No. 19-64

IN THE

Supreme Court of the United States

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

Petitioners,

—v.—

THE STATE OF NEW HAMPSHIRE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

BRIEF OF GRAB THEM BY THE BALLOT, INC., SPENCER TUNICK, AND CHRISTINE HALLQUIST AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

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?

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BRIEF OF AMICI CURIAE

Amici curiae Grab Them by the Ballot, Inc., Spencer Tunick, and Christine Hallquist hereby submit this brief in support of the Petition for a Writ of Certiorari filed in this Court on July 8, 2019 by Petitioners Heidi C. Lilley, Kia Sinclair, and Ginger M. Pierro, in the matter *Lilley, et al. v. New Hampshire*, No. 19-64 (the Petition), and respectfully requests that this Court consider the following argument in considering whether to grant certiorari.[1]

IDENTIFICATION AND INTEREST OF AMICI

Grab Them by the Ballot, Inc. is a viral nude photo campaign that aims to empower women and increase voter turnout. The organization uses protest art and its campaign and media presence to promote female body sovereignty, to discourage the oversexualization and objectification of women, and to encourage open and frank discussion of female nudity. The organization's work also includes addressing and ameliorating sexual trauma, and educating the public on policy and legislation concerning women's bodies and artistic censorship. Its founder and Director, Dawn P. Robertson, has been devoted to women's rights for almost thirty years. Robertson graduated from the University of Pennsylvania, summa cum laude, where she studied women's studies, history, and the anthropology of sexuality. Later, she graduated from Harvard Law School. Ms. Robertson practiced

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[1] Pursuant to Rule 37.2(a), all parties were timely notified of and gave written consent to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no party's counsel authored this brief in whole or in part and that no person or entity other than amicus and their counsel funded its preparation or submission.

law on Wall Street, founded a thriving international recruiting company, and is writing a book about female nudity, sexuality, and women's rights.

Spencer Tunick is a photographer and installation artist recognized around the world for photographs depicting nude groups of men, women and all genders outdoors and in public settings, often involving thousands of participants in a single work. He has organized and photographed over 100 such nude installations in the United States and abroad, frequently in collaboration with museums and art galleries. Since 1994, Tunick has been arrested five times while attempting to photograph in New York City. Soon after his Times Square arrest in 1999, as with the previous four arrests, all charges were dropped. Nevertheless, the NYCLU and lawyer Ron Kuby filed a Federal Civil Rights lawsuit against the city to protect Tunick's right to create his work on the streets of New York and to protect him and his models from future arrest. The district court granted a preliminary injunction in July 1999, holding that Tunick's work is protected by the First Amendment. *Tunick v. Safir*, 1999 WL 511852 (S.D.N.Y. July 19, 1999). The Second Circuit affirmed, holding that "in light of Tunick's showing of irreparable injury and the clear likelihood of Tunick's success on the merits, it was not an abuse of discretion for the district court to grant the preliminary injunction." *Tunick v. Safir*, 228 F.3d 135, 137 (2d Cir. 2000) (per curiam). This Court then denied the City of New York's application for a stay, allowing the lower court decision to stand and permitting Tunick to freely organize his work on New York City streets. *Safir v. Tunick*, 530 U.S. 1211 (June 3, 2000).

Christine Hallquist was trained as an electrical engineer and, between 2005 and 2018, was the CEO of the Vermont Electric Coop (VEC), and in that capacity took it from dire financial distress to a thriving utility that has solid bond ratings, stable customer rates, and employs a high level of renewable and carbon-free resources.

As argued herein, the case before the Court involves a binary gender classification that is not only unconstitutional, but fails to consider and adversely affects transgender people. In late 2015, Hallquist came out as a transgender woman, becoming the first business leader in the country to transition while in office, and in a heavily male-dominated industry. In 2018, she left VEC to become the first major party candidate for governor in the country who is transgender. That distinction came with vitriol and death threats from around the world. Consequently, Hallquist has witnessed firsthand the irrationality of gender division from both sides.

INTRODUCTION

The regulation of public nudity is fraught with thorny constitutional collisions between personal and artistic expression, and the public desire to establish uniform norms of sexual modesty. However, whatever support there is for regulating public nudity falls utterly apart when that regulation purports to require one standard of modesty for men and another for women. Requiring women to cover their breasts while permitting men to bare them at will is sex discrimination, and it presumptively violates the Equal Protection Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1.

