laws will be invalidated by application of that exacting standard. "The fact that strict scrutiny applies says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny." Johnson v. California, 543 U.S. 499, 515 (2005) (quotation omitted). Therefore, if the State meets its burden to demonstrate that a law that classifies on the basis of gender is necessary and narrowly tailored to further a compelling government interest, this court would find—as have others—that such a law is

constitutional. See People v. Carranza, No. B240799, 2013 WL 3866506, at *7-8 (Cal. Ct. App. July 24, 2013) (concluding that a sexual battery statute which criminalized non-consensual touching of the breast of a female, but not of a male, did not violate the state's constitutional equal protection guarantee when analyzed under strict scrutiny because "there is a compelling government interest in protecting females from non-consensual touching of their breasts"); Michael M. v. Superior Court of Sonoma Cty., 601 P.2d 572, 573-74 (Cal. 1979) (en banc), aff'd, 450 U.S. 464 (1981) (applying strict scrutiny and holding that a statute which criminalized sexual intercourse with a minor female, but not a male, classified by sex but did not violate equal protection because the law was "supported not by mere social convention but by the immutable physiological fact that it is the female exclusively who can become pregnant," and the State had a "compelling ... interest in minimizing both the number of [teen] pregnancies and their disastrous consequences").

Finally, the majority concludes its equal protection analysis by stating that we as a court should not allow any feelings we may have as judges about the ordinance to "lead us to forget our constitutional role" because "'[o]ur obligation' is to interpret and apply the law, 'not to mandate our own moral code.'" (Quoting Casey, 505 U.S. at 850.) The suggestion is that we, as judges, should interpret and apply the constitution as it exists, not as we think it ought to exist. On this point, we agree. However, the constitution—as it has existed for the past 45 years—includes an Equal Rights Amendment: "Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or

national origin." N.H. CONST. pt. I, art. 2. Surely the citizens thought they were accomplishing something important when they changed the constitution. Our "constitutional role" is, therefore, to interpret and apply Part I, Article 2.

In service of that role, over four decades, we have fashioned an analytical framework which subjects laws that distinguish on the basis of gender to the highest level of constitutional scrutiny: strict scrutiny. See Holbrook, 140 N.H. at 189; Sandra H., 150 N.H. at 637; LeClair, 137 N.H. at 222. However, perhaps mindful of the State's obvious failure to present evidence sufficient to meet the exacting burden of strict scrutiny in this case, the majority strains to conclude that an ordinance that prohibits women—but not men—from engaging in certain behavior does not discriminate on the basis of sex, but is, in fact, gender-neutral. Such an approach is not in service of our constitutional role: it is an abdication of it. Based upon the record before us, we conclude that Laconia's ordinance violates Part I, Article 2 of the New Hampshire Constitution. We respectfully dissent.

## APPENDIX B

BELKNAP, SS. 4TH CIRCUIT COURT-
DISTRICT DIVISION
LACONIA

STATE OF NEW HAMPSHIRE

V.

HEIDI LILLEY, KIA SINCLAIR, GINGER PIERRO

DOCKET #450-2016-CR-1603, 1623, 1879

ORDER

The parties appeared October 14, 2016, with counsel in response to the Defendants' Motion to Dismiss.

At issue is Laconia, NH Ordinances Chapter 180, s. 4 (1998). The Ordinance defines "Nudity" and prohibits "the showing of the female breast with less than a fully opaque covering any part of the nipple..." where the action occurs at "any public street, way, alley, parking area, park, common, beach or other property or public institution of the City."

The basis of the prohibition was intended to exclude 'harmful secondary effects in places and communities where it takes place- that is, crimes of various types and the reduction of property values wherein recreation and tourism have high profiles'.

The Defendants argue that substantive Constitutional rights prohibit the legislating sanctions for the Defendants' conduct. The State asserts that the legislature has empowered local municipalities through RSA 41 with the authority to police the activities which the entity finds detrimental to their communities.

> "But while general statutes must be enacted by the legislature, it is plain the power to make local regulations, having the force of law in limited localities may be committed to other bodies representing the people in their local division, or to the people of those districts themselves. Our whole system of local government in cities, villages, counties and towns, depends upon that distinction. The practice has existed from the foundation of the state, and has always been considered a prominent feature in the American system of government." ***Marine Corps League v. Benoit***, 96 NH 423; ***State v. Roger***, 105 NH 366", ***State v. Grant***, 107 NH 1, 3 (1965).

The present associated cases are reasonably, similar factually to several cases that involved the township of Gilford earlier. In that matter, the Court reviewed the Defendants' line of claims which are analogously aligned in the present series of cases.

The Defendants argue that "(D)efendant's(s') conduct involved expression and political speech and has artistic value". (Motion to Dismiss).

. . . . . .

***Facts:***

. . . . . .

Gina Peirro [*sic*] testified that she went to Weirs Beach to enjoy the day. She was topless and her breasts were fully exposed. She was doing Yoga on the beach. She asserted that she was not nude.

She described being violently harassed by other beach goers. She testified that she bothered no one. She described one woman with a 3 year old who was not bothered by her dress. However, she described a 'handful' of individuals who were upset with the display.

She acknowledged that there was a male photographing her as she exercised. There was no identification, as to the connection or lack thereof, of the photographer. She acknowledged that people were staring at her as she exercised. She indicated that there were children as well as elderly at the beach on that date.

The Defendant Kia Sinclair testified that she had joined the "Free the Nipple" movement in 2015. She expressed concern for the public's stigmatizing and sexualizing the female breast. She believed that the sexualization of the female breast, as if pornographic, led to less women breast feeding their infants.

She described herself purposely exposing herself so as to be arrested. She indicated that she was 'publicly protesting Ginger's arrest' for exposing her breasts.

She described arriving at the beach at the Weirs, going swimming topless and then sunbathing on her stomach. When the officer approached her and asked

her to cover herself or she would be arrested, she asked to be arrested.

Heidi Lilley testified to being involved in the "Free the Nipple" movement since May 2015. She indicated that she has attempted to change the public and government's view of the exposure of the female breast. She indicated that she had appeared in front of the City's Council, the elected body that administers the community. She indicated that she had testified before the legislature and, specifically, a House Committee, reviewing proposed legislation to authorize communities to respond the Gilford situation upon which the Court has been [*sic*] previously ruled. She indicated that the NH Legislature declined to pass such legislation.

She described supporting the other Defendant, particularly, Ms. Pierro. She expressed concern for the enforcement through arrest of Ms. Pierro who was civilly protesting.

She indicated that she was not approached by anyone. She acknowledged that she was aware of the city statute and aware that her actions violated the City Ordinance. She acknowledged activating social media in her efforts to reverse the ordinance which had been in effect since 1998.

The State called Sgt. Black who reported receiving a number of complaints of 'nude yoga' on Weirs Beach on May 28. He was examined as to his ability to recognize the difference between the female and male breast.

He testified to responding to the Weirs and, particularly, the Endicott Parking Lot. He indicated

that the response did not call for emergency lights or sirens.

He observed numerous families on the beach. He observed a topless female performing yoga on a beach towel and a male photographing her. He was able to identify the female. He indicated that he assigned Officer Callahan [*sic*] to assist him.

He reported his observations as to the state of clothing worn by the Defendants as well as the activities of the various Defendants. The officer noted his observations as to the surrounding environment on the date of the Defendants' alleged activities.

Officer Callahan [*sic*] also testified as to her response to the area and interaction with the Defendants and others on the beach on that date.

Sandra Smith, who is Easter Seals chaperone of disabled clients, and Ian Davis, a citizen enjoying the day at the beach with his family, testified as to their observations, concerns, and reservations as to the Defendants' actions that day.

. . . . . .

***Equal Protection:***

The Defendants argue that their appearance topless as alleged in the complaints were "enjoyed'(enjoined) from the value of the right afforded to males under the town(city) ordinance, but also engaged in promoting an idea and message." (Defendants' Motion to Dismiss.)

The Defendants' [*sic*] argue that their prosecutions, based upon the alleged violations of their 'due process/equal protection clause of the US Constitution

as well as Article I and Article 2 of the NH Constitution', are impermissible.

Arguing the ordinance's violation of their equal protection expectations by ordaining a gender/sex based regulation and, therefore, gender discrimination, the Defendants urge that the Court must apply Strict Scrutiny standard of review, the highest and strictest standard of review of legislation in Judicial Review. In doing so, the Defendants would be arguing that, if the Court finds a violation of the Defendants' equal protection guarantees, the Court must require the State to establish a Compelling Interest in the regulation.

The Court must, first, find that the ordinance violates the right of Equal Protection, that is, that all persons similarly situated are to be treated equally. In the present matter, the ordinance ordains that all women who wish to be, present in "public place" which includes "(a)ny public street, way, alley, parking area, park, common, ***beach*** or other property or public institution of the City" must properly clothed. (Emphasis added.)

The Court finds that the regulatory powers of the city are designated in RSA 47:17, XIII, in regulating "times and place of bathing and swimming in... the water of the city and the clothing to be worn by bathers and swimmers". That authorizing legislation is consistent with the cited, Judicial recognition of ***State v. Grant*** and its progenies. The Court finds that RSA 47:17, XIII is only prohibited when it is "repugnant to the constitution and law of the state". ***Dover News, Inc. v. City of Dover***, 117 NH 1066, 1069 (1977).

The Defendants' [*sic*] urge the Court adopt a continuation of its Gilford ruling as the legislature has recently declined to remedially address what was perceived as flawed Judicial ruling. Analogously, ***Dover News, Inc.*** cited the failure to enact "is not legislative action in this area..." ***Dover***, 1069.

This subject ordinance creates no violation of the Equal Protection clause as it treats all females equally. There is, albeit, an omission of males to the ordinance; however, the ordinance on its face creates no classification as to the female body. The Court finds that the proper standard of review is intermediate. The Court finds that the governmental regulation is well established by case law and legislative empowerment of municipalities.

> "Protecting the public sensibilities is an important government interest based on an indisputable difference between the sexes. (Which the Defendants argued was not indisputable.) Further, the prohibition against females baring their breasts in public, although not offensive to everyone, as shown by the testimony of all three witnesses in this cases, [*sic*] is still seen by society, as unpalatable. Therefore, the ordinance does not violate the Equal Protection Clause of the Fourteenth Amendment.
>
> "We agree. Restrictions on exposure of the female breast are supported by the important governmental interest in safeguarding the public's moral sensibilities, and this ordinance is substantially related to that interest. Hence, the ordinance satisfies both the deferral [*sic*] and state tests for equal protection.

> A gender-based distinction challenged under the Equal Protection Clause of the United States Constitution is gauged by the so-called "intermediate level of scrutiny: the distinction must be justified by an important governmental interest that is substantially accomplished by the challenged discriminatory means. ***United States v. Morrison***, 529 US 598, 620 (2000)..." ***State of New Jersey v. Arlene E. Vogt*** 775 A.2d. 551, 557 (2001)

The ordinance does not limit the use of the public accommodation by discriminating against individual [sic] by gender thereby restricting the access of the public property. ***Franklin Lodge of Elks v. Sally Marcoux*** 149 NH 581, 587 (2003). The ordinance prohibits conduct at that public accommodation. That regulation has been found to be validated by the statutory authorization.

***Free Speech/Expression/Artistic Expression:***

"It is established, of course, that the 14th Amendment, is made applicable to the State's 1st Amendment guaranteed of free speech." [*sic*] ***Douglas v. City of Jeannette*** 319 US 157, 162 (1943)

The Defendants argue that their rights to the freedom of their expression are being violated. The Defendants argue that their appearance topless in public in the manner alleged constituted action of expressions. [sic] They further argue that such action was intended to "demonstrate to others her (their) political viewpoint and message that the female is not a sexual object." (Defendant's Motion to Dismiss).

The Defendants testified that they were seeking the normalization of the human body.

"As a general rule, in such a forum, the government may not selectively...shield the public from some kinds of speech on the ground that they are more offensive than others..." "The plain, if at times, disquieting truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences from [*sic*] many purposes." ***Erznoznik v. City of Jackson-ville***, 422 US 205, 209-210 (1975). "No one would suggest that the First Amendment permits nudity in public places.'" ***Erzoznik***, supra 211.

In the present cases, the Defendants' actions are being presented in 'pubic [*sic*] areas' as defined by the ordinance.

The Defendants further argue that their actions are protected as 'artistic endeavors' as articulated in the Supreme Court's protection of the musical ***Hair***.

> "(I)nvariably, the Court has been obliged to condemn systems in which the exercise of such authority was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgement of our precious First Amendment freedoms, [is] too great where officials have unbridled discretion over a forum's use. Our distaste for censorship—reflecting the natural distant [*sic*] of a free people—is deep written in our law." ***Southeastern Promotions Ltd . v. Conrad***, 420 US 546, 554 (1975).

In ***Conrad***, the production was disputing the municipality prohibiting and/or limiting access to

municipally owned locales was, in actuality, an act of prior restraint. In the present case, the Defendants are not being prohibited from using the public property but ***in manner*** in which their demonstration is actioned. [*sic*] "(T)he basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule." ***Joseph Burstyn, Inc. v. Wilson***, 343 US 495, 503 (1952)

In the present ordinance, there is no evidence that the ordinance inhibited the effectiveness of their ability to express their opinion—there is no prohibition to where they might express their opinions. Their conduct was restricted but they were not prohibited from lobbying on the beach or with beach goers as to their agenda. The ordinance "leaves open ample alternative channels for communications..." ***Clark v. Community for Creative Nonviolence*** 468 US 288, 293 (1984) cited in ***McCullen v. Coakley***, 12-1168, June 26, 2014.

The ordinance does not attack the content of the message and thereby restrict the expressions of the Defendants. The ordinance is not content based but is conduct based which distinguishes the reach and the prohibitions and which defines the ordinance's relationship between the Defendants' Constitutional rights and the validity to protecting public sensibilities.

The Court further anticipates, though not articulated, the Defendants' argument that ***Southeastern*** establishes the artistic value of the female nipple. The argument is misplaced to ***Conrad*** as the

case addresses the municipality's decision-making seeded [*sic*] in prior restraint in restricting the public forum in which the performance is allowed and, therefore, confines the free exercise of expression and not the content as artistic, and therefore expressive value.

In the present case, the prohibition of the exposure of the female nipple is found by the Court not to restrict impermissibly the Defendants' free speech. The Court finds that the ordinance is not impermissibly restrictive.

The Defendants' argument that there are alternative venues for those who object to the Defendants' crusade is also without merit. The area of prohibition is a public facility. Said locale is defined by statute, presumptively, due to the geographically limited nature of access to the lake. Further, the presence of children is valid consideration for the cited 'protection of public sensibilities'.

Conversely, there are ample alternatives for the Defendants to promote their views on the ordinance.

Further, not included within the Defendants' argument per se is an implied argument that there is violation of the Defendants' right of association under the First Amendment. "The plaintiffs are not, after all, prevented from advocating the concept of nude sunbathing (toplessness). I conclude, therefore nude (as defined by the ordinance) sunbathing is not constitutionally protected activity." ***South Florida Free Beaches v. City of Miami*** 548 F. Supp. 53, 57 (1982)." In short, while nudity in the privacy of one's own property and nudity in the context of artistic expression may be protected, it seems clear that nude sunbathing on a public beach is not a right of

Constitutional dimensions." ***New England Naturalist Association Inc. v. Howard Larsen, et al.***, 692 F.Supp. 75, 79 (1988)

***Preemption:***

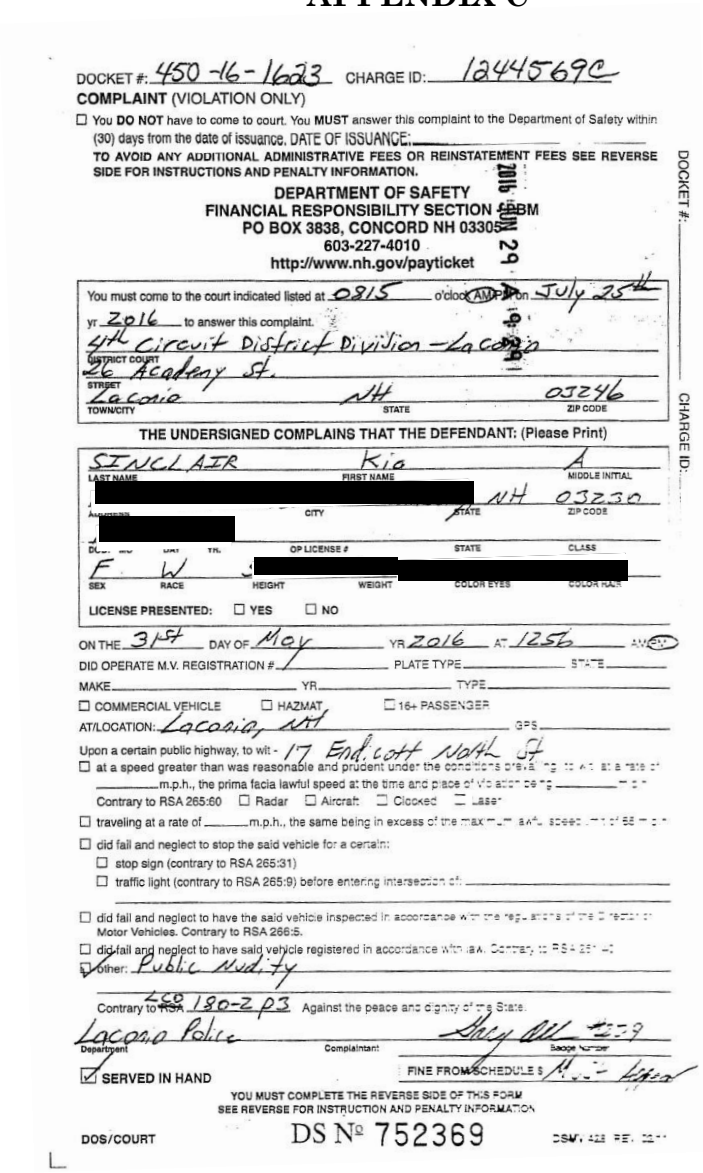
For reasons cited above, the Court, as indicated in the case law cited above, finds that the subject ordinance is neither invalidated nor repugnant by legislative regulatory preemption in RSA 645:1. The Court finds that the validity of the regulatory action in the present is clearer than the former order of the Court in Gilford.

