No. 19-64

IN THE
Supreme Court of the United States

HEIDI C. LILLEY, KIA SINCLAIR, AND GINGER M. PERRIO,

Petitioners,

v.

NEW HAMPSHIRE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Hampshire

BRIEF OF AMICUS CURIAE FOUNDATION FOR MORAL LAW IN SUPPORT OF RESPONDENT

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Foundation for Moral Law ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to strict interpretation of the Constitution according to the intent of its Framers, defending the unalienable rights guaranteed by the Constitution, and defending the moral principles that underlie the Constitution. The Foundation has an interest in this case because it believes that the Framers never intended for the First Amendment to protect nudity and that ruling in the Petitioners' favor will subject the moral principles that underlie the Constitution to even further decay.

SUMMARY OF ARGUMENT

The Supreme Court of New Hampshire correctly ruled that the Laconia, New Hampshire Code of Ordinances ch. 180, art. I, § 180-2 (1998)[2] violates

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[1] *Amicus Curiae* Foundation for Moral Law files this brief with consent from both Petitioner and Respondent. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus's* intention to file this brief. All parties have consented. Counsel for *amicus* authored this brief in its entirety. No person or entity—other than *amicus*, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

[2] The ordinance defines "Nudity" as "[t]he showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple." In keeping with the ordinance, *Amicus* will use the

neither the First Amendment Free Speech Clause nor the Fourteenth Amendment Equal Protection Clause. The Foundation contends that Petitioners' conduct does not constitute protected First Amendment "speech" and that disparate treatment, if any, between men and women in this ordinance is consistent with the Equal Protection Clause.

ARGUMENT

I. The Laconia Ordinance Does Not Violate the Free Speech Clause.

Although Petitioners did not base their appeal primarily on free speech issues, they claimed free speech violations in their appeal to the New Hampshire Supreme Court, and that Court devoted nearly half of its opinion to free speech analysis. Accordingly, *Amicus* will address the free speech issue in this section of our brief.

A. The Constitution is the "supreme Law of the Land."

Our Constitution dictates that *the Constitution itself* is the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. All judges take their oath of office to support *the Constitution itself*—not a person, office, government body, or judicial opinion. *Id.* *Amicus* respectfully submits that this Constitution and the solemn oath thereto are still relevant today and

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terms "nude" and "nudity" as applied to Petitioners even though they were nude only from the waist up.

should control, above all other competing powers and influences, the decisions of federal courts.

Chief Justice John Marshall observed that the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* …. Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

B. The Constitution should be interpreted according to the Framers' intent.

George Washington, who served as President of the Constitutional Convention and as President of the United States when the First Amendment was adopted and ratified, said in his Farewell Address,

> If, in the opinion of the people, the distribution or modification of the Constitutional powers be at any particular wrong, let it be amended in the way the Constitution designates. But let there be no change by usurpation; though this may in one instance be the instrument of good, it is the customary weapon by which free governments are destroyed.[3]

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[3] George Washington, *Farewell Address*, *in* American Historical Documents 144 (New York: Barnes and Noble, Inc., 1960).

Thomas Jefferson, third President and primary author of the Declaration of Independence, echoed the same theme:

> On every question of construction, [let us] carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed of the text, or invented against it, conform to the probable one in which it was passed.[4]

And this Court honored that principle in *South Carolina v. United States,* 199 U.S. 437, 448 (1905),

> The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.

C. The Framers of the First Amendment did not intend to include nudity as protected speech.

The First Amendment language, "or abridging the freedom of speech," mentions no exceptions, but its Framers did not intend that the amendment protect every possible form of expression. As Justice Brennan observed for this Court in *Roth v. United States,* 354 U.S. 476, 482-83 (1957),

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[4] Andrew M. Alison, *The Real Thomas Jefferson* 382 (1981).

The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, 11 and all of those States made either blasphemy or profanity, or both, statutory crimes. As early as 1712, Massachusetts made it criminal to publish 'any filthy, obscene, or profane song, pamphlet, libel or mock sermon' in imitation or mimicking of religious services. Acts and Laws of the Province of Mass. Bay, c. CV, § 8 (1712), Mass. Bay Colony Charters & Laws 399 (1814). Thus, profanity and obscenity were related offenses.