Many courts have nevertheless simply refused to believe that sex discrimination is possible in connection with proscribed nudity, evading the question by asserting that these proscriptions merely reflect intrinsic differences between the sexes. Other courts have recognized the equal protection issue but, despite this Court's guidance to the contrary, they have failed to apply intermediate scrutiny or failed to question seriously the rationales offered in support of the discriminatory rules. They frequently uphold discriminatory ordinances on the basis of boilerplate recitations of "community sensibilities" or "secondary effects" without analyzing whether these rationales are themselves merely the product of supposition, stereotypes, or gender bias.

Consequently, to the outside observer, many of the lower courts' approach to equal protection in the context of nudity statutes seems to boil down to the idea that sex discrimination is permissible, so long as it is traditional. That is directly opposed to this Court's instruction to ensure that historical sex discrimination is not carried forward by its own momentum. These decisions entrench the gender stereotypes and bias they endorse as legitimate reasons to discriminate against women, and to suppress their liberty and personal expression.

Prescribing different modesty requirements for men and women needlessly compounds the already tangled problems of nudity regulation by introducing the element of sex discrimination. Further, contemporary understandings about gender identity cast doubt on a system that ties the legal privilege of bare breasts arbitrarily to biological sex, both as a matter of practical enforcement and basic fairness.

Lacking consistency, the body of law upholding sex discrimination in public nudity statutes may be publicly perceived as lacking credibility. Meanwhile, the issue directly affects half the population by the public criminalization of their anatomy. Women have protested the law for decades, many facing prosecution, and they continue to bare their breasts to protest the laws as long as they provide for unequal treatment. The issue will not go away, and it is certainly time for this Court to resolve the equal protection issue by making it clear that, whatever justifications there may be for proscribing public nudity, there is no justification for treating men and women differently.

ARGUMENT

This Court has consistently affirmed a strong presumption that gender classifications are invalid and subject to heightened scrutiny. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) (holding that "our Nation has had a long and unfortunate history of sex discrimination . . . which warrants the heightened scrutiny we afford all gender-based classifications today"); *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (reaffirming that "heightened scrutiny . . . now attends all gender-based classifications") (internal quotation marks omitted). Under this heightened or intermediate scrutiny, the state is expected "to give its real reasons for passing an ordinance." *Watchtower Bible and Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 170 (2002) (Breyer, J., 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." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982), quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461

(1981). This Court has made clear that gender-based distinctions in statutes must not be based upon anachronistic stereotypes about the gender roles of men and women. *Hogan*, 458 U.S. at 724-25 ("[C]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.").

Amici submit that lower courts have frequently misapplied these precedents in upholding laws that permit men to bare their chests in public places, but prohibit women from doing the same. The most questionable are those cases, as in the *Lilley* case before this Court, in which courts deny that there is a gender-based distinction at all, despite facially disparate treatment of men and women, on an "apples to oranges" theory that intrinsic anatomical differences nullify discriminatory treatment in nudity statutes. *See* Petition at 17, citing *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1256 (5th Cir. 1995) and *City of Seattle v. Buchanan*, 584 P.2d 918, 922 (Wash. 1978). *See also* Petition at 22 (arguing that "ordinances outlawing exposure of "the female breast" plainly classify on the basis of gender."); and *see also generally* 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 (2005).

Other courts acknowledge that public nudity statutes discriminate between men and women's breasts, but then stumble in their subsequent equal protection analyses. Petition at 23 (enumerating circuit court decisions in which courts have failed to apply a strong presumption of invalidity or require exceedingly persuasive justifications for challenged ordinances); *see also* Nassim Alisobhani, *Female Toplessness: Gender Equality's Next Frontier*, 8 Irvine

L. Rev. 299 at 305 & n.45-46 (2018). Thus, courts continue to permit perceived "public sensibilities" or "community standards" to drive equal protection analysis entirely, or accept a speculative parade of horrible "secondary effects" that supposedly justify discrimination.[2] Yet superficial reliance on these rubrics to support sex discrimination in public nudity statutes directly conflicts with this Court's equal protection jurisprudence—as the Tenth Circuit recently recognized when it chose instead to follow "the arc of the Court's equal protection jurisprudence…." *Free the Nipple – Fort Collins v. City of Fort Collins*, 916 F.3d 792, 805 (10th Cir. 2019).

