THE STATE OF NEW HAMPSHIRE

LACONIA DISTRICT COURT

STATE OF NEW HAMPSHIRE

V.

HEIDI LILLEY, KIA SINCLAIR, GINGER PIERRO

16-CR,

DEFENDANT’S MOTION TO DISMISS

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

**FACTS**

1. Defendants[[1]](#footnote-1) are charged with a violation of City of Laconia Ordinance 180-2 Public Indecency: Prohibited conduct. Presumably, the charge alleges defendant appeared in a state of nudity which under City of Laconia Ordinance Sec. 180-4 is defined as: “The showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple.”

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

3. Defendant belongs to/supports the “Free the Nipple” Movement.

“Free The Nipple is a film, an equality movement, and a mission to empower women across the world. We stand against female oppression and censorship, both in the United States and around the globe. Today, in the USA it is effectively ILLEGAL for a woman to be topless, breastfeeding included, in 35 states. In less tolerant places like Louisiana, an exposed nipple can take a woman to jail for up to three years and cost $2,500 in fines. Even in New York City, which legalized public toplessness in 1992, the NYPD continues to arrest women. We’re working to change these inequalities through film, social media, and a grassroots campaign.

THE MOVEMENT

Free The Nipple has become a “real life” equality movement that’s sparked a national dialogue. Famous graffiti artists, groups of dedicated women, and influencers such as Miley Cyrus, Liv Tyler, and Lena Dunham have shown public support which garnered international press and created a viral #FreeTheNipple campaign. The issues we’re addressing are equal rights for men and women, a more balanced system of censorship, and legal rights for all women to breastfeed in public.

THE FACTS

Over 75 years ago it was illegal in all 50 states of America for men to be ‘Shirtless’ on a beach. A small dedicated group fought the puritanical status quo, the police and the courts. After several arrests and protests men finally won their basic human right to be ‘TOPLESS’ in public in 1936. Today there are 37 states in the USA that still arrest women for this same freedom, in some states that even includes breastfeeding. “ See http://freethenipple.com/what-is-free-the-nipple/

4. The Free the Nipple movement in New Hampshire has received significant media coverage[[2]](#footnote-2). Additionally, the legislature has addressed this issue twice in the past term.

HB 1525-FN had a unanimous recommendation by the committee to be inexpedient to legislate (kill the bill), and was determined inexpedient to legislate by the House. That bill’s text would have amended RSA 645:I(b) Public decency to include: Such person purposely exposes his or her anus or, if a woman, purposely exposes the areola or nipple of her breast or breasts in a public place and in the presence of another person with reckless disregard for whether a reasonable person would be offended or alarmed by such act.

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

AN ACT enabling the state and municipalities to adopt laws and ordinances regulating attire on state and municipal property.

 Be it Enacted by the Senate and House of Representatives in General Court convened:

1  New Subparagraph; Powers and Duties of Towns; Power to Make Bylaws.  Amend RSA 31:39, I by inserting after subparagraph (p) the following new subparagraph:

(q)  Regulating the times and places of bathing, sunbathing, and swimming in municipal parks, beaches, pools, or other municipal properties, and the clothing to be worn by users.  Nothing in this subparagraph shall authorize a town to prohibit breastfeeding in such town properties.

2  Powers of City Councils; Bylaws and Ordinances; Power to Make Bylaws.  Amend RSA 47:17, XIII to read as follows:

XIII.  Vagrants, Obscene Conduct.  To restrain and punish vagrants, mendicants, street beggars, strolling musicians, and common prostitutes, and all kinds of immoral and obscene conduct, and to regulate the times and places of bathing, sunbathing, and swimming in the canals, rivers and other waters of the city, or other city properties, and the clothing to be worn by [bathers and swimmers] users.  Nothing in this paragraph shall authorize a city to prohibit breastfeeding in such city properties.

3  New Subparagraph; Department of Resources and Economic Development; Rulemaking.  Amend RSA 12-A:2-c, II by inserting after subparagraph (f) the following new subparagraph:

(g)  The times and places of bathing, sunbathing, and swimming in state waters or in state parks, forests, or other state recreational areas, and the clothing to be worn by users.  Nothing in this subparagraph shall prohibit breastfeeding in such state recreational areas.

4  Effective Date.  This act shall take effect 60 days after its passage.”

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

5. Defendant’s conduct involved expression and political speech and has artistic value. By appearing topless, Defendant not only enjoyed the value of the right afforded to males under the town ordinance, but also engaged in promoting an idea and message.

**ARGUMENT**

**I. THE TOWN ORDINANCE IS UNCONSTITUTIONAL**

A: The city ordinance violates the due process/ equal protection clause of the United States Constitution as well as Art 1.and Art 2. of the N.H. Constitution.