In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. *Beauharnais v. People of State of Illinois*, 343 U.S. 250, 266, 72 S.Ct. 725, 735, 96 L.Ed. 919. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that

> obscenity, too, was outside the protection intended for speech and press.

The Court therefore concluded on p. 485, "We hold that obscenity is not within the area of constitutionally protected speech or press," and even Justice Douglas, writing in dissent at p. 512, agreed that "No one would suggest that the First Amendment permits nudity in public places...." The Framers' intent was to state the general principle that speech is protected and leave it to the courts and legislatures to work out the exceptions. They intended to give strong protection to speech, but they did not consider every possible form of expression to be "speech" entitled to First Amendment protection. The representatives of the various states in Congress would not have passed an amendment that invalidated the laws on the books of their states, and even if they had, the states would never have ratified such an amendment.

In the days leading up to the adoption of the First Amendment, nudity was not condoned and was often prohibited. As Philippa Levine has noted concerning colonies in general, "A lack of clothing among colonized individuals has connoted primitiveness and savagery since at least the seventeenth century."[5] And according to *The World of the American Revolution: A Daily Life Encyclopedia,*

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[5] Philippa Levine, *Nakedness and the Colonial Imagination*, 50 Victorian Studies 189 (2008).

> Europeans and European Americans kept their bodies covered from head to toe. ...
>
> To display one's naked body (or even parts of the body) in public indicated at the least that one was uncouth, but to most, it also indicated a depraved and licentious nature. ...
>
> Since most 18th-century Americans did not live with or expect the type of privacy that 21st-century Americans do, it is likely that certain inadvertent exposure of bare skin was accepted or ignored. ... [M]ost people would have seen a bare breast as a woman breastfed a child, and this would not have been considered scandalous -- although by the mid-18th century "genteel" women did not usually nurse in public or formal settings, particularly if men were there. ... By the time of the Revolution and even more in the postwar period, ideas of gentility and virtue, especially among the well-to-do, meant individuals who wanted to be considered virtuous "ladies" or "gentlemen" of the new republic dressed modestly, eschewing British fashions.[6]

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[6] *The World of the American Revolution: A Daily Life Encyclopedia,* 290-292.

Accordingly, New Englanders not only prohibited nudity among European settlers but also extended those prohibitions to Native American nations that chose to become part of their colony. One such ordinance for the Town of Noonatomen read, "6. If any woman shall goe with naked breasts, they shall pay two shillings."[7] Likewise, *The Common Law in Colonial America* tells of a Virginia case of "a woman prosecuted for nudity."[8] "Historically, indecent exposure was a 'common law' offense, meaning it originated from custom and court decisions rather than by statutes."[9] As the Florida Supreme Court said in *McGuire v. State,* 489 So. 2d 729, 732-33 (Fla. 1986), "Since the beginning of civilization public nudity has been considered improper. We are fully aware of the changing social values as expressed in new modes of dress, but are convinced that by enacting Section 877.03, Florida Statutes (1975), the Legislature intended to prohibit adult females from appearing in public places, including Florida's beaches, with openly exposed breasts."

Seeing how nudity was regarded in 18th-century America, clearly the Framers of the First Amendment did not intend to include nudity as a

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[7] Alden T. Vaughan, ed., *The Puritan Tradition in America, 1620-1730*, 266 (rev. ed. 1972).

[8] 1 William E. Nelson, *The Common Law in Colonial America* 85 (2009).

[9] E.A. Gjelten, *Indecent Exposure Laws*, Lawyers.com, https://www.lawyers.com/legal-info/criminal/criminal-law-basics/the-crime-of-indecent-exposure.html (last visited Nov. 12, 2019).

form of protected speech. And if nudity is not protected speech, then questions of strict scrutiny, compelling interests, or substantial interests do not apply, because no constitutionally-protected right is infringed.

