THE FULL MONTY: ANALYZING THE CONSTITUTIONALITY OF ORDINANCES THAT ONLY PUNISH WOMEN FOR BEING TOPLESS IN PUBLIC

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I. INTRODUCTION

This Article addresses two concerns surrounding the equal protection clause of the Fourteenth Amendment: First, whether an ordinance expressly punishing women—but not men—for being topless in public violates the Equal Protection Clause; and second, whether an ordinance targeting women and criminalizing exposure of "the female breast" is unconstitutional.

Currently, there is variation amongst courts over the designated legal standard with regard to analyzing these issues.[1] This Article focuses specifically on the constitutionality of *public* female–only topless ban ordinances. There are a number of cases which center on female–only topless ban ordinances—or in certain instances nudity—within the context of a *commercial* setting.[2] To clarify, if a law classifies on the basis of gender, courts must examine it under the Equal Protection Clause of the Fourteenth Amendment to determine whether it is constitutional. The argument as to

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1 *See infra* Section IV.

2 *See generally* Ways v. City of Lincoln, 331 F.3d 596 (8th Cir. 2003); Buzzetti v. City of New York, 140 F.3d 134 (2d Cir. 1998); Hang On, Inc. v. City of Arlington, 65 F.3d 1248 (5th Cir. 1995); J & B Soc. Club No. 1, Inc. v. City of Mobile, 966 F. Supp. 1131 (S.D. Ala. 1996); City of Jackson v. Lakeland Lounge of Jackson, Inc., 688 So. 2d 742 (Miss. 1996); Tolbert v. City of Memphis, 568 F. Supp. 1285 (W.D. Tenn. 1983); Schleuter v. City of Fort Worth, 947 S.W.2d 920 (Tex. Ct. App. 1997); City of Tucson v. Wolfe, 917 P.2d 706 (Ariz. Ct. App. 1995); Dydyn v. Dep't of Liquor Control, 531 A.2d 170 (Conn. App. Ct. 1987). It is important to note the difference in the analyses between public and commercial scenarios. "[T]he interest at stake [in the public context] 'is societal disapproval of nudity in public places and among strangers,' so the prohibition 'is not a means to some greater end, but an end in itself.'" Tagami v. City of Chicago, 875 F.3d 375, 379-80 (7th Cir. 2017) (quoting Barnes v. Glen Theatre, Inc., 501 U.S. 560, 572 (1991)). Whereas in the commercial context, nudity is acceptable. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975). In *Erznoznik*, the Court struck down an ordinance prohibiting drive-in movies from displaying nude scenes that were visible to passersby. *Id.* at 217. Even though the depictions could be viewed from motorists on the highway, including minors, the Court expounded that it is no more distracting to a driver than "a wide variety of other scenes in the customary screen diet, ranging from soap opera to violence . . . ." *Id.* at 214-15.

whether a public female–only topless ban ordinance classifies on the basis of gender is a threshold argument as to whether this ordinance violates the Fourteenth Amendment's Equal Protection Clause.[3]

The Equal Protection Clause of the Fourteenth Amendment does not make any distinctions between gender classifications or other discriminatory practices.[4] Furthermore, it does not require equal treatment or equal rights.[5] The Equal Protection Clause requires equal protection of the laws for every *person* within the jurisdiction of a state.[6]

This Article argues that public female–only topless ban ordinances are in fact constitutional since there is no constitutional right to public nudity. There is, however, a constitutional right for states to determine if they want to enact ordinances that only punish women for being topless in public.[7] In addition to arguing that public female–only topless ban ordinances do not classify on the basis of gender nor violate Fourteenth Amendment's Equal Protection Clause, this Article analyzes the standard of scrutiny courts employ when reviewing these ordinances.