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

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

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

“In considering an equal protection challenge under our State Constitution, "we must first determine the appropriate standard of review: strict scrutiny; fair and substantial relationship; or rational basis." Boehner v. State, 122 N.H. 79, 83, 441 A.2d 1146, 1148 (1982). Equal protection under the law does not forbid classifications, see 2 B. SCHWARTZ, RIGHTS OF THE PERSON § 471, at 496-97 (1968), but requires us to examine the individual rights affected and the purpose and scope of the State-created classifications. See Allgeyer v. Lincoln, 125 N.H. 503, 508-09, 484 A.2d 1079, 1082-83 (1984).

We apply the strict scrutiny test, in which the government must show a compelling State interest in order for its actions to be valid, when the classification involves a suspect class based on "race, creed, color, gender, national origin, or legitimacy," State v. LaPorte, 134 N.H. 73, 76, 587 A.2d 1237, 1239 (1991) (quotation omitted), or affects a fundamental right”. LeClair v. LeClair, 137 NH 213, 222 - NH: Supreme Court 1993

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

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

9. By appearing topless in public, defendant engaged in speech and expression deserving of constitutional protection. Defendant was not just utilizing her right to be topless under state law, but to demonstrate to others her political viewpoint and message that the female nipple is not a sexual object. Defendant’s message further seeks to bring attention to gender equality and how the female nipple is treated different than the male nipple both legally and for social norms. Defendant’s message seeks to continue the advancement of women’s rights and to have the conduct of being topless be accepted and normalized. Artistic endeavors involving nudity as part of their expression such as the musical *Hair* have been accorded *First Amendment* protection. *Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 550, 557- 558, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975)*.

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

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

12. "The First Amendment commands, `Congress shall make no law . . . abridging the freedom of speech." Ashcroft, 535 U.S. at 244, 122 S.Ct. 1389. "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear." Id. at 245, 122 S.Ct. 1389. "[A] law imposing criminal penalties on protected speech is a stark example of speech suppression." Id. at 244, 122 S.Ct. 1389. If a statute regulates speech based upon its content, application of the statute is subject to strict scrutiny. United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000); see Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989). This places the burden upon the State to prove that the statute is "narrowly tailored to promote a compelling [state] interest. If a less restrictive alternative would serve the [state]'s purpose, the legislature must use that alternative." Playboy Entertainment Group, 529 U.S. at 813, 120 S.Ct. 1878 (citation omitted).” State v. Zidel, 940 A. 2d 255 - NH: Supreme Court 2008

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

C: The ordinance fails strict scrutiny and is therefore unconstitutional

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

“Strict scrutiny is the correct standard to apply when determining the constitutionality of a statute that touches upon a fundamental right. In re Sandra H., 150 N.H. 634, 638 (2004). As parental rights are fundamental and protected by due process, strict scrutiny should be applied when examining statutes dealing with these rights. Robert H., 118 N.H. at 716. Under the State Constitution, this test requires that I determine if granting custody to a stepparent or grandparent is necessary to achieve a compelling State interest. Sandra H., 150 N.H. at 638; see also Palmore v. Sidoti, 466 U.S. 429, 432 (1984). Additionally, such a custody award must be neither unduly restrictive nor unreasonable. Seabrook Police Assoc. v. Town of Seabrook, 138 N.H. 177, 179 (1993). In this sense a strict scrutiny analysis under the State Constitution is much like the "narrowly tailored" analysis required under the Federal Constitution. See id.; Washington v. Glucksberg, 521 U.S. 702, 721 (1997).” In the Matter of RA & JM, 153 NH 82, 95-96 - NH: Supreme Court 2005”

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

16. To satisfy strict scrutiny, the ordinance must be the least restrictive means available.

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

The State cannot show the ordinance is necessary to achieve a compelling State interest, is narrowly tailored/ not unduly restrictive nor unreasonable, and is the least restrictive means. One less restrictive means available would be to prohibit everyone from showing their nipple and not just females. If the State is concerned about the harm caused by the display of a nipple they could likely constitutionally ban the display of all nipples (this still might not be allowed under N.H. Home rule, however).

Even under a lesser standard, one court has held the judgment overturning the dismissal of information charging defendants with public exposure of their breasts was reversed because the People failed to demonstrate that discriminatory effect of statute, which was directed only at females, served an important governmental interest or had a rational basis, and because defendants' conduct was neither commercial nor lewd. People v. Santorelli

Court of Appeals of New York 80 N.Y.2d 875 (1992); 600 N.E.2d 232; 587 N.Y.S.2d 601; 1992 N.Y. LEXIS 1609

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

17. The City of Laconia Ordinance 180-1 Purpose and findings holds:

“This article is adopted by the City of Laconia for the purpose of upholding and supporting public health, public safety, morals and public order. The conduct prohibited hereunder is deemed to be contrary to the societal interest in order and morality. In addition, the prohibited conduct has been widely found and is deemed to have harmful secondary effects in places and communities where it takes place, including crimes of various types and reduction of property values, not only in the immediate vicinity, but on a community-wide basis.” Since Laconia is relying on this language to set out the intent of their ordinance, it should be their burden to show this regulation actually meets the purposes and findings under their ordinance.