Motion to Dismiss is denied.

Date: November 20, 2016 /s/

Judge James M. Carroll

# APPENDIX C



DOCKET #: 450-16-1623 CHARGE ID: 1244569C

**COMPLAINT** (VIOLATION ONLY)

☐ You **DO NOT** have to come to court. You **MUST** answer this complaint to the Department of Safety within (30) days from the date of issuance. DATE OF ISSUANCE:

**TO AVOID ANY ADDITIONAL ADMINISTRATIVE FEES OR REINSTATEMENT FEES SEE REVERSE SIDE FOR INSTRUCTIONS AND PENALTY INFORMATION.**

**DEPARTMENT OF SAFETY**
**FINANCIAL RESPONSIBILITY SECTION**
**PO BOX 3838, CONCORD NH 03305**
**603-227-4010**
**http://www.nh.gov/payticket**

2016 NOV 29 P 3:

DOCKET #: CHARGE ID:

You must come to the court indicated listed at 0815 o'clock AM PM on July 25th yr 2016 to answer this complaint.

4th Circuit District Division – Laconia
DISTRICT COURT

26 Academy St.
STREET

Laconia NH 03246
TOWN/CITY STATE ZIP CODE

**THE UNDERSIGNED COMPLAINS THAT THE DEFENDANT: (Please Print)**

SINCLAIR Kia A
LAST NAME FIRST NAME MIDDLE INITIAL

[redacted] NH 03230
ADDRESS CITY STATE ZIP CODE

[redacted]
DL NO. DAY YR. OP LICENSE # STATE CLASS

F W [redacted]
SEX RACE HEIGHT WEIGHT COLOR EYES COLOR HAIR

**LICENSE PRESENTED:** ☐ YES ☐ NO

ON THE 31st DAY OF May YR 2016 AT 1256 AM PM

DID OPERATE M.V. REGISTRATION # PLATE TYPE STATE

MAKE YR TYPE

☐ COMMERCIAL VEHICLE ☐ HAZMAT ☐ 16+ PASSENGER

AT/LOCATION: Laconia, NH GPS

Upon a certain public highway, to wit: - 17 Endicott North St

☐ at a speed greater than was reasonable and prudent under the conditions existing to wit: at a rate of m.p.h., the prima facia lawful speed at the time and place of violation being m.p.h.
Contrary to RSA 265:60 ☐ Radar ☐ Aircraft ☐ Clocked ☐ Laser

☐ traveling at a rate of m.p.h., the same being in excess of the maximum lawful speed limit of 55 m.p.h.

☐ did fail and neglect to stop the said vehicle for a certain:
☐ stop sign (contrary to RSA 265:31)
☐ traffic light (contrary to RSA 265:9) before entering intersection of:

☐ did fail and neglect to have the said vehicle inspected in accordance with the regulations of the Director of Motor Vehicles. Contrary to RSA 266:5.

☐ did fail and neglect to have said vehicle registered in accordance with law. Contrary to RSA 261:1

☑ other: Public Nuisance

Contrary to ~~RSA~~ LOC 180-2 P3 Against the peace and dignity of the State.

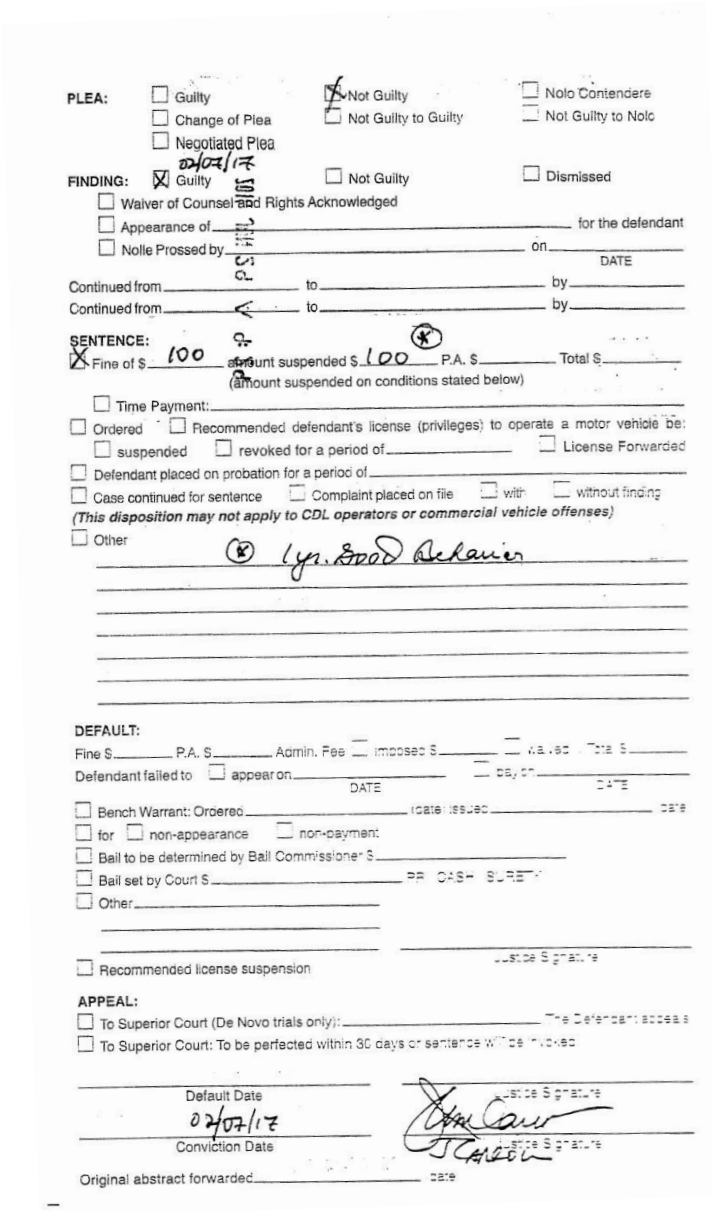
Laconia Police Department — Complainant — Badge Number

☑ SERVED IN HAND

FINE FROM SCHEDULE $ [illegible]

**YOU MUST COMPLETE THE REVERSE SIDE OF THIS FORM**
**SEE REVERSE FOR INSTRUCTION AND PENALTY INFORMATION**

DOS/COURT DS № 752369 DSMV 428 REV. 03/11



PLEA: ☐ Guilty ☒ Not Guilty ☐ Nolo Contendere
☐ Change of Plea ☐ Not Guilty to Guilty ☐ Not Guilty to Nolo
☐ Negotiated Plea

FINDING: ☒ Guilty 02/07/17 ☐ Not Guilty ☐ Dismissed
☐ Waiver of Counsel and Rights Acknowledged
☐ Appearance of _____ for the defendant
☐ Nolle Prossed by _____ on _____ DATE
Continued from _____ to _____ by _____
Continued from _____ to _____ by _____

SENTENCE:
☒ Fine of $ 100 amount suspended $ 100 (*) P.A. $ _____ Total $ _____
(amount suspended on conditions stated below)
☐ Time Payment: _____
☐ Ordered ☐ Recommended defendant's license (privileges) to operate a motor vehicle be:
☐ suspended ☐ revoked for a period of _____ ☐ License Forwarded
☐ Defendant placed on probation for a period of _____
☐ Case continued for sentence ☐ Complaint placed on file ☐ with ☐ without finding
***(This disposition may not apply to CDL operators or commercial vehicle offenses)***
☐ Other
(*) Lyn. Boad Reclassier

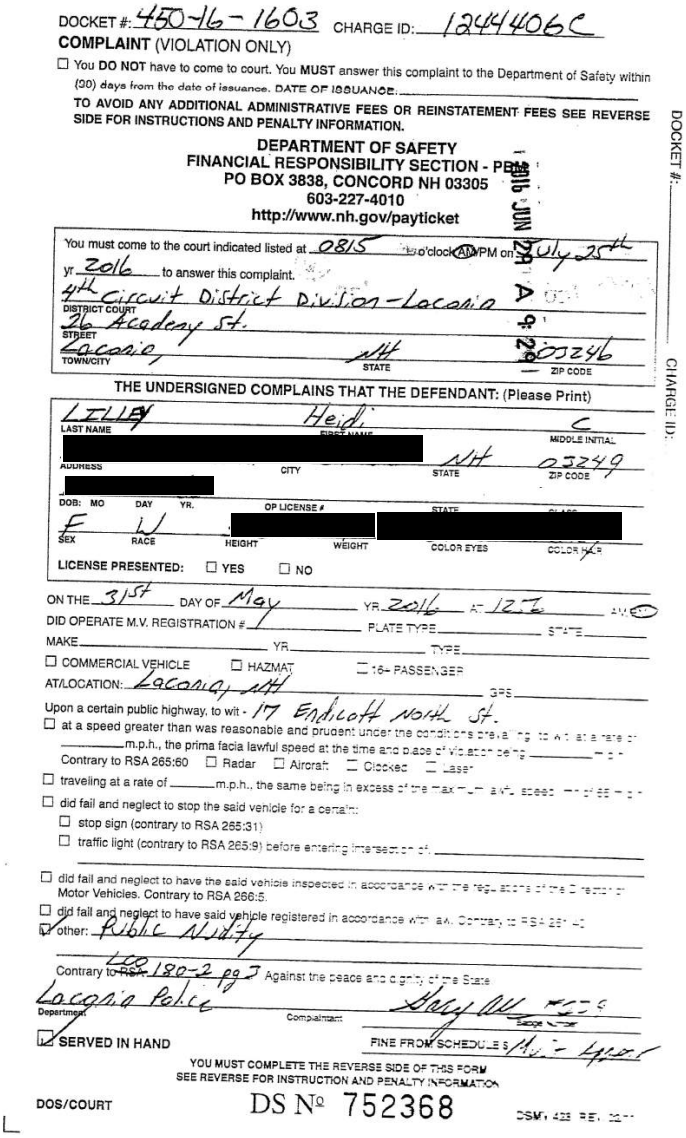
DEFAULT:
Fine $ _____ P.A. $ _____ Admin. Fee ☐ imposed $ _____ ☐ waived Total $ _____
Defendant failed to ☐ appear on _____ DATE ☐ pay on _____ DATE
☐ Bench Warrant: Ordered _____ date issued _____ date
☐ for ☐ non-appearance ☐ non-payment
☐ Bail to be determined by Bail Commissioner $ _____
☐ Bail set by Court $ _____ PR CASH SURETY
☐ Other _____
_____ _____ Justice Signature
☐ Recommended license suspension

APPEAL:
☐ To Superior Court (De Novo trials only): _____ The Defendant accepts
☐ To Superior Court: To be perfected within 30 days or sentence will be invoked

_____ _____ Justice Signature
Default Date
02/07/17
Conviction Date
_____ Justice Signature
J Carlson

Original abstract forwarded _____ date

# APPENDIX D



DOCKET #: 450-16-1603 CHARGE ID: 1244406C

**COMPLAINT** (VIOLATION ONLY)

☐ You **DO NOT** have to come to court. You **MUST** answer this complaint to the Department of Safety within (30) days from the date of issuance. DATE OF ISSUANCE: _____

**TO AVOID ANY ADDITIONAL ADMINISTRATIVE FEES OR REINSTATEMENT FEES SEE REVERSE SIDE FOR INSTRUCTIONS AND PENALTY INFORMATION.**

**DEPARTMENT OF SAFETY**
**FINANCIAL RESPONSIBILITY SECTION - PB**
**PO BOX 3838, CONCORD NH 03305**
**603-227-4010**
**http://www.nh.gov/payticket**

2016 JUN 2 P 2:

DOCKET #: _____ CHARGE ID: _____

You must come to the court indicated listed at 08:15 o'clock AM/PM on July 25th
yr 2016 to answer this complaint.
4th Circuit District Division - Laconia
DISTRICT COURT
2 Academy St.
STREET
Laconia, NH 03246
TOWN/CITY STATE ZIP CODE

**THE UNDERSIGNED COMPLAINS THAT THE DEFENDANT: (Please Print)**

LILLY Heidi C
LAST NAME FIRST NAME MIDDLE INITIAL
[redacted] NH 03249
ADDRESS CITY STATE ZIP CODE
[redacted]
DOB: MO DAY YR. OP LICENSE # STATE CLASS
F W [redacted] [redacted]
SEX RACE HEIGHT WEIGHT COLOR EYES COLOR HAIR

LICENSE PRESENTED: ☐ YES ☐ NO

ON THE 31st DAY OF May YR. 2016 AT 12:3[illegible] AM/PM
DID OPERATE M.V. REGISTRATION # _____ PLATE TYPE _____ STATE _____
MAKE _____ YR. _____ TYPE _____
☐ COMMERCIAL VEHICLE ☐ HAZMAT ☐ 16+ PASSENGER
AT/LOCATION: Laconia, NH GPS _____
Upon a certain public highway, to wit - 17 Endicott North St.
☐ at a speed greater than was reasonable and prudent under the conditions prevailing to wit: at a rate of _____ m.p.h., the prima facia lawful speed at the time and place of violation being _____ m.p.h.
Contrary to RSA 265:60 ☐ Radar ☐ Aircraft ☐ Clocked ☐ Laser
☐ traveling at a rate of _____ m.p.h., the same being in excess of the maximum lawful speed of 65 m.p.h.
☐ did fail and neglect to stop the said vehicle for a certain:
☐ stop sign (contrary to RSA 265:31)
☐ traffic light (contrary to RSA 265:9) before entering intersection of: _____
☐ did fail and neglect to have the said vehicle inspected in accordance with the regulations of the Director of Motor Vehicles. Contrary to RSA 266:5.
☐ did fail and neglect to have said vehicle registered in accordance with law. Contrary to RSA 261:1
☑ other: Public Nuisance
Contrary to ~~RSA~~ 180-2 pg 3 Against the peace and dignity of the State
Laconia Police Department Gary M. [illegible] Complainant Badge #
☑ SERVED IN HAND FINE FROM SCHEDULE $ 44.00

YOU MUST COMPLETE THE REVERSE SIDE OF THIS FORM
SEE REVERSE FOR INSTRUCTION AND PENALTY INFORMATION

DOS/COURT DS Nº 752368 DSM 423 REV. [illegible]

**PLEA:** ☐ Guilty ☒ Not Guilty ☐ Nolo Contendere
☐ Change of Plea ☐ Not Guilty to Guilty ☐ Not Guilty to Nolo
☐ Negotiated Plea

**FINDING:** ☒ Guilty 02/07/17 ☐ Not Guilty ☐ Dismissed
☐ Waiver of Counsel and Rights Acknowledged
☐ Appearance of _____ for the defendant
☐ Nolle Prossed By _____ on _____ DATE
Continued from _____ to _____ by _____
Continued from _____ to _____ by _____

**SENTENCE:**
☒ Fine of $ 100 amount suspended $ 100 (*) P.A. $ _____ Total $ _____
(amount suspended on conditions stated below)
☐ Time Payment _____
☐ Ordered ☐ Recommended defendant's license (privileges) to operate a motor vehicle be:
☐ suspended ☐ revoked for a period of _____ ☐ License Forwarded
☐ Defendant placed on probation for a period of _____
☐ Case continued for sentence ☐ Complaint placed on file ☐ with ☐ without finding
***(This disposition may not apply to CDL operators or commercial vehicle offenses)***
☐ Other (*) 1yr. Good Behavior

