THE STATE OF NEW HAMPSHIRE

LACONIA DISTRICT COURT

STATE OF NEW HAMPSHIRE

V.

HEIDI LILLY

DEFENDANT'S MOTION TO DISMISS

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

FACTS

1. Defendant is charged with Town Ordinance 3.4(G)(7) which reads: "There shall be no skinny dipping, nude tanning, female topless sun bathing or exposure of genitalia allowed on Town Beach property."

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.

3. 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. Shortly prior to the date of this occurrence, on August 23, defendant joined many other people as part of the "Free the nipple day"/ International Go Topless Day in which many women participated in Hampton New Hampshire by being topless at the beach. That event gained significant media coverage including comments regarding the movement[1].

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 town 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."

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1 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/

7. The town ordinance in question applies solely to “female topless sun bathing”. 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.

10. This message/movement was apparently recognized as a witness indicated people at the beach had “freed the nipple”, and Officer O’Connor said he “understood and was aware of what they were doing as far as the “Free the Nipple event”. The Free the Nipple campaign had recently received significant media coverage as a result of many women appearing topless at Hampton Beach in support of international topless day.

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. 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. Accordingly, the ordinance must be deemed unconstitutional.

17. The United States' Supreme Court's recent decision on marriage equality recognizing same-sex couples right to marry is further evidence of evolving social norms of equality where the court will not hesitate to step in and declare a law unconstitutional. In Obergefell et al. v. Hodges, Decided June 26 2015, the Court held:

"Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty. This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry."

II. THE TOWN ORDINANCE IS UNLAWFUL AS THE TOWN LACKS AUTHORITY FOR THE 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. Here, the authority for the ordinance/regulations as stated in the town regulations is:
"3.1 AUTHORITY
These Regulations are adopted pursuant to the authority granted under RSA 41:11-a".

20. RSA 41:11-a holds: "**41:11-a Town Property. –**

I. The selectmen shall have authority to manage all real property owned by the town and to regulate its use, unless such management and regulation is delegated to other public officers by vote of the town, or is governed by other statutes, including but not limited to RSA 31:112, RSA 35-B, RSA 36-A:4, and RSA 202-A:6.

II. The authority under paragraph I shall include the power to rent or lease such property during periods not needed for public use, provided, however, that any rental or lease agreement for a period of more than one year shall not be valid unless ratified by vote of the town.

III. Notwithstanding paragraph II, the legislative body may vote to authorize the board of selectmen to rent or lease municipal property for a term of up to 5 years without further vote or ratification of the town. Once adopted, this authority shall remain in effect until specifically rescinded by the legislative body at any duly warned meeting provided that the term of any lease entered into prior to the rescission shall remain in effect."

21. Defendant is not disputing the jurisdiction/authority of the entire town beach regulations, just Town Ordinance 3.4(G)(7) as it relates to female topless sunbathing.

22. While RSA 41:11-a gives towns certain authority to regulate their property, that authority is not unlimited. The plain language of the statute indicates it does not apply when governed by other statutes. Here, the town is preempted under state law as this issue has been decided at the State level. 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."

23. The legislature has authorized/condones defendant's conduct by not prohibiting it. The ordinance is further prohibited under RSA 354-A (see section III of this motion).

24. The town does not have carte blanche to make illegal any conduct they want just because it is occurs on town property. Any such interpretation would necessarily make RSA 41:11-a unconstitutionally overbroad and essentially convert New Hampshire into a "home rule" state. Additionally, town 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)

25. 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.

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. (Emphasis added)

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.

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.

26. 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 female while enjoying the beach in the same manner that any male can.

27. The only exemption under the statute is for religious purposes (see RSA 354-A:18), which is clearly inapplicable here. It does not matter what the reason for the town ordinance is; treating females differently than males is strictly prohibited under RSA 354-A:16 and RSA 354-A:17.

28. The town ordinance is not only prohibited by the State Constitution, RSA 354-A invalidates the town ordinance under RSA 41:1(a), and denying someone access to a public accommodation based upon their sex is expressly deemed unlawful under RSA 354-A. Accordingly, defendant seeks this Court to dismiss the charge and declare Town Ordinance 3.4(G)(7) unlawful/unenforceable/enjoining the State from bringing any complaints under it as it relates to the female nipple/treating females differently than males..

CONCLUSION

The language in the town ordinance dealing with "female nipple" 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. Defendant does not contest the portion of the ordinance dealing with exposure of genitalia. Defendant has no objection to the Court declaring the portion of the statute addressing "female nipple" as unenforceable/unconstitutional while allowing the rest of the ordinance to maintain in place; assuming the language skinny dipping/nude tanning would not apply to the display of the female nipple or female breast/chest area.

WHEREFORE, the defendant respectfully requests that this Court:
a: Dismiss the charge;
b: Declare Gilford Town Ordinance 3.4(G)(7) unlawful/unconstitutional in regard to the phrase "female nipple".
c: Issue an injunction/enjoin the town from bringing any further complaints against females for being topless in public.

/Daniel Hynes/_____

Daniel Hynes
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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

Prosecutor by email on 12/17/15.

/Daniel Hynes/ _____