STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0116

State of New Hampshire
v.
HEIDI LILLEY, KIA SINCLAIR & GINGER PIERRO

RULE 7 APPEAL OF FINAL DECISION OF
LACONIA DISTRICT COURT

REPLY BRIEF OF APPELLANTS/DEFENDANTS, HEIDI LILLEY, KIA SINCLAIR & GINGER PIERRO

APPELLANTS REQUEST
15 MINUTES ORAL ARGUMENT

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TEXT OF RELEVANT STATUTES

City of Laconia Ordinance Chapter 180: Indecent Exposure:

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

§ 180-1 Purpose and findings.

This article is adopted by the City of Laconia for the purpose of upholding and supporting public health, public safety, morals and public order. The conduct prohibited hereunder is deemed to be contrary to the societal interest in order and morality. In addition, the prohibited conduct has been widely found and is deemed to have harmful secondary effects in places and communities where it takes place, including crimes of various types and reduction of property values, not only in the immediate vicinity, but on a community-wide basis.

§ 180-2 Prohibited conduct.

A.

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

(1)

Engage in sexual intercourse;

(2)

Engage in deviate sexual conduct;

(3)

Appear in a state of nudity; or

(4)

Fondle the person's genitals or the genitals of another person.

(5)

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

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

B.

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

(1)

Has not been prosecuted for the offense;

(2)

Has not been convicted of the offense;

(3)

Has been acquitted of the offense; or

(4)

Has not engaged in the prohibited conduct.

§ 180-3 Exemption.

A.

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

B.

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

§ 180-4 Definitions.

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

NUDITY

> The showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple.

PUBLIC PLACE

A.

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

B.

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

C.

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

§ 180-5 Violations and penalties.

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

§ 180-6 Intent; construal of provisions.

A.

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

B.

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

Part 1 Art 2. Of the New Hampshire Constitution: All men have certain natural, essential, and inherent rights - among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness.

Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.

Part 1 Art. 22. Of the New Hampshire Constitution Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved.

First Amendment of the United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment of the United States Constitution:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.H. RSA 47:17 Bylaws and Ordinances. – The city councils shall have power to make all such salutary and needful bylaws as towns and the police officers of towns and engineers or firewards by law have power to make and to annex penalties, not exceeding $1,000, for the breach thereof; and may make, establish, publish, alter, modify, amend and repeal ordinances, rules, regulations, and bylaws for the purposes stated in this section. Provisions in this section granting authority to establish and collect fines for certain violations shall not be interpreted to limit the authority hereunder to establish and collect fines for any other violations:

I. In General. To carry into effect all the powers by law vested in the city.

II. Order and Police Duty. To regulate the police of the city; to prevent any riot, noise, disturbance, or disorderly assemblages; to regulate the ringing of bells, blowing of horns or bugles, and crying goods and other things; and to prescribe the powers and duties of police officers and watchmen.

III. Disorderly Houses and Gaming. To suppress and restrain disorderly houses and houses of ill-fame, gambling houses and places, billiard tables, nine or ten pin alleys or tables and ball alleys, and all playing of cards, dice or other games of chance; to restrain and prohibit all descriptions of gaming and fraudulent devices; and to authorize the destruction and demolition

of all instruments and devices used for the purpose of gaming.

IV. Sale of Liquor. To establish regulations for groceries, stores, restaurants, and places of public amusement; to authorize the entry of proper officers into all such places to inspect the same, and the seizure and forfeiture of all liquors and the instruments used or designed to be used in the manufacture or sale of the same, in violation of law.

V. Shows. To regulate or prohibit the exhibitions of natural or artificial curiosities, caravans, circuses, theatrical performances, or other shows.

VI. Porters, Vehicles, Etc. To license and regulate porters, cartmen and cartage, runners for boats, stages, cars, and public houses, hackney coaches, cabs, and carriages, and their drivers; the care and conduct of all animals, carriages, and teams, standing or moving in the streets; to prevent horse-racing and immoderate riding or driving in streets and on bridges; and to prevent cruelty to animals.

VII. Use of Public Ways. To regulate all streets and public ways, wharves, docks, and squares, and the use thereof, and the placing or leaving therein any carriages, sleds, boxes, lumber, wood, or any articles or materials, and the deposit of any waste or other thing whatever; the removal of any manure or other material therefrom; the erection of posts, signs, steps, public telephones, telephone booths, and other appurtenances thereto, or awnings; the digging up the ground by traffic thereon or in any other manner, or any other act by which the public travel may be incommoded or the city subjected to expense thereby; the securing by railings or otherwise any well, cellar, or other dangerous place in or near the line of any street; to prohibit the rolling of hoops, playing at ball or flying of kites, or any other amusement or practice having a tendency to annoy persons passing in the streets and sidewalks, or to frighten teams of horses within the same; and to compel persons to keep the snow, ice, and dirt from the sidewalks in front of the premises owned or occupied by them.

VIII. Traffic Devices and Signals.

(a) To make special regulations as to the use of vehicles upon particular highways, except as to speed, and to exclude such vehicles altogether from certain ways; to regulate the use of class IV highways within the compact limits and class V highways by establishing stop intersections, by erecting stop signs, yield right of way signs, traffic signals and all other traffic control devices on those highways over which the city council has jurisdiction. The erection, removal and maintenance of all such devices shall conform to applicable state statutes and the latest edition of the Manual on Uniform Traffic Control Devices.

