THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2017-0116

State of New Hampshire

v.

Heidi Lilley, Kia Sinclair & Ginger Pierro

Appeal Pursuant to Rule 7

BRIEF FOR THE *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE IN SUPPORT OF DEFENDANTS HEIDI LILLEY, KIA SINCLAIR & GINGER PIERRO

Respectfully Submitted,

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

Gilles R. Bissonnette, Esq.
(N.H. Bar No. 265393)
American Civil Liberties Union of New Hampshire
18 Low Avenue
Concord, NH 03301
(603) 224-5591
gilles@aclu-nh.org

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QUESTIONS PRESENTED

A. Whether the City of Laconia's public indecency ordinance banning "the showing of the female breast with less than a fully opaque covering of any part of the nipple" in a public place violates the Equal Rights Amendment to Part I, Article 2 of the New Hampshire Constitution.

B. Whether the City of Laconia's public indecency ordinance banning "the showing of the female breast with less than a fully opaque covering of any part of the nipple" in a public place violates Part I, Article 22 of the New Hampshire Constitution and the First Amendment to the United States Constitution.

IDENTITY OF AMICUS CURIE

The American Civil Liberties Union of New Hampshire ("ACLU-NH") is the New Hampshire affiliate of the American Civil Liberties Union ("ACLU")—a nationwide, nonpartisan, public-interest organization with over 1.2 million members (including over 8,000 New Hampshire members and supporters). The ACLU-NH engages in litigation, by direct representation and as *amicus curiae,* to encourage the protection of individual rights guaranteed under state and federal law, including the rights to equal protection and freedom of speech.

The ACLU has appeared before state and federal courts in numerous equal protection cases concerning gender inequality, both as direct counsel and as *amicus curiae.* These cases include: *Frontiero v. Richardson,* 411 U.S. 677 (1973) (ACLU as *amicus curie*; holding that benefits given by the United States military to "dependent" spouses of service members cannot be given out differently because of sex); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975) (ACLU representing the plaintiff; holding that the gender-based distinction under 42 U.S.C. § 402(g) of the Social Security Act of 1935—which permitted widows but not widowers to collect special benefits while caring for minor children—violated the right to equal protection); *Sessions v. Morales-Santana,* 137 S. Ct. 1678 (2017) (as amicus; holding that the gender line Congress drew in Section 1409(c) of the Immigration and Nationality Act—which creates an exception for an unwed U.S.-citizen mother, but not for such a father, to the physical-presence requirement for the transmission of U.S. citizenship to a child born abroad—is incompatible with equal protection).

The ACLU-NH has also appeared before state and federal courts in numerous free speech cases, both as direct counsel and as *amicus curiae*. These cases include: *Doyle v. Comm'r, N.H. Dep't of Res. & Econ. Dev.*, 163 N.H. 215 (2012) (representing the plaintiffs; holding that N.H. Code Admin. R. Ann. Res. 7306.01(a)—which requires a person to obtain a special-use permit to use New Hampshire Department of Resources and Economic Development (DRED) properties

before holding organized or special events that go beyond routine recreational activities—was overbroad, and therefore facially invalid under Part I, Article 22 of the New Hampshire Constitution, because it applied without regard to the number of people attending an event and to a wide range of speech that had no relation to the State's significant interests); *Montenegro v. N.H. DMV*, 166 N.H. 215 (2014) (as *amicus curie*; holding that the DMV's prohibition of vanity registration plates that were "offensive to good taste" violated the right to free speech under Part I, Article 22 of the New Hampshire Constitution because the regulation authorized or even encouraged arbitrary and discriminatory enforcement); *Rideout v. Gardner*, 123 F. Supp. 3d 218 (D.N.H. 2015), *aff'd*, 838 F.3d 65 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 1435 (2017) (representing the plaintiffs; striking down New Hampshire law banning certain forms of online speech on grounds that it violates the First Amendment).

Thus, the ACLU-NH has a strong interest in ensuring that females wishing to bare their breasts are protected when they seek to (i) incorporate their breasts into expressive conduct, and (ii) make choices about their state of nudity in public using the full range of options available to their male counterparts. This case presents an issue of significant importance and visibility concerning the right of women to speak freely and the constitutional implications of codified stereotypes related to females' roles and sexuality. The ACLU-NH believes that its experience in these legal issues will make its brief of service to the Court.

STATEMENT OF THE CASE AND THE FACTS

Each of the Defendants was charged under Section 180-(2)(A)(3) of the City of Laconia's Public Indecency Ordinance. This section prohibits persons from "knowingly or intentionally . . . [a]ppear[ing] in a state of nudity" in a public place in Laconia, which includes public beaches. LACONIA, N.H., CODE § 180-(2)(A)(3); § 180-(4)(A). "Nudity" is defined, in part, as "the showing

of the ***female breast*** with less than a fully opaque covering of any part of the nipple." CODE § 180-(4) (emphasis added), *available at* http://www.ecode360.com/15049286.

Defendant Ginger Pierro was arrested for violating the ordinance on May 28, 2016, at Weirs Beach in Laconia, NH. Trial Tr. 14:22-24, 54:19-25 (Oct. 14, 2016). Her purpose for going to the beach was to "enjoy [it]," and do beach yoga. Trial Tr. 14:25, 15:1-2, 15:13-20. Pierro was doing yoga topless, with her breasts and nipples exposed, while a friend was taking photos of her, and she recalled that other beachgoers were staring at her, "as they ha[d] that option to do . . . to anybody else." Trial Tr. 15:11-23, 16:17-24. She testified to being "violently harassed" by "several citizens," though she noted that the more people who did harass her, the more support she received from other beachgoers defending her actions. Trial Tr. 15:3-9, 17:13-16, 18:10-20. Pierro agrees that society sexualizes the female breast, but also believes she was "providing [a] very healthy example of being a human." Trial Tr. 17:1-2, 17:24-25, 18:1-2. When approached by police officers, Pierro "began to speak about case law that [the officers] were unable to enforce the city ordinance." Trial Tr. 44:25, 45:1. One of Pierro's arresting officers confirmed that men were also on the beach with exposed nipples, and he has "never arrested a male for having their nipples exposed in public in Laconia." Trial Tr. 28:3-16.

Defendant Kia Sinclair was arrested for violating the ordinance on May 31, 2016, at Weirs Beach in Laconia, NH. Trial Tr. 10:14-15, 12:3-5. Her purpose for going to the beach was to protest the arrest of Defendant Pierro and to "purposeful[l]y engage[] in civil disobedience knowing that the City of Laconia ha[d] an ordinance against the exposure of the female nipple and areola." Trial Tr. 8:25, 9:1-2, 10:19-25. Sinclair was topless with her nipples exposed while riding in her car to the beach, swimming, and sunbathing, and "pretty much ke[pt] to herself." Trial Tr. 10:19-25, 53:16-18. Sinclair saw fully topless men at the beach and a fully topless male jogger on the way to the police station after she was arrested. Trial Tr. 11:8-14. Sinclair also agrees that

society hypersexualizes female breasts and treats them as taboo. Trial Tr. 8:1-10, 12:9-13. She was "one of the main people" who started the "Free the Nipple" movement in New Hampshire,[1] and is particularly passionate about the "stigma" of breastfeeding. Trial Tr. 7:16-25, 8:2-10. Sinclair noted that society's views may change over time, but "without any kind of victories or being allowed [to change], it'll never [happen]." Trial Tr. 12:20-25.

Defendant Heidi Lilley also was arrested for violating the ordinance on May 31, 2016, at Weirs Beach in Laconia, NH. Trial Tr. 24:19-21. Her purpose for going to the beach was to protest Defendant Pierro's arrest and the continued illegality of exposing female nipples in Laconia, and to advocate for her belief in the "equality of the male and female." Trial Tr. 20:18-24, 22: 17-24, 24:1-5. When Lilley was arrested, she "was acting civilly, sitting in a chair without a top," and she "announced to the arresting officer that [she] was acting in a protest and that [she] did not believe that [she] could be arrested for protesting." Trial Tr. 22:25, 23:1. Lilley is part of the "Free the Nipple" movement and has petitioned Laconia's City Council to change its public indecency ordinance. Trial Tr. 21:1-7, 25:2-6.

The Hon. Judge James M. Carroll of the Fourth Circuit Court (Laconia Division) denied Defendants' motion to dismiss on Nov. 20, 2016. This appeal followed.