The Tenth Circuit is right: "[E]qual protection law should be particularly alert to the possibility of sex stereotyping in contexts where 'real' differences are involved, because these are the contexts in which sex classifications have most often been used to perpetuate

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[2] *Ways v. City of Lincoln*, 331 F.3d 596, 600 (8th Cir. 2003) (summarily finding ordinance "substantially related" to interest in "preventing the secondary adverse effects of public nudity and protecting the order, morality, health, safety, and well-being of the populace…."); *United States v. Biocic*, 928 F.2d 112, 115-16 (4th Cir. 1991) ("The important government interest is the widely recognized one of protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous zones."); *Craft v. Hodel*, 683 F. Supp. 289, 299 (D. Mass. 1988) (citing *People v. Craft*, 509 N.Y.S.2d 1005, 1010 (N.Y. City Ct. 1986)) ("Here, the statute's objective is to protect the public from invasions of its sensibilities, and merely reflects the current community standards as to what constitutes nudity." (internal quotations omitted)). A district court recently brushed aside an equal protection argument on a finding that the ordinance accurately reflected the opinion of the local citizenry that women, unlike men, should not be topless in public. *Eline v. Town of Ocean City,* 382 F. Supp. 3d 386, 389-92 (D. Md. 2018).

sex-based inequality.") *Id.,* quoting Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83, 145-46 (2010).

Just as with classifications based on race, it is hard to imagine a legislative classification based on gender could ever truly be justified on the basis of "public sensibilities" or "secondary effects" alone. *See* Petition at 25-26 (arguing that this Court's precedents hold "that long-standing gendered norms of morality no longer can sustain laws that classify on the basis of gender."). On the contrary, it seems the attempt invariably requires the invocation of the self-same stereotypes and biases the law is supposed to prevent, first by a legislature and then by a judge. Reena N. Glazer, *Women's Body Image and the Law*, 43 Duke L.J. 113, 128 (1993) ("[T]he concept of 'public sensibilities' itself…may be nothing more than a reflection of commonly held preconceptions and biases.").

I. Sex Discrimination in Nudity Regulation Causes Its Own Harmful Secondary Effects

In the context of sex discrimination and equal protection, this Court has consistently cautioned that neither the statutory objective nor the justifications for it should embody "archaic and stereotypic notions" about the proper role of women in society. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982) ("[C]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions."); *Craig v. Boren*, 429 U.S. 190, 210 n.23 (1976) (disapproving *Goesaert v. Cleary*, 335 U.S.

464 (1948), which had upheld a law against women bartending asserting a government interest in avoiding "moral and social problems"). Yet in courts across the country, equal protection analysis in nudity regulation has repeatedly been subordinated to archaic stereotypes and unsupported notions about women, men, and sexuality. The effect, of course, is to reinforce those stereotypes and their negative effects.

Discriminatory exposure laws reinforce the over-sexualization of the nude female body as well as deeply-rooted cultural narratives around women, nudity and sexuality. Ruthann Robson, *Dressing Constitutionally: Hierarchy, Sexuality, and Democracy from Our Hairstyles to Our Shoes* 73 (Cambridge & New York: Cambridge University Press, 2013) (discussing the hypothesis that "[w]omen's dress provokes (heterosexual) men to sexual violence" underlying "the mandate, whether directly or indirectly enforced, that female dress should not be 'provocative.'"). These narratives are harmful both to women and to men. Alisobhani, *supra*, 8 Irvine L. Rev. at 317 ("These laws tell women that their bodies are obscene, while at the same time telling men that they are unable to trust their ability to control themselves around persons of the opposite sex.").