(b) The commissioner of transportation shall only approve the installation and modification of traffic signals as to type, size, installation, and method of operation.

IX. Combustibles. To regulate the keeping, conveying and places of deposit of gunpowder and other combustible and dangerous materials; the use of candles, lights, and matches in barns, stables, and other buildings containing combustible and dangerous materials; to regulate the erection or use of buildings within the most compact part of the city, for any purpose which in the opinion of the city councils shall more immediately expose said city to destruction by fire, and to define the limits of such compact part.

X. Stock at Large. To regulate, restrain, or prohibit the keeping or running at large of horses, cattle, sheep, swine, geese, goats and other poultry and animals, or any of them, to create the limits of districts within which the same may be kept and the conditions and restrictions under which they may be kept.

XI. Dogs. To regulate the keeping of dogs and their running at large, require them to be licensed, and authorize the destruction of those kept or running at large contrary to the ordinance.

XII. Markets, Sales. To establish markets and market-places; regulate the place and manner of selling and weighing hay, selling pickled and other fish, and salted and fresh provisions; selling and measuring wood, lime, coal, and other heavy articles; and to appoint suitable persons to superintend and conduct the same; to prevent and punish forestalling and regrating; and to restrain every kind of fraudulent device and practice.

XIII. Vagrants, Obscene Conduct. To restrain and punish vagrants, mendicants, street beggars, strolling musicians, and common prostitutes, and all kinds of immoral and obscene conduct, and to regulate the times and places of bathing and swimming in the canals, rivers and other waters of the city, and the clothing to be worn by bathers and swimmers.

XIV. Nuisances. To abate and remove nuisances; to regulate the location and construction of slaughterhouses, tallow chandlers' shops, soap factories, tanneries, stables, barns, privies, sewers, and other unwholesome or nauseous buildings or places, and the abatement, removal or purification of the same by the owner or occupant; to prohibit any person from bringing, depositing, or having within the city any dead carcass or other unwholesome substance; to provide for the removal or destruction, by any person who shall have the same upon or near such person's premises, of any such substance, or any putrid or unsound beef, pork, fish, hides, or skins, and, on such person's default, to authorize the removal or destruction thereof by some officer of the city; to authorize and provide for the collection, removal, and destruction of garbage and other waste material, to make necessary regulations relative thereto, and to provide for payment therefor by assessment, or appropriation, or both. A municipality may create fines for violations related to garbage and other waste material regulations and a procedure for the administrative enforcement of such violations and collection of penalties as provided in RSA 48-A:8, VI, or in any other manner authorized by law.

XIV-a. Interfering With Voters. To regulate the distribution of campaign materials or electioneering or any activity which affects the safety, welfare and rights of voters at any election held for any purpose in such city. Such power shall not extend to the display of printed or written matter attached to any legally parked motor vehicle, nor shall such power extend to activities conducted wholly on private property so as not to interfere with people approaching or entering a polling place.

XIV-b. Local Election Reporting Requirements. Requiring the reporting of contributions to, and expenditures by, any candidate or political committee made for the purpose of influencing the election of any candidate for local elective office, or any person or committee for the purpose of influencing the vote on any local ballot or referendum question.

XV. Miscellaneous. Relative to the grade of streets, and the grade and width of sidewalks; to the laying out and regulating public squares and walks, commons, and other public grounds, public lights, and lamps; to trees planted for shade, ornament, convenience, or use, and the fruit of the same; to trespasses committed on public buildings and other public property, and in private yards and gardens; in relation to cemeteries, public burial grounds, the burial of the dead, and the returning and keeping records thereof, and bills of mortality, and the duties of physicians, sextons and others in relation thereto; relative to public wells, cisterns, pumps, conduits, and reservoirs; the places of military parade and rendezvous, and the marching of

military companies with music in the streets of the city; relative to precautions against fire; relative to oaths and bonds of city officers, and penalties upon those elected to such offices refusing to serve; and relative to licensing and regulating butchers, petty grocers, or hucksters, peddlers, hawkers, and common victualers; dealers in and keepers of shops for the purchase, sale or barter of junk, old metals or second-hand articles, and pawnbrokers; under such limitations and restrictions as to them shall appear necessary. They may make any other bylaws and regulations which may seem for the well-being of the city; but no bylaw or ordinance shall be repugnant to the constitution or laws of the state; and such bylaws and ordinances shall take effect and be in force from the time therein limited, without the sanction or confirmation of any other authority whatever.

XVI. Warnings and Citations. To establish a procedure for the issuance of warnings and citations for the violation of health, fire, planning board, building, licensing, zoning, and housing codes and ordinances.

XVII. Drug-Free Zones. Establish as a drug-free zone any area inclusive of public housing authority property and within 1,000 feet of such public housing authority property. If such drug-free zones are established, the municipality shall publish a map clearly indicating the boundaries of such drug-free zone, which shall be posted in a prominent place in the district or municipal court of jurisdiction, the local police department, and on the public housing authority property. The municipality shall also develop signs or markings for the drug-free zone which shall:

(a) Be posted in one or more prominent places in or near the public housing authority property; and

(b) Indicate that the posted area is a drug-free zone which extends to 1,000 feet surrounding such property; and

(c) Warn that a person who violates RSA 318-B, the controlled drug act, within the drug-free zone, shall be subject to severe criminal penalties under RSA 318-B and a penalty of up to $1,000 under this paragraph.