SUMMARY OF ARGUMENT

This brief raises two arguments. First, on its face, the City of Laconia's public indecency ordinance banning "the showing of the female breast with less than a fully opaque covering of any part of the nipple" violates the Equal Rights Amendment to Part I, Article 2 of the New Hampshire Constitution. The ordinance is discriminatory on its face because its definition of "nudity" facially

[1] The Free the Nipple movement's mission statement is: "Free the Nipple is a global platform for change in the world. We believe that as human beings, we should all be treated equally. We are a global movement of equality, empowerment and freedom. We are a movement of change." FREE THE NIPPLE MOVEMENT HOMEPAGE, http://freethenipple.com/our-mission/ (last visited July 20, 2017).

distinguishes between females and males. The New Hampshire Constitution provides that "[e]quality 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. 1, art. 2. This sentence, known as the Equal Rights Amendment, was added to the New Hampshire Constitution in 1974 and was perceived at the time to be an important constitutional provision substantially enhancing protection against gender discrimination by the State. Subsequent to this amendment's passage, this Court formalized these additional protections in *LeClair. v. LeClair*, holding that "[w]e apply the strict scrutiny test, in which the government must show a compelling [s]tate 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.'" *LeClair v. LeClair*, 137 N.H. 213, 222 (1993); *see also Cheshire Med. Ctr. v. Holbrook*, 140 N.H. 187, 189-90 (1995). Since New Hampshire's passage of the Equal Rights Amendment in 1974, the ACLU-NH is not aware of any gender-based classification that has been upheld by this Court as satisfying strict scrutiny under Part I, Article 2 of the New Hampshire Constitution. Here, given the ordinance's gender-based distinction, there can be no serious dispute that this Court must apply strict scrutiny to the ordinance.

The State cannot satisfy strict scrutiny here. "[A]nachronistic assumptions" about gender roles "do[] not withstand scrutiny under the compelling interest standard." *Holbrook*, 140 N.H. at 189-90. The U.S. Supreme Court has similarly held that, even under the lesser intermediate scrutiny standard, statutory objectives that rely on "fixed notions concerning [a gender's] roles and abilities" are "illegitimate." *Morales-Santana,* 137 S. Ct. at 1692. Yet the State's justification for the ordinance centers on conflating moral sensitivities about the exposure of female breasts with real, physiological differences between male and female nipples. At least one court has correctly rejected such a theory under the lesser intermediate scrutiny standard. *See Free the Nipple - Fort Collins v. City of Fort Collins*, No. 16-cv-01308-RBJ, 2017 U.S. Dist. LEXIS 24648, at *8 (D.

Colo. Feb. 22, 2017) (preliminarily enjoining an indecent exposure ordinance; finding the city's "female breast is a sex object because we say so" rationale insufficient to justify sex discrimination). Additionally, the State fails to sustain its burden under strict scrutiny to show that the ordinance is narrowly tailored. The public indecency ordinance imposes a blanket ban on the exposure of female nipples in a public place, regardless of the parties or circumstances involved. And, fatally, the State has failed to produce specific, tangible evidence establishing a link between the regulated activity and harmful secondary effects the ordinance seeks to address. To the extent the State is concerned about public safety, the far more tailored approach would be to enforce existing criminal laws that ban disorderly conduct and assault. Based on the record, it appears that Laconia is the only municipality in New Hampshire that has enacted and is enforcing such a town-wide ordinance. New Hampshire's other communities have apparently found ample ways to address public safety without engaging in gender discrimination. So too can Laconia. Indeed, as recently as 2016, the New Hampshire General Court rejected legislation that would have imposed a statewide female toplessness ban.

Second, Laconia's ordinance violates Part I, Article 22 of the New Hampshire Constitution and the First Amendment to the United States Constitution—though this Court need not reach this question if it concludes that the ordinance violates Part I, Article 2. At the outset, the ordinance directly bans forms of topless speech in public places—expression which warrants constitutional protection, yet would be banned under the ordinance's prohibition on "the showing of the female breast with less than a fully opaque covering of any part of the nipple." *See Schad v. Mount Ephraim*, 452 U.S. 61, 65-66 (1981) (recognizing nude dancing as expressive activity); *Free the Nipple - Springfield Residents Promoting Equal. v. City of Springfield*, 153 F. Supp. 3d 1037, 1045 (W.D. Mo. Dec. 28, 2015) (in topless protest case, denying the City's motion to dismiss plaintiff's First Amendment claim; holding that "Defendant has not demonstrated that, as a matter of law,

Plaintiffs' conduct is *not* expressive") (emphasis in original); *Tagami v. City of Chicago*, No. 14-cv-9074, 2015 U.S. Dist. LEXIS 90149, at *6 (N.D. Ill. July 10, 2015) (in denying motion to dismiss, holding that, in the context of a "GoTopless Day" event, the plaintiff had sufficiently alleged that "she engaged in expressive conduct protected by the First Amendment"); *Hightower v. City & County of San Francisco*, 77 F. Supp. 3d 867, 878 (N.D. Cal. 2014) (holding that nude protesters at city hall expressing "pro-body" and anti-public-indecency-ordinance messages engaged in protected expression); *City of Daytona Beach v. Book*, No. 2005-00021-CAAP, at *1, 4 (Fla. Volusia County Ct. Oct. 5, 2006) (affirming that defendant's toplessness in a "Top Free Protest" was "incidental to and necessary for the conveyance of her message"), attached at *Exhibit D*. Here, the ordinance is content-based because it bans exposing a female nipple as part of expressive conduct simply because the City of Laconia disfavors it. Thus, once again, strict scrutiny applies. Not only do the interests enumerated by the ordinance fail to satisfy the "compelling interest" standard for equal protection under the New Hampshire Constitution and content-based restrictions on free speech, they also fail to warrant "important" or "significant" interests required of content-neutral restrictions due to a lack of evidence showing how they are furthered by the ordinance. The scope of the public indecency ordinance is also simply too broad to satisfy narrow tailoring because it regulates expression beyond the ordinance's purported justifications.

ARGUMENT

I. The public indecency ordinance violates the Equal Rights Amendment to Part I, Article 2 of the New Hampshire Constitution.

The threshold question in an equal protection analysis is whether the law treats similarly situated persons differently. *Appeal of Marmac*, 130 N.H. 53, 58 (1987). While classifications that distinguish between males and females are subject to intermediate scrutiny under the United

States Constitution's Equal Protection Clause, strict scrutiny is the standard for such classifications under the New Hampshire Constitution. *LeClair*, 137 N.H. at 222. To satisfy strict scrutiny, a law "that distributes benefits or burdens on the basis of gender must be necessary to serve a compelling [s]tate interest." *Holbrook*, 140 N.H. at 189-90. The government cannot meet its burden of satisfying this high standard in this case.

A. Gender-based classifications are subject to strict scrutiny and thus presumptively unconstitutional under the Equal Rights Amendment to Part I, Article 2 of the New Hampshire Constitution.

New Hampshire is one of eight states to apply the strict scrutiny standard of review to gender-based classifications, under which such classifications "are presumed invalid." Paul Benjamin Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement?*, 70 TEMP. L. REV. 907, 912 (1997).[2] The New Hampshire Constitution provides that "[e]quality 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. 1, art. 2. This sentence, known as the Equal Rights Amendment, was added to the state constitution in 1974 and "was perceived at the time to be an important constitutional provision substantially enhancing protection against discrimination by the state." Mary K. Cabrera & Jared R. Green, *The New Hampshire Equal Rights Amendment: A Powerful, Yet Rarely Invoked Anti-Discrimination Weapon*, 33 N.H. B. J. 496, 496 (1992), attached as ***Exhibit E***. At its proposal, the amendment received a favorable report by the Bill of Rights Committee, and it was adopted by the Constitutional Convention on a voice vote. *Id.* at 496. One of the amendment's co-sponsors described it as a "Right to Living Resolution" that would "guarantee to all people the right to live with a certain measure of dignity, a dignity which comes from not having to fight for every step we wish to take." *Id.* at 498 (internal quotations

[2] The seven other states are California, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, and Texas. *Id.*

omitted). Another representative articulated the importance of the proposed amendment when he wrote that "it is fitting that [a constitution] should recognize the inherent equality of all people." *Id.* (internal quotations omitted). After its was adopted by the convention, the amendment was submitted to New Hampshire voters for approval by a two-thirds margin. *Id.* at 496. A voter's guide[3] explained that, if the amendment was adopted, "the Constitution will guarantee equality of these and other rights by including the provision that equality of rights shall not be denied or abridged by the state because of race, creed, color, sex, or national origin." *Id.* at 496-97.