The laws also reinforce gender conformity norms, because the sex classification is inevitably expressed as imposing one rule for men, and another for women. But in the context of gender and public attire, classifications starkly defined in terms of male and female create public expectations about "proper" gender conformity. Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Laws*, 75 Den. U. L. Rev. 1321, 1322-23 (1998); Helen Pundurs, *Public Exposure of the Female Breast: Obscene and Immoral or Free and*

Equal?, 14 In the Public Interest 1, 19, 23-24, 28 (1994) (discussing regulation of female breasts as reinforcing compartmentalized "acceptable" female roles); Robson, *supra*, at 59 ("Arguably, breast-feeding exceptions do little to dismantle sexualized hierarchy given their applicability only to women in their role as mothers."). This finds the state creating, supporting, and enforcing regulations that prescribe traditional gender conformity, and penalizing women who depart from that traditional expectation.

There is therefore substantial heft to the charge that the "sentiments" governing the display of the female breast are predominantly those preserving heterosexual male prerogatives of possession and sexual control. Glazer, *supra*, 43 Duke L.J. at 116 Robson, *supra*, at 59 ("Because women are the sexual objects and property of men, it follows that what might arouse men can only be displayed when men want to be aroused."); (concluding that "[n]udity regulations, including but not limited to differentiation of breasts, sustain sexual and gender hierarchies."). Amici agree with Petitioners that "women's breasts no longer can sensibly be deemed lewd or indecent or obscene," and that deeming them so to sustain sexual and gender hierarchies are not legitimate state interests. Petition at 27.

The foregoing problems occur in the context of a traditional binary view of gender, without even considering variations in gender identity. But the question of who is a man or a woman for the purposes of nudity statute looms ever larger in light of the growing public understanding of transsexuality, natural gender variation, and gender identity. *See* Jessica A. Clarke, *They, Them, and Theirs*, 192 Harv. L. Rev. 894, 897-98, 921-930 (2019) (explaining differences and overlap between non-binary gender

identity, sexuality, transsexuality, biological sex, and natural intersex variation).[3] For example, under a purely biological approach, Laconia's statute would permit a transgender person who was born male, but has had breast surgery, to display bare in public what appear to all the world to be female breasts. A person born female whose breasts have been surgically altered to appear male could not display them, though it may go unnoticed. It is doubtful that this is what the community envisioned, and yet another approach would find citizens and law enforcement attempting to determine whether any given breast appeared to be female enough to be obscene unless covered, a standard far too vague and subjective to sustain criminal liability for its breach.[4]

Accordingly, the equal protection analysis of statutes like this should proceed with the realization that its superficial gender-based classification is not only inapplicable to significant segments of society, it is increasingly being abandoned for more accurate means of characterization. *See* Clarke, *supra*, 192

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[3] *See also* Luke Boso, *A (Trans)Gender-Inclusive Equal Protection Analysis of Public Female Toplessness*, 18 Law & Sexuality 143, 156 n.84 (2009), citing Jennifer M. Ross-Amato, *Transgender Employees & Restroom Designation--Goins v. West Group, Inc.*, 29 Wm. Mitchell L. Rev. 569, 589-90 (2002) ("Not all transgender people define themselves similarly. The transgender community includes people who understand themselves to be of the opposite sex from which their genitals would suggest and seek to become physically, socially, and legally the sex they have always been psychologically.").

[4] *See* Clarke, *supra*, 2019 Harv. L. Rev. at 936, observing that "[w]hether sex or gender should be defined based on genetics, hormones, morphology, physiology, psychology, elective choice, documentary evidence such as birth certificates, public perceptions, something else, or not at all—is a difficult question to answer in general."

Harv. L. Rev. at 897, n.7 (collecting authority from numerous states that now permit non-binary or unspecified gender designations on birth certificates and drivers licenses). Courts should be cognizant that discriminatory nudity regulations force binary gender distinctions upon a populace increasingly aware of their practical and analytical shortcomings, and for the base purpose of attempting to mete out unequal privilege.

II. Sex Discrimination Needlessly Compounds the Constitutional Problems of Nudity Regulation

The attempt to regulate public nudity, as against individual liberty and free expression, has historically been a difficult topic for courts to grapple with under the Constitution. The realities of attempting to enforce different public nudity standards for men and women compound all of those issues, and raise more.

As explained below, to the extent the statutory prohibitions on female toplessness promote essentially religious convictions about modest attire for women, a state's endorsement and enforcement of that viewpoint runs afoul of the Establishment Clause. To the extent men have an enforceable liberty interest in being bare chested, there is no valid explanation for why the state may curtail that liberty for women. And to the extent there are elements of expression in toplessness, there is no explanation for why women's expression should be constrained while men's expression is not. All of these issues are superimposed upon the basic question of public nudity, needlessly complicating any analysis.