XVIII. Automobile Parking Controls. The city councils shall have the authority to adopt such bylaws and ordinances as are necessary to control the parking, standing and stopping of automobiles within the city limits, including ordinances allowing for the towing or immobilization of automobiles for nonpayment of parking fines and creating parking fines recoverable by means of civil process.

XIX. Businesses Obtaining City Permits. To establish regulations relative to businesses obtaining city permits.

Source. 1846, 384:17. GS 44:11. GL 48:10. PS 50:10. 1905, 10:1. 1907, 35:1. 1915, 55:1; 98:1. 1923, 15:1. PL 54:12. 1935, 117:2. 1941, 35:1. RL 66:13. RSA 47:17. 1961, 26:1. 1971, 512:9. 1981, 298:2. 1983, 166:2. 1986, 102:1. 1991, 74:1; 364:7. 1993, 183:1. 1996, 268:1, 5. 2006, 202:1. 2007, 43:2. 2009, 270:2, 3, eff. Jan. 1, 2010.

N.H. RSA 354-A:1 Title and Purposes of Chapter. – This chapter shall be known as the "Law Against Discrimination." It shall be deemed an exercise of the police power of the state for the

protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the constitution of this state concerning civil rights. The general court hereby finds and declares that practices of discrimination against any of its inhabitants because of age, sex, race, creed, color, marital status, familial status, physical or mental disability or national origin are a matter of state concern, that such discrimination not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants. A state agency is hereby created with power to eliminate and prevent discrimination in employment, in places of public accommodation and in housing accommodations because of age, sex, race, creed, color, marital status, familial status, physical or mental disability or national origin as herein provided; and the commission established hereunder is hereby given general jurisdiction and power for such purposes. In addition, the agencies and councils so created shall exercise their authority to assure that no person be discriminated against on account of sexual orientation.

Source. 1992, 224:1. 1997, 108:8, eff. Jan. 1, 1998.

N.H. RSA 354-A:2 Definitions. – In this chapter:

I. "Commercial structure" means any building, structure, or portion thereof which is continuously or intermittently occupied or intended for occupancy by a commercial or recreational enterprise, whether operated for profit or not, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

II. "Commission," unless a different meaning clearly appears from the context, means the state commission for human rights created by this chapter.

III. "Covered multifamily dwellings" means:

(a) Buildings consisting of 4 or more units if such buildings have one or more elevators; and

(b) Ground floor units in other buildings consisting of 4 or more units.

IV. "Disability" means, with respect to a person:

(a) A physical or mental impairment which substantially limits one or more of such person's major life activities;

(b) A record of having such an impairment; or

(c) Being regarded as having such an impairment.

Provided, that "disability" does not include current, illegal use of or addiction to a controlled substance as defined in the Controlled Substances Act (21 U.S.C. 802 sec. 102).

V. "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

VI. "Employee" does not include any individual employed by a parent, spouse or child, or any individual in the domestic service of any person.

VII. "Employer" does not include any employer with fewer than 6 persons in its employ, an exclusively social club, or a fraternal or religious association or corporation, if such club, association, or corporation is not organized for private profit, as evidenced by declarations filed with the Internal Revenue Service or for those not recognized by the Internal Revenue Service, those organizations recognized by the New Hampshire secretary of state. Entities claiming to be religious organizations, including religious educational entities, may file a good faith declaration with the human rights commission that the organization is an organization affiliated with, or its operations are in accordance with the doctrine and teaching of a recognized and organized religion to provide evidence of their religious status. "Employer" shall include the state and all political subdivisions, boards, departments, and commissions thereof.

VIII. "Employment agency" includes any person undertaking to procure employees or opportunities to work.

IX. "Familial status" means one or more individuals, who have not attained the age of 18 years of age, and are domiciled with:

(a) A parent, grandparent or another person having legal custody of such individual or individuals; or

(b) The designee of such parent or other person having such custody, with the written permission of such parent or other person.

"Familial status" also means any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

X. "Labor organization" includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection in connection with employment.

XI. "Multiple dwelling" means 2 or more dwellings, as defined in paragraph V, occupied by families living independently of each other.

XII. "National origin" includes ancestry.

XIII. "Person" includes one or more individuals, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, trustees in bankruptcy, receivers, and the state and all political subdivisions, boards, and commissions thereof.

XIV. "Place of public accommodation" includes any inn, tavern or hotel, whether conducted for entertainment, the housing or lodging of transient guests, or for the benefit, use or accommodations of those seeking health, recreation or rest, any restaurant, eating house, public conveyance on land or water, bathhouse, barbershop, theater, golf course, sports arena, health care provider, and music or other public hall, store or other establishment which caters or offers its services or facilities or goods to the general public. "Public accommodation" shall

not include any institution or club which is in its nature distinctly private.

XIV-a. "Qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this chapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

XIV-b. "Reasonable accommodation" may include:

(a) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities.

(b) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

XIV-c. "Sexual orientation" means having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality. This definition is intended to describe the status of persons and does not render lawful any conduct prohibited by the criminal laws of this state or impose any duty on a religious organization. This definition does not confer legislative approval of such status, but is intended to assure basic rights afforded under this chapter.