Notably, the amendment was intended "to go beyond the existing constitutional and statutory provisions against discrimination and to provide the citizens of the state with protection *in excess of the minimum level set by the federal government*." Cabrera, 33 N.H. B. J. at 498, *Exhibit E* (emphasis added). As a result, subsequent to this amendment's passage, the New Hampshire Supreme Court formalized these additional protections. In *LeClair*, this Court stated, "[w]e apply the strict scrutiny test, in which the government must show a compelling [s]tate 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.'" *LeClair*, 137 N.H. at 222, 224. Four years later, this Court again confirmed that Part I, Article 2 of the New Hampshire Constitution requires that strict scrutiny be applied to gender-based classifications. *Holbrook*, 140 N.H. at 189-190 ("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 [s]tate interest."). Since New Hampshire's passage of the Equal Rights Amendment in 1974, the ACLU-NH is not aware of any gender-based classification that has been upheld by this Court as satisfying strict scrutiny under Part I, Article 2 of the New Hampshire Constitution. *See id.*

[3] Voter's Guide Explaining Proposed Amendments to the Constitution of the State of New Hampshire; J. OF CONST. CONVENTION 469 (1974).

(holding that the necessaries doctrine violated the equal protection clause of the New Hampshire Constitution because it was predicated on anachronistic assumptions about marital relations and female dependence); *In re Certain Scholarship Funds*, 133 N.H. 227, 231 (1990) (benefit provided by two charitable trusts granting college scholarships to any deserving "boy" or "protestant boy" triggered equal protection review and could not withstand any standard of review); *Buckner v. Buckner*, 120 N.H. 402, 404 (1980) (disagreeing with plaintiff's argument that the statute made no provision for alimony per se to be awarded to a husband, because "[i]f the statutes of this State [were to] be constructed to treat husbands less favorably than wives, they would be invalid" under the state and federal constitutions).

B. The public indecency ordinance is facially discriminatory on the basis of gender because it treats males and females differently. Therefore, strict scrutiny applies.

The trial court erred in concluding that intermediate scrutiny applies to the ordinance. *Lilley*, No. 450-2016-CR-1603, at *5 (N.H. 4th Cir. Ct Oct. 14, 2016). Rather, strict scrutiny applies.

"The first question in an equal protection analysis is whether the [s]tate action in question treats similarly situated persons differently." *Appeal of Marmac*, 130 N.H. at 58. The answer to this question here is obvious: the ordinance discriminates against females on its face by prohibiting females from exposing their nipples while allowing males to do so. While the first clause of the "nudity" definition of the ordinance prohibits "[t]he showing of the human *male or female* genitals, pubic area or buttocks with less than a fully opaque covering" when using Laconia's public ways, the second clause prohibits only "the showing of the ***female*** breast with less than a fully opaque covering of any part of the nipple." CODE § 180-(4) (emphasis added). The ordinance's facial discrimination is further confirmed by the manner by which Laconia has enforced its terms. The police officers who arrested the Defendants did not arrest any males who were displaying their

nipples when Defendants were arrested, and the officers and another State's witness never questioned that completely topless men would not run afoul of the ordinance's terms. Trial Tr. 28:11-16, 51:21-23.

The trial court concluded that the ordinance does not discriminate on the basis of gender because "it treats all females equally." *Lilley*, No. 450-2016-CR-1603, at *4 (N.H. 4th Cir. Ct Oct. 14, 2016). This conclusion is unequivocally wrong and must be rejected by this Court. It is—as the United States Supreme Court has concluded for nearly 50 years—not a defense to assert that the challenged ordinance "treats all women the same." In *Loving v. Virginia*, 388 U.S. 1 (1967), the U.S. Supreme Court explained that "the mere 'equal application' of a statute containing racial classifications" is not "enough to remove the classifications from the Fourteenth Amendment's proscription …." *Id.* at 8. The same principle applies in the gender discrimination context. Put another way, "[i]f a law provides that one subclass receives different treatment from another class, it is not enough that persons within that subclass be treated the same." *Britt v. City of Pomona*, 223 Cal. App. 3d 265, 274 (1990).

Accordingly, strict scrutiny—"with its presumption of unconstitutionality"—is the appropriate standard to apply in New Hampshire to the public indecency ordinance. *Bleiler v. Chief, Dover Police Dep't.*, 155 N.H. 693, 699 (2007) (quotations omitted). Under this standard, the burden is "upon the State to prove that the statute is narrowly tailored to promote a compelling [state] interest." *State v. Zidel*, 156 N.H. 684, 686 (2008). Though intermediate scrutiny does not apply here as it would in federal court, the burdens imposed on the State would still be considerable if the Court applied this standard to the ordinance. *See United States v. Virginia*, 518 U.S. 515, 533, 574 (1996) ("[I]ntermediate scrutiny that has been our [federal] standard for sex-based classifications for some two decades"; "The burden of justification is demanding and it rests

entirely on the State."); *Morales-Santana*, 137 S. Ct. at 1690 (noting that the burden falls on the "defender of [the] legislation").

C. The ordinance fails any form of scrutiny.

The State cannot satisfy any form of scrutiny, let alone strict scrutiny. Here, under either intermediate or strict scrutiny, the State must furnish some actual evidence to substantiate the interest pursued by the law and explain how the law relates to the interest. *See Guare v. State*, 167 N.H. 658, 665 (2015) (even under intermediate scrutiny, "the government may not rely upon justifications that are hypothesized or invented post hoc in response to litigation"); *Rideout*, 838 F.3d at 72 ("[I]ntermediate scrutiny is not satisfied by the assertion of abstract interests. Broad prophylactic prohibitions that fail to respond[] precisely to the substantive problem which legitimately concerns the State cannot withstand intermediate scrutiny.") (internal quotations omitted). The State is incorrect in asserting that (i) "it doesn't have to know" why the law was enacted and (ii) the basis for the ordinance is not relevant to the public's responsibility to abide by it. Trial Tr. 32:14-24. Indeed, when a law is challenged under the state or federal constitution, not only is it exclusively the State's burden to show a state interest and appropriate relation to the law enacted, strict scrutiny mandates that the highest of such burdens be imposed on the government. *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012) (holding that, under strict scrutiny, the government has a "heavy burden" to show "a direct causal link between the restriction imposed and the injury to be prevented"). None of the interests asserted for enacting and enforcing the public indecency ordinance are sufficiently compelling to satisfy strict scrutiny in this case. And even if any of these interests are deemed compelling, the ordinance lacks adequate tailoring. *See*

Zidel, 156 N.H. at 686 (under strict scrutiny, "[i]f a less restrictive alternative would serve the [state]'s purpose, the legislature must use that alternative").[4]

Public Health and Safety. The ordinance states that its purpose is to "uphold[] and support[] public health, public safety, morals and public order," and reduce the "harmful secondary effects" of the conduct it prohibits, including "knowingly or intentionally, in a public place . . . [a]ppear[ing] in a state of nudity." CODE § 180-(1),(2),(4). Here, the State has failed show the claimed public health, safety, and order interests are sufficiently compelling to support the constitutionality of the ordinance.[5] The State has not offered any meaningful evidence that female nipples are "uniquely disruptive of public order," pose a risk to public health, or endanger the public in any way. *See Free the Nipple - Fort Collins*, 2017 U.S. Dist. LEXIS 24648, at *8 (applying intermediate scrutiny, and holding the City did not demonstrate how female nipples, but not male nipples, disrupted order, posed a specific risk to children, or addressed the other professed interests its nudity ordinance claimed to serve).

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[4] In assessing whether more narrowly tailored options exist, this Court need not "give [its] approval" to or deem constitutional any of the alternatives it discusses. *See Cutting v. City of Portland*, 802 F.3d 79, 92 n.14 (1st Cir. 2015). "Whether they would, in fact, be constitutionally valid would depend on a number of factors" that are not currently before the Court. *Id.*

[5] Various news articles point to the City having enacted the ordinance due to issues at Motorcycle Week. *See* Warren D. Huse, *Council Bans Nudity During Bike Week*, FOSTER'S DAILY DEMOCRAT (Nov. 29, 2008), http://www.fosters.com/article/20081129/GJCOMMUNITY02/711290405 ("By a 5-1 vote, city councilors approved an ordinance, Nov. 23, 1998, 'that will ban public nudity in Laconia, particularly during annual Motorcycle Week festivities,' The Citizen reported, 10 years ago this week."); Michael Kitch, *Baring it All Won't be Tolerated in Laconia*, LACONIA DAILY SUN (Mar. 29, 2016), http://www.laconiadailysun.com/newsx/local-news/93438-keeping-abreast-of-the-law ("The ordinance was adopted in 1998 to curb what was a ritual during Motorcycle Week when women were encouraged, pestered and harassed to reveal their breasts."); *'Free the Nipple' Protestors Looks to Target Laconia After Hampton Beach*, LACONIA DAILY SUN (Aug. 13, 2015), http://www.laconiadailysun.com/newsx/local-news/88089-free-the-nipple-nh-movement-targets-laconia (City Councilor Brenda Clary "noted that the ordinance allows police to cite people for encouraging others to display their genitalia or breasts, which goes to the heart of why most city councilors who were reached said it was passed in the first place."). Evidence supporting the management of behavior at Motorcycle Week is not apparent in the ordinance's 1998 legislative history beyond listing the ordinance under "Motorcycle Week" titles. *See* Excerpts of Legislative History/Meeting Minutes, attached at ***Exhibit A***. If the State had raised these interests—and even if this Court found that preventing women from being harassed during Motorcycle Week was a compelling state interest—the ordinance would still fail for lack of tailoring. While the ordinance may have been enacted to prevent women from being "encouraged, pestered and harassed to reveal their breasts," the ordinance bans the voluntary display of the female nipple even absent any harassment.