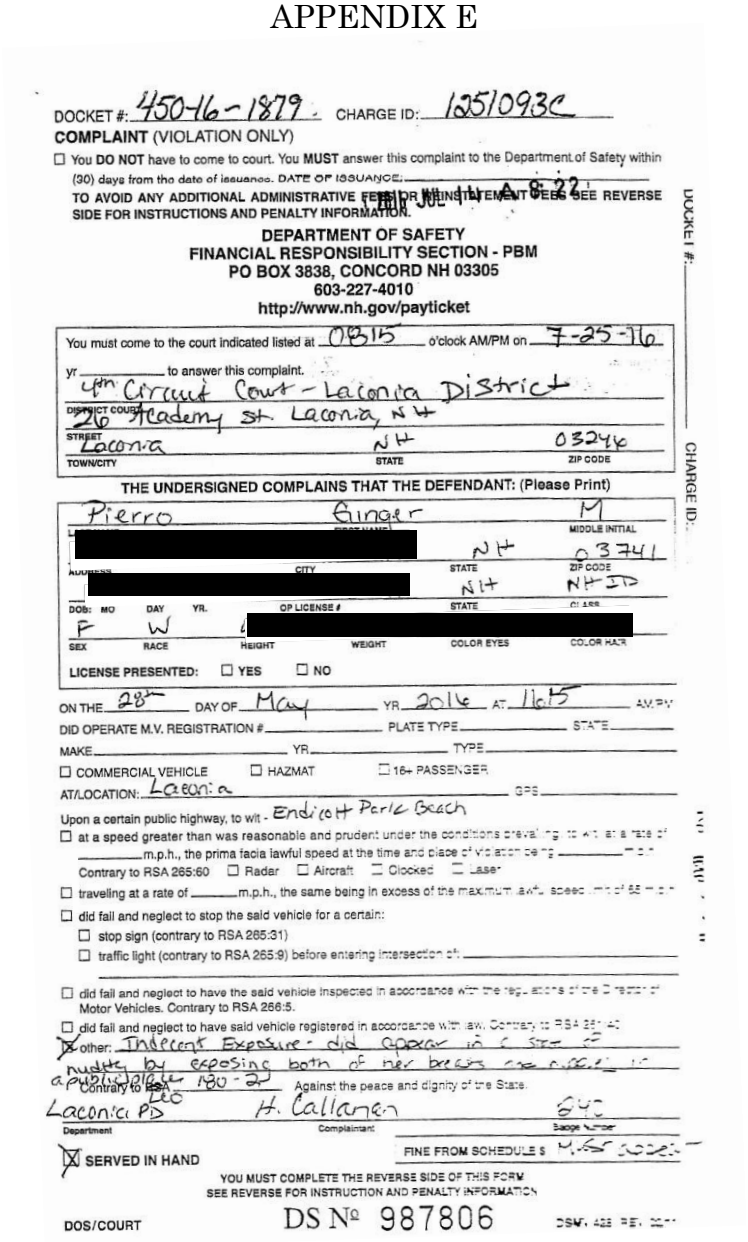
**DEFAULT:**
Fine $ _____ P.A. $ _____ Admin. Fee ☐ imposed $ _____ ☐ waived Total $ _____
Defendant failed to ☐ appear on _____ DATE ☐ pay on _____ DATE
☐ Bench Warrant: Ordered _____ date issued _____ date
☐ for ☐ non-appearance ☐ non-payment
☐ Bail to be determined by Bail Commissioner $ _____
☐ Bail set by Court $ _____ PR CASH SURETY
☐ Other _____
☐ Recommended license suspension _____ Justice Signature

**APPEAL:**
☐ To Superior Court (De Novo trials only): _____ The Defendant appeals
☐ To Superior Court: To be perfected within 30 days or sentence will be imposed

_____ Default Date _____ Justice Signature
02/07/17 Conviction Date Justice Signature

Original abstract forwarded _____ date

# APPENDIX E



DOCKET #: 450-16-1879 CHARGE ID: 1251093C

**COMPLAINT** (VIOLATION ONLY)

☐ You **DO NOT** have to come to court. You **MUST** answer this complaint to the Department of Safety within (30) days from the date of issuance. DATE OF ISSUANCE: JUL 11 A 8:22

**TO AVOID ANY ADDITIONAL ADMINISTRATIVE FEES OR REINSTATEMENT FEES SEE REVERSE SIDE FOR INSTRUCTIONS AND PENALTY INFORMATION.**

**DEPARTMENT OF SAFETY**
**FINANCIAL RESPONSIBILITY SECTION - PBM**
**PO BOX 3838, CONCORD NH 03305**
**603-227-4010**
**http://www.nh.gov/payticket**

DOCKET #: _____ CHARGE ID: _____

You must come to the court indicated listed at 0815 o'clock AM/PM on 7-25-16
yr _____ to answer this complaint.
6th Circuit Court - Laconia District
DISTRICT COURT
26 Academy St. Laconia, NH
STREET
Laconia NH 03246
TOWN/CITY STATE ZIP CODE

**THE UNDERSIGNED COMPLAINS THAT THE DEFENDANT: (Please Print)**

Pierro Ginger M
FIRST NAME MIDDLE INITIAL
[redacted] NH 03741
ADDRESS CITY STATE ZIP CODE
[redacted] NH NH ID
DOB: MO DAY YR. OP LICENSE # STATE CLASS
F W [redacted]
SEX RACE HEIGHT WEIGHT COLOR EYES COLOR HAIR

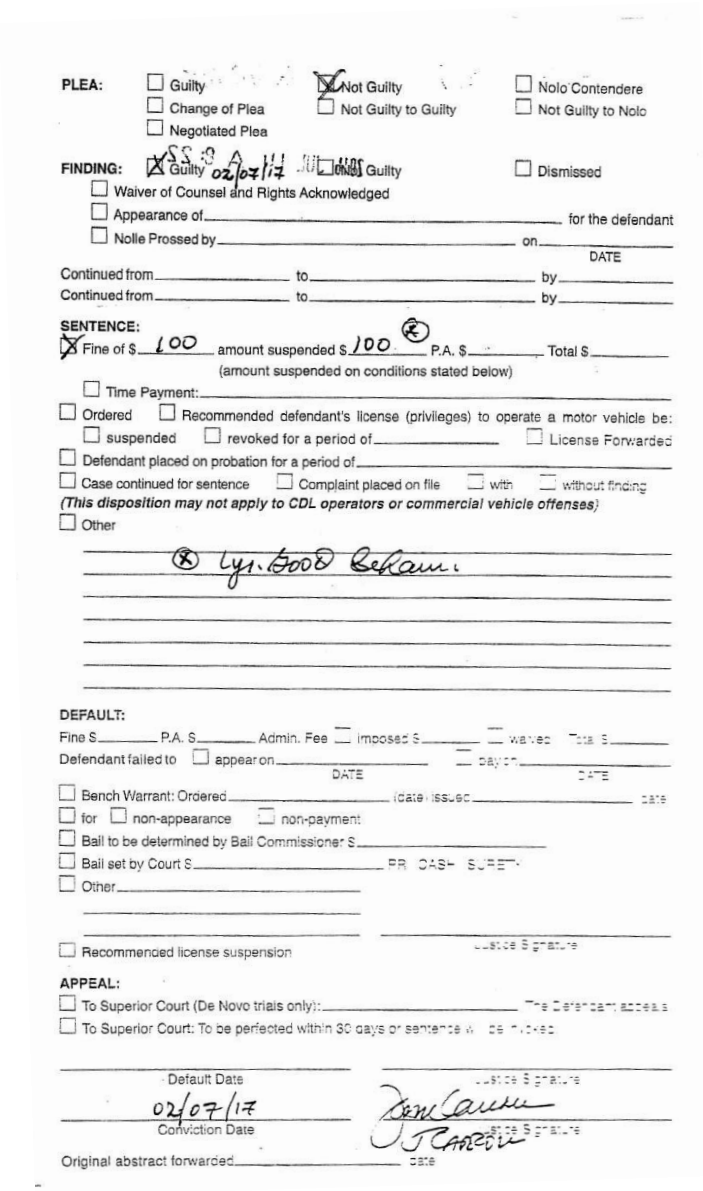
**LICENSE PRESENTED:** ☐ YES ☐ NO

ON THE 28th DAY OF May YR 2016 AT 1615 AM/PM
DID OPERATE M.V. REGISTRATION # _____ PLATE TYPE _____ STATE _____
MAKE _____ YR _____ TYPE _____
☐ COMMERCIAL VEHICLE ☐ HAZMAT ☐ 16+ PASSENGER
AT/LOCATION: Laconia GPS _____
Upon a certain public highway, to wit - Endicott Park Beach
☐ at a speed greater than was reasonable and prudent under the conditions prevailing to wit: at a rate of _____ m.p.h., the prima facia lawful speed at the time and place of violation being _____ m.p.h.
Contrary to RSA 265:60 ☐ Radar ☐ Aircraft ☐ Clocked ☐ Laser
☐ traveling at a rate of _____ m.p.h., the same being in excess of the maximum lawful speed limit of 55 m.p.h.
☐ did fail and neglect to stop the said vehicle for a certain:
☐ stop sign (contrary to RSA 265:31)
☐ traffic light (contrary to RSA 265:9) before entering intersection at: _____
☐ did fail and neglect to have the said vehicle inspected in accordance with the regulations of the Director of Motor Vehicles. Contrary to RSA 266:5.
☐ did fail and neglect to have said vehicle registered in accordance with law. Contrary to RSA 261:41
☒ other: Indecent Exposure - did appear in a state of nudity by exposing both of her breasts and vagina to a public place
Contrary to RSA 645:1 180-2 Against the peace and dignity of the State.
Laconia PD LEO H. Callanan 642
Department Complainant Badge Number

☒ SERVED IN HAND FINE FROM SCHEDULE $ [illegible]

YOU MUST COMPLETE THE REVERSE SIDE OF THIS FORM
SEE REVERSE FOR INSTRUCTION AND PENALTY INFORMATION

DOS/COURT DS № 987806 DSM 428 REV. [illegible]



PLEA: ☐ Guilty ☒ Not Guilty ☐ Nolo Contendere
☐ Change of Plea ☐ Not Guilty to Guilty ☐ Not Guilty to Nolo
☐ Negotiated Plea

FINDING: ☒ Guilty 02/07/17 ☐ Guilty ☐ Dismissed
☐ Waiver of Counsel and Rights Acknowledged
☐ Appearance of _____ for the defendant
☐ Nolle Prossed by _____ on _____ DATE

Continued from _____ to _____ by _____
Continued from _____ to _____ by _____

SENTENCE:
☒ Fine of $ 100 amount suspended $ 100 P.A. $ _____ Total $ _____
(amount suspended on conditions stated below)
☐ Time Payment: _____
☐ Ordered ☐ Recommended defendant's license (privileges) to operate a motor vehicle be:
☐ suspended ☐ revoked for a period of _____ ☐ License Forwarded
☐ Defendant placed on probation for a period of _____
☐ Case continued for sentence ☐ Complaint placed on file ☐ with ☐ without finding
***(This disposition may not apply to CDL operators or commercial vehicle offenses)***
☐ Other
⊗ 1yr. Good Behavior.

DEFAULT:
Fine $ _____ P.A. $ _____ Admin. Fee ☐ imposed $ _____ ☐ waived Total $ _____
Defendant failed to ☐ appear on _____ DATE ☐ pay on _____ DATE
☐ Bench Warrant: Ordered _____ (date issued) _____ date
☐ for ☐ non-appearance ☐ non-payment
☐ Bail to be determined by Bail Commissioner $ _____
☐ Bail set by Court $ _____ PR CASH SURETY
☐ Other _____
_____ Justice Signature
☐ Recommended license suspension

APPEAL:
☐ To Superior Court (De Novo trials only): _____ The Defendant appeals
☐ To Superior Court: To be perfected within 30 days of sentence unless otherwise ordered

_____ Default Date _____ Justice Signature
02/07/17 Conviction Date
J CARROLL Justice Signature
Original abstract forwarded _____ date

## APPENDIX F

### United States Constitution
### Amendment XIV, §1, cl.2

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### N.H. RSA 132:10-d

**Breast-feeding**. – Breast-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.

## Laconia, N.H., Code of Ordinances ch. 180, article I, §§180-1 to 180-6 (1998)

### Chapter 180. Public Indecency

### Article I. Indecent Exposure

[Adopted 11-23-1998 by Ord. No. 10.98.10]

#### §180-1. Purpose and findings.

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 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.

#### §180-2. Prohibited conduct.

A. From and after the effective date of this article, it shall be unlawful for any person to knowingly or intentionally, in a public place:

(1) Engage in sexual intercourse;

(2) Engage in deviate sexual conduct;

(3) Appear in a state of nudity; or

(4) Fondle the person's genitals or the genitals of another person.

(5) Urinate, defecate or masturbate in a public place which can be viewed by any person.

[Added 5-14-2001 by Ord. No. 01.2001.01]

B. From and after the effective date of this article, it shall be unlawful for any person to knowingly or intentionally aid, induce or cause another person to commit any act prohibited under Subsection A, even if the other person:

(1) Has not been prosecuted for the offense;

(2) Has not been convicted of the offense;

(3) Has been acquitted of the offense; or

(4) Has not engaged in the prohibited conduct.

**§180-3. Exemption.**

A. Notwithstanding the foregoing, the conduct prohibited hereunder shall not include conduct permitted as part of the operation of a sexually-oriented business pursuant to § 235-42 of the City of Laconia Zoning Ordinance, provided that such sexually-oriented business has been lawfully established and possesses all necessary land use approvals and other required permits at the time the conduct occurs.

B. Nothing herein is intended nor shall it be construed to alter, affect, enlarge, expand or diminish the range of conduct permitted as part of the operation of a sexually-oriented business that has been lawfully established pursuant to §235-42 of the City of Laconia Zoning Ordinance.

**§180-4. Definitions.**

For the purpose of this article, the following words shall be defined as follows:

**NUDITY**

The 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.

**PUBLIC PLACE**

A. Any public street, way, alley, parking area, park, common, beach or other property or public institution of the City.

B. Any outdoor location, whether publicly or privately owned, which is visible to the public at the time the prohibited conduct occurs.

C. Any area within any theater, hall, restaurant, food service establishment, shopping mall, business, place of public accommodation or other private property which is generally frequented by the public.

**§180-5. Violations and penalties.**

Any person who violates this article shall be fined $250 for the first offense, $500 for the second offense and $1,000 for the third and each successive offense. Each act of conduct prohibited under this article, whether occurring at separate times on the same day, or on different days, shall constitute a separate violation.

**§180-6. Intent; construal of provisions.**

A. It is specifically the intention of this article to prohibit as broad a range of the defined conduct as may be lawfully accomplished. To that end, the determination by a court of competent jurisdiction that a given application of this article to certain specific conduct is beyond the authority of the City shall not affect the validity of other applications of the article that may be lawfully enforced.

B. To the extent that any prohibition under this article is declared overbroad by a court of competent jurisdiction, it is the declared intention to apply the article in a constitutionally permissible manner.

## APPENDIX G

THE STATE OF NEW HAMPSHIRE
LACONIA DISTRICT COURT

STATE OF NEW HAMPSHIRE

V.

HEIDI LILLEY, KIA SINCLAIR, GINGER PIERRO
16-CR,

DEFENDANT'S MOTION TO DISMISS

NOW COMES the defendant, and requests the city ordinance complaint be dismissed and the town ordinance be declared unlawful/unconstitutional.

**FACTS**

1. Defendants[1] are charged with a violation of City of Laconia Ordinance 180-2 Public Indecency: Prohibited conduct. Presumably, the charge alleges defendant appeared in a state of nudity which under City of Laconia Ordinance Sec. 180-4 is defined as: "The 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."

[1] Heidi Lilley, Kia Sinclair, and Ginger Pierro are all charged with the same City ordinance and the same motion has been filed in each case.

2. Defendant was cited due to her nipple and breast being exposed in public. There was no exposure of genitalia and defendant at all times had an appropriate layer of clothing in that regard. There is no state law which prohibits adult females, or males. from being in public with their nipples or breasts/chest exposed.

3. Defendant belongs to/supports the "Free the Nipple" Movement.

> "Free The Nipple is a film, an equality movement, and a mission to empower women across the world. We stand against female oppression and censorship, both in the United States and around the globe. Today, in the USA it is effectively ILLEGAL for a woman to be topless, breastfeeding included, in 35 states. In less tolerant places like Louisiana, an exposed nipple can take a woman to jail for up to three years and cost $2,500 in fines. Even in New York City, which legalized public toplessness in 1992, the NYPD continues to arrest women. We're working to change these inequalities through film, social media, and a grassroots campaign.
>
> THE MOVEMENT
>
> Free The Nipple has become a "real life" equality movement that's sparked a national dialogue. Famous graffiti artists, groups of dedicated women, and influencers such as Miley Cyrus, Liv Tyler, and Lena Dunham have shown public support which garnered international press and created a viral #FreeTheNipple campaign. The issues we're addressing are equal rights for men

and women, a more balanced system of censorship, and legal rights for all women to breastfeed in public.

[* * *]

http://freethenipple.com/what-is-free-the-nipple/

4. The Free the Nipple movement in New Hampshire has received significant media coverage.[2] Additionally, the legislature has addressed this issue twice in the past term. HB 1525-FN had a unanimous recommend-dation by the committee to be inexpedient to legislate (kill the bill), and was determined inexpedient to legislate by the House. That bill's text would have amended RSA 645:I(b) Public decency to include: Such person purposely exposes his or her

---

[2]http://www.boston.com/news/local/new-hampshire/2015/08/23/rain-can-stop-free-the-nipple-day-hampton-beach/lR1rtxy2OhlqiKXXRplZHO/story.html

http://www.necn.com/news/new-england/Free-the-Nipple-Movement-Brings-Topless-Protest-to-Hampton-Beach-322641592.html

http://www.seacoastonline.com/article/20150730/NEWS/150739852

http://www.nh1.com/news/it-s-just-boobs-60-plus-go-topless-for-free-the-nipple-event-at-hampton-beach

http://www.unionleader.com/Free-the-Nipple-movement-gets-day-in-court

http://www.huffingtonpost.com/entry/new-hampshire-topless_us_56e07c3ee4b065e2e3d485cc

http://www.seacoastonline.com/news/20160825/go-topless-day-returns-to-hampton-beach-sunday

http://www.nh1.com/news/3-free-the-nipple-activists-arrested-over-the-weekend-for-topless-sunbathing-at-weirs-beach/

anus or, if a woman, purposely exposes the areola or nipple of her breast or breasts in a public place and in the presence of another person with reckless disregard for whether a reasonable person would be offended or alarmed by such act.