XIV-d. "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in this paragraph. In determining whether an accommodation would impose an undue hardship on an employer, factors to be considered include:

(a) The nature and cost of the accommodation needed under this chapter.

(b) The overall financial resources of the facility involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility.

(c) The overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; and the number, type, and location of its facilities.

(d) The type of operation or operations of the employer, including the composition, structure, and functions of the workforce of such employer; the geographic separateness, administrative, or fiscal relationship of the facility in question to the employer.

XV. "Unlawful discriminatory practice" includes:

(a) Practices prohibited by RSA 354-A;

(b) Practices prohibited by the federal Civil Rights Act of 1964, as amended (PL 88-352);

(c) Practices prohibited by Title VIII of the Civil Rights Act of 1968, as amended (42 U.S.C. §&sec 3601-3619);

(d) Aiding, abetting, inciting, compelling or coercing another or attempting to aid, abet, incite, compel or coerce another to commit an unlawful discriminatory practice or obstructing or preventing any person from complying with this chapter or any order issued under the authority of this chapter.

Source. 1992, 224:1. 1997, 108:9. 2006, 181:1, eff. Jan. 1, 2007; 274:1, eff. July 1, 2006.

N.H. RSA 354-A:16 Equal Access to Public Accommodations a Civil Right. – The opportunity for every individual to have equal access to places of public accommodation without discrimination because of age, sex, race, creed, color, marital status, physical or mental disability or national origin is hereby recognized and declared to be a civil right. In addition, no person shall be denied the benefit of the rights afforded by this section on account of that person's sexual orientation.

Source. 1992, 224:1. 1997, 108:15, eff. Jan. 1, 1998.

N.H. RSA 354-A:17 Unlawful Discriminatory Practices in Public Accommodations. – It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, because of the age, sex, race, creed, color, marital status, physical or mental disability or national origin of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof; or, directly or indirectly, to publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of age, sex, race, creed, color, marital status, physical or mental disability or national origin; or that the patronage or custom thereat of any person belonging to or purporting to be of any particular age, sex, race, creed, color, marital status, physical or mental disability or national origin is unwelcome, objectionable or acceptable, desired or solicited. In addition, no person shall be denied the benefit of the rights afforded by this section on account of that person's sexual orientation.

Source. 1992, 224:1. 1997, 108:15, eff. Jan. 1, 1998.

N.H. RSA 354-A:25 Construction. – No provision of this chapter shall be deemed to supersede any other provision of law for the protection of minors or for the regulation of the employment of minors. The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal any of the provisions of the civil rights law or any other law of this state relating to discrimination because of age, sex, race, creed, color, marital status, physical or mental disability or national origin; but, as to acts declared unlawful by this chapter the procedure provided in this chapter shall, while pending, be exclusive and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned. If such individual institutes any action based on such grievance without resorting to the procedure provided in this chapter, such person may not subsequently resort to the procedure in this chapter, provided, however, that nothing in this section shall prevent any individual from applying for or receiving unemployment compensation while the procedure provided for in this chapter is pending or after the procedure provided in this chapter has been concluded. This section shall not prevent the commission for human rights from investigating and acting upon a complaint of discrimination when the complainant has also filed a claim for unemployment compensation in which the issue of illegal discrimination is raised.

Source. 1992, 224:1, eff. May 13, 1992.

ARGUMENT

I. The Ordinance Violates RSA 354-A with Respect to Public Accommodations Run by Laconia, Including Public Beaches

The ordinance violates State law to the extent that it bans female toplessness in beaches and other public accommodations run by the City of Laconia. N.H. RSA 354-A, the Law Against Discrimination, makes it clear that the State does not condone sex discrimination or authorize towns or cities to discriminate upon someone in places of public accommodations based upon their sex. This statute does not contain an illicit motive or animus requirement, nor does it contain a balancing test. *See* RSA 354-A:17. This statute imposes a strict rule. Indeed, the legislature and this Court has made clear that this statute must be interpreted broadly.[1]

The State argues that RSA 354-A does not apply to municipalities because of the language "person" in RSA 354-A:17. *See* State's Br. at 42. The State is wrong, as the statute defines "person" to include "the state and *all political subdivisions*, boards, and commissions thereof." *See* RSA 354-A:2, XIII (emphasis added). Municipalities like Laconia, which are political subdivisions, are therefore plainly covered under the Act to the extent they maintain places of public accommodations.

The State also argues that a public beach maintained, run, and kept open by Laconia—which is where Appellants were cited—is not a "place of public accommodation." *See* State's Br. at 42. This is also incorrect. "Places of public accommodation" are broadly defined to include, among other things, "establishment[s] which cater[] or offer[] its services or facilities or goods to the general public." *See* RSA 354-A:2, XIV; *see also Franklin Lodge of Elks v. Meroux*, 149 N.H. 581, 585 (2003) (acknowledging and broadly applying this catch-all

[1] RSA 354-A:25 ("The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof."); *see also Franklin Lodge of Elks v. Meroux*, 149 N.H. 581, 586 (2003) ("we are mindful of the legislative directive to broadly interpret the statutory scheme to effectuate its purpose").

category). Here, public beaches run by Laconia, which are open for public recreation and where females would be barred from going topless, obviously fit this expansive definition[2].