Little evidence exists in the record justifying these municipal interests. The City of Laconia provided legislative history related to the ordinance in response to an open records request submitted under RSA 91-A by the ACLU-NH. *See* Excerpts of 1998 Legislative History/Meeting Minutes, attached at ***Exhibit A***. This history is virtually silent on the motivation for enacting the ordinance beyond the ordinance's conclusory "purpose and findings" section and the fact that it was proposed by the Public Safety Subcommittee and listed in the "Public Safety" section of City Council Meeting Minutes. *See id.* This legislative history does not substantively discuss public health or order as interests meant to be addressed by the ordinance. *Id.* The only "potential health issue" put forth by the State is that being "forced [and] confronted by the defendants" amounts to a "mental health issue" for children in Laconia and in society who have certain "expectations." Trial Tr. 76:3-6. This statement about a mental health risk to children from viewing female nipples—which is unsupported by any expert testimony—does not amount to a compelling interest regarding public health. And even if it did, the ordinance could not possibly be tailored because it does not limit violations of the ordinance to exposures viewed by children, let alone children who are vulnerable to have their "mental health" impacted by such exposure. As one court has explained in rejecting this argument:

> [The City has not] provided any meaningful evidence that the mere sight of a female breast endangers children. The female breast, after all, is one of the first things a child sees. Of course, those are very young children, but children of any age might come upon a woman breastfeeding a child and see a naked breast . . . It seems, then, that children do not need to be protected from the naked female breast itself but from the negative societal norms, expectations, and stereotypes associated with it.

Free the Nipple – Fort Collins, 2017 U.S. Dist. LEXIS 24648, at *8 (applying intermediate scrutiny). It is also worth noting that the testimony at trial demonstrates that public health, safety, and order interests were also not at issue when the ordinance was enforced against the Defendants. *See* Trial Tr. 33:11-15, 33:16-23, 36:21-24, 57:21-24, 67:10-15 (Defendant Pierro "was not acting

disorderly per the RSA," did not cause "any concern for . . . safety," was behaving in a manner that did not appear to amount to "physical violence or anything of that nature," and did not cause "worr[y] about anyone getting sick"); *Id.* at 53:16-18 (Defendant Sinclair was "pretty much keeping to herself" according to the State's witness); *Id.* at 22:25, 23:1 (Defendant Lilley describing herself as "acting civilly, sitting in a chair without a top").

Ordinances like the City's not only fail to further public safety, but they also perpetuate gender stereotypes that may place women and girls in potentially harmful, harassing, or shaming situations. Defendant Pierro testified that she was harassed and disturbed at the beach, unlike her fellow male beachgoers. Defendant Lilley was told by a member of Laconia's City Council that her concerns regarding women's equality were "uncalled for with the other issues going on with the world" and was "encouraged . . . to use her time more productively." Trial Tr. 15:3-9; *see also* LACONIA CITY COUNCIL MEETING MINUTES (June 13, 2016) (comments by Councilor Hamel), at ACLU-NH Ex. B 002, attached as ***Exhibit B***. The State has used these facts to support its argument that the ordinance furthers public safety, but instead they show both the City's animus and how the ordinance "creates a self-fulfilling cycle of discrimination," which in and of itself is harmful to those who experience it and to our greater society. *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

The State has also asserted that Defendants' behavior "caused a disturbance, which could have risen to potential violence if the police didn't respond appropriately." Trial Tr. 75:15-18. Even assuming that the State had evidence to show violence was a likely outcome resulting from the public exposure of a female—but not male—nipple, Laconia's wholesale ban on such exposure is not narrowly tailored. To the extent the City is concerned about disturbances or violence, the City could readily enforce existing criminal statutes, including New Hampshire's disorderly conduct and assault provisions. *See* RSA 644:2 (disorderly conduct); RSA 631:2-a (simple

assault). Courts have repeatedly recognized this more tailored approach. *See e.g.*, *McCullen v. Coakley*, 134 S. Ct. 2518, 2538 (2014) (noting that Massachusetts had ample alternatives that would more directly address its public safety interests, including greater enforcement of existing "criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like"); *Rideout*, 838 F.3d at 74 ("the State has not demonstrated that other state and federal laws prohibiting vote corruption are not already adequate to the justifications it has identified"); *see also Zidel*, 156 N.H. at 693 ("The State may not prohibit speech because it increases the chance an unlawful act will be committed at some indefinite future time.") (*quoting Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002)). Here, as is required, Laconia has not shown that "it seriously undertook to address the problem with less intrusive tools readily available to it." *McCullen*, 134 S. Ct. at 2518; *see also Cutting v. City of Portland*, 802 F.3d 79, 91 (1st Cir. 2015) ("the City did not try—or adequately explain why it did not try—other less speech restrictive means of addressing the safety concerns it identified."). And, perhaps most obviously, onlookers could simply look away. *See Frye v. Kansas City Missouri Police Dep't*, 375 F.3d 785, 798 (8th Cir. 2004) ("These sidewalk demonstrators held no passing drivers captive, so the drivers should have looked away and driven on instead of looking to the government to silence the demonstrators."); *see also Van Arnam v. GSA*, 332 F. Supp. 2d 376, 402 (D. Mass. 2004) ("Courts have held that when the cost to the speaker of using the forum location is made to depend not only on expenses for which she may be directly responsible, but also for the expenses potentially created by counterdemonstrators and others over whom she has no control, an unconstitutional 'heckler's veto' can be created.") (citing *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992)).[6]

[6] When addressing persons making a complaint about publically exposed female nipples, police officers in Laconia could inform them that "it's not against the law" and the police are "not going to arrest that person" (absent a violation

***Harmful Secondary Effects*.** Additionally, if a law purports to further the interest of reducing "harmful secondary effects," the State must "produce some specific, tangible evidence establishing a link between the regulated activity and harmful secondary effects." *Foxxxy Ladyz Adult World, Inc. v. Village of Dix, Ill.*, 779 F.3d 706, 715 (7th Cir. 2015). This is commonly raised by cities and states as an "important state interest" of managing adult entertainment businesses. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000). Section 180 borrows this language in claiming that one of its purposes is to reduce the harmful secondary effects caused by the exposure of the female nipple, despite its explicit exception for such conduct "as part of the operation of a sexually oriented business." CODE § 180-(1)-(4). Even under a lower standard of intermediate scrutiny,

> in terms of demonstrating that such secondary effects pose a threat, the city need not conduct new studies or produce evidence independent of that already generated by other cities to demonstrate the problem of secondary effects, *so long as whatever evidence the city relies upon* is reasonably believed to be relevant to the problem that the city addresses.

Pap's A.M., 529 U.S. 277, 298 (2000) (emphasis added) (internal quotations omitted).