SB 347 was also deemed inexpedient to legislate by the House. That bill's text was:

> AN ACT enabling the state and municipalities to adopt laws and ordinances regulating attire on state and municipal property.
>
> Be it Enacted by the Senate and House of Representatives in General Court convened:
>
> 1 New Subparagraph; Powers and Duties of Towns; Power to Make Bylaws. Amend RSA 31:39, I by inserting after subparagraph (p) the following new subparagraph:
>
> (q) Regulating the times and places of bathing, sunbathing, and swimming in municipal parks, beaches, pools, or other municipal properties, and the clothing to be worn by users. Nothing in this subparagraph shall authorize a town to prohibit breastfeeding in such town properties.
>
> 2 Powers of City Councils; Bylaws and Ordinances; Power to Make Bylaws. Amend RSA 47:17, XIlI to read as follows:
>
> XIII. Vagrants, Obscene Conduct. To restrain and punish vagrants, mendicants, street beggars, strolling musicians, and

> common prostitutes, and all kinds of immoral and obscene conduct, and to regulate the times and places of bathing, sunbathing, and swimming in the canals, rivers and other waters of the city, or other city properties, and the clothing to be worn by [bathers and swimmers] users. Nothing in this paragraph shall authorize a city to prohibit breastfeeding in such city properties.
>
> 3 New Subparagraph; Department of Resources and Economic Development; Rulemaking. Amend RSA 12-A:2-c, II by inserting after subparagraph (f) the following new subparagraph:
>
> (g) The times and places of bathing, sunbathing , and swimming in state water s or in state parks, forests, or other state recreational areas, and the clothing to be worn by users. Nothing in this subparagraph shall prohibit breastfeeding in such state recreational areas.
>
> 4 Effective Date. This act shall take effect 60 days after its passage."

Part of the media coverage and subsequent attempt at legislation was a result of this court's Order allowing Defendant's conduct under the applicable Gilford Beach Ordinance: Docket = 2015-CR-2801.

5. Defendant's conduct involved expression and political speech and has artistic value. By appearing topless, Defendant not only enjoyed the value of the

right afforded to males under the town ordinance, but also engaged in promoting an idea and message.

**ARGUMENT**

**I. THE TOWN ORDINANCE IS UNCONSTITUTIONAL**

A: The city ordinance violates the due process/equal protection clause of the United States Constitution as well as Art l. and Art 2. of the N.H. Constitution.

**6. Article 1. [Equality of Men; Origin and Object of Government.]** All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.

**[Art.] 2. [Natural Rights.]** All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin."

7. The town ordinance in question applies solely to "the showing of the *female* breast with less than a fully opaque covering of any part of the nipple" (Emphasis added). As the ordinance discriminates based upon sex/gender, it is subject to strict scrutiny.

> "In considering an equal protection challenge under our State Constitution, "we must first determine the appropriate standard of review: strict scrutiny; fair and substantial relationship;

> or rational basis." Boehner v. State, 122 N.H. 79, 83, 441 A.2d 1146, 1148 (1982). Equal protection under the law does not forbid classifications, see 2 B. SCHWARTZ. RIGHTS OF THE PERSON §471, at 496-97 (1968), but requires us to examine the individual rights affected and the purpose and scope of the State-created classifications. See Allgeyer, v. Lincoln, 125 N.H. 503, 508-09 , 484 A.2d 1079, 1082-83 (1984).
>
> We apply the strict scrutiny test, in which the government must show a compelling State interest in order for its actions to be valid, when the classification involves a suspect class based on "race, creed, color, gender, national origin, or legitimacy," State v. LaPorte, 134 N.H. 73, 76, 587 A.2d 1237, 1239 (1991) (quotation omitted), or affects a fundamental right". LeClair v. LeClair, 1 37 NH 213, 222 - NH: Supreme Court 1993

B: The ordinance in question violates defendant's rights under the 1st amendment of the federal constitution and Art 22 of the State Constitution.

8. "**[Art.] 22. [Free Speech; Liberty of the Press**.] Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved."

9. By appearing topless in public, defendant engaged in speech and expression deserving of constitutional protection. Defendant was not just utilizing her right to be topless under state law, but to demonstrate to others her political viewpoint and message that the female nipple is not a sexual object. Defendant's message further seeks to bring attention to gender

equality and how the female nipple is treated different than the male nipple both legally and for social norms. Defendant's message seeks to continue the advancement of women's rights and to have the conduct of being topless be accepted and normalized. Artistic endeavors involving nudity as part of their expression such as the musical *Hair* have been accorded *First Amendment* protection. *Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 550, 557-558, 43 l. Ed. 2d 448, 95 S. Ct 1239 (1975).*

10. This message/movement was likely recognized given the significant media coverage as well as through any discussions defendant may have had with the City of Laconia and their police department.

11. The expression of the female nipple also contains artistic value and accordingly is not considered obscene. To be considered obscene and outside of first amendment protections, "the Government must prove that the work, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary. artistic, political, or scientific value." Ashcroft, 535 U.S. at 246, 122 S.Ct. 1389 (citing Miller, 413 U.S. at 24, 93 S.Ct. 2607).

12. "The First Amendment commands, 'Congress shall make no law ... abridging the freedom of speech.'" Ashcroft, 535 U.S. at 244, 122 S.Ct. 1389. "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear." Id. at 245, 122 S.Ct. 1389. "[A] law imposing criminal penalties on protected speech is a stark example of speech suppression." Id. at 244, 122 S.Ct. 1389. If a statute regulates speech based upon its content, application of the statute is subject to

strict scrutiny. United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000); see Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989). This places the burden upon the State to prove that the statute is "narrowly tailored to promote a compelling [state] interest. If a less restrictive alternative would serve the [state]'s purpose, the legislature must use that alternative." Playboy Entertainment Group, 529 U.S. at 813, 120 S.Ct. 1878 (citation omitted); State v. Zidel, 940 A.2d 255 - NH: Supreme Court 2008

13. Exercising free speech and free expression are fundamental rights. Petition of Brooks, 140 NH 813 - NH: Supreme Court 1996.

C: The ordinance fails strict scrutiny and is therefore unconstitutional

14. Strict scrutiny is the highest burden and level of scrutiny that a law can face. This burden lies upon the State to meet.

> "Strict scrutiny is the correct standard to apply when determining the constitutionality of a statute that touches upon a fundamental right. In re Sandra H., 150 N.H. 634, 638 (2004).
>
> [* * *]
>
> In this sense a strict scrutiny analysis under the State Constitution is much like the "narrowly tailored" analysis required under the Federal Constitution. See id.; Washington v. Glucksberg, 521 U.S. 702, 721 (1997)." In the Matter of RA & JM, 153 NH 82, 95-96 - NH: Supreme Court 2005"

15. Strict scrutiny requires that legislation be necessary to achieve a compelling governmental interest, reasonably related to its objective, and not unduly restrictive. Seabrook, 138 N.H. at 179. Intermediate and strict scrutiny also contain some type of least-restrictive-means inquiry, although the level of "fit" between the legislation's means and ends differs under each test. Id. ("requirement that regulations be neither unduly restrictive nor unreasonable [under State strict scrutiny test] is similar to the federal 'narrowly tailored requirement'"); City of Dover v. Imperial Cas. & Indemn. Co., 133 N.H. 109, 126 (1990) (Souter, J., dissenting) (discussing over- and underinclusive nature of statute to determine whether it was "fairly and substantially related" to objective under intermediate scrutiny). Boulders at Strafford v. Town of Strafford, 153 NH 633, 640-641 - NH: Supreme Court 2006

16. To satisfy strict scrutiny, the ordinance must be the least restrictive means available. If a less restrictive alternative would serve the [state]'s purpose, the legislature must use that alternative." *Playboy Entertainment Group,* 529 U.S. at 813, 120 S.Ct. 1878 (citation omitted)." *State v. Zidel,* 940 A 2d 255 - NH: Supreme Court 2008.

The State cannot show the ordinance is necessary to achieve a compelling State interest, is narrowly tailored/ not unduly restrictive nor unreasonable, and is the least restrictive means. One less restrictive means available would be to prohibit everyone from showing their nipple and not just females. If the State is concerned about the harm caused by the display of a nipple they could likely constitutionally ban the

display of all nipples (this still might not be allowed under N.H. Home rule, however).

Even under a lesser standard, one court has held the judgment overturning the dismissal of information charging defendants with public exposure of their breasts was reversed because the People failed to demonstrate that discriminatory effect of statute, which was directed only at females, served an important governmental interest or had a rational basis, and because defendants' conduct was neither commercial nor lewd. People v. Santorelli Court of Appeals of New York 80 N.Y.2d 875 (1992); 600 N.E.2d 232; 587 N.Y.S.2d 601; 1992 N.Y. LEXIS 1609

**II. THE TOWN ORDINANCE IS UNLAWFUL AS THE TOWN LACKS AUTHORITY FOR THE ORDINANCE**

17. The City of Laconia Ordinance 180-1 Purpose and findings holds: "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 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." Since Laconia is relying on this language to set out the intent of their ordinance, it should be their burden show this regulation actually meets the purposes and findings under their ordinance.

18. Under state law, it is legal for women to be topless/display their nipple in public.

[* * *]

19. There is no State law criminalizing the public display of the female nipple or breast. See "**N.H. RSA 645:1 Indecent Exposure and Lewdness. –**

I. A person is guilty of a misdemeanor if such person fornicates, exposes his or her genitals, or performs any other act of gross lewdness under circumstances which he or she should know will likely cause affront or alarm." Further, subsequent legislative attempts to broaden this statute or to allow the towns and cities authority to regulate this conduct have been defeated.

[* * *]

**CONCLUSION**

The language in the town ordinance regulating the public display of a "female breast" is unlawful as it treats females differently than males and is an equal protection violation. It also violates first amendment protections. The ordinance is outside the scope of laws that the town is permitted to adopt. The ordinance violates RSA 354-A.

WHEREFORE, the defendant respectfully requests that this Court:

a: Dismiss the charge;
b: Declare City of Laconia ordinance Sec. 180-2 unlawful/unconstitutional in regard to the phrase "female breast".

c: Issue an injunction/enjoin the town from bringing any further complaints against females for being topless in public

/Daniel Hynes/ _____

Daniel Hynes
250 Commercial St. #3020
Manchester, NH 03101
(603) 674-5183
Bar ID # 17708

AFFIDAVIT

I, Daniel Hynes, do state under the pains and penalties of perjury that the facts relied on in this motion are true and accurate to the best of my information and belief.

/Daniel Hynes/ _____
Daniel Hynes

## APPENDIX H

STATE OF NEW HAMPSHIRE
4TH CIRCUIT COURT - DISTRICT DIVISION – LACONIA

| | |
|---|---|
| STATE OF NEW HAMPSHIRE, Complainant, vs. HEIDI C. LILLEY, Defendant. | Supreme Court Case No. 2017-0116<br>District Division Case No. 450-2016-CR-01603 450-2016-CR-01623 450-2016-CR-01879 |
| STATE OF NEW HAMPSHIRE, Complainant, vs. KIA SINCLAIR, Defendant. | Laconia, New Hampshire October 14, 2016 8:27 a.m. |
| STATE OF NEW HAMPSHIRE, Complainant, vs. GINGER M. PIERRO, Defendant. | |

MOTION TO DISMISS
BEFORE THE HONORABLE JAMES M. CARROLL
JUDGE OF THE CIRCUIT COURT - DISTRICT DIVISION

APPEARANCES:

For the State: James M. Sawyer, Esq.
LACONIA POLICE
DEPARTMENT
125 New Salem Street
Laconia, NH 03246

For the Defendant: Daniel Hynes, Esq.
2050 Commercial Street
Suite 3020
Manchester, NH 03101

[* * *]

(Proceedings commence at 8:27 a.m.)

THE COURT: All right. We ready to proceed?

MR. HYNES: Yes, Your Honor. And so we filed a motion to dismiss. They filed an objection.

THE COURT: Yeah.

MR. HYNES: And if the Court thinks it's in the interest of justice, we would look to I guess address that motion and then proceed to trial with the testimony. Obviously carrying over, I think, that's the State's position as well, but we will leave it up to the Court.

THE COURT: Well, I'm going to reserve the decision on the motions to dismiss. We're going to proceed with the evidence and in the final offering to the Court, you can argue your motions.

MR. SAWYER: Judge, procedurally, I know we require two evidentiary hearings.

THE COURT: What?

MR. SAWYER: What I—the State would like to do is to hear the motion and I think Attorney Hynes would like the evidence on the motion—on the motions to—

THE COURT: Okay.

MR. SAWYER: —and then have a ruling on that and if it favors the State and I think the parties would stipulate that the evidence taking at the motion hearing would be just used at the trial. So there will be no second hearing, evidentiary hearing.

MR. HYNES: I guess or alternatively if Your Honor wants to reserve judgment on that, I think the State's concern was possibly double jeopardy issues if Your Honor proceeded through trial and then reached a decision on that addressing the motion, depending on how that might play out, could preclude the State from dealing is my understanding.

MR. SAWYER: Yes.

THE COURT: Say that one more time.

MR. SAWYER: If jeopardy attaches on the case, then unless we—we could actually take one defendant and do, but if jeopardy—my understanding from the attorney general is if jeopardy attaches on a case there, it's very difficult for them to appeal that case.

THE COURT: Uh-huh.

MR. SAWYER: Even on a legal issue.

THE COURT: Uh-huh.

MR. SAWYER: This may be separate. I haven't talked to him about this specific case, but in prior cases, that's been their position. This may be different because it's more of a constitutional issue.

THE COURT: Right.

MR. SAWYER: But if this was not a constitutional type, you know, first amendment, equal protection, they would definitely not appeal it because jeopardy's attached. There'd be no purpose. The issue is moot relative to that defendant, you know, and it's not an overarching concern.

THE COURT: To me, it looks like a distinction without a difference quite frankly. But if you wish to present evidence which I don't understand is any dis– is dissimilar to the trial.

MR. SAWYER: It's not going to be. It's a really procedural technicality—

THE COURT: Right.

MR. SAWYER: —is what it is. It's just so jeopardy does not attach.

THE COURT: That's fine. You can reserve that and we'll proceed on the motions and it would be defendant's motion to dismiss. So is he going to present evidence?

MR. HYNES: Yes, Your Honor, it would be I guess substantially similar evidence to the trial. I guess at that point though, we were looking to have the—I mean I can—

THE COURT: All right. Let's officially call this a hearing on the motion to dismiss. So everybody's rights are guaranteed and protected. So all right. So—

MR. HYNES: Yes, Your Honor.

THE COURT: —it's your motion. You proceed. Attorney Hynes, you want to take a few minutes with your clients?

MR. HYNES: Just so we can establish the order. (Pause)

MR. HYNES: Your Honor, defense would call Kia Sinclair.

THE COURT: Sure, come on up. Just be careful. There's sort of a ramp there and TV set and everything.

THE BAILIFF: Come around this way. Remain standing and raise your right hand.

KIA SINCLAIR, DEFENDANT, SWORN

THE BAILIFF: Have a seat, ma'am. State your name and spell your last name.

THE WITNESS: Kia Sinclair, S-I-N-C-L-A-I-R.

COURT: Go ahead, Mr. Hynes.

DIRECT EXAMINATION

BY MR. HYNES:

Q And Kia, can you give us a little background about your involvement with Free the Nipple?

A So I actually am one of the main people who started the Free the Nipple movement here in New Hampshire. It was last summer 2015 and basically the reason I started it and become passionate about it was because I had my first son in July of 2014 and I breastfeed him. He's two; I actually still nurse him. And I realized that there was a very big stigma on breastfeeding and you know women are asked to cover up or leave, go in the bathrooms, and such.

And long before I had ever heard of Free the Nipple, I had already come to the conclusion that because we hypersexualize breasts and specifically the nipple of females and we censor them, we consider them pornographic and taboo, that directly is what results in that stigma and basically the idea is if we say that nipples are harmful to children, it's that sentiment that, you know, causes that stigma and also I think it's a direct contribu—contributes to the low breastfeeding rates that the United States has compared to the rest of the world.

Q All right. Thank you. And in regards to this case, were you arrested for appearing in Laconia with your nipples exposed in public?

A Yes.

Q Okay. And so you don't dispute that at all?

A No.

Q Okay. And what was your—

THE COURT: What doesn't she dispute?

MR. HYNES: Sorry.

THE COURT: Whether or not she was arrested or whether or not she was—didn't have whatever you want to say, appropriate clothing I guess.

MR. HYNES: All right.

THE COURT: What was—

THE WITNESS: I purposely engaged in civil disobedience knowing that the City of Laconia has an ordinance against the exposure of the female nipple and areola.

Q All right. And I'll try to give you a little more direct questions. And so in regard to that, you appeared in public with your nipples exposed?

A Yes.

Q And what was your purpose or intent behind doing so?

A On one hand, I–it's a lifestyle choice that I choose. I whenever I go to a beach or, you know, if it suits me, I don't wear a shirt and I don't cover my nipples. But in this specific incident, I was protesting Ginger's case where she had been arrested a few days prior.