18. Under state law, it is legal for women to be topless/display their nipple in public. As New Hampshire is not a “Home Rule” state, towns and cities can only pass laws that the legislature gives them permission to pass.

“...towns are but subdivisions of the State and have only the powers the State grants to them.” Piper v. Meredith , 110 N.H. 291 (1970). Further, “[u]nder our State Constitution ‘(t)he supreme legislative power...(is) vested in the senate and house of representatives ....’ N.H. Const. pt. II, art. 2. See also N.H. Const., pt. I, art. For these reasons, we have held that the towns only have ‘such powers as are expressly granted to them by the legislature and such as are necessarily implied or incidental thereto.’” Girard v. Allenstown , 121 N.H. 268, 270 ‐ 71 (1981)..

19. There is no State law criminalizing the public display of the female nipple or breast. See   **“N.H. .RSA 645:1 Indecent Exposure and Lewdness. –**   
    I. A person is guilty of a misdemeanor if such person fornicates, exposes his or her genitals, or performs any other act of gross lewdness under circumstances which he or she should know will likely cause affront or alarm.” Further, subsequent legislative attempts to broaden this statute or to allow the towns and cities authority to regulate this conduct have been defeated.

20. As this court has determined in its March 20, 2016 order in Docket #2015-CR-2800, this matter has been preempted by the State and cannot be legislated by the town:

“Because preemption ‘is essentially a matter of statutory interpretation and construction,’ Bond. V. Martineau, 164 NH 210, 213 (2012), whether a State statute preempts local regulation is a question of law… Rines, 164 NH at 528.” Forster v. Town of Henniker, No 2013-813 Supreme Court June 12, 2015

Although most cited preemption disagreements are regulatory in nature, “(S)tate law prempts local law also when there is an actual conflict between State and local regulation.” North Country Environmental Services, Inc. v. Town of Bethlehem 150 NH 606, 611 (2014). “A conflict exists when a municipal ordinance or regulation permits that which a State statute prohibits or vice versa. “(Citing *North Country v. Bethlehem* 150 NH 606) Town of Carroll v. William Runes, 164 NH 523, 528 (2013). Such is the case in the present matter.

“(t)he preemption doctrine flows from the principle that municipal legislation is invalid if it is repugnant to, or inconsistent, with State law. Arthur Whitcomb, Inc. v. Town of Carroll, 141 NH 402, 406 (1996). Municipal legislation is therefore preempted if it expressly contradicts State law of ‘runs counter to legislative intent underlying a statutory scheme” Casciso, Inc. v. City of Manchester, 142 NH 312, 315 (1997).

21. The city does not have carte blanche to make illegal any conduct they want just by alleging it is a moral issue. Further, local ordinances cannot “be repugnant to the constitution of the State”. Dover News Inc. v. City of Dover, 117 NH 1066 (NH 1977). As previously discussed, the ordinance runs afoul of the State Constitution.

**III. THE TOWN ORDINANCE VIOLATES RSA 354-A STATE COMMISSION FOR HUMAN RIGHTS (ANTI-DISCRIMINATION LAWS)**

22.   **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.

23. It is clear under RSA 354-A that a town would not be able to exclude someone from being on public property based solely on that person’s sex/gender. Yet, that is precisely what this ordinance accomplishes. The ordinance manages to make it illegal to be a topless female in public while allowing a male to be topless in public. There is not an exception to regulate conduct based upon gender. Laconia is therefore not providing equal access to a public accommodation.

**CONCLUSION**

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

WHEREFORE, the defendant respectfully requests that this Court:

a: Dismiss the charge;

b: Declare City of Laconia ordinance Sec. 180-2 unlawful/unconstitutional in regard to the phrase “female breast”.

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

/Daniel Hynes/\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Daniel Hynes

250 Commercial St. #3020

Manchester, NH 03101

(603) 674 – 5183

Bar ID # 17708

AFFIDAVIT

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

/Daniel Hynes/\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Daniel Hynes

CERTIFICATE OF SERVICE

I, Daniel Hynes, do certify that copies of the attached motion were delivered to

/Daniel Hynes/ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

1. Heidi Lilley, Kia Sinclair, and Ginger Pierro are all charged with the same City ordinance and the same motion has been filed in each case. [↑](#footnote-ref-1)
2. <http://www.boston.com/news/local/new-hampshire/2015/08/23/rain-can-stop-free-the-nipple-day-hampton-beach/lR1rtxy2OhlqiKXXRplZHO/story.html>

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

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

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

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

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

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

   <http://www.nh1.com/news/3-free-the-nipple-activists-arrested-over-the-weekend-for-topless-sunbathing-at-weirs-beach/> [↑](#footnote-ref-2)