Here, the State has neither "demonstrated that such secondary effects pose a threat" nor presented evidence of any studies or assessments from Laconia or any other city on which Laconia's City Council relied to support its claim that the exposure of a female, but not male, nipple causes harmful secondary effects. The trial court opined that in enacting an ordinance "there would be a legislative intent behind the act that in some jurisdiction somewhere there may have been studies" and questioned its ability to "impute the knowledge of those studies directly to the city council who passed the ordinance." Trial Tr. 30:22-25, 31:1-3. The State has simply suggested

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of a criminal statute), just as Sergeant Black conceded he would do if a person complained about a female's exposed breast with her nipple otherwise covered, which is lawful under the current language of the ordinance. Trial Tr. 37:7-16.

that "potentially, this could be a mecca for topless sunbathing, which may have a negative impact on property values," and tourism revenue may decrease because "[p]eople with conservative, moral principles … may not come to Laconia." Trial Tr. 77:1-7. These claims of potential losses to tourism and property values are speculatively raised without evidence and are disputed in the ordinance's legislative history. *See* Letter to City Council (Sept. 28, 1998) (interests not referenced in letter), at ACLU-NH Ex. A 004, attached in ***Exhibit A***. It is noteworthy that Laconia appears to be the only municipality in New Hampshire that has enacted and is enforcing such a town-wide ordinance, *see* Trial Tr. 24:1-5, yet statewide tourism is growing. Emily Corwin, *N.H. Tourism Officials: Holiday Weekend Will Kick Off $2.25 Billion Season*, NEW HAMPSHIRE PUBLIC RADIO.ORG (June 30, 2017), http://nhpr.org/post/nh-tourism-officials-holiday-weekend-will-kick-225-billion-season#stream/0. ("The division of travel and tourism expects a major increase in tourism this summer over last: between June 30 and the beginning of fall, 17 million visitors are expected to spend two and a quarter billion dollars in New Hampshire."). Indeed, as recently as 2016, the New Hampshire General Court rejected legislation that would have imposed a statewide female toplessness ban.[7] As the U.S. Supreme Court has made "abundantly clear in past cases[,]

[7] On March 1, 2016, the House Criminal Justice and Public Safety Committee of New Hampshire voted 19-0 to kill a bill—HB1525—that would have amended New Hampshire's public indecency statute (RSA 654:1) to prohibit women from "purposely expos[ing] 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." *See* http://www.gencourt.state.nh.us/bill_Status/bill_docket.aspx?lsr=2151&sy=2016&sortoption=&txtsessionyear=2016&txtbillnumber=HB1525. The House of Representatives followed this recommendation and deemed the bill "inexpedient to legislate" by a voice vote on the consent calendar. The Committee believed that this bill would violate New Hampshire's Equal Rights Amendment. The Committee stated in its report as follows: "This bill expands the indecent exposure law to include the anus (regardless of gender) as well as the nipple and areola (only if female). The committee heard testimony from many who warned that, due to likely acts of civil disobedience, the state would face expensive court fees should this become law. The NH Civil Liberties Union testified that violation of such a law could be considered protected political speech, indicating that the state would be unsuccessful in litigation. The committee sees no sense in passing a law that cannot be enforced. *The committee also believes that this bill violates Part I, Article 2 of the State constitution, which states that 'Equality of rights under the law shall not be denied or abridged on account of race, creed, color, sex or national origin.' This bill attempts to apply a law to women only* …." *See* http://www.gencourt.state.nh.us/house/caljourns/calendars/2016/HC_14.pdf, at page 8 (emphasis added). In 2016, the New Hampshire House of Representatives also went so far as to reject legislation—SB 347—that would have given municipalities the authority to regulate the clothing worn by sunbathers. *See* http://www.gencourt.state.nh.us/bill_Status/bill_docket.aspx?lsr=2750&sy=2016&sortoption=billnumber&txtsessio

. . . gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization." *Free the Nipple - Fort Collins*, 2017 U.S. Dist. LEXIS 24648, at *6-7 (*quoting J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994)). Consequently, the lack of statistical support or any other meaningful evidence provided by the State to demonstrate that the public indecency ordinance furthers a compelling interest in reducing harmful secondary effects fails any form of scrutiny.

The State has also argued that equal protection law does not require "that things that are different in fact be treated the same in law, nor that a state pretend that there are no physiological differences between men and women." *See Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981). But in making this argument, the State relies upon federal precedent that has, in examining "real differences" among genders, both (i) adopted a lower intermediate scrutiny standard and (ii) has been significantly undermined by recent federal precedent.[8] To the extent this "real

nyear=2016&txtbillnumber=sb347. The House Municipal and County Government Committee's report stated, in part, the following: "The fear that the enabling legislation could be used to suppress free speech and restrict personal freedoms, possibly creating restrictions that were gender-specific, prevailed among the committee members. The committee might have considered removing this provision from the statutes for cities if it had not been for the fact that this would be retrospective legislation and would not have been upheld in court when existing ordinances were determined illegal. There has been no widespread evidence of the need for this legislation and the possibility of misuse outweighed the benefits." http://www.gencourt.state.nh.us/house/caljourns/calendars/2016/HC_29.pdf, at page 13.

[8] Both the State and the New Jersey case it heavily cites—*New Jersey v. Vogt*, 775 A.2d 551 (Super. Ct. App. Div. 2001)—rely upon *Michael M. v. Sup. Court. of Sonoma Cty*, 450 U.S. 464 (1981) (plurality opinion). There, the U.S. Supreme Court applied intermediate scrutiny to uphold a state law that penalized only males for sexual intercourse with females under the age of eighteen due to the "natural" or "physiological" fact that only women can become pregnant. However, *Michael M* has been significantly undermined since its decision over 35 years ago. *See Free the Nipple v. City of Fort Collins*, 216 F.Supp.3d 1258, 1265 (D. Co. Oct. 20 2016) ("As the Court's sex discrimination jurisprudence developed, however, the Court came to undermine its reasoning in [*Michael M.*] and other decisions about there being 'broad leeway' for government to discriminate based on 'real' differences between men and women."); *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017) (holding that the gender line Congress drew in Section 1409(c) of the Immigration and Nationality Act—which creates an exception for an unwed U.S.-citizen mother, but not for such a father, to the physical-presence requirement for the transmission of U.S. citizenship to a child born abroad—is incompatible with equal protection); Susannah Miller, *The Overturning of Michael M.: Statutory Rape Law Becomes Gender-Neutral in California*, 5 UCLA WOMEN'S L.J. 289 (1994); Cary Franklin, *The Anti–Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 145 (2010); *see also* Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 931-33, 955-56 (1983); Virginia F. Milstead, *Forbidding Female Toplessness: Why "Real Difference" Jurisprudence Lacks "Support" and What Can Be Done About It*, 36 U. TOL. L. REV. 273, 300-03, 308-10, 313 (2005).

differences" analysis applies at all in New Hampshire after the Equal Rights Amendment, it is subject to greater rigor under the strict scrutiny standard of review.

At trial, the State asserted that physiological differences exist between a male and female nipple in "common lay terms." Trial Tr. 29:1-4. Yet the State did not describe what "physiological" or "real" differences there are between a male and female nipple; rather, the State explained that the "differen[ce] in fact" involves "implications for the moral and aesthetic sensitivities" of the public. The State confuses the "fact" of society's moral sensitivities regarding female nipple exposure with actual physiological or "real" differences between the male and female nipple. Trial Tr. 12:9-13; Trial Tr. 17:24-25, 18:1-2. The only non-morals based "difference" presented on this issue was by Sergeant Black, who testified that "[t]he female nipple . . . can breastfeed" while he, as a male, is unable to. Trial Tr. 34:2-6. This distinction is technically incorrect, as both male and female nipples possess glands that are capable of secreting milk. *See* Nikhil Swaminathan, *Strange but True: Males Can Lactate*, SCIENTIFICAMERICAN.COM (Sept. 6, 2007), https://www.scientificamerican.com/article/strange-but-true-males-can-lactate/. There is also no difference in the anatomy of the nipple areolar complex between women and men. Male and female nipples are virtually identical from birth to puberty. And, after puberty, male and female nipples develop based on factors unrelated to their sex. Despite the State's persistence in asserting that "society views the female breast in a sexualized manner"—a statement to which Defendants readily agree—society's views do not amount to actual or real differences between the male and female nipple. Trial Tr. 12:9-13.

In sum, the State's argument can be boiled down to the following statement: there are real differences between male and female nipples because the State and society's morals say so. But this self-fulfilling and circular rationalization cannot possibly demonstrate a compelling state interest necessary to satisfy strict scrutiny under New Hampshire law. *See Free the Nipple - Fort*

Collins, 2017 U.S. Dist. LEXIS 24648, at *13 ("At bottom this ordinance is based upon ipse dixit—the female breast is a sex object because we say so …. The irony is that by forcing women to cover up their bodies, society has made naked women's breasts something to see."). The State's justification is not even sufficient to withstand intermediate scrutiny, as "[t]his heightened standard bars governments from discriminating on the basis of supposed 'differences' between the sexes when doing so is a means of 'creat[ing] or perpetuat[ing] the legal, social, and economic inferiority of women.'" *Id.* at *6-7 (striking down the city ordinance on equal protection grounds under intermediate scrutiny) (*quoting Virginia*, 518 U.S. at 534).