Q Okay. And is it your understanding that New Hampshire state statute does not have any prohibition on that conduct that you're—

MR. SAWYER: Objection.

THE COURT: Yeah, calls for a legal.

MR. HYNES: All right.

BY MR. HYNES:

Q Have you been arrested elsewhere for this conduct in New Hampshire?

A No.

MR. SAWYER: I'm going to object, Judge.

THE COURT: It's not relevant.

MR. HYNES: It's—

THE COURT: It's not relevant whether or not she's got arrested.

BY MR. HYNES:

Q Okay. So part of your purpose was protesting Laconia's ordinance?

A Yes.

Q All right.

A I've been to Laconia though before with my nipples exposed and I hadn't had any trouble.

Q All right. And did you have—did you come into contact with anyone other than the police that day while your nipples were exposed?

A No.

Q And where were you located?

A Weirs Beach.

Q Okay. And did anyone come up to you and express their concern?

A No.

Q And in regards to your protest, were you—I guess how were you—were you just there with your nipples exposed or—

A Yeah, I was riding in the car, actually I didn't have a shirt on. I just has a skirt and when we got on the beach, I immediately went swimming for a few minutes and then when the police officers came, I was actually laying on my stomach sunbathing.

Q Okay. And did the police have any discussion with you?

A Sort of. I think there was a lot that was kind of left unsaid.

They just basically came right up and said we're here to tell you to cover up or we're going to arrest you.

Q All right. And what did you respond, if any, to that?

A I said okay, I want you to arrest me.

Q All right. And on that particular day, do you recall if you saw any men on a shirt (sic) with their nipples exposed?

A Yes.

Q Or on the beach with their—thank you.

A Yes, I saw several. And when I was in the cruiser, arrested, as we were driving to the station, there was a man that was shirtless jogging down the road.

Q All right. And do you feel you created any safety hazard by engaging in your contact—conduct?

A No.

Q All right. Do you feel the health of the public was endangered by your conduct?

A No.

MR. HYNES: Thank you. I don't have any further questions at this time.

THE COURT: Okay. Mr. Sawyer, any questions for Ms. Sinclair?

MR. SAWYER: Just briefly.

CROSS-EXAMINATION

BY MR. SAWYER:

Q Just briefly, this was on May 28th; is that correct, that you were given the summons and—

A I believe so, yeah.

Q And you said you were topless without any covering of your breast or nipples, correct?

A Yes.

Q You actually started your answers by talking about how society views the female breast in a sexualized manner.

A Yes.

Q You agree with that?

A Yes.

Q Okay. And you—but you disagree with that premise. But you acknowledge that is an American society specifically New Hampshire anyway that that is—the female breast is sexualized?

A Yes, I compare it to how 80 years ago men—their nipples were also sexualized and illegal.

Q You would agree that over the course of time, people's views change on different things?

A Yes. And that's my goal is to change that perception and it's a slow going thing. But it won't happen overnight, but without any kind of victories or being allowed to, it'll never change.

MR. SAWYER: I have no further questions.

THE COURT: Okay. Mr. Hynes, any follow-up?

MR. HYNES: Briefly.

THE COURT: Sure.

REDIRECT EXAMINATION

BY MR. HYNES:

Q Have you appeared in Laconia before with your nipples covered but breasts otherwise exposed?

MR. SAWYER: Objection.

THE COURT: What's the objection?

MR. SAWYER: It's beyond the scope and I'm not sure what it's about.

MR. HYNES: I'm looking to address that the statute covers specifically nipples as opposed to female toplessness which I think are—

THE COURT: I'll let him ask the question. What was the question? I'm confused.

MR. HYNES: If you have appeared in Laconia with your—without a shirt on with your nipples covered but breasts otherwise exposed?

THE COURT: Gotcha.

THE WITNESS: Yes, I have.

BY MR. HYNES:

Q And were you arrested on that time?

A No.

MR. HYNES: Thank you. Nothing further.

THE COURT: Okay. Mr. Sawyer.

MR. SAWYER: Nothing further at this point, Judge.

THE COURT: Okay. Thanks, Ms. Sinclair. You can step down.

THE WITNESS: Thank you.

THE COURT: Mr. Hynes.

MR. HYNES: Thank you. Your Honor, the defense would call Ginger Pierro.

THE COURT: Okay.

BAILIFF: Just remain standing. Raise your right hand.

GINGER PIERRO, DEFENDANT, SWORN

BAILIFF: Have a seat. For the record, state your name and spell your last name please?

THE WITNESS: Ginger Pierro, P as in Peter, I-E-R-R-O.

THE COURT: Mr. Hynes.

MR. HYNES: Thank you.

DIRECT EXAMINATION

BY MR. HYNES:

Q And Ginger, do you agree that you appeared in Laconia with your nipples exposed on the date you were arrested?

A Yes.

Q And what was your purpose or could you give some background regarding that incident?

A Well, my purpose was to enjoy the beach.

Q Okay. And did you have any confrontations with anyone at the beach that day?

A Yes.

Q And what occurred then?

A I was violently harassed.

Q Okay. And was that by police or citizens or—

A Several citizens.

Q Okay. And—

A Their problem seemed to be not just—not that I was topless, but that I was enjoying myself.

Q All right. And what do you mean by enjoying yourself?

A I'm an athletic woman, I do yoga, these things take a lot of work and they take space. I was asked if I could do that in my bedroom and no, I can't do yoga on the beach in my bedroom.

Q All right. So you were performing yoga on the beach that day?

A Yes.

Q All right. And besides your nipples being exposed, did you have some form of bottoms on?

A Absolutely.

Q All right. So you weren't completely nude at the beach?

A No.

Q All right. And as far which I—do you identify as female?

A Yes.

Q All right.

MR. HYNES: Thank you. Nothing further.

THE COURT: Mr. Sawyer.

CROSS-EXAMINATION

BY MR. SAWYER:

Q You were performing topless yoga on the beach, correct?

A Correct.

Q And your nipples were exposed?

A Yes.

Q And while you were doing that, you had a friend taking photographs of you; is that correct?

A Yes.

Q And you would agree that you were a focus of people surrounding you?

A Well, that's their own prerogative, yes.

Q People are staring at you?

A They decided to, yes, they could stare at me.

Q Yeah, prior to—

A That they would—as they have that option to do that to anybody else.

Q Yeah.

A I was—I believe I was providing very healthy example of being a human.

Q And that—people were staring at you prior to the police arriving on scene; is that fair to say?

A Yes.

Q And there were children of all ages there?

A There were.

Q There—

A Including my own.

Q There were elderly people there?

A Yes.

Q And you heard Kia testify; is that—

A Now, I would like to say that not everybody was harassing me. And in fact, the more people that did harass me, the more support I got and people actually came to defend me. I had one woman in particular who had a very small child.

MR. SAWYER: I'm going to object.

THE COURT: There's no question.

THE WITNESS: Okay, thank you.

THE COURT: Yep.

BY MR. SAWYER:

Q You heard Kia testify, right?

A Yes.

Q And would you agree with her that the society, although you may not agree, would—views the naked female breast including nipple in a sexualized manner?

A I do agree with that. But what people think should have very little to do with what actually ends up somebody in a cage unless it's going to hurt somebody.

MR. SAWYER: I have no further questions.

THE COURT: Okay. Mr. Hynes.

MR. HYNES: Briefly.

REDIRECT EXAMINATION

BY MR. HYNES:

Q So besides people confronting you, you said people were defending you?

A Yes.

Q And what do you mean by that?

A I had one woman who seemed to move away from me when I first began practicing with her three-year-old daughter and when I was confronted by three people who were yelling, screaming, swearing, calling me names, she came up and said that this woman is not bothering me at all and she's being very peaceful and that the swearing is very inappropriate in front of children.

Q All right. So would you say some people there supported your behavior?

A Absolutely. There were only out of everybody on the beach, there were only actually a handful that were upset and many people felt supportive as humans for what I was doing.

Q All fight. [*sic*]

MR. HYNES: Thank you. Nothing further.

THE COURT: Mr. Sawyer.

RECROSS-EXAMINATION

BY MR. SAWYER:

Q So you'd agree this day at the beach turned into kindof a disturbance?

A No.

Q You don't—you people having a heated conversation, swearing, is a disturbance?

A They were disturbing me.

MR. SAWYER: I have no further questions.

THE WITNESS: And other people on the beach.

MR. SAWYER: I have no further questions.

MR. HYNES: Nothing further.

THE COURT: Yeah.

MR. HYNES: Ginger, you can step down.

THE WITNESS: Thank you.

THE COURT: Hold on.

MR. HYNES: Oh.

THE COURT: Ms. Pierro, were people yelling at you or—Mr. Sawyer called it conversing with you?

THE WITNESS: They were yelling at me and I was very sweet. I maintained this tone of voice or silence.

THE COURT: Okay. Thank you. Mr. Hynes.

MR. HYNES: Thank you. Your Honor, defense would call Heidi Lilley to testify.

THE COURT: Sure. Ms. Lilley, come forward.

BAILIFF: Turn real slow and raise your right hand.

HEIDI LILLEY, DEFENDANT, SWORN

BAILIFF: Have a seat. For the record, state your name and spell your last name?

WITNESS: Heidi Lilley, L-I-L-L-E-Y.

COURT: Mr. Hynes.

MR. HYNES: Thank you.

DIRECT EXAMINATION

BY MR. HYNES:

Q And Heidi, do you agree that you were—you appeared in Laconia with your nipple exposed on the day you were arrested?

A Yes.

Q All refight. [*sic*] And what's your background with Free the Nipple campaign?

A Kia invited me along for the ride with Free the Nipple in I think May of last year, 2015. She told me about it and it was something that I believed in. Not so much for the same reasons that she did, but as a feminist, I believe in the equality of the male and female.

Q Okay. Thank you. And in regards to your involvement with the movement, have you testified before the legislature?

A Yes.

Q All right. And was that on this issue?

A Yes.

Q And are you aware—did you testify in front of the house committee?

A Yes.

Q All right. Do you—was that bill really—what was that bill about in your opinion?

A That was regarding the changing of the law to make it illegal for a woman to be—have bare breasts in the State of New Hampshire.

Q All right. And to your understanding, was that bill defeated?

MR. SAWYER: Objection.

THE COURT: What's the objection?

MR. SAWYER: It's a legal question, Judge.

THE COURT: Okay. It is a legal question.

MR. HYNES: Okay.

THE WITNESS: It is legal in the State of New Hampshire to—

THE COURT: Ma'am. Ma'am.

MR. HYNES: That's fine.

THE COURT: Ma'am, there's no—

THE WITNESS: —to—

BY MR. HYNES:

MR. HYNES: I'll ask you questions, ma'am.

THE COURT: Ma'am, there's no question.

Q Okay. And in regards to you being involved with Free the Nipple, have you had support through others?

A Absolutely.

THE COURT: What was the question?

MR. HYNES: In regards to being involved with the Free the Nipple movement, have you received support—

THE COURT: Gotcha. Gotcha.

MR. HYNES: —from others.

THE WITNESS: Absolutely.

MR. HYNES: All right.

BY MR. HYNES:

Q So it's not everyone who disagrees with this conduct?

A No.

Q And specifically on the day you were arrested, was there a reason you were—your nipples were exposed to the public that day?

A Absolutely. I was very—I was at the beach the day that Ginger was arrested and I was very distressed at her arrest. And I was there in protest and I announced to the arresting police officer that I was acting in a protest and that I did not believe that I could be arrested for protesting. But they arrested me regardless. I was acting very civilly, sitting in a chair without a top.

Q All right. And during this past year, did you testify to the Laconia City Council regarding this ordinance?

A Yes, I did.

Q You asked them to repeal it?

A I did. I was asked to go home.

Q All right.

A I was treated—well, I was asked to go home.

Q All right. So they didn't repeal the city ordinance, correct?

A No, they did not. They did not hear me.

Q Okay.

A They don't—did not listen to me.

Q All right. And were you harassing anyone during your conduct that day?

A I don't think I was harassing here at all.

Q All right.

A But other than Kia, nobody.

Q All right. Were—did people come up to you and approach you?

A Not at all.

Q All right. And did you have any discussion with the police officer that day?

A Yes.

Q And what was that discussion about?

A I told him—he asked why we didn't do this—where in Concord, where it would count and we said because we had already done it in Concord where it counted. And that it was legal in New Hampshire. That it was only illegal in Laconia and that this is why I was protesting in Laconia.

Q All right.

A That's about the only real conversation.

Q Thank you.

MR. HYNES: And no further questions.

THE COURT: Okay. Mr. Sawyer.

CROSS-EXAMINATION

BY MR. SAWYER:

Q You've seen the Laconia City ordinance, right?

A I'm sorry.

Q You've seen the Laconia City ordinance—

A Yes.

Q —prohibiting public nudity?

A Yes. Yes.

Q And you knew on—it was the 31st, right, was when you were there?

A Yes.

Q And you—

A I'm not sure of the date.

Q You knew on that date that you were by your actions, you were—your conduct, you were violating that ordinance?

A Yes.

Q And you testified that you've tried to have that ordinance changed?

A Yes.

Q You went to the city council meeting?

A Yes.

Q You could also have written letters to the editor of papers which you have done?

A I have.

Q Is that fair to say?

A Actually, no, I have not.

Q Okay. But you've seen letters, correct?

A Yes, I have seen.

Q And you can do that yourself, right?

A Yes, I could.

Q You could actually phone or write letters to the city councilmen, individually?

A I have. I have.

Q You could protest or advertise your cause—

A And I've done such since—

Q —in various ways?

A —the arrest date. I have done such.

Q Through social media?

A Yes.

Q Through the regular media?

A Yes, sir.

Q You could stand out on the corner with signs?

A Yes, sir, I have.

Q You could stand on the beach with signs fully clothed and—

A Yes, sir.

Q —advocate your position?

A Yes, sir.

Q Without—all those things would not cause you to violate the city ordinance; would you agree with that?

A That's correct.

Q So you chose to take it upon yourself to violate the ordinance to give attention to your cause?

A That's correct.

Q How long has the Free the Nipple movement been in effect?

A In the State of New Hampshire?

Q Yes.

A For a little over a year. About a year and a half.

Q And you're aware that the city ordinance was passed in 1998?

A Yes, sir.

Q So you're not saying that the ordinance was in response to advocacy groups claiming discrimination?

A Absolutely not.

MR. SAWYER: I have no further questions.

THE COURT: Okay. Mr. Hynes, anything further of Ms. Lilley?

MR. HYNES: Thank you, Your Honor. Nothing further with this witness.

THE COURT: Good. Thanks, Ms. Lilley. You can step down.

MR. HYNES: Your Honor, the defense would call Sgt. Black to the stand.

THE COURT: Sure. Come on down, Sarge.

THE BAILIFF: Remain standing and raise your right hand.

SGT. BLACK, WITNESS FOR THE DEFENDANT, SWORN

THE BAILIFF: Have a seat.

THE WITNESS: Thank you.

THE BAILIFF: For the record, state your name and spell your last name.

THE WITNESS: Sgt. Black, B-L-A-C-K.

DIRECT EXAMINATION

BY MR. HYNES:

Q And Sergeant, you're a police officer with Laconia?

A I am.

Q All right. And part of your job is to enforce city ordinances?

A Yes, sir.

Q All right. And what is your involvement with this case?

A On May 28th, we received several calls about a female on Weirs Beach doing nude yoga. So I responded with one of my officers.

Q Okay. And when you responded, did you have contact with Ginger Pierro?

A I did.

Q All right. And was her nipple exposed on that time?

A Yes, sir.

Q All right. Did you notice any men on the beach with their nipples exposed?

A Yes.

Q All right. Have you ever arrested any males for having their nipples exposed in public in Laconia?

A No.

Q Okay. All right. What, if any, is the difference between the male and the female nipple?

MR. SAWYER: Judge, I'm going to object.

THE COURT: Keep the noise down. You understand me?

UNIDENTIFIED SPEAKER: Yes, sir.

THE COURT: Thank you. Objection?

MR. SAWYER: I mean if he's asking for a scientific biological reason, I don't think he's qualified to answer that.

THE COURT: I would agree.

MR. SAWYER: I think it's common lay terms in terms of the difference between a male and female nipple as indicated in my pleading, Judge, in terms of opinions from justices. There is a physiological difference as indicated in case law. I don't think this witness is the appropriate witness to go into that.

THE COURT: Okay. Mr. Hynes.

MR. HYNES: I can reword it.

BY MR. HYNES:

Q So you have no medical training to state that there is a difference between a male and female nipple, correct?

A No.

Q All right. Now, when someone has their nipple exposed in public, what health issue does that create?

MR. SAWYER: Objection.

THE COURT: Yeah, I would think it—you better lay a foundation that he would have the expertise to make that determination. Otherwise, there would be objection.

MR. HYNES: Right, well, Your Honor, part of the State's argument is that they passed the statute based on safety, health, and morals. And I suggest that the legis—or the city council can't just broadly state that that's their intent. They would actually have to show that it is actually related. So I suggest it's the State's burden in that behalf. I was trying to elicit from the officer testimony on that. Otherwise, I suggest the record's going to be absent on that. That the State I would suggest would have to show not just that the statute claims it, but that it actually occurs.

THE COURT: Mr. Sawyer.