The State also argues, as the trial court held, that banning females from exposing their breasts is simply a conduct-based restriction at a place of public accommodation. But this ignores the reality that this restriction plainly discriminates on the basis of gender by barring only females—but not males—from a place of a public accommodation if they engage in toplessness. For example, Chapter 354-A would clearly bar Laconia from passing an ordinance banning African-Americans from having dreadlocks in public accommodations run by the City, as this restriction discriminates on the basis of race. So too must Chapter 354-A bar Laconia from banning females—but not males—from exposing their breasts in public accommodations run by the City. This strict interpretation of Chapter 354-A is fully consistent with how several other states have strictly interpreted their gender discrimination laws. If Laconia wishes to run a public beach, it must fully comply with New Hampshire's public accommodations laws.[3]

"To the extent it is unclear whether Appellants are raising express or implied pre-emption, both arguments are made under RSA 354-A. It is expressly forbidden under RSA 354-A: 16, 17, and implicitly prohibited under RSA 354-A:1 (which does not in itself expressly

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[2] Even Laconia's ordinance makes it clear it applies to places of public accommodation: § 180-4 Definitions. For the purpose of this article, the following words shall be defined as follows:... PUBLIC PLACE A. Any public street, way, alley, parking area, park, common, beach or other property or public institution of the City. B. Any outdoor location, whether publicly or privately owned, which is visible to the public at the time the prohibited conduct occurs. C. Any area within any theater, hall, restaurant, food service establishment, shopping mall, business, place of public accommodation or other private property which is generally frequented by the public.

[3] *See Koire v. Metro Car Wash*, 707 P.2d 195, 204 (Cal. 1985) (barring a promotional car wash discount to women under California's Unruh Act); *City of Clearwater v. Studebaker's Dance Club*, 516 So.2d 1106, 1109 (Fla. App. 1987) (holding that club policy of allowing women into "Pink Ladies' Club" at a bar, which was a special membership that included discounted drink prices, was in violation of local anti-discrimination ordinances); *Pa. Liquor Control Bd. v. Dobrinoff*, 471 A.2d 941, 943 (Pa. Commw. Ct. 1984) (holding that the practice of admitting women into "go-go bar" for free while charging men one dollar was in violation of the Human Relations Act); *Ladd v. Iowa W. Racing Ass'n*, 438 N.W.2d 600, 602 (Iowa 1989) (holding that because the Iowa Civil Rights Act did not provide de minimis defense based on legitimate purpose, the practice of admitting women into a racetrack at a reduced admission price violated the Act); *Peppin v. Woodside Delicatessen*, 506 A.2d 263, 267 (Md. Ct. Spec. App. 1986) (affirming panel decision that "Skirt and Gown Night" discount violated the Human Relations Act because it was "discriminatory subterfuge" and merely an extension of ladies' night).

contradict the actual Laconia ordinance prohibiting women from appearing topless in public, but it does expressly contradict the Laconia ordinance's stated purpose and intent).

II. The Public Indecency Ordinance Violates the Equal Rights Amendment to Part I, Article 2 of the New Hampshire Constitution.

If the Court concludes that the Ordinance does not violate RSA 354-A, then the Court must conclude the Ordinance violates the Equal Rights Amendment to Part I, Article 2 of the New Hampshire Constitution.

i. Appellants Preserved Their Claim Under the New Hampshire Constitution

In an attempt to evade the strict scrutiny standard that this Court must apply to Laconia's ordinance under the Equal Rights Amendment to Part I, Article 2 of the New Hampshire Constitution, the State argues that Appellants have not preserved their claim under the Equal Rights Amendment. *See* State's Br. at 11-14. This argument fails.

The State essentially argues that preservation requires the Appellants to raise not only all their legal arguments before the trial court, but also every discrete point in support of those arguments. This is not—and has never been—the standard for preservation. The general rule is that "parties may not have judicial review of matters not raised in the forum of trial." *Matter of Kelly,* 164 A.3d 379, 382 (N.H. 2017); *see also Thorndike v. Thorndike*, 154 N.H. 443, 447 (2006) (same). An argument is preserved when the Court and opposing counsel are sufficiently placed on notice of the argument. *See Appeal of Bosselait,* 130 N.H. 604, 607 (1988) (finding there was no preservation when plaintiff's remark could not reasonably "put anyone on notice" that the plaintiffs sought to raise a State Constitutional claim).

Here, Appellants put both the Court and the State on notice of—and therefore preserved on appeal—their contention that the ordinance, on its face, fails strict scrutiny and therefore

violates the Equal Rights Amendment. This is amply demonstrated in the record. *See* Trial Court Appellants' Motion to Dismiss 4 (arguing that "The city ordinance violates the due process/ equal protection clause of the United States Constitution as well as Art 1.and Art 2. of the N.H. Constitution .... As the ordinance discriminates based upon sex/gender, it is subject to strict scrutiny."); Oct. 14, 2016 Motion Hearing 68:13-69:4 (Defense counsel: "In this case, where it touches upon First Amendment or equal protection issues, those are entitled to strict scrutiny ... Now whatever Laconia's goal was in this case, there were certainly other means to do it. If the female, Nicole, is harming people, offending people, causing concern for people, if Laconia wants to regulate that so much, they could do so in a gender neutral fashion by requiring everyone to have their nipples covered in public, Laconia chose not to do that."[4] Moreover, preservation is particularly obvious here where the Court specifically acknowledged Appellants' facial claim and then (in error) rejected it. *See* Court's Nov. 20, 2016 Order on Motion to Dismiss 4-5 ("Arguing the ordinance's violation of their equal protection expectations by ordaining a gender/sex based regulation and, therefore, gender discrimination, the Appellants urge that the Court must apply Strict Scrutiny standard of review .... This subject ordinance creates no violation of the Equal Protection clause as it treats all females equally").[5] Thus, Appellants preserved their claim under the Equal Rights Amendment.[6]

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[4] Although the transcript says "Nicole", the word said at Court was "nipple."