***Morality*.** Absent any physiological differences, harmful secondary effects, or genuine threat to public safety, health, or order, the State is left to argue that moral sensibilities regarding the exposure of female—but not male—nipples sustain its burden of furnishing a compelling interest. That argument also fails. "[M]oral disapproval" of individual conduct has been unambiguously foreclosed as a sufficient argument to justify discriminatory laws. *See Lawrence v. Texas*, 539 U.S. 558, 582-83 (2003) ("Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be drawn for the purpose of disadvantaging the group burdened by the law.") (internal quotations omitted); *see also United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013). The lack of any significant evidence in this case makes it clear that stereotypes underscore all other interests purportedly served by the ordinance—"namely, that society considers female breasts primarily as objects of sexual desire whereas male breasts are not." *Free the Nipple - Fort Collins*, 2017 U.S. Dist. LEXIS 24648, at *8. As stated above, Defendants acknowledge that this stereotype exists, and this is precisely what they are attempting to protest. Trial Tr. 8:2-4.

The State argued below—under the lesser and improper intermediate scrutiny standard—that "[t]here is an important government interest in protecting the [public's] moral sensibilities

from anatomies that traditionally in this society have been regarded as erogenous zones, which still include[s] (whether justifiably or not in the eyes of all) the female, but not the male, breast." *See New Jersey v. Vogt*, 775 A.2d 551, 558 (Super. Ct. App. Div. 2001) (applying intermediate scrutiny, not strict scrutiny). However, the U.S. Supreme Court has recognized that if a "statutory objective is to exclude or 'protect' members of one gender" in reliance on "fixed notions concerning [that gender's] roles and abilities," the "objective itself is illegitimate." *Morales-Santana*, 137 S. Ct. at 1692 (*quoting Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)). This Court has similarly declared that "anachronistic assumptions" fail to satisfy strict scrutiny. *Holbrook*, 140 N.H. at 189-90.

The public indecency ordinance bans "knowingly or intentionally" causing any female's nipple to be exposed in a public place for any reason, with a single exception for "conduct permitted as part of the operation of a sexually-oriented business." CODE § 180-(2),(3). This lone exception for adult entertainment suggests that the City's "moral sensitivities" are rooted in the stereotypical perception that female nipples are inherently sexual and therefore may only be permitted when members of the public have clearly consented to being exposed to their sexual nature, i.e. frequenting a "sexually-oriented business." This type of "generalized notion" about a woman's sexuality, again, "perpetuates a stereotype engrained in our society" and has been held to violate equal protection by at least one court. *Free the Nipple - Fort Collins*, 2017 U.S. Dist. LEXIS 24648, at *11 ("[T]he ordinance discriminates against women based on the generalized notion that, regardless of a woman's intent, the exposure of her breasts in public (or even in her private home if viewable by the public) is necessarily a sexualized act.") (*citing People v. Santorelli*, 600 N.E.2d 232, 237 (N.Y. 1992) (Titone, J. concurring) (acknowledging the perpetual stereotype surrounding a female's sexuality and observing that it is "a suspect cultural artifact rooted in centuries of prejudice and bias toward women")). Yet the State before the lower court

placed the crux of its position on the idea that a "substantial segment of [the City of Laconia] . . . still does not want to be exposed willy-nilly" to "traditionally . . . erogenous zones" such as female breast in public. *Vogt*, 775 A.2d at 558. However, as a U.S. District Court Judge opined earlier this year, "[u]nfortunately, our history is littered with many forms of discrimination, including discrimination against women. As the barriers have come down, one by one, some people were made uncomfortable. In our system, however, the Constitution prevails over popular sentiment." *Free the Nipple - Fort Collins*, 2017 U.S. Dist. LEXIS 24648, at *10 (*citing Lawrence*, 539 U.S. at 577; *Craig v. Boren*, 429 U.S. 190, 210, n.23 (1976)).

While the Constitution prevails regardless, one cannot simply assume that popular sentiment regards female nipple exposure as offensive or harmful. This Court should view the State's claims regarding the majority or popular views of the public with skepticism, or at least fluidity. The U.S. Supreme Court has "recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2591 (2015). In 1989, a Texas appellate court noted "the concept that the breasts of female[s] . . . unlike their male counterparts, are commonly associated with sexual arousal" but explained that, in reality, this is "a viewpoint . . . subject to reasonable dispute, depending on the sex and sexual orientation of the viewer." *Williams v. City of Fort Worth*, 782 S.W.2d 290, 297 (Tex. Ct. App. 1989); *see also Free the Nipple - Fort Collins*, 2017 U.S. Dist. LEXIS 24648 at *11-12. One of the Defendants in the present case testified how "the more people that did harass [her], the more support [she] got and people actually came to defend [her]." Trial Tr. 17:13-16. 18:10-25. The "Free the Nipple" movement, of which Defendants Sinclair and Lilley are members, is a global campaign that has grown in influence since its creation 2012. Trial Tr. 7:16-19, 15-19, 20:18-24; *see also* Julie Zeilinger, *Here's What the Free the Nipple Movement Has Really Accomplished*, MIC.COM (Aug. 21, 2015), https://mic.com/articles/124146/here-s-what-the-

free-the-nipple-movement-has-really-accomplished#.wxlvXWilN (including in the list of the movement's accomplishments how "[p]eople across the country are organizing and protesting in their daily lives"). The exposure of men's nipples used to be prohibited in American society, yet few now would question the banality of a topless male, including the City of Laconia which does not ban the exposure of male nipples. CODE § 180-(4); Trial Tr. 12:14-19, 28:11-16; *see Morales-Santana*, 137 S. Ct. at 1689. Should popular sentiment conclusively find the exposure of the female nipple unpalatable, "the [g]overnment must [still] ensure that the laws in question are administered in a manner free from gender-based discrimination." *Morales-Santana*, 137 S. Ct. at 1686. While it might be true that a substantial segment of the City of Laconia has aversions to the "willy-nilly" exposure of a female—but not a male—nipple, laws that codify such stereotypes have a "constraining impact" and cannot withstand strict scrutiny. *Id.* at 1692-93 ("Overbroad generalizations of that order, the Court has come to comprehend, have a constraining impact, descriptive though they may be of the way many people still order their lives.").

Lastly, Laconia's ordinance is not tailored with respect to protecting the public's moral sensitivities because it imposes a blanket ban on the exposure of female nipples in a public place, regardless of the parties or circumstances involved. CODE § 180-(2)-(4); *see Seabrook Police Ass'n. v. Town of Seabrook*, 138 N.H. 177, 179 (1993) (internal citations omitted). The ordinance does not carve out exceptions for breastfeeding[9], protesting and other expressive speech, the general intent of the female exposer, the female exposer's age (it would include, for example, a 3-year-old toddler changing her top), or the age and circumstances of the witnessing public. Though such more narrowed approaches would still not necessarily cure the ordinance's constitutional infirmities, the lack of any such exceptions renders it all the more clearly unconstitutional. *See*

[9] However, RSA 132:10-d states that "[b]reast-feeding a child does not constitute an act of indecent exposure and to restrict or limit the right of a mother to breast-feed her child is discriminatory."

e.g., *Free the Nipple - Fort Collins*, 2017 U.S. Dist. LEXIS 24648, at *3-4 (modified nudity ordinance exempting breastfeeding and females under the age of ten still found unconstitutional); *Book*, No. 2005-00021-CAAP at *1, 4 (anti-nudity ordinance was more tailored because it exempted nudity that that is expressive and "necessary for the conveyance of a genuine message"), attached as *Exhibit D*. Again, it appears that Laconia never even attempted—let alone considered—these more tailored approaches, as is required. *See McCullen*, 134 S. Ct. at 2518. Nor can this Court rewrite the ordinance to make it more narrowly tailored; the proper remedy is to simply strike the ordinance's language specifically banning "the showing of the female breast with less than a fully opaque covering of any part of the nipple" in a public place.[10]

Accordingly, the ordinance is unconstitutional for violating the Equal Rights Amendment to Part I, Article 2 of the New Hampshire Constitution.

II. The Public Indecency Ordinance Violates Part I, Article 22 of the New Hampshire Constitution and the First Amendment

Laconia's ordinance also violates Part I, Article 22 of the New Hampshire Constitution and the First Amendment to the United States Constitution—though this Court need not reach this question if it concludes that the ordinance violates Part I, Article 2. Article 22 of the New Hampshire State 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.

[10] Courts "will not rewrite a … law to conform it to constitutional requirements." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988). As the United States Supreme Court has explained, "doing so would constitute a serious invasion of the legislative domain and sharply diminish [the legislature's] incentive to draft a narrowly tailored law in the first place." *United States v. Stevens*, 559 U.S. 460, 481 (2010) ("To read [the law] as the Government desires requires rewriting, not just reinterpretation."). This Court has embraced these principles. *See, e.g.*, *Montenegro*, 166 N.H. at 220 (striking down regulation that encouraged "arbitrary and discriminatory enforcement," and declining to "add or delete text to the regulation" to save it); *State v. Brobst*, 151 N.H. 420, 422 (2004) (holding that a section of harassment statute was facially overbroad, and concluding that the Court could not envision a limiting construction "that would allow us to limit the scope of the statute without invading the province of the legislature"); *State v. Lukas*, 164 N.H. 693, 694 (2013) ("courts may not add words to a statute that the legislature did not see fit to include"); *Balke v. City of Manchester*, 150 N.H. 69, 73 (2003) ("We will not rewrite the statute; that is the province of the legislature.").