MR. SAWYER: I believe that the case law and it'd take me a minute to find it, but indicates you don't have to look behind the actual studies that were done. I mean if there is a plausible explanation that supports the legislative body's determination, that's what it is. You don't dig down and look for studies that support that. As long as it's related to that I

believe. And I can find it if I could have a moment. But I believe it's—I don't know if I referenced—

THE COURT: Are we going to have testimony from city councilors that passed the ordinance to determine that there in fact was consideration of that? I mean that there are studies out there is one thing. It's another thing to say that I'm supposed to attach those studies to the mindset of the city councilors who passed the ordinance.

MR. SAWYER: Judge, I think it's public health/public safety does not mean necessarily the biological or physiological health of—

THE COURT: I'm not suggesting that there is a medical basis for it, but I would think that in the conception of ordinances, that in passing it, that there would be a legislative intent behind the act that in some jurisdiction somewhere there may have been studies, but I don't think that I can impute the knowledge of those studies directly to the city council who passed the ordinance.

MR. SAWYER: Can I have a moment, Judge?

THE COURT: Yeah.

(Pause)

THE COURT: Mr. Sawyer, would it be fair to say, I'm just putting this out there, would it be fair to say that Officer Black does not have personal knowledge of whatever safety or health issues there are? He doesn't have a basis of that opinion?

MR. SAWYER: Well, what I can say is he doesn't have—he can't be put in the place of the city council. I agree with that.

THE COURT: Right.

MR. SAWYER: I mean I think he could come up with—I probably can ask him the answer in terms of the disturbance that was caused by this.

THE COURT: Well, I think that's another issue.

MR. SAWYER: Which is a public safety issue which is, you know, a more—

THE COURT: Which is on that day.

MR. SAWYER: Yes.

THE COURT: Whether or not, but it's not in regards to the conceptualization and drafting of the ordinance per se.

MR. SAWYER: That is correct.

THE COURT: Bursae [*sic*] I can't make that connect.

MR. SAWYER: And I don't think that is respectfully your role in this proceeding. The burden is on the petitioner to show that this is unconstitutional.

THE COURT: Uh-huh.

MR. SAWYER: And is not a valid ordinance. It's not on the State. This ordinance was passed by elected officials in the City of Laconia based—who are elected by the citizens of this community.

THE COURT: What would you say to the issue of notice to the defendants as to what is a risk to safety or health by those actions?

MR. SAWYER: That was the—there was a purpose and basis for the ordinance. They don't have to be put

on notice as to the basis for the ordinance. They have to abide by the ordinance. Just like I don't have to know why the legislature chose to make it a requirement that only so many milligrams of MTBE can be in a well. They made that choice.

THE COURT: Uh-huh.

MR. SAWYER: But, you know, through the legislative process, giving the power to DES and the EPA to make that choice. I don't have to know why they made that choice. What the reasons were. I can't say well, they haven't told me why that's illegal so I'm going to ignore that.

THE COURT: Okay.

MR. SAWYER: The fact that they passed that rule, I have to follow. That's what they have to know is that there is a rule in place. And they have to follow it.

THE COURT: Mr. Hynes.

MR. HYNES: Thank you. I can ask more direct question related to that day.

THE COURT: Sure.

DIRECT EXAMINATION CONTINUED

BY MR. HYNES:

Q On the day you made an arrest, was there a health issue by Ginger's nipple being exposed in public? There wasn't any health—you weren't worried about any anyone getting sick, right?

A No.

Q Thank you. Now, did you arrest Ginger for disorderly conduct?

A No.

Q All right. So it's fair to say she wasn't acting disorderly?

A We arrested Ginger for the city ordinance violation.

Q All right.

A And she was not acting disorderly per the RSA.

Q And is it fair to say that absent this ordinance, you wouldn't have arrested her?

A That is correct.

Q And how do you determine the difference between a female nipple and a male nipple?

A There are several differences. The female nipple, you can breastfeed. There's one of the differences there. I'm not able to do that. And a female can. So there's one difference.

THE COURT: I don't think that was the question.

BY MR. HYNES:

Q How do you decide who you're arresting?

A If they're in a violation of the ordinance.

Q All right. And part of that violation of the ordinance requires the person to be a female, not a male, correct?

A Correct.

Q So how do you make the determination that someone's female, not a male?

A Outwardly appearances are generally pretty obvious.

Q So you base it on their outwardly appearances?

A I can tell the difference I would say always between a male and female.

Q Just by them not wearing a shirt and having their nipple exposed?

A Can you restate?

Q All right. You said you can—you say always or generally tell the difference?

A Yeah, I can tell who's male and female. I think most people can do that.

Q Do you base that by hair length? What are you basing that on?

A Well, you're asking me to tell you how I can tell a male is a male and a female is a female?

Q Well, it's your understanding you can arrest someone for having their female—for a female having their nipple exposed, but not the male having their nipple exposed.

A Uh-huh.

Q So I'd like to know how you're deciding who to arrest and who not?

A Okay.

MR. SAWYER: I think he's answered that question, Judge.

THE COURT: Yeah, I believe he has answered that question.

MR. HYNES: All right.

BY MR. HYNES:

Q And was Ginger provoking anyone that day that you saw?

A Provoking? We received numerous calls of pole [*sic*] complaining that there was a female on the beach doing nude yoga. Exposing her breasts and that there were numerous children and families there. So we were getting numerous complaints from citizens on the beach.

Q Okay. And prior to that day, did you—were you aware of this ordinance?

A Yes.

Q Okay. And did you respond to those people who were making complaints?

A Yes.

Q And what, if anything, did you tell them?

A Well, I received an initial call from one person advising that this is what was happening. I advised him that we were sending units out. And then when I responded to the beach, I was approached by several groups of people saying she's over there. There's a female who's nude and I told them to remain where they were, we would go talk to the person doing the nude yoga and that we would address the issue with her.

Q All right. And just to clarify, when you used the word nude, you refer to how Laconia has defined it to mean that a nipple is exposed? Not fully without clothing, correct?

A That's correct, sir.

Q Okay. So people called in their complaint because Ginger's nipple was exposed?

A That's correct.

Q And they didn't indicate that Ginger was otherwise harassing them or anything like that?

A The complaint was that she was nude or with her nipples out.

Q Okay. And you wouldn't arrest a female if her nipple was covered, correct?

A No.

Q So it's not actually the female breast that apparently is the problem. It's the female nipple?

A Ordinance specifically speaks about the nipple being exposed.

Q And so if someone's—a female's breast is exposed but her nipple is otherwise covered with tape or something, you wouldn't arrest that person, correct?

A No, I would not.

Q Have you ever received calls or complaints regarding that?

A I'm sure I have over my last 12 to 13 years here.

Q All right. And you would respond to that person, it's not against the law, I'm not going to arrest that person?

A That's correct.

Q Okay. So the nipple is what's offending people?

A They're not—I'm going to restate.

MR. SAWYER: I'm going to object, Judge, in terms if he's asking the officer to speculate as to—

THE COURT: I think it's speculation on the part of the officer unless he had direct information from a witness as to what exactly it was that they were concerned about.

BY MR. HYNES:

Q Do you live in Laconia?

A No.

Q All right. But you work in Laconia obviously?

A Yes, sir.

Q Are you personally offended or distraught if you see female's nipples?

MR. SAWYER: Objection.

THE COURT: How is that relevant?

MR. HYNES: Well, ultimately I think the State's going to try to show that—part of their argument was tourism and that the city council is ultimately representing the people. I'm just trying to show that depending on the answer that not everyone agrees with said position.

MR. SAWYER: I would agree with that.

MR. HYNES: That's fine.

MR. SAWYER: Obviously, his clients don't agree with that, Judge.

MR. HYNES: Right.

THE COURT: Yeah.

MR. SAWYER: But that's the purpose of the legislative process.

THE COURT: But it has nothing to do with whether or not the officer has any—

MR. SAWYER: Exactly.

THE COURT: —feelings one way or another.

MR. HYNES: All right. That's fine.

THE COURT: I would hope it wouldn't have anything to do with it.

MR. HYNES: Thank you, Your Honor, nothing further.

THE COURT: Okay. Mr. Sawyer, questions for Officer Black. Strike that. Sergeant Black.

CROSS-EXAMINATION

BY MR. SAWYER:

Q Sgt. Black, you responded on the 28th which was a Saturday around 3:43?

A Yes, I did.

Q And that was to the phone calls about somebody doing nude yoga on the beach?

A That is correct.

Q And how many officers responded to that?

A Myself and one other officer.

Q And who was the other officer?

A Officer Holly Callanan.

Q And could you—strike that. When did you respond to—where'd you park? In the parking lot of Endicott Beach or on Lakeside Avenue?

A I parked in the parking lot of Endicott Beach.

Q And do you know where Officer Callanan had parked?

A She parked right up as close to the beach as you can.

Q And did you—you came in with your lights and sirens blaring I'm assuming?

A No.

Q You just came in and parked the car?

A We just parked.

Q Okay.

A No lights, no sirens.

Q Okay. And you—where did you go once you parked the car?

A We were directed to a female near the lifeguard stand.

Q And when you were directed in that direction, I assume you looked in that direction?

A Yes.

Q And what did you see happening in that area?

A There was numerous people, families, out on the beach.

Q When you say families, can you define what you mean by families?

A Adults with children, moms, dads, kids.

Q And what was happening near the lifeguard stand?

A There was a female on a beach towel sitting down doing yoga.

Q And was there anybody else around her?

A There was also a male I believe who was with the female who was taking photographs of her.

Q And how would you describe him taking photographs? Was it—how—just can you paint a picture for the Judge in terms of how the photographs were being taken?

A Yes, he was—there was a male who was there just taking photographs of her and just as she's doing her yoga poses and as we approached, I believe he was taking photographs of us and just—

Q What kind of camera was it? Was it—

A It was a very large camera with a big lens.

Q Was there a flash attached to that camera or?

A I don't know if there was a flash. But it was a nice, nice camera.

Q How far away from this woman was he when he was taking the photographs?

A Oh, five to ten feet. Not very far.

Q And was it like a photo shoot where he's getting different angles and moving up and down and taking photographs or was it—

A He was moving around. I didn't pay too much attention to him at that point.

Q Besides the gentleman that was taking photographs, were there other people watching this individual doing the yoga?

A Yeah, there was lots of people all around that area. It was very, very—it was a lot of people at the beach that day.

Q Okay. But what I'm saying, I know there were a lot of people, but were there a lot of people watching her do the—

A Oh, yeah, there was—this is what people's attention was directed at.

Q So when you saw her doing yoga and is she present in the courtroom today?

A She is.

Q Where is she?

A She's seated here at the defendant's table?

Q Wearing what?

A A pearl necklace and a grey shirt.

THE COURT: The record will reflect that the officer has identified Ms. Pierro.

BY MR. SAWYER:

Q And is Ms.Pierro a male or a female as far as you know?

A A female.

Q And did you—when you responded to—did you refer to her in a certain way? Did you say ma'am or miss or how did you—or say, hey, you?

A I'm sure it was either ma'am or miss. I don't recall which, but—

Q And was there any statement from her that that's not correct? I'm not—I'm a man?

A No.

Q I'm a mister?

A There was nothing to that.

Q Describe your interaction with her when you first approached her?

A Officer Callanan and I approached her and I allowed Officer Callanan to make initial contact. She began to speak to Ms. Pierro who began to—or who just ignored us as we asked her to place clothing on, advising her there was a city ordinance prohibiting exposing herself. And she just ignored us and continued to do yoga.

Q Okay. When you first were responding to her, how were you talking? Was it similar to the way you're speaking now or you had a more angry tone or how would you describe your tone of voice when you were talking to her or Officer—

A Just a direct tone. When I'm addressing somebody, I want them to hear me, know that I'm speaking to them. I identify myself as an officer to her. I was quite close to her so that she could hear me. There was no mistake in that.

Q Okay. How close were you to her?

A Right next to her.

Q Okay. Was she—this yoga pose that she was doing, was that—she on the ground or was she standing in some—bent over? How would you describe it?

A She was seated and she was reaching for—doing some sort of stretch.

Q And how were you dressed that day?

A As I am today in a short sleeve uniform.

Q And so you asked her what again?

A I advised her to cover up, that there was an ordinance, that we had been called there because numerous people were complaining that she was nude.

Q And you said she ignored you?

A She ignored me.

Q Did you ask again?

A Several times.

Q And did you give any warnings to her or any statements to her about if she did not cover up what would happen?

A I advised her that if she did not comply, that she would be charged and arrested.

Q Had she covered up on your first request, what would have happened?

A That would have been it and we would have given her a warning and she would have been able to enjoy the rest of the day there.

Q Was she eventually placed into custody?

A She was.

Q Was she told this by you or Officer Callanan?

A Yes.

Q Who told her that she was under arrest or—

A Officer Callanan did.

Q And prior to that happening, did the defendant ever indicate that she was going to put something on or refused? Did she say anything?

A She began to speak about case law that we were unable to enforce the city ordinance.

Q And when she was told she was under arrest, what happened then?

A She complied immediately.

Q And was she placed in handcuffs?

A She was.

Q And was she still fully exposed at that point in time? Her chest?

A Her chest and nipples, everything was fully exposed.

Q And did you do anything to try to have her covered up?

A There was no clothing nearby, so I asked a bystander if we could have their towel and a lady gave me a pink towel that we wrapped around her.

Q Did anything happen as you walked back toward the cruisers?

A Can you read [sic] that?

Q Did anything happen as you walked back towards the police cars?

A As we began to walk her away, a bunch of people began to clap.

Q You were asked questions by Attorney Hynes at length about whether or not you can tell the

difference between a male and a female. How old are you, Officer Black?

A Thirty-five.

Q And are you in relationship?

A I'm married.

Q And you have children?

A I do.

Q Okay. And during your 35 years on this earth, have you had occasion to come in contact with the different genders?

A Yes.

Q And if I were to ask you to point to every person in this courtroom and for the most part you could identify whether appeared to be a male or female?

A Yes.

Q Obviously you're not looking at their actual genitals, right? We're all clothed.

A Correct.

Q But you can give a good faith or a belief as to what they are?

A Yes.

Q Have you come across a transgender individual before?

A I have.

Q Okay. And it's—I think that's what Attorney Hynes was trying to point out. There's some occasions where it may not be evident that the person is one

gender or another. Do you have any doubt that Ms.—the defendant is a female?

A No.

Q Had she told you afterwards that she was in fact a man, would you have unarrested her?

A If we could—yeah, if we could say she was a man after further investigation, yes.

MR. SAWYER: I have no further questions.

MR. HYNES: Thank you.

REDIRECT EXAMINATION

BY MR. HYNES:

Q Is the beach open to the public?

A It is.

Q All right. So both men and women could be at the beach?

A Correct.

Q But men could be topless and women can't? Or have their nipples exposed but women cannot?

A Yes.

Q And this ordinance doesn't apply just to the beach. It's anywhere in public in the entire City of Laconia, correct?

A I would have to review it, but I believe that's how it's written, yes.

Q All right.

MR. HYNES: Thank you. Nothing further.

THE COURT: Okay. Mr. Sawyer.

MR. SAWYER: I have nothing further.

THE COURT: Sgt. Black, you may step down.

THE WITNESS: Thank you.

THE COURT: Mr. Hynes.

MR. HYNES: Your Honor, the defense has no more witnesses on this issue.

THE COURT: State?

MR. SAWYER: State would call Sandra Smith to the stand.

THE COURT: Ms. Smith. There's a slight ramp there, Ms. Smith. Just be careful.

THE BAILIFF: Remain standing and raise your right hand. Your right hand.

SANDRA SMITH, WITNESS FOR THE STATE, SWORN

THE BAILIFF: Have a seat. For the record, state your name and spell your last name.

THE WITNESS: My—Sandra Smith, S-M-I-T-H.

THE COURT: Mr. Sawyer.

DIRECT EXAMINATION

BY MR. SAWYER:

Q Ms. Smith, what do you do for work?

A I work for Easter Seals.

Q And what is your job there?

A I take disabled clients out to beaches, jobsites, and a lot more what we do.

Q And on May 31st of this year, did you have occasion to—were you working on that day?

A Yes, I was.

Q And how many clients did you have?

A I had one client and my other two staff had their clients.

Q So there was three staff and three clients?

A Yes.

Q It's a one to one?

A One to one.

Q And what was your outing that day?

A My outing day just enjoying—the client enjoyed theirself on the beach and have lunch.

Q And what beach did you enjoy?

A Weir Beach.

Q Weirs Beach?

A Yep.

Q And did anything happen during your beach day that day?

A There's a thing happened that's the lady came down and walked past us with no shirt on. She walked down to the beach, you know, and I knew it wasn't proper and approved. And I just called the police because I don't think it was right. And the police responded.

Q And when you say the woman, do you recognize the woman that you saw?

A Yes, I do.

Q Can you point to her and identify a piece of clothing that she's wearing?

A She's sitting right—she's got a black sweater on and she's got the red—

Q The red top?

A —top.

THE COURT: The record will reflect that Ms. Smith has identified Ms. Kia Sinclair.

BY MR. SAWYER:

Q And Ms. Smith, I don't mean to be impolite here, but are you a male or female?

A I'm a female.

Q And how old are you?

A I'm 51.

Q And in your 51 years, have you been able to determine you see somebody whether or not they are a male or female

A Pretty much, yeah.