Community sensibilities against female breast exposure are frequently grounded in religious belief.

Alisobhani, *supra*, 8 Irvine L. Rev. 314-316 (discussing Judeo-Christian scriptural underpinnings of nudity statutes and questioning judicial reliance on them); Anita L. Allen, *Disrobed: The Constitution of Modesty*, 51 Vill. L. Rev. 841, 847 (2006) (concluding that "[l]ongstanding ethical and religious notions do seem to explain why contemporary law so aggressively regulates nudity."). In the *Lilley* case before this Court, the State's witness who summoned the police when she saw defendant topless testified that she did so because she felt that female toplessness "wasn't proper" and explicitly admitted that her feeling was "based on religious belief." *See* Petition at 5, citing Pet.App, 133a, 137a.

The Petition does not explain the more pernicious effects of such reasoning. The essential claim is that a local population can, through majority religious or moral conviction, dictate that all women dress publicly in a certain "proper" manner that is different from men. That is a precept popular in theocracies, regimes with patriarchal state religions, and dictatorships. *E. Hartford Ed. Ass'n v. Bd. of Ed. of Town of E. Hartford*, 562 F.2d 838, 842 (2d Cir. 1977) ("Today, dictatorships of both the left and the right use hair and dress regulation as part of their programs of behavior regulation.").

United States jurisprudence is to the contrary, not the least because of the Establishment Clause. Here, we generally accommodate people of faith in wearing what their convictions dictate. But we do not permit moral convictions, even those of a majority, to dictate other people's behavior. Furthermore, a strong basic liberty interest prevents the government from prescribing the public attire of private citizens. *Williams v. Pryor*, 240 F.3d 944, 948 & n.2 (11th Cir. 2001) (citing "the irrationality of government attempts

to regulate the dress and grooming of adults" as among the exceptional circumstances in which statutes are found unconstitutional under rational basis review); *Hodge v. Lynd*, 88 F. Supp. 2d 1234, 1243 (D.N.M. 2000) ("Ordinances attempting to regulate what the general public wears, on public streets and in other public areas, have not fared well.").[5]

The Eleventh Circuit has recognized the liberty interest in declining to wear a shirt, vindicating that interest in favor of a man who, ticketed while jogging shirtless, successfully challenged an ordinance prohibiting any person from being without a shirt in public places. *DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1369 (11th Cir. 1987). That court found no rational basis in the variety of interests asserted by the town in requiring DeWeese to wear a shirt in public, including preserving land values, the town's residential nature, or the town's "history, tradition, identity, or quality of life." *Id.* at 1367-68. Though the court suspected that "the town fathers' distaste for the

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[5] *See also Kelley v. Johnson*, 425 U.S. 238, 244 (1976) (assuming arguendo that "the citizenry at large has some sort of 'liberty' interest within the Fourteenth Amendment in matters of personal appearance...."); *E. Hartford Ed.*, 562 F.2d at 842 (teacher challenging aspects of dress code regulations) ("[T]he liberty interest asserted by appellant here is a weighty one deserving our careful attention."); *Zalewska v. Cty. of Sullivan, New York*, 316 F.3d 314, 321 (2d Cir. 2003) ("A substantial body of precedent suggests the existence of a liberty interest in one's personal appearance.") quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)("[l]iberty under law extends to the full range of conduct which the individual is free to pursue."); *Hodge*, 88 F. Supp. 2d at 1239 ("This Court agrees that deciding what clothes to wear and what appearance to present to the rest of the world are personal decisions, constitutionally protected from arbitrary governmental interference.") (applying *Kelley v. Johnson, supra,* and *Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 542–43 (10th Cir. 1987)).

personal dress of …a citizen at large, as he jogs the Town's streets is simply not a legitimate governmental interest," it held only that any such interest is so "manifestly weak" that it cannot justify intrusion on a male jogger's liberty interests even under rational basis review. *Id*. at 1369. Yet lower courts almost routinely uphold ordinances that limit themselves to prohibiting female toplessness, despite this Court's far stronger heightened standard of review for gender classifications. That dichotomy cannot easily be explained.