[5] The State also erroneously contends that Appellants "never argued that there are no physiological or biological differences between male and female nipples, or that distinctions based on moral views are unrelated to them." *See* State's Br. at 12. *Both* Appellants and the State raised the issue of physiological differences before the trial court. Appellants specifically addressed whether "moral issue[s] in the female nipple or breast" are inherently dangerous. *See* Oct. 14, 2016 Motion Hearing 86:1-4 (Defense counsel: "*In regards to physiological differences*, I would suggest there's nothing inherently dangerous, it being a safety, health, or moral issue in the female nipple or female breasts.") (emphasis added). Further the trial court acknowledged Appellants' argument that the difference between the sexes was not indisputable. *See* Court's Nov. 20, 2016 Order on Motion to Dismiss 4 ("Protecting the public sensibilities is an important governmental interest based on an indisputable difference between the sexes.").

[6] The State argues none of the ACLU-NH's "additional arguments" and most of their citations are improperly before this Court. SB 12–13. Even if the ACLU-NH was construed as a party to this case (which it is not), the State, once again, adopts a granular view of preservation that this Court has never adopted. Here, the ACLU-NH raises the same facial equal protection argument that Appellants have asserted from the inception of this case. In any event, the State fundamentally misunderstands the role of an amicus brief. Amicus curiae's function is "to make useful suggestions to the court." *See Blanchard v. Boston & M.R.R.* 167 A.

ii. Strict Scrutiny Applies Because the Ordinance Makes a Gender-Based Classification on its Face.

As this Court has itself explained on two separate occasions, if a law makes a gender-based classification on its face, strict scrutiny applies under the Equal Rights Amendment. *See LeClair v. LeClair*, 137 N.H. 213, 222 (1993) (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'"); *Cheshire Med. Ctr. v. Holbrook*, 140 N.H. 187, 189-90 (1995) (strict scrutiny applies to a gender-based classification). Tellingly, the State makes no reference in its entire brief to the *Leclair* and *Holbrook* decisions.[7]

The State attempts to avoid strict scrutiny by contending that the ordinance "treats all females equally" and is based on the view that "females baring their breasts in public ... is still seen by society, as unpalatable." *See* State's Br. at 14. That argument misunderstands the equal protection analysis. More specifically, the State conflates the threshold question of whether a law makes a gender-based classification (thereby requiring strict scrutiny review) with the separate and subsequent inquiry of whether a gender-based classification is justified under strict scrutiny. The question of whether the ordinance is justified based on "real differences" and societal norms goes only to whether, when applying strict scrutiny to this gender-based classification, the State can meet it burden of showing that the ordinance is narrowly tailored to a

158, 160 (N.H. 1933). As such, limiting amicus curiae to the exact arguments raised in the trial courts contradicts their role of "remind[ing] the court of some matter of law which has escaped its notice, and in regard to which it appears to be in danger of going wrong." *Id.* Thus, "while it is true that 'amici may not present legal theories not argued by the parties,' they may present 'variations on the arguments presented by' a party." *Velerio-Ramirez v. Lynch*, 808 F.3d 111, 117 (1st Cir. 2015) (quoting *Albathani v. INS*, 318 F.3d 365, 375 n.6 (1st Cir. 2003)); *see Lewis v. Harris*, 875 A.2d 259, 269 n. 2 (N.J. Super. Ct. App. Div. 2005) ("Although an amicus curiae is ordinarily limited to arguing issues raised by the parties, an amicus may present different arguments than the parties relating to those issues"); *Keating v. State*, 157 So. 2d 567, 569 (Fla. Dist. Ct. App. 1963) ("amicus is not at liberty to inject new issues in a proceeding; however, amicus is not confined solely to arguing the parties' theories in support of a particular issue. To so confine amicus would be to place him in a position of parroting 'me too' which would result in his not being able to contribute anything to the court by his participation in the cause").

[7] This Court cannot decline to apply strict scrutiny without also overruling *Leclair* and *Holbrook*. The State has not asked this Court to overrule *Leclair* and *Holbrook*, nor argued that the principles of state decisis should not apply here. Instead, the State has simply ignored these binding decisions.

compelling governmental interest. *See* § II.iii *infra*. Whether the ordinance is justified based on "real differences" or moral judgments *does not* go to the threshold question of whether the ordinance, on its face, makes a gender-based classification, thereby triggering strict scrutiny review. *See Appeal of Marmac*, 130 N.H. 53, 58 (1987) ("The first question in an equal protection analysis is whether the State action in question treats similarly situated persons differently."). This threshold question here is a simple one: the law either makes a gender-based classification on its face or it does not. If it does, as both this Court and the United States Supreme Court have explained, then heightened scrutiny applies. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017) ("Successful defense of legislation that differentiates on the basis of gender, we have reiterated, requires an exceedingly persuasive justification.") (internal citations omitted); *LeClair*, 137 N.H. at 222 (same, applying strict scrutiny); *Holbrook*, 140 N.H. at 189-90 (same, applying strict scrutiny).