Q And is Ms.—was Ms. Sinclair a male or female?

A Female.

Q Were you the only one looking at or noticing Ms. Sinclair walking topless down the beach?

A No, some of the staff I worked with saw the same thing.

Q Okay. Besides the staff, were there other people at the beach besides the six of you?

A Oh, yeah, there was kids—yeah, they're all watching them walking down.

Q And when you saw Ms. Smith, which I think it's stipulated to, there was no covering of the nipple.

MR. HYNES: Right.

MR. SAWYER: So—

MR. HYNES: Yes.

MR. SAWYER: I'm not—that's all I have.

THE COURT: Okay. Mr. Hynes, questions for Mrs. Smith?

MR. HYNES: Yes, thank you.

THE COURT: Yep.

CROSS-EXAMINATION

BY MR. HYNES:

Q Your testimony was you didn't think it was right that she had her breasts and nipple exposed?

A No, I don't think it was right.

Q All right.

A Not when you got kids.

Q All right. Did any kids complain about this conduct?

A No, they just laughed because the clients I work with, they don't understand so they just laughed. That's all they did.

Q All right. And do you think it's right for a male to be on the beach with his nipple exposed?

A Yes, I do.

Q Why is that right?

MR. SAWYER: Objection.

THE WITNESS: The—

THE COURT: The objection is?

MR. SAWYER: Her opinion is not relevant to—

THE COURT: It isn't relevant, is it, Mr. Hynes?

MR. HYNES: Well, she's testifying one's right and one's—not the other. I'd like to know the basis of that conclusion. I mean the State's ultimately trying to show why—what the statute is intended to do.

THE COURT: Well, you can change your question then.

MR. HYNES: All right.

BY MR. HYNES:

Q I guess I'll back up. What's not right about the female nipple being exposed?

MR. SAWYER: Objection, Judge. I mean the let the question go, but it's not relevant. The issue is whether the—she's not here to speak for the entire citizenry of Laconia or New Hampshire. She's not here to speak for society. She has her own individual opinion which is not relevant for the validity of the city ordinance.

THE COURT: Mr. Hynes.

MR. HYNES: She's purportedly the alleged victim or I'll back up.

BY MR. HYNES:

Q Did you make the phone call to the police that day?

A Yes, I did.

Q All right.

MR. HYNES: Your Honor, she's the one reporting this. The State is trying to say there's a disturbance. I would suggest if someone is offended, we should know why. If the State's going to have—

THE COURT: I'll allow you to ask that question.

BY MR. HYNES:

Q So what don't you think was right about a female having her nipple exposed that—

A I don't think it's right. I really don't.

Q Is that based on a religious belief?

A Yes, it is.

Q All right. Now, other than having her nipple exposed, was she harassing you?

A Oh, no.

Q Okay. She was just there pretty much keeping to herself?

A Yep.

Q Okay.

MR. HYNES: Thank you. Nothing further.

THE COURT: Mr. Sawyer.

REDIRECT EXAMINATION

BY MR. SAWYER:

Q Besides a religious belief, were you brought up to have modesty about your breasts and nipples?

A Uh-huh. Not to be exposed. To be covered.

MR. SAWYER: I have no further questions.

THE COURT: Mr. Hynes.

MR. HYNES: Nothing further.

THE COURT: Okay. Thanks a lot, Ms. Smith. You can step down. Mr. Sawyer.

MR. SAWYER: The State calls Ian Davis.

THE COURT: Okay.

THE BAILIFF: Raise your right hand.

IAN DAVIS, WITNESS FOR THE STATE, SWORN

THE BAILIFF: Have a seat. For the record state your name and spell your last name?

THE WITNESS: Ian Davis, D-A-V-I-S.

THE COURT: Mr. Sawyer.

DIRECT EXAMINATION

BY MR. SAWYER:

Q Mr. Davis, where do you live?

A I live in Concord.

Q And on May 28th of this year at around 3:43, where were you on that date?

A I was at Weirs Beach—

THE COURT: What's the date—was it the 28th we're talking—

MR. SAWYER: 28th, yep.

THE WITNESS: I was at Weirs Beach in Laconia.

BY MR. SAWYER:

Q And what were you doing there?

A I was just enjoying the day with my family.

Q Okay. Who is—what makes up your family?

A Nieces, nephews, uncles, aunts.

Q How old are your nieces and nephews?

A Anywhere from, I believe it was two months to 13.

Q Okay. How many nieces and nephews were there?

A I believe that there is six. There's a lot of them.

Q And your aunts and uncles, how many aunts and uncles did you have there?

A Four.

Q And how old—approximately how old are they? I don't need an exact number. Forties, 50s, 60s?

A No, 20s, mid-20s to 40s.

Q Besides your family, were there other people enjoying the beach that day?

A Yes.

Q And did you have occasion to call the police that day?

A Yes, I did.

Q Why did you call the police that day?

A I called the police because there is a woman who was topless, with her nipples exposed, and there was a man also taking a picture, you know, taking pictures of her, and so I felt unsafe with their being, you know, my nieces and nephews there, that I don't know what he's taking pictures of, if he was taking pictures of her or if it was the children. That was my reason of calling.

Q Was this person doing yoga?

A Yes.

Q The one with the top off?

A Yes.

Q And she's already testified that she didn't have anything covering her nipples.

A No.

Q Was she attracting attention by doing this?

A I believe so. I don't know how to answer that.

Q Did you look at her?

A Yes, I did.

MR. SAWYER: I have no further questions.

THE WITNESS: Okay.

THE COURT: Questions, Mr. Hynes?

MR. HYNES: Yes. Thank you.

CROSS-EXAMINATION

BY MR. HYNES:

Q Who did you say you were at the beach that day with?

A Family, uncles, aunts, nieces, nephews.

Q All right. And what were you wearing that day?

A I was wearing a t-shirt and Board shorts.

Q All right. Have you been to the beach before and had a shirt on?

A Yes.

Q So, ultimately, you made the choice that day to keep your shirt on?

A Yes.

Q All right. And is it fair to say that you were more concerned with the person actually taking the pictures, that's what was causing the concern?

A I was.

Q And you weren't concerned for your safety at any point, correct?

A Not to mine, no.

Q Were you concerned for anyone's safety from—or who you identified as having their nipples—being having their nipples exposed?

THE COURT: I'm sorry. I'm not—if he can answer the question, he's better than I. I don't understand the question.

MR. HYNES: Sorry.

BY MR. HYNES:

Q So I would tell you the person you identified is Ginger. She didn't cause you any concern for your safety, right?

A No.

Q Thank you.

MR. HYNES: Nothing further.

THE COURT: Okay. Mr. Sawyer?

MR. SAWYER: I have nothing further.

THE COURT: Okay. Thank you.

Mr. Davis, you can step down. Thank you.

MR. SAWYER: The State calls Officer Callanan to the stand.

Would you go the stand and raise your right hand?

HOLLY CALLANAN, WITNESS FOR THE STATE, SWORN

MR. SAWYER: Have a seat.

THE WITNESS: Thank you.

DIRECT EXAMINATION

BY MR. SAWYER:

Q For the record, state and spell your last name, please.

A Okay. Officer Holly Callanan. Last name is spelled C-A-L-L-A-N-A-N.

Q Where are you employed, Officer Callanan?

A The Laconia Police Department.

Q In what capacity?

A As a patrol officer.

Q How long have you been so employed?

A A little over six years.

Q How old are you?

A Twenty-nine.

Q And are you a male or female?

A I'm a female.

Q Are you able to determine—distinguish between males and females based upon their appearance?

A Yes.

Q Even if they're fully clothed, can you pretty much tell the difference between a male and female?

A Usually, yes.

Q And if somebody doesn't have a shirt on, is it easier or more difficult to tell?

A Easier.

Q I'm going to direct your attention to May 28th of this year, around 3:43. Were you working on that day and time?

A I was.

Q Where were you?

A In this City of Laconia.

Q And were you dispatched to any particular location around that time?

A I was, I was dispatched to Endicott Beach.

Q In reference to what?

A That we had received multiple complaints about a female subject that was topless and doing yoga on the beach.

Q And did you respond?

A I did.

Q And when you arrived, what did you see?

A When I pulled in with my cruiser, I parked like at the bottom of the hill, and as soon as I got out of my car, there were several subjects that approached my vehicle and complained about the female subject that was doing topless yoga on the beach, and that they were offended, and they wanted us to take some kind of action.

Q So what did you do?

A Sgt. Black was there with me, so we—it was a very crowded beach, so I asked the subjects that had approached me to direct my attention to where this female subject was, and they did so.

And we walked—she was closer to the waterline, not back by the parking lot, so we walked over to her, where she was sitting on the beach and she was facing the water, so initially, her back was to us.

So I came around the right side of her and then also, to the front of her, and I realized at that point that she's not wearing any shirt and her breasts, as well as her nipples, were both exposed.

Q And did anybody speak to her at that time?

A I made attempts to speak to her. She—when we first approached her, she was—she continued to do her yoga poses, and I introduced myself, Officer Callanan, Laconia Police, excuse me, and she was like pretend, like avoiding me, like not making eye contact with me, but pretending that she didn't hear me. Sgt. Black, the same thing. And then after about a minute or so, she looked up and acknowledged that we were, in fact, trying to speak to her.

Q And did you have a brief conversation at that point in time?

A I did, yes. We asked her—or I explained to her that the reason we were making contact with her was in reference to a Laconia City Ordinance, since her nipples were exposed on the beach in a public place.

Q And did you ask her to do anything?

A Yes. We asked her multiple times to cover up, to put her bathing suit top back on, or put her shirt back on.

MR. HYNES: Your Honor, Heidi Lilley asked for a brief recess for her to go the bathroom. I guess I—

THE COURT: Sure, go ahead. I got stuff I can work on.

MR. HYNES: I'm sorry, I—

THE COURT: Yeah, we'll recess. That's fine.

MR. HYNES: Thank you.

THE COURT: Officer, you can step down.

THE WITNESS: Thank you.

(Recess at 9:35 a.m., recommencing at 9:38 a.m.)

THE COURT: Officer Callanan, I just remind you you're under oath.

THE WITNESS: Yes, Your Honor.

THE COURT: Go ahead.

BY MR. SAWYER:

Q So, you made—there was conversations about whether or not she put her top back on?

A That is correct.

Q And was she given warnings what would happen if she did not?

A Yes.

Q Was she given direction as to what would happen if she did?

A Correct.

THE COURT: So—

BY MR. SAWYER:

Q If she did, was she given direction as to what would happen if she did put her top back on.

THE COURT: Gotcha.

THE WITNESS: Yes. We advised her that if she covered up, if she put her bathing suit top on or her shirt on, that she could remain at the beach without any further issue, and there wouldn't be any other problems from us. We advised her that if she did not, that we would have to take her into custody and go from there.

BY MR. SAWYER:

Q And after those options, did she put her top back on?

A No, she refused.

Q And so what did you do at that point in time?

A Advised her that we were taking her into custody in reference to a violation of the city ordinance, so she was handcuffed, walked to the cruiser. We obtained some of her personal belongings from the party that she was with, like her cell phone.

I think her shoes, a cover-up, wallet, ID, personal items, and then we—I put her in the rear of my cruiser, seat-belted her in, and transported her to the police department for booking.

Q And during the booking, did you give her a summons?

A I did, yes.

Q And also during the booking, did you enter her information into the computer system?

A I did.

Q And is there a place on summons and on the booking sheet in the computer for sex or gender?

A I—honestly, I don't think that there is an actual tab for male or female on the summons or in IMCA. I could be wrong.

Q If I showed you the summons, would that help refresh your memory?

A Yes, it would. I think in IMC, there is a tab, but on the summons, I don't know. Oh, it does, yes, there is a tab for their sex.

Q And on this pair of summons, you put what as to that?

A F for female.

Q And you gave that summons to her?

A That is correct.

Q And did you have a copy of her license?

A I did.

Q And what does the license indicate her gender is?

A Female.

Q Without the license, were you able to determine whether Ms. Pierro was a female or a male?

A Yes.

Q What—how?

A Her appearance.

Q What about her—

A Her anatomy.

Q What about her appearance?

A She—her breasts were exposed, and they appeared to be female breasts. She was wearing a bathing suit bottom upon contact with her, that didn't appear to be male genitalia. She appears to be a woman. She has long hair, she talks like a woman, she—I think she even talked about—I think she might have been a mother. During—I'm just trying to recall the booking conversation.

Q Yeah.

A I think she has a child.

Q The structure of her face or her neck?

A Correct. Her bone structure, her—it's just so obvious, like she is a woman, like that's—

Q So all those things you take into account when you make a judgment that this person is male or female?

A That is correct.

Q And some people do look more female—or more feminine than others?

A That is correct.

Q Some males may look feminine?

A That is correct.

Q But you can make—based upon the totality, you can make a determination whether or not?

A Correct.

MR. SAWYER: I have no further questions.

THE COURT: Okay.

Mr. Hynes?

MR. HYNES: Thank you.

CROSS-EXAMINATION

BY MR. HYNES:

Q So, in other words, sex and gender often get used interchangeably. When you refer to gender, are you referring to someone's sex?

A I ask you to define the difference for me?

Q Okay. So if I said there's generally accepted two sexes, male and female, would you agree with that?

A Correct.

Q And if it said it's generally accepted that not all males classify, or would consider themselves males, and not all females would consider themselves females?

A That does occur, yes.

Q All right. And for sake of argument, let's just say we consider those transgender people, would you agree with that?

A Okay.

Q All right. So you don't actually inquire into anyone's gender during this, correct? You're basing it solely on—or you would consider their natural born sex, male or female?

A Their natural born sex, yes.

Q Do you only make arrests for this ordinance after a complaint's been made?

A That's actually the first time I've ever made an arrest for this offense, so.

Q Have you ever made one since then?

A I have not, no.

Q Is the reason you responded is because a complaint was made?

A That's correct.

Q Okay. Other than that day, have you observed femalesin public in Laconia with their nipple exposed?

A I have not, no.

Q So you would enforce the law whether you agree with it or not?

A That's correct.

Q Even if you think it's unfair or unjust, you would enforce it?

A I'm required to enforce the laws of New Hampshire, the city ordinances within the City of Laconia.

Q And if the Court found that law unconstitutional, you would stop enforcing it, correct?

A That is correct.

Q And your personal health or safety wasn't threatened at all that day, correct?

A No, I didn't feel threatened by Ms. Pierro.

Q And Ms. Pierro wasn't harassing or provoking anyone?

A Her behavior caused attention to be drawn to her, but as far as physical violence or anything of that nature, no.

Q All right. So it was just causing attention to be drawn to her?

A That's correct.

Q Thank you.

MR. HYNES: Nothing further.

THE COURT: Okay.

Mr. Sawyer?

MR. SAWYER: I have nothing further.

THE COURT: Officer Callanan, you can step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: Thanks.

Mr. Sawyer?

MR. SAWYER: I have no further witnesses.

THE COURT: Okay.

And Mr. Hynes, anything further?

MR. SAWYER: Just brief oral argument on this motion.

THE COURT: Go right ahead.

DEFENDANTS' CLOSING ARGUMENT

MR. HYNES: Obviously, this is a complicated issue with many different components of it. While I would suggest generally it's the defense's burden to show something, a statute is unconstitutional.

In this case, where it touches upon First Amendment or equal protection issues, those are entitled to strict scrutiny. Apparently, the burden is on the State to meet that, and the State, in their motion, cited, particularly, I believe in regards to equal protection with Browns.

A lot of federal case, and federal case law is different on this issue. The federal case law only applies intermediate scrutiny on gender issues under the O'Brien test, and there is difference between intermediate and strict scrutiny. Specifically, the difference being the least restricted means possible.

Now whatever Laconia's goal was in this case, there were certainly other means to do it. If the female, Nicole, is harming people, offending people, causing concern for people, if Laconia wants to regulate that so much, they could do so in a gender neutral fashion by requiring everyone to have their nipples covered in public, Laconia chose not to do that.

In regards to the First Amendment issue, I recognize nudity, in itself, is not likely protected under the First Amendment, but we should look at the underlying reason for this. So while not all nudity might be protected in certain cases, in this case, I would suggest it is, where people are expressing beliefs, protesting the—the prosecutor went to some length to show all the different ways she could have and they did, in fact, protest. This is just one avenue, after all the other avenues were essentially posed. She did all the other avenues were essentially closed. She did all the other methods, went to Concord, testified, testified in front of the city council here. There was no other action that she could have taken to get the response that she wants, which is to get the statute called unenforceable and unconstitutional.

In regards to the issue of whether the home rule issue and whether the State even has authority for this statute, I would suggest that they don't based on Your Honor's previous decision. That was slightly different at the Gilford statute, different than Laconia statute, different underlying and needling provision; but here, where Laconia is relying on health safety and moral, I would suggest that this time it doesn't rise to that.

The legislature, in this case, city council, shouldn't just be able to broadly assert something and—I mean they could do that with any case, and if it is the defense's burden to show that it didn't meet that, I would suggest we met that in this case. There's been no testimony offered that there was a health issue. I think it's obvious that the female nipple is not causing a major health crisis when in public. I think that's just absurd.

In regards to the safety issue, the conduct, itself, was safe. The issue was people who are becoming offended by it or otherwise engaging in ultimately the kind of harassing that people are engaged in this conduct. I would suggest that that's essentially a heckler's veto. If the State is only arresting people based on complaints, I would suggest that that's unfair, when—I mean someone could just say I don't like that conduct, so arrest someone.