The right to free expression under the First Amendment is implicated, too. This Court has long wrestled with the boundaries and intersections of nudity-as-expression and nudity-as-obscenity. *See generally* Alisobhani, *supra*, 8 Irvine L. Rev. at 311-17. Plurality opinions, drawn out over time, have left an analytical framework that is fractious, even on fundamental threshold issues.[6] Ordinances like Laconia's press further, compounding restraint of expression by attempting to make an additional

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[6] *Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425 (2002), for example, produced no opinion of the Court, even though a majority of the Court's justices recognized that bans on public nudity operate to target content. Justice O'Connor's four-justice plurality opinion suggested the ordinance should be deemed content-neutral. *Id.* at 434. But Justice Kennedy's concurring opinion, which provided the fifth vote and ratio decidendi in *Alameda,* noted that earlier opinions' description of public nudity bans as "content neutral" was "something of a fiction." *Id.* at 448 (Kennedy, J., concurring). "These ordinances are content based, and we should call them so." *Id.* Writing for four justices in dissent, moreover, Justice Souter protested that the plurality had endorsed "a policy of content-based regulation." (Souter, J., joined by Stevens, Ginsburg, and Breyer, J.J., dissenting). Thus, a majority of the Court's justices recognized that regulation of public nudity amounts to regulation of content.

distinction between men and women in restraining it. Thus, whatever personal expression men may make by going shirtless, women are denied. *See, e.g.*, Robson, *supra*, at 59 (observing that the women litigants in "many of the topless cases…might be viewed as advocating a type of cross-dressing, or at least the seeking of male privilege through equality in (un)dress."); Pundurs, *supra*, 14 In the Public Interest at 15-19 (framing regulation of female toplessness as limiting women's expression to discrete, compartmentalized roles, such as maternal or sexual.).

Finally, unjustified sex discrimination begets noncompliant protest, and will surely continue to do so until it is rectified. The facts underlying the *Lilley* petition show that the defendants went topless because they were protesting the enforcement of the discriminatory ban on female breast exposure in Laconia. Petition at 4 (citing Pet.App. 94a-96a and 107a-108a), and 5 (citing Pet.App. 94a-96a, 107-108a).

Protest by noncompliance against such gender discrimination has a venerable history. Puritans wrangled over whether to make women wear veils in public. *See* 1 Sydney George Fisher, *Men, Women & Manners in Colonial Times* 137 (Philadelphia & London: J.B. Lippincott Co., 1898). The dispute was apparently resolved by the women's concerted refusal to wear them. *Id*. ("On the question of veils, Roger Williams was in favor of them; but John Cotton one morning argued so powerfully on the other side that in the afternoon the women all came to church without them.").

Over thirty years ago, it was women protesters who bared their breasts in protest and gave rise to the seminal *Santorelli* decision in New York state, which is notable for the concurring opinion of Judge Titone,

joined by Judge Simons, focusing on equal protection. *See generally People v. Santorelli*, 600 N.E.2d 232 (N.Y. 1992); Robson at 57-58 (concluding that "Titone's concurring opinion stands as one of the most supportive judicial statements of the unconstitutionality of legally imposed gender differentials in required clothing.").

When women have consistently protested similar social inequality, they have traditionally obtained their objectives. In all such cases, it has in hindsight seemed obvious that the inequality was unjustifiable, that too many women were roughly arrested, prosecuted, and stigmatized for doing nothing more than what a man could, and that justice was too long in coming. Ironically, protesting women invoking the First Amendment need do so only because they have been denied equal protection. As one commentator wryly put it nearly twenty-five years ago, "topfree activists claim First Amendment protection for expressing their right to equal protection; if topfree activity received equal protection, it would not need the First Amendment." Pundurs, *supra*, In the Public Interest at 30.

After decades of protest, courts like the Tenth Circuit are finally taking that point seriously, holding it up to this Court's equal protection jurisprudence, and finding discrimination. The resulting divergence from the courts of other jurisdictions requires this Court's intervention and clarification.

CONCLUSION

For these reasons Amici respectfully request that this Court grant the Petition for a Writ of Certiorari filed in *Lilley, et al. v. New Hampshire*, No. 19-64.

Respectfully submitted,

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