This argument proceeds as follows. Part I provides an introduction. Part II examines what constitutes classifying on the basis of gender, and how courts have inconsistently applied the Equal Protection Clause to this issue. Part III elucidates that the Equal Protection Clause does not extend to gender from a textualist perspective, as well as the purpose of the Equal Protection Clause does not extend to gender either. Part IV discusses court decisions that interpret the constitutionality of public female–only topless ban ordinances. Part V explores a slew of secondary arguments as to why public female–only topless ban ordinances are constitutional. Part VI explores why the secondary arguments as to why public female–only topless ban ordinances are unconstitutional are unpersuasive. Part VII identifies why the overreach of the Equal Protection Clause is subject to *reductio ad absurdum*. Part VIII concludes.

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3 *Tagami*, 875 F.3d at 379-80 ("Moving now to the equal-protection claim, the City advances a threshold argument that its public-nudity ordinance does not actually classify by sex, so the Equal Protection Clause is not implicated at all.").

4 U.S. CONST. amend. XIV, § 1.

5 *See* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1, 3 (2008) ("*The Equal Protection Clause does not require all laws to be equal*. Rather, the requirement of equal protection is a requirement that the government supply 'protection of the laws,' and do so equally.") (emphasis added).

6 *Id.*

7 U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

II. CLASSIFY ON THE BASIS OF GENDER

A. The Rational Basis Standard of Review

The Supreme Court of the United States has determined that legislative gender-based classifications are valid and may have different standards for each of the sexes.[8] Under certain conditions, it is constitutional for laws to differ regarding men and woman. While the law will have to be narrowly tailored, the anatomical sexual differences between men and women is a sufficient justification.[9] The public female–only topless ban ordinances that have been litigated are narrowly tailored.[10]

Rational basis[11] should be the constitutional standard of review[12] to determine whether a public female–only topless ban ordinance classifies on the basis of gender. Rational basis is the lowest level of scrutiny under judicial review, with the low threshold of the classification at issue be rationally related to a legitimate governmental interest.[13] The United States Supreme Court has also promulgated that rational basis only requires that there be some sort of causal relationship between a law and outcome.[14]

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8 Caban v. Mohammed, 441 U.S. 380, 398 (1979) (Stewarts, J., dissenting) ("Nonetheless, gender-based classifications are not invariably invalid.").

9 *See* Earl A. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499, 504 (1985).

10 *See infra* Section VI.

11 R. Randall Kelso, *The Structure of Rational Basis and Reasonableness Review*, 45 S. ILL. U. L.J. 415, 423-24 (2021) ("[The first inquiry is] to determine whether a statute 'rationally furthers a legitimate state interest'. . . . Once it is determined that the statute is advancing a 'legitimate state interest,' the next inquiry turns to whether the statute 'rationally furthers' that interest. As with the presumption that the statute's ends are legitimate, in practice, the Court presumes the statute's means are 'rationally related' to furthering its ends, leaving the burden on the challenger to prove that no rational relationship exists."); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973); Shoshana Zimmerman, Note, *Pushing the Boundaries?: Equal Protection, Rational Basis, and Rational Decision Making by District Courts in Cases Challenging Legislative Classifications on the Basis of Sexual Orientation*, 21 S. CAL. INTERDISC. L.J. 727, 733 (2012) ("Supreme Court precedent is replete with strong language suggesting that it is almost entirely impossible for a plaintiff to prevail on equal protection grounds under the rational basis standard.").

12 David T. Hardy, *Standards of Review, the Second Amendment, and Doctrinal Chaos*, 45 S. ILL. U. L.J. 91, 91 (2018) ("The determination of standard of review is a standard threshold to arguing, and to deciding, a constitutional challenge asserting a substantive right. It determines, after all, whether the law at issue will be presumed valid or invalid, and, if the latter, the quantum and quality of evidence necessary to justifying it.").

13 *Moreno*, 413 U.S. at 533; *see also* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1713 (1984) ("[R]ationality review under the equal protection clause, as elsewhere, is highly deferential and almost always results in the validation of statutory classifications.").