Here, the ordinance makes a gender-based classification on its face. Under the ordinance, a man on a public beach in Laconia is permitted to bare his nipple, while a similarly-situated woman in the exact same location on the exact time of day is not permitted to bare her nipple. Thus, strict scrutiny applies. Indeed, the purpose of strict scrutiny under the New Hampshire Constitution is to test whether an ordinance like this one that makes a gender-based classification is benign or whether it misuses gender and fosters harmful and divisive gender stereotypes without a compelling justification. *See Bush v. Vera*, 517 U.S. 952, 984 (1996) (plurality opinion) ("We subject racial classifications to strict scrutiny precisely because that scrutiny is necessary to determine whether they are benign ... or whether they misuse race and foster harmful and divisive stereotypes without a compelling justification.").[8]

[8] Here, given the language and history of the Equal Rights Amendment, this Court's reasoning as to the threshold necessary for a gender-based classification to receive strict scrutiny would inevitably apply to race-based classifications. Moreover, for an

iii. The Ordinance Fails Both Strict and Intermediate Scrutiny

Under either strict or intermediate scrutiny, the ordinance fails and the burden falls squarely on the State to justify this gender-based classification. *State v. Zidel*, 156 N.H. 684, 686 (2008) (burden on State when applying strict scrutiny). This legal principle, and the significant burdens it imposes on the State, are well settled in New Hampshire. *See id.*

Neither the State nor Laconia has, as is required, provided evidence that this gender-based classification is necessary. Both intermediate scrutiny and strict scrutiny require the government to provide actual evidence justifying a classification based on a suspect class. As this Court explained in *Guare* when citing New Hampshire equal protection case law, "[t]o meet this burden [under intermediate scrutiny], the government may not rely upon justifications that are hypothesized or invented post hoc in response to litigation, nor upon overbroad generalizations." *Guare v. State*, 167 N.H. 658, 665 (2015) (quoting *Cmty. Res. for Justice v. City of Manchester*, 154 N.H. 748, 762 (2007) (discussing intermediate scrutiny test in equal protection context and rejecting post hoc justifications)). The State has not met its burden of presenting actual evidence establishing a significant or compelling justification considered at the time the ordinance was enacted in 1998. Despite the State's request that this Court simply "take the Council at its word" concerning the necessity of the ordinance's gender-based classification, bare and conclusory legislative findings are insufficient to warrant a gender-based classification. *See Guare*, 167 N.H. at 668 (noting that the State must establish "that the challenged language is actually necessary"); *see also Indep. Inst. v. Buescher*, 718 F. Supp. 2d 1257, 1276 (D. Colo.

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examination of this "threshold" question, see, e.g., Richard Banks, Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse, 48 UCLA L. Rev. 1075, 1109 (2001) ("Race-dependent state action is not exempt from strict scrutiny merely because it might be characterized as benign or useful .... More recently, the Court has rejected the benign/invidious dichotomy in determining the appropriate level of scrutiny. The purpose of strict scrutiny, the Court has stated, is to distinguish those laws that are, in fact, benign from those that are invidious."). *See also Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) ("Our decisions have established that all laws that classify citizens on the basis of race ... are constitutionally suspect and must be strictly scrutinized."); *Johnson v. De Grandy*, 512 U.S. 997, 1029-30 (1994) ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.") (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)).

2010) (in strict scrutiny case, rejecting legislative findings not supported by actual evidence). Indeed, the legislative purpose and findings here say nothing about why females are or should be treated different than males.

The ordinance also fails strict or intermediate scrutiny because it is not narrowly tailored. In addressing tailoring, the State focuses on perceived "real differences." The only non-morals based "difference" presented by the State is that the female breast, but not the male breast, "is a mammary gland." *See* State's Br. at 19. At the outset, this is a post hoc justification that is not in the legislative record from 1998 and was formulated solely in response to this litigation. Therefore, this argument must be rejected. *See Guare*, 167 N.H. at 668 (rejecting post hoc justifications when applying intermediate scrutiny). In any event, as the ACLU-NH's amicus brief demonstrates, this assumption is incorrect. Aside from this perceived difference, the State's "real differences" argument is really about morality and sexual stereotypes, not biology. 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, as one court recently held, 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."); *see also New York v. David*, 585 N.Y.S.2d 149, 150 (N.Y. Cnty. Ct. 1991) (holding that New York's female toplessness ban violated New York's equal protection principles). Simply put, citing tradition is not good enough, particularly when used to perpetuate the social inferiority of women by removing their option to choose what any man is allowed to choose. Indeed, the

City's contention that the female breast is sexualized only highlights its discriminatory nature. This contention focuses exclusively on the male response to viewing topless women. There is no focus on the female actor herself.[9]