This does not change simply because a person intends nudity to be a means of expressing an idea. If it were, then a nude person engaged in a demonstration in support of a cause would be protected by the First Amendment while another nude person sunbathing on the beach would not. And citizens making complaints, officers investigating and making arrests, and judges and juries deciding guilt or innocence would have to intuitively perceive the nude person's intent. By this reasoning a nude sunbather or nude yoga practitioner could claim, either before, during, or after the arrest, that "I'm demonstrating in favor of nudity" or "I'm protesting the clothing ordinance" and thereby avoid prosecution. Recognizing this, this Court has observed in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 n.7 (1984):

> 7. When the Government seeks to regulate conduct that is ordinarily non-expressive it may do so regardless of the situs of the application of the regulation. Thus, even against people who choose to violate Park Service regulations for expressive purposes, the Park Service may enforce regulations relating to grazing animals, 36 CFR § 50.13 (1983); flying model planes, § 50.16; gambling, §

> 50.17; hunting and fishing, § 50.18; setting off fireworks, § 50.25(g); and urination, § 50.26(b).

And as the New York Court of Appeals said in *People v. Hoffman,* 507 N.Y.S.2d 977, 980 (N.Y.1986),

> While there may be contexts in which a public display of nudity would reasonably be understood as a means of communicating an idea, it cannot be said that nude sunbathing on a beach is a form of expression likely to be understood by the viewer as an attempt to convey a particular point of view. Although defendant apparently has a specific philosophy regarding nudism, his mere nude appearance did not create a great likelihood that his philosophy would be imparted to the public. Rather, the likely message to viewers was that defendant, like many others on the beach, had doffed his clothing to enhance his comfort, acquire an even tan or simply display his body to others. Such conduct cannot be considered sufficiently expressive to invoke the protections of the First Amendment and article I, § 8 of the New York State Constitution merely because its setting was a beach where nudity is commonplace.

In the case at hand, nothing in the actions of the Petitioners would give any indication that their nudity was a means of protest. No onlooker would have any reason to think they were engaged in protest. Petitioner Pierro was engaged in yoga on the beach, and Petitioners Lilley and Sinclair were simply "at the beach." According to the New Hampshire Supreme Court, Lilley "announced to the arresting police officer that [she] was acting in a protest and that [she] did not believe that [she] could be arrested for protesting." That's like a person mowing his lawn nude and then claiming he cannot be arrested for mowing his lawn. Lilley was not arrested for protesting; she was arrested for being nude in public.

In *United States v. O'Brien,* 391 U.S. 367 (1968), this Court considered whether burning a draft card was a form of protected speech. Without determining whether it was speech or not, Chief Justice Warren held for this Court at p. 377 that "a government interest is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." The Court noted that the prohibition on destruction of draft cards did not prohibit O'Brien from speaking out against the draft but prohibited only the "noncommunicative impact of his conduct." *Id.* at 382. Justice Harlan concurred, noting that "O'Brien manifestly could have conveyed his message in many

ways other than by burning his draft card." *Id.* at 389. Likewise, in *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560 (1991), this Court found that although nude dancing (unlike general nudity) might be expressive activity, "Indiana's requirement that the dancers wear at least pasties and a G-string is modest, and the bare minimum necessary to achieve the state's purpose."

Similarly, Petitioners were not arrested for speaking out against the nudity ordinance or conducting a demonstration aimed at amending the ordinance to eliminate breasts from the definition of nudity; they were arrested only for being nude in public. They could have conveyed their message in many ways other than by being nude in public.

II. The Laconia Ordinance Does Not Violate the Equal Protection Clause.

The New Hampshire Supreme Court properly concluded that Laconia's ordinance does not violate the Equal Protection Clause of the Fourteenth Amendment.

A. The Equal Protection Clause must be interpreted according to its Framers' intent.

The reasons set forth in Parts I.A-B of this brief for interpreting the First Amendment as its Framers intended it apply also to the interpretation of the Equal Protection Clause of the Fourteenth Amendment.

B. The Framers of the Equal Protection Clause never intended the clause to protect public nudity.

The Fourteenth Amendment was enacted in 1868 primarily to address problems of racial equality. An immediate purpose was to eliminate concerns about the constitutionality of the Civil Rights Act of 1866, which effectively overturned *Dred Scott v. Sanford,* 60 U.S. (19 How.) 393 (1857), and provided that "citizens of every race and colour ... [have] full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." In his famous dissent in *Plessy v. Ferguson,* 163 U.S. 537 (1896), Justice Harlan argued at 562 that the Fourteenth Amendment prohibited "a badge of servitude wholly inconsistent with the civil freedom and equality before the law established by the Constitution."