14 U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174 (1980) (explaining that a law passes constitutional muster under rational basis "*if any state of facts reasonably can be conceived that would sustain it*") (emphasis added); *see also* Kelso, *supra* note 11. In his article, R. Randall Kelso described the test of "heightened rational basis" as follows:

The Court almost always upholds legislation under a rational basis.[15] Public female–only topless ban ordinances pass constitutional muster under the higher standard of rational basis, as the public may not want to be subject to unwelcomed nudity, and some may be offended by it.[16]

B. Similarly Situated

Courts have engaged in judicial activism[17] by taking it upon themselves to develop a test from a term from *Reed*.[18] In *Reed*, the Court further expanded the rational basis test with regards to whether laws classify on the basis of gender, the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced[19] shall be treated alike."[20] Courts have interpreted this to mean that when performing analysis to determine whether a law classifies on the basis of gender, they will apply the "similarly situated" test.[21] The Iowa

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> First, in *Burdick*, the Court is limited to the "precise interests put forward by the State," not "any reasonably conceivable interest." Under minimum rationality review, the government can use "any reasonably conceivable legitimate interest to support the constitutionality of the government action." In contrast, under "reasonableness balancing," "legitimate" government interests can still be used to validate government action as constitutional, but the *Burdick* test requires the Court only to consider government interests "put forward by the government" in the litigation, not "any conceivable" government interest to be argued to the Court.

Kelso, *supra* note 11, at 429.

15 Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 319 (Marshall, J., dissenting) (per curiam).

16 People v. Hollman, 500 N.E.2d 297, 301 (N.Y. 1986) ("The effect of the nude sunbathers' repeated appearance at Bay 1 was to foreclose its use by others. The Legislature saw fit to remedy the possible crowding of surrounding beaches by prohibiting nudity altogether. *There is clearly an important governmental interest* in providing recreational space for the citizens of this State.") (emphasis added).

17 *Judicial Activism*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "judicial activism" as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions . . . with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent").

18 Reed v. Reed, 404 U.S. 71 (1971).

19 "Similarly circumstanced" is one of the variations of "similarly situated." Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949). "The question is, however, what does that ambiguous and crucial phrase 'similarly situated' mean?" *Id.* at 345. "Similarly situated" refers to one class of persons being alike in all relevant ways to another class for purposes of a particular decision or issue. *See* Blue Shield of Va. v. McCready, 457 U.S. 465, 484 n.21 (1982) ("McCready and the banker and the distributor are in many respects similarly situated."); United States v. Brown, 381 U.S. 437, 449 n.23 (1965) ("The vice of [bills of] attainder is that the legislature has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction, not that it has failed to sanction others similarly situated.").

20 *Reed*, 404 U.S. at 76.

21 *Id.* at 77. ("Regardless of their sex, persons within any one of the enumerated classes of that section are *similarly situated* with respect to that objective. By providing dissimilar treatment for men and women who are thus *similarly situated*, the challenged section violates the Equal Protection Clause.") (emphasis added); Frontiero v. Richardson, 411 U.S. 677, 680-81 (1973) ("In essence,

Supreme Court has taken the erroneous position that the similarly situated test is different from an equal protection analysis.[22] The similarly situated test raises the standard from the state providing a reason for a law to treat men and women differently to the state providing a reason for why men and women should not be treated identically.[23]

In essence, the similar situated test is the same as the equal protection analysis.[24] For reasons not clear, nor constitutional, the Court would apply a higher level of scrutiny to the similarly situated test when it adopted an intermediate-level of scrutiny for gender classifications[25] which has been named "strict judicial scrutiny."[26] In *Craig v. Boren*, the Court declared that in order "[t]o withstand constitutional challenge . . . *classifications by gender* must serve important governmental objectives and must be substantially related to achievement of those objectives."[27]

There is no textual basis for a heightened constitutional standard of review beyond rational basis, and the *Boren* court does not provide a legal basis for why it chose to do so. The Equal Protection Clause[28] protects