I, art. 22. Similarly, the First Amendment bars laws "abridging the freedom of speech." U.S. CONST. amend. I. The robust protection of free-speech rights is essential to the health of our democracy, especially when that speech is unpopular. As such, courts view laws that burden expression with suspicion. *See Brown v. Enter. Merchants Ass'n*, 564 U.S. 786, 790 (2011).

A. The use of exposed female nipples can be expressive conduct protected under Part I, Article 22 of the New Hampshire Constitution and the First Amendment to the U.S. Constitution.

Expressive conduct receives constitutional protection when it conveys a particularized message that was likely to be understood by those who viewed it. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989) (*citing Spence v. Washington*, 418 U.S. 405, 410-11 (1974). As this Court has stated, "[a]lthough 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, we . . . acknowledge[ ] that conduct may be sufficiently imbued with elements of communication to fall within the scope of [constitutional protections]." *State v. Bailey*, 166 N.H. 537, 541 (2014) (*quoting Johnson*, 491 U.S. at 404); *see State v. Comley*, 130 N.H. 688, 691 (1988) (although the statute did not specifically regulate speech, its application "may have such an effect where a prosecution under the statute concerns conduct encompassing expressive activity").

When analyzing the likelihood that those who view the alleged symbolic speech will understand the message, courts must consider the context in which symbolic conduct is used, as the context may give the conduct its meaning. *Spence*, 418 U.S. at 410-11 (explaining that the timing of conduct, during or around "issues of great public moment," may transform "otherwise bizarre behavior" into conduct that most citizens would understand). Notably, in recent years, at least five federal circuits have loosened the "particularized message" prong of the expressive-conduct test as a result of the U.S. Supreme Court's unanimous decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), which raised the

issue of whether a private parade sponsor could be compelled to include a group it did not want. Under this trend of recent cases, "a narrow, succinctly articulable message is not a condition of constitutional protection." *Robb v. Hungerbeeler*, 370 F.3d 735, 744 (8th Cir. 2004) (holding that participation in Adopt-A-Highway program was expressive conduct).[11] Thus, the mere fact that Free the Nipple advocates may protest silently does not exclude their expressive conduct from constitutional protections. *See State v. Cline*, 113 N.H. 245, 247 (1973) (referencing a number of cases where "ideas communicated nonverbally were held entitled to constitutional protection"). Indeed, nine years before *Spence*, the U.S. Supreme Court had already "repeatedly stated these [freedom of speech and of assembly] rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be." *Brown v. State of La.*, 383 U.S. 131, 141-42 (1966).

Embracing these principles, several courts have correctly held that topless speakers can engage in expressive conduct sufficient to trigger constitutional protection—expression that would be banned under the ordinance's prohibition on "the showing of the female breast with less than a fully opaque covering of any part of the nipple" in a public place. *See Schad*, 452 U.S. at 65-66 (recognizing nude dancing as expressive activity); *Free the Nipple - Springfield Residents Promoting Equal.*, 153 F. Supp. 3d at 1045 (in topless protest case, denying the City's motion to dismiss plaintiff's First Amendment claim; holding that "Defendant has not demonstrated that, as

[11] According to the 11th Circuit, a court should now consider whether a "reasonable person would interpret [the conduct at issue] as some sort of message, not whether an observer would necessarily infer a specific message." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004); *see also Cressman v. Thompson*, 719 F.3d 1139, 1150 (10th Cir. 2013) ("*Hurley* suggests that a *Spence–Johnson* 'particularized message' standard may at times be too high a bar for First Amendment protection."); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010) (observing that inherently expressive activities are "afforded . . . full constitutional protection without relying on the *Spence* test"); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 160 (3d Cir. 2002) (going further to hold that *Hurley* "eliminated the 'particularized message' aspect of the *Spence-Johnson* test").

a matter of law, Plaintiffs' conduct is *not* expressive") (emphasis in original); *Tagami*, 2015 U.S. Dist. LEXIS 90149 at *6 (in denying motion to dismiss, holding that, in the context of a "GoTopless Day" event, the plaintiff had sufficiently alleged that "she engaged in expressive conduct protected by the First Amendment"); *Hightower*, 77 F. Supp. 3d at 878 (holding that nude protesters at city hall expressing "pro-body" and anti-public-indecency-ordinance messages engaged in protected expression); *Book*, No. 2005-00021-CAAP at *1, *4 (affirming that defendant's toplessness in a "Top Free Protest" was "incidental to and necessary for the conveyance of her message"), attached at ***Exhibit D***. In particular, Free the Nipple protesters choose to bare their breasts in order to (i) normalize the human body and (ii) convey their political message that females are not sexual objects. *See* Trial Tr. 8:25, 9:1-2 ("[Defendant Sinclair] purposeful[l]y engaged in civil disobedience knowing that the City of Laconia has an ordinance against the exposure of the female nipple and areola.") Without the ability to bare the female breast, the message sought to be conveyed loses its salience, and far fewer observers will even understand the message sought to be conveyed.[12]

While perhaps provocative to some, this is the point of the speech engaged in by Free the Nipple protesters—namely, to challenge societal norms. And this provocative nature only further demonstrates why this speech is protected under the First Amendment. As the U.S. Supreme Court has explained: "a function of free speech under our system of government is to invite dispute. It

[12] According to information provided to *amicus curie* per its 91-A request, the Laconia Police Department has referred to people associated with "Free the Nipple," including Defendants, as "protesters" both before and after Defendants' arrests. *See* June 1, 2016 Email by Sergeant Finogle to Police Dep't Staff, at ACLU-NH Ex. C 001, attached as ***Exhibit C*** (referring to the three Defendants as "Free the Nipple protesters" who were cited under the public indecency ordinance); June 3, 2016 Laconia Police Dep't Staff Meeting Notes, at ACLU-NH Ex. C 003, attached as ***Exhibit C*** (reminding officers to "follow protocol when dealing with violators of the City ordinance" because "'Free the Nipple' advocates may demonstrate during the week"—Motorcycle Week); Nov. 20, 2015 Laconia Police Dep't Staff Meeting Notes, at ACLU-NH Ex. C 006, attached as ***Exhibit C*** ("'Free The Nipple' protest will be coming to Bike Week next year. Jim Sawyer suggest (sic) we have City Council look at the city's ordinance regarding indecent exposure before we determine our response."); Aug. 26, 2015 Laconia Police Dep't Staff Meeting Notes, at ACLU-NH Ex. C 008, attached as ***Exhibit C*** (Captain Canfield commenting that a "Free the Nipple" protest will be coming to Weirs Beach).

may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). The Court has also noted that, "[a]s a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." *See Boos v. Berry*, 485 U.S. 312, 322 (1988); *see also United States v. Soderna*, 82 F.3d 1370, 1374 (7th Cir. 1996) ("With matters of taste we have nothing to do. If taste were a criterion of protected speech, public debate in the United States would be stilled."); *Snyder v. Phelps*, 580 F.3d 206, 223-24 (4th Cir. 2009) (protecting speech of Westboro Baptist Church, holding that "the statements are protected by the Constitution [because] … they clearly contain imaginative and hyperbolic rhetoric intended to spark debate about issues with which the Defendants are concerned"); *Spence*, 418 U.S. at 412 (expression may not be prohibited merely "to protect the sensibilities of passersby").

B. The public indecency ordinance is a content-based restriction, and is therefore subject to strict scrutiny.

Laconia's ordinance is content-based for two reasons. First, the ordinance prohibits conduct based on the sensibilities of passersby. Laws that ban "one person's speech based on another person's reaction is the very definition of content-based" regulation. *Spence*, 418 U.S. at 412. As the U.S. Supreme Court has explained, "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cty.*, 505 U.S. at 134; *see also Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785, 791 (8th Cir. 2015) (finding that a law banning expression if it could be viewed as "profane . . . rude or indecent" was "content-based"); *Brown*, 564 U.S. at 798 (holding an enacted law that imposed restrictions on the sale or rental of "violent video games" to minors violated the First Amendment because "disgust is not a valid basis for restricting expression"). Here, the State's proffered justifications for the ordinance are "concerned

with undesirable effects that arise from 'the direct impact of speech on its audience.'" *McCullen*, 134 S. Ct. at 2531 (holding such a law "would not be content neutral") (internal quotations omitted); *see Johnson*, 491 U.S. at 412 (holding a statute regulating flag desecration was content-based because it penalized the expressive conduct based on "the emotive impact of [the] speech on its audience"). The State has explained that the ordinance is meant to "protect[] the [public's] moral sensibilities from anatomies that traditionally in this society have been regarded as erogenous zones, [which] still include[s] (whether justifiably or not in the eyes of all) the female, but not the male, breast." *See also Vogt*, 775 A.2d at 558. The ordinance restricts certain conduct involving the female nipple because a "substantial segment of [the City of Laconia] . . . still does not want to be exposed willy-nilly" to such "traditionally . . . erogenous zones" and finds the exposure of a female nipple "unpalatable." CODE § 180-(2),(4); *Lilley*, No. 450-2016 at *4; *Vogt*, 775 A.2d at 558. These justifications epitomize the definition of a content-based restriction designed to prohibit certain imagery.