In regards to the moral issue, we heard testimony from one of the witnesses, that she doesn't think it was right based on religious belief. I would suggest that that is an inappropriate basis to make a law. If the State is going to rely on just broadly religious or moral issues, it's hard to imagine any law ever not meeting that definition because certainly, I guess, everyone have different moral issues.

We've heard in this case that not everyone was offended, there was support for her, all three went in this case, and I would suggest that if it's to be read as broad as that, this is no longer a home rule State. The town would—or city in this case, would have just free reign to draft any other statute, and just say there's a moral issue, we think it's wrong, so we want to punish it. That's just that—but that's outside of the scope of what the State can do.

And finally, I suggest that this is pre-empted under state statute, particularly, Your Honor, as I noted in my brief, I forget the exact HB number. I have it in front of me, HB 1525 Fn., and then the similar Senate Bill, was in direct response to Your Honor's order in the Gilford case, and the State tried to amend it to make it comply with home rule to give local ordinances power to address this issue. The

legislature said no, that's not something we want to do, and those bills were both killed at the House.

So I suggest that the legislator—legislative intent here is clear. So even if the statute's ambiguous, that legislature makes it know what it wants, that under New Hampshire law, it is legal for a woman to be in public with her breasts and nipples exposed, just as it is for a man, and we don't want towns and cities to go enforcing and treating women differently than men. I think the legislature is very clear on what they want.

So, for those reasons, I would suggest that Your—we would ask that Your Honor find the statute unconstitutional, unenforceable and dismiss the charges.

THE COURT: Okay.

MR. HYNES: Thank you.

THE COURT: Mr. Sawyer?

STATE'S CLOSING ARGUMENT

MR. SAWYER: I respectfully disagree with Mr. Hynes on that last point. I'll focus on this point because that's what he last said.

Using that same analogy, the same reasoning, Judge, the City would not be able to prohibit wearing spikes on a track, because there's no State law that prohibits wearing spikes on a track. So his logic is if there's no State law prohibiting it, then you must be able to wear spikes on a track. His argument is because there's no State law prohibiting exposing the breasts, then it is thereby legal for everybody and is mandated to be legal. That is not correct.

There is no express law that permits women to expose their breasts and nipples. That would be pre-emption. That would be implied pre-emption in this case because there would be a conflict with State law. There is no conflict with State law, there is no affirmative right for a woman to expose her breasts. I don't think Attorney Hynes has pointed to that.

In effect, legislation didn't pass. You can't use that as a basis for the will of the people. Obviously legislation determined that was a statute, that was not which had criminal counties. This is an ordinance which has this civil counties, Judge. Quite different.

In the legislature, and I don't disagree with the legislature for not passing that law, that would be a bad law to paint a broad brush to determine the social standards for every single community in this state. We're a small state, but there are different, you know, the southern part of the state is very different than Coos County in terms of their social and moral beliefs. I think the legislature has left it open to the towns and cities to pass ordinances that fits their social framework.

Attorney Hynes has focused his argument on a purpose of public health and public safety. I don't think you even get there, Judge. And I believe, I don't have a case, but – that the cite from the case, but State versus Grant, as well as other case, and I'm just reading from New Hampshire Practice, Local Government Law by Loughlin, under Section 914.

> "The law is very clear in New Hampshire that the presumption favors the validity of ordinances" —

And this is in my pleading, but it goes further than what I put in my pleading.

> "The validity of ordinances and regulations adopted in the exercise of police power pursuant to legislative authorizing. The presumption governs, unless it is overcome by unreasonableness apparent on the face," which I don't think it is, "of the ordinance or by extrinsic evidence which carries sufficient, which clearly establish the ordinances and reasonableness."

I've heard nothing presented that indicates that ordinance is unreasonable for those safety and health reasons, Judge.

> "The presumption is based upon judicial recognition that municipalities are prima facie, the soul of judges of the necessity and reasonableness of their ordinances. It is also based upon the consequent judicial reluctance to interfere with the decision of the municipal legislative body as to what is necessary, wise, reasonable, or justified."

The legislature and the courts defer to the legislative body as to the validity or the purpose for the ordinances. They're not going to look under that.

THE COURT: That was cited in Grant?

MR. SAWYER: I believe so. That's the cite—I knew I read it and I didn't put it in my ordinance, but in Grant and Ramseyer (ph.), which is not in my pleading, but this is according to—

THE COURT: And what's the cite?

MR. SAWYER: Ramseyer is 73 NH 31, the 1904 case; Grant, which is cited in my pleading, is 107 NH 1, the first—

THE COURT: That's right. I remember that one. All right.

MR. SAWYER: And that's the cite that Mr. Loughlin uses to support his position, as well as a Municipal Corporations Treatise, 5 E. McQuillin. It's a Municipal Corporations Treatise, Section 18.23. If you have the New Hampshire Practice Series, that cite would be there as well.

So I don't think you get to look under or judge what the city council did, unless it is clear by extrinsic evidence or on its face unreasonable, and I don't think that's been proven, and that's only on just two things that Attorney Hynes is focused on, the safety and health.

I think, based upon the reaction of the folks that have seen this event, it caused a disturbance, which could have risen to potential violence if the police didn't respond appropriately.

If that was left to be unfettered, people are pointing fingers, according to, I think, one of the Defendants being—she was being physically harassed. So it has the potential for violence, as well as, on the health issue, there's a potential that people in this society, whether it's good or bad, it's a fact, these people in society hold the female breasts in a sexualized manner, as the defendants have said. People in this society have grown up, for the large part, to be modest about the female breast and nipple.

Those kids on that beach, who live in this society, have those expectations, and now they are forced,

they're confronted by the defendants, and that is a potential health issue, a mental health issue.

And so, on its face, and you don't have to agree with it wholeheartedly, but I don't think it's, on its face, it's unreasonable to use those as a purpose, but then you go on to the other purposes of the statute, of the ordinance, which is the morals and public order.

I think it's clear that it is against the morals as determined by the city council, and I don't think there's any evidence to indicate otherwise, presented extrinsically by the Defendants. There were some varied opinions, but that's a legislative process.

The purpose goes on to say, in the ordinance:

> "In addition, the prohibited conduct has been widely found and is deemed to have harmful secondary effects in places and communities where it takes place, including crimes of various types, and reduction of property values."

Okay? And I would agree that not all of these things apply to this section that we're dealing with here, this ordinance deals with other things, but if there was not this ordinance, potentially, this could be a mecca for topless sunbathing, which may have a negative impact on property values. People with conservative, moral principles, which I plea this ordinance is based upon from the city council, may not come to Laconia for—with their tourist dollars. So that is a valid reason for this ordinance, as determined by the legislative body, elected by the citizens of this city.

If the citizens disagree with the ordinance, and they agree with the defendants, that will change. That's the legislative process, that's how that is fixed.

And they have the availability to advocate for their position. Every day of the week, they can—at every city council meeting, they can ask to be heard, they can protest outside. They can put newspaper articles in. They can draw attention to this. And I don't, personally, have any opinion on this, but it's really a separation of powers issue.

Does the City of Laconia have the ability to render ordinances to protect the city's welfare, the morals, preserve the City's character, to help safety, public order? I would say it does, Judge.

In the enabling statute, I think it's clear and it is broad, that allows the cities to set rules for the use of its public places. And I use analogy of the example of the public library. The enabling clause that I refer to is the one actually for the towns, but as indicated in my pleading, the cities enjoy two essentially, statutes, 47-17 and 31-9 -- 31-39, which the legislation has given cities both of those.

And with regard to 31-39, it says, "The city is empowered to make bylaws for the care, protection, preservation, and use of the public cemeteries, parks, commons, libraries, and other public institutions of the town."

I would say commons and other public institutions include all public property, all the roads, all the parks, all the beaches. They are open to the public.

So the legislature has specifically given the cities ability to set rules about their use. Without that enabling clause, and I use the example of the library, the library could not set rules about the opening and closing time. There would be a public library, it would be open at all times. There would be no rules

whatsoever, you could do what you want, but obviously, that would be anarchy.

So by this statute, 31-39, the legislature has given them the authority to regulate it. They don't say what authority you have to use, as long as it's not repugnant to state or federal law, that's the only prohibition or limitation they have, which is understandable. If it's repugnant to federal or state law, they have the ability to regulate the use of those facilities.

Just like if one of the defendants went to a DARE graduation, it's a public building, they're able to go to that building, and they went topless. Absent the enabling clause, the City could not regulate that. Obviously, the City can regulate and ask that person to leave, that would be inappropriate. That's an extreme example, and I'm not saying they would do that, but just because they may not like that the City regulates the beach, prohibiting the not wearing of—or exposing their nipples, doesn't mean it's not valid. It's a pretty broad mandate that the Legislature is giving the cities, because absent that, there would be no rules. You could do what you want.

And if you look at the enabling statute, most, if not all of the subsections, there's a bunch of them and they're very specific. The specific ones, Judge, deal with going into private homes, private businesses, that's why they're very specific. All those about what you can do on your own private property and they're very detailed. They've very broad when they're talking about public property, you know. So they give the cities, the towns, ability to regulate their public property. Where they want very specific is when

you're talking about private property, and that's a distinction.

And when you read it, well, it's not very—it's—they're not talking about anything specific about these things for a reason, because they want the cities to be able to say the beaches can open and close at certain times, people can wear certain thing swimming, people can not stand on a chair in the middle of the children's section of the library. And that is a—I'm assuming it's implicit rule, it's not explicit rule, but it would be upheld because the librarian superintendent, or the librarian, Mr. Brough, is given the authority by the city council, through the trustees of the library to set rules of the library. And if he says you cannot stand up on a chair in the middle of the children's room, you cannot do that, but that authority is given to him by grants by the legislature for the City to set rules and regulations in the library.

I would argue, Judge that equal protection, as defined by Attorney Hynes, and New Hampshire is not strictly applicable to this case.

15 And if you look at Lapport (phonetic), which is a case that Attorney Hynes cites, it's a 1991 case. It reads, and this is on page 76, "The doctrine of equal protection demands that all persons similarly situated, should be treated alike."

And therefore, the first question in the equal protection analysis is whether the state action in question treats similarly situated persons differently.

And if you look at my pleading, Judge, there's replete, and in the case, also cites a U.S. Supreme Court case, that actually cites the U.S. Supreme

Court, Claire Brennan versus Claire Brennan Living Center.

So I think New Hampshire Equal Protection Doctrine is closer to federal than Attorney Hynes with respect to this case, because in this case, we're not talking about similarly situated individuals, we're talking about different genders, and as I cite in my pleadings, "Equal protection does not demand that things that are different in fact be treated the same in law, not that a state pretend that there is no physiological differences between men and women."

It's on page 9 of my pleading. That's citing State versus Vogt, I don't know how to pronounce it, V-O-G-T. "Nor does the equal protection require things which are different in fact to be treated in law as though they were the same."

And I think that's what the NH Supreme Court is saying, as well. I don't think they would say that in this case, they are the same. Men and woman are not the same, they are different, society treats them different. And as such, I don't think it rises to that level of strict scrutiny, as Attorney Hynes, in this case.

If it was about men and women being able to vote; if it was about men and women being able to use the bus, those are—they're used in the same situation at that point, and they have to be treated the same, absent strict scrutiny.

But in this case, because of the physiological differences, they are different. And the conduct of exposing the breasts is different for a male and female. So it is the lesser scrutiny, as indicated in all of the—most all of the States of the Union, Judge.

And paragraph 21 of page 10 in my pleading, "The overwhelming majority of cases, including holding that laws being female, but not male toplessness do not violate federal or state legal protection guidelines." And that again, is the Vogt case.

So the last thing that Mr. Hynes talked about is pre-emption, Judge. And, if you—I think my pleading is very clear on that. There's two types of pre-emption, express, which is not the case. There is no state law which expressly permits—or there's no state law that says that towns cannot issue laws regarding public nudity. There's no state law that says the state has all authority to issue laws regarding public immunity—public nudity. There's no such thing. So there's no express pre-emption.

There's two kinds of implied pre-emption. One is, by the regulatory and statutory scheme, it's apparent that the state has determined to have the sole decision-making on this issue if it's complicated. This is not a complicated decision, it's whether a woman can have—bear her breasts and nipples in public. It's not a complicated issue.

Those types of pre-emptions incur with regulatory situations such as environmental issues, solid waste, nuclear, I'm sure. That's where there's the—that implied pre-emption, where the regulatory scheme is so huge and complex that obviously, unless there's an express rant, which there are some cases that the cities cannot pass their own laws about that.

The other is whether there is, in fact, the city ordnance [*sic*] is contrary to state law, and again, there is no state law that expressly permits the exposing of breasts, and I use the Rochester case as an example, where the City of Rochester initiated a

ordinance which said that no vehicles can use their sirens in the city compact, including ambulances and fire trucks.

The state had passed regulations which basically said if you are -- you have to transport patients as quickly as possible and use the appropriate means to do so, and it set requirements for uses of sirens.

So if the City of Rochester had its way, that would be against that state mandate. It doesn't say that cities and towns can't do it, but based upon the state law at the time, that was in direction contradiction to that state law, and therefore, that was pre-empted. There's no such pre-emption in this case, Judge.

So I would argue that the state has enabled the city to pass this ordinance, that the ordinance is reasonable for the purposes that it seeks to address that it is constitutional, both under equal protection, and I don't think Attorney Hynes really talked about the First Amendment, but I think the pleadings can speak for themselves.

And the—also, that the last thing that he addresses in his motion is the civil rights issue. I don't think it applies to cities issuing legislation, I think it applies to employers to house, you know, to landlords and such. It would apply to a city in an employment situation, like a city worker that's being discriminated I think would fall in that civil rights thing, but I don't think that civil rights statute applies to cities and acting legislation. That's when you get at the Equal Protection First Amendment issues, and that's what will decide whether legislation is valid, not—and that civil rights also deals with discrimination against individuals.

The law was put in place, not to—and this is the First Amendment argument, not to push down on expression or speech, and that's the really the litmus test. It is not there to quiet people, it is there to prevent conduct. It's content mutual. In other words, it's not meant to seek to push down the freedom nipple movement, that's not what it's there for. This law does not prevent them from advocating their positions among a number of different avenues.

So even if you think the civil rights statute does apply, I don't think this is discriminatory, and you can look at the Equal Protection First Amendment analysis for that.

THE COURT: Mr. Hynes?

MR. HYNES: Your Honor, may I just briefly respond?

THE COURT: Sure.

MR. HYNES: Thank you.

In regards to the civil rights, one of the subsections of that chapter does deal with public accommodations, so I would suggest that that pre-empting the state's—or the city's ordinance in this case. They're treating men and woman differently in a public accommodation. They're allowing men to be topless at the beach, that they're excluding females to be topless at the beach. I suggest that is pre-empting.

In regards to the physical—

THE COURT: You don't think accommodations—are you saying public accommodations as in accommodating people or accommodations in terms of location?

MR. HYNES: I believe the ordinance defines public accommodation to include things like hotel—anywhere the public can be, so hotel, different things in that regard, and I would suggest that that specifically is the one.

Additionally, one of the subchapters specifically states some—and I don't have the exact language in front of me, that it's essentially a human right and is—and the chapter is to be interpreted as broadly as possible.

In regards to physiological differences, I would suggest there's nothing inherently dangerous, it being a safety, health, or moral issue in the female nipple or female breasts.

Society may choose to make that difference, but I mean that's what our country has unfortunately done over the course of our history. We've made differences based on race, but there's not an inherent difference. We've made differences based on gender, where there's no inherent difference prohibiting women from owning land, voting, have property rights, all sorts of different things.

And ultimately, thankfully, legislature often times does address these issues and people[']s views do change, but not always at the rate it should.

So the courts have stepped in over the entire course of this country and stepped in when a constitutional issue comes up as depriving someone based on there rights, based on suspect investigations [*sic*] that's just race and gender, whether it be the U.S. Supreme Court validating separate but equal—

Board versus—Brown versus Board of Education in regards to allowing people to go to school based on—

independent of race, and most recently, the same sex marriage issue. That was an issue based on gender and states, they were making progress on that issue.

One at a time, legislatures were coming to the conclusion this is a right we want to have. It just wasn't happening quick enough. The U.S. Supreme Court stepped in and said this is a fundamental right and we're going to address this issue for everyone.

So that's why we're here today, I'm asking the Court to address that.

THE COURT: Okay.

Mr. Sawyer?

MR. SAWYER: Judge, there's a concept called stare decisis.

THE COURT: Yep.

MR. SAWYER: And I think we're obligated to follow those laws. It's up to the Supreme Court of New Hampshire and the U.S. Supreme Court to overturn their prior rulings, and I think those rulings stand today with all respect, that is the law of the land and it's not up to—it's only up to the Supreme Court to overturn a decision.

We have to follow that, and I—the Court has made it clear, about the U.S. Supreme Court and other courts around this country, that there is a difference.

And Attorney Hynes may be right, maybe they will change their mind, but that is the law of the land and that's what we have to deal with.

THE COURT: Okay. Thank you, folks. The Court will take it under advisement, issue an order, and you will be hearing from me—

MR. HYNES: Thank you.

THE COURT: —in some time.

(Proceedings concluded at 10:15 a.m.)