While the Equal Protection Clause may be extended beyond racial discrimination to other forms of discrimination, an ordinance prohibiting nudity certainly does not impose a "badge of servitude" on anyone. The purpose and intent of the Equal Protection Clause certainly was not intended to prohibit public conduct that almost everyone at that time would have considered scandalous and immoral. Even if Congress had passed the amendment with that intent in mind (which they certainly did not), the states would never have ratified an amendment with that purpose.

As the New Hampshire Supreme Court correctly observes, the Laconia ordinance prohibits public nudity for both men and women. However, the ordinance defines nudity as including exposure of the breasts for women but not for men. The reason is self-evident: men and women are anatomically different, and one of those difference is that women's breasts are different in appearance from men's and fulfill a biological and sexual function that men's do not,[10] and the public exposure of female breasts produces reactions that public exposure of men's chests does not.[11] Requiring men to cover their chests makes about as much sense as placing urinals in women's restrooms in the name of "equal protection."

III. Petitioners Have Failed to Show an Adequate Basis for This Court to Grant Certiorari.

In a valiant but futile effort to demonstrate a split among jurisdictions on this issue, Petitioners rely largely upon *Free the Nipple - Fort Collins v. City of Fort Collins, Co.*, 916 F.3d 792 (10th Cir. 2019), in which the Tenth Circuit affirmed a District Court's preliminary injunction against enforcement of an ordinance which provided that "No female who is ten 910) years of age or older shall knowingly appear in

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[10] Although this is medically incorrect, in popular parlance it is common to say women have breasts but men do not.

[11] See, J.E. Robinson and R.V. Short, *Changes in Breast Sensitivity at Puberty, During the Menstrual Cycle, and at Parturition*, British Medical Journal 1, 1188-91 (1977).

any public place with her breast exposed ...." However, several factors should be noted about the *Fort Collins* case:

(1) The Fort Collins ordinance expressly applied to females but not to males; the Laconia ordinance prohibited both male and female public nudity but defined them differently.

(2) The City of Fort Collins acknowledged that its ordinance was a "gender-based classification."

(3) The Tenth Circuit only affirmed the District Court's preliminary injunction. The City of Fort Collins decided not to pursue the case further.

(4) The Tenth Circuit expressly stated in its opinion,

> We recognize that ours is the minority viewpoint. Most other courts, including a recent (split) Seventh Circuit panel, have rejected equal protection challenges to female-only toplessness bans.

The Tenth Circuit might choose to go beyond the other circuits in extending constitutional protection to nudity, and the City of Fort Collins might choose not to contest the Tenth Circuit's decision. But that does not constitute a basis for this Court to grant certiorari and overturn a New Hampshire Supreme Court decision that is consistent with the common law and with the United States Constitution and

with the previous decisions of this Court and of the vast majority of other courts.

CONCLUSION

Former Chief Justice Warren Burger wrote for this Court in *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 69 (1973) that

> The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as "wrong" or "sinful." The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Chief Justice Warren's words, the States' "right ... to maintain a decent society."

And the nudity or obscenity prohibited in the *Paris Adult Theatre* was in a theater behind closed doors and open only to consenting adults. The nudity prohibited by the Laconia ordinance is in public in full view to all, young and old alike.

Petitioners say on p. 26 of their brief, "Laconia's Ordinance regulating women's dress by proscribing exposure of their breasts clearly is grounded in such archaic, overbroad, and obsolescent notions about gender."

But that is not a basis for constitutional adjudication.

If in fact ordinances like that of Laconia are archaic and obsolete, Petitioners and their allies can work to change them through city councils, county commissions, state legislatures, and appeals to public opinion.

But to impose this sweeping moral and aesthetic change from the top down by Court edict would, in the late Justice Scalia's words, "violate a principle even more fundamental than no taxation without representation: no social transformation without representation." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2629 (2015) (Scalia, J., dissenting).

The Foundation urges this Court to deny Petitioners' petition for writ of certiorari.

Respectfully submitted,

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