Second, the public indecency ordinance privileges certain speakers over others by banning certain expressive conduct from women and girls—but not men and boys—thereby making it "content-based." *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994). The First Amendment generally prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 888 (2010); *see also Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011) (applying strict scrutiny to law that "disfavors specific speakers"). This restriction among a certain subset of speakers (females) using a specific form of speech (toplessness) is presumptively invalid.

It is important to note that the trial court appears to have mistakenly concluded that the purported existence of "ample alternative channels" renders the ordinance content neutral. *Lilley*, No. 450-2016 at *6 ("There is no evidence that the ordinance inhibited the effectiveness of

[Defendants'] 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 alternatives for communications.'") Put another way, the trial court seems to have suggested that the ordinance is not content-based because females can pursue another "alternatives for communications" if they would like to espouse their message of gender inequality. This is wrong. The existence of alternative channels of communication is wholly independent from the threshold question of whether a speech restriction is content based.[13]

Therefore, the trial court erred in finding that Laconia's ordinance was not content-based. Accordingly, strict scrutiny applies.

C. The ordinance fails any form of scrutiny.

Content-based restrictions are subjected to strict scrutiny and must be narrowly tailored to serve a compelling government interest. Content-neutral restrictions are subject to intermediate scrutiny, and they must be narrowly tailored to serve a significant government interest, as well leave open ample alternative channels for communication.[14] *Doyle*, 163 N.H. at 221. Where

[13] This Court need not address alternative channels because, as explained below, the ordinance lacks tailoring under either strict or intermediate scrutiny. *McCullen*, 134 S. Ct. at 2540 n.9 ("Because we find that the Act is not narrowly tailored, we need not consider whether the Act leaves open ample alternative channels of communication."). In any event, any alternative channels argument still fails and misses the point of the speech Defendants seek to convey. To say that these women can simply convey their message some other way is, as the United States Supreme Court explained in *Reno v. ACLU*, 521 U.S. 844 (1997), "equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books. In invalidating a number of laws that banned leafletting on the streets regardless of their content—[the Supreme Court has] explained that 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'" *Id*. at 880 (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)). Significantly, the ordinance constitutes <u>*an absolute and blanket prohibition*</u> on political speech using the display of a female nipple. Undoubtedly, a female's "free the nipple" message is diluted—if not destroyed altogether—by banning this protester's ability to actually "free" her own nipples in protest of traditional gender norms. In short, the ordinance deprives women of one of their most powerful means of challenging this form of gender inequality.

[14] Even if the Court subjects the ordinance to intermediate scrutiny as a content-neutral speech restriction, it need not address whether alternative channels exist if the Court concludes that the law is not narrowly tailored. *See McCullen*, 134 S. Ct. at 2540 n.9.

speech is concerned, the burden falls upon the government to meet either of these standards. *See United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 816-17 (2000) ("When the Government restricts speech, [it] bears the burden of proving the constitutionality of its actions.") (collecting cases); *McCullen*, 134 S. Ct. at 2537-40 ("To meet the requirement of narrow tailoring, the government must demonstrate [that the speech restriction meets the relevant requirements]). Moreover, merely reciting an interest is not sufficient for it to be deemed compelling or significant. *See Alvarez*, 132 S. Ct. at 2549 ("But to recite the Government's compelling interests is not to end the matter."); *see also Rideout*, 838 F.3d at 72 ("[I]ntermediate scrutiny is not satisfied by the assertion of abstract interests."). Under either strict or intermediate scrutiny, the tailoring analysis requires the State to demonstrate a "close fit" between the law and the interests it claims to advance thereby. *See Alvarez*, 132 S. Ct. at 2549 (holding that, under strict scrutiny, the government has a "heavy burden" to show "a direct causal link between the restriction imposed and the injury to be prevented"); *McCullen*, 134 S. Ct. at 2535–36 (holding that, under intermediate scrutiny, courts "demand[ ] a close fit between ends and means" in order to "prevent[ ] the government from too readily sacrificing speech for efficiency").

Significant or Compelling Governmental Interest. Not only do the interests enumerated by the ordinance fail to satisfy the "compelling interest" standard for equal protection under the New Hampshire Constitution and content-based restrictions on free speech, they also fail to constitute "important" or "significant" interests required of content-neutral speech restrictions. This is because, beyond abstract notions of morality, the State has proffered little evidence justifying the significance of these proffered interests. For example, in its free speech analysis, the trial court limited its discussion of the ordinance's justifications to morality, and then held that "the presence of children [wa]s a valid consideration for the cited 'protection of public sensibility.'" *Lilley*, No. 450-2016 at *7. However, the First Amendment protects speech that

offends the public's sensibilities. This is, in fact, when free speech protections are needed the most. *See Boos*, 485 U.S. at 322; *Terminiello*, 337 U.S. at 4. Moreover, "morals" are insufficient to support laws that either discriminate between classes of people or burden individual speech rights, and here, the public indecency ordinance does both. In *Lawrence v. Texas*, the U.S. Supreme Court made clear that even "profound and deep convictions accepted as ethical and moral principles" could not justify a constitutionally suspect law because "[o]ur obligation is to define the liberty of all, not to mandate our own moral code." *Lawrence*, 539 U.S. at 571 (internal quotation marks omitted).

The lack of evidence to substantiate the ordinance's purported interest in reducing harmful secondary effects also causes the ordinance to fail strict scrutiny review under free speech law, just as it does under the above equal protection analysis—namely because "audience disapproval or general concern about disturbance of the peace does not justify regulation of expression." *Survivors Network*, 779 F.3d at 790 (internal quotations omitted); *see also Zidel*, 156 N.H. at 687 (rejecting the defendant's argument that "exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence," because there was "little empirical basis for that assertion" and "the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law").

Tailoring. Laconia's ordinance is not a "close fit" to the interests it purports to serve because it "regulate[s] expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Doyle*, 163 N.H. at 224; *see also McCullen*, 134 S. Ct. at 2535–36. Laconia could advance its interests, assuming they were significant or compelling, with far less restrictive means, "such as through an educational initiative, or simply by warning citizens about [Defendants'] protests" in lieu of language in the ordinance. *See, e.g.*, *Spence*, 418 U.S. at 412 ("[A]ppellant did not impose his ideas upon a captive audience. Anyone who might

have been offended could easily have avoided the display."). And circumstances that unnecessarily come within the ordinance's scope include, but are not limited to, breastfeeding[15] and changing a female child's top after it is stained. *See* CODE § 180-(1),(2),(4); *Doyle*, 163 N.H. at 224 (concluding that permit requirement "will hardly burden park resources and will not likely cause unwelcome or unwarranted annoyance" and "is wholly unnecessary"). These examples go far beyond the justifications presented by the State.

CONCLUSION

For the aforementioned reasons, the City of Laconia's public indecency ordinance violates the Equal Rights Amendment to Part I, Article 2 of the New Hampshire Constitution. Alternatively, the ordinance violates Part I, Article 22 of the New Hampshire Constitution and the First Amendment to the U.S. Constitution.

Respectfully Submitted,

American Civil Liberties Union of New Hampshire Foundation,

Gilles R. Bissonnette (N.H. Bar. No. 265393)
AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE
18 Low Avenue
Concord, NH 03301
Tel.: 603.224.5591
gilles@aclu-nh.org

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[15] *See supra* note 9.

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing *Brief for the Amicus Curiae American Civil Liberties Union of New Hampshire in Support of Defendants Heidi Lilley, Kia Sinclair and Ginger Pierro* was served this 24th day of July, 2017 by first class mail, postage prepaid, and by electronic mail on counsel for the Defendants/Appellants (Dan Hynes, Esq.) and the State/Appellee (Stephen Fuller, Esq.).

/s/ Gilles R. Bissonnette
Gilles R. Bissonnette, Esq.