Finally, the State contends that, if the Court strikes down the Laconia ordinance, so too must three criminal statutes that make gender-based distinctions. *See* State's Br. at 22. Those criminal statutes are fundamentally different in purpose and justification than the ordinance, as they are tailored to protect victims from criminal behavior—particularly, from nonconsensual sexual misconduct and violations of privacy. Unlike these criminal statutes, the ordinance does not protect female victims who have been harmed or had their privacy violated without consent; rather, the ordinance penalizes females who *consensually and publicly* wish to bare their breast and specifically invoke their right to be treated equally. Put another way, the application of these criminal statutes do not implicate a female's invocation of her equal protection rights at all.[10]

iv. The Court Cannot Re-write the Ordinance

The State argues that, if this Court finds the Ordinance violates the Equal Rights Amendment, the Court can "simply strike the word 'female' from the part of the ordinance at issue here," therefore prohibiting *both* men and women from "showing [] the [] breast with less than a fully opaque covering of any part of the nipple.[11] The State's view would constitute an impermissible judicial rewriting of an otherwise unambiguous (and unconstitutional) law.

Courts cannot rewrite a law in the face of constitutional infirmities when such a rewrite would run contrary to clear legislative intent. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383,

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[9] Appellant referenced *Free the Nipple-Springfield Residents Promoting Equality. v. City of Springfield*, No. 15-3467-CV-S-BP, 153 F. Supp. 3d 1037 (W.D. Mo. 2015) in their brief. There, the Court denied Springfield's Motion to Dismiss on equal protection and free speech grounds. On October 4, 2017, the Court found in favor of the City with respect to equal protection. On November 3, 2017, the plaintiffs filed a notice of appeal with respect to this decision. In any event, that district court case was decided under a lower level of scrutiny as is required here under the Equal Rights Amendment.

[10] In regard to the "secondary effects" argument raised by the State, the legislature has already expressly rejected this argument (i) when enacting its Law Against Discrimination in the context of public accommodations (see Chapter RSA 354-A), and (ii) when rejecting a statewide ban on toplessness in 2016. *See* ACLU-NH Amicus Br. at 19 n.7.

[11] *See* State's Br. at 23.

397 (1988) ("[W]e will not rewrite a ... law to conform it to constitutional requirements."). 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."). The Laconia City Council, through the ordinance's plain terms, was clear that its ban applies *only* to females—not both males and females as the State's interpretation would mandate. New Hampshire courts "may not add words to a statute that the legislature did not see fit to include," *see State v. Lukas*, 164 N.H. 693, 694 (2013), because doing so "is the province of the legislature." *See Balke v. City of Manchester*, 150 N.H. 69, 73 (2003).[12]

Because the Ordinance, as intended by the Laconia City Council, unconstitutionally makes a gender-based classification, the only remedy this Court can impose is to (i) dismiss the criminal case and (ii) declare unconstitutional the entire sentence "or the showing of the female breast with less than a fully opaque covering of any part of the nipple."[13]

As to Appellants' additional claims, Appellants rest on their opening brief.[14]

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[12] *See also Montenegro v. N.H. DMV*, 166 N.H. 215, 220 (2014) (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").

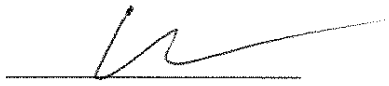
[13] Put another way, the term "female"—the deletion of which would cause the ordinance to now ban nipple displays of *both* males and females—is not severable. This is for three reasons. First, as explained above, this remedy would fundamentally rewrite the ordinance contrary to the Laconia City Council's intent. Severance must not "give[] a statute meaning the legislature did not intend, either by addition or subtraction from its terms." *Claremont Sch. Dist. v. Governor*, 144 N.H. 210, 218 (1999). Second, and relatedly, severing only the word "female" would alter the ordinance's fundamental purpose of discriminating on the basis of gender. When provisions "central to the legislature's purpose in enacting [a] statute" are unconstitutional, and "[t]he fundamental structure of the statute ha[s] been affected, the entire [statute] must be deemed invalid." *Antoniou v. Kenick*, 124 N.H. 606, 609 (1984). Third, no one knows whether the Laconia City Council would approve of banning *both* male and female nipple displays. Indeed, the language of the ordinance clearly indicates that Laconia does *not* want to apply this prohibition to males. New Hampshire courts do not sever unconstitutional portions of a statute and allow the rest to remain in force when the Court is "not sure whether the legislature would have enacted [the valid provisions] in the absence of all of the unconstitutional provisions." *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 531 (1983).

[14] The argument under RSA 47:17, XIII fails because the ordinance applies to all females in public in Laconia—and is not limited to public beaches or swimwear. RSA 47:17, II and 47:17, XV—which deal with preventing a disturbance and a municipality's well-being—are also not applicable. Laconia's ordinance would ban female toplessness even in the absence of a public disturbance. Public toplessness is banned even where no one can even see the toplessness—toplessness which would also have no impact on the City's well-being (which also highlights its lack of tailoring under the Equal Rights Amendment).

CONCLUSION

For the foregoing reasons, Defendants ask this court to vacate their conviction by invalidating City of Laconia Ordinance Ch. 180-2 and Ch. 180-4 as it applies to prohibiting display of the female nipple in public.

Respectfully Submitted,



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CERTIFICATION

I hereby certify that two copies of the brief and exhibits will be forwarded to the Attorney General , 33 Capitol St. Concord, NH 03301 & NH ACLU on this day, 11-07 by first class mail.

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