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appellants asserted that the discriminatory impact of the statutes is twofold: first, as a procedural matter, a female member is required to demonstrate her spouse's dependency, while no such burden is imposed upon male members; and, second, as a substantive matter, a male member who does not provide more than one-half of his wife's support receives benefits, while a *similarly situated* female member is denied such benefits. Appellants therefore sought a permanent injunction against the continued enforcement of these statutes and an order directing the appellees to provide Lieutenant Frontiero with the same housing and medical benefits that a *similarly situated* male member would receive.") (emphasis added); Orr v. Orr, 440 U.S. 268, 271 (1979) ("It appears that Mr. Orr made no claim that he was entitled to an award of alimony from Mrs. Orr, but only that he should not be required to pay alimony if *similarly situated* wives could not be ordered to pay.") (emphasis added).

22 Varnum v. Brien, 763 N.W.2d 862, 884 n.9 (Iowa 2009) (explaining that similarly situated test should be "infused . . . with principles traditionally applied in the complete equal protection analysis").

23 Craig v. Boren, 429 U.S. 190, 197 (1976).

24 Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 516 (2004) (examining the history of the "tiered" structure of constitutional standard of review with regard to the Equal Protection Clause); Mo., Ky. & Tex. Ry. Co. of Tex. v. May 194 U.S. 267, 269 (1904). In his opinion for the Court, Justice Holmes implores judicial restraint when he blazons that legislation should not be invalidated by courts unless there is such an injustice being done that constitutional rights are being violated, and if the "legislature has declared that . . . policy requires a certain measure, its action should not be disturbed by the courts . . . unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." *Id.*

25 *Boren*, 429 U.S. at 228 ("While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively *deferential* '*rational basis*' *standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases*.") (emphasis added).

26 *See, e.g.*, *Frontiero*, 411 U.S. at 688 ("Classifications based on race, alienage, or national origin, are inherently suspect, and must therefore be subjected to *strict judicial scrutiny*.") (emphasis added).

27 *Boren*, 429 U.S. at 197 (emphasis added).

28 U.S. CONST. amend. XIV.

persons, not "suspect classes" such as race, ancestry, or alienage.[29] The similarly situated test is a judicial-made construct, born out of activism, that has no constitutional nor legal basis. The similarly situated test should not be applied to a court's analysis of the constitutionality of a public female-only topless ban ordinance because the words "similarly situated" are not a part of the Fourteenth Amendment.

III. A TEXTUALIST INTERPRETATION OF THE EQUAL PROTECTION CLAUSE

Justice Holmes has derided the Equal Protection Clause as the "usual last resort of constitutional arguments."[30] Justice Scalia famously questioned the collision course between the Equal Protection Clause and Title VII of the Civil Rights Act of 1964.[31] If courts were to apply textualism to cases centering on gender equality, they would dismiss claims based upon Equal Protection Clause arguments, and instead focus on laws that address this matter.[32]

The Supreme Court has rarely utilized a textualist approach to the Constitution when deciding cases.[33] Ironically, the Court proclaimed that if

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29 Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (per curiam) ("[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class."). The Court stated that classifications based on race, ancestry, or alienage qualify as "suspect." *Id.* at 312 n.4.

30 Buck v. Bell, 274 U.S. 200, 208 (1927).

31 Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) ("I join the Court's opinion in full, but write separately to observe that its resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?").

32 Supreme Court jurisprudence of the Equal Protection Clause is a complete and utter mess. For purposes of this discussion, *United States v. Morrison* is a perfect illustration. *See* United States v. Morrison, 529 U.S. 598 (2000). In *Morrison*, the Court held that Congress did not have the authority to create a civil remedy for victims of gender-motivated violence in the Violence Against Women Act ("VAWA"). *Id.* at 626-27. The U.S. Solicitor General made a textualist argument that has significant merit. Brief for the United States at 37-42, United States v. Morrison, 529 U.S. 598 (2000), Nos. 99-5, 99-29. He argued that certain states neglected gender-based crimes. *Id.* Further, this was to the detriment of women, and their Equal Protection rights were violated because they were not being equally protected from violent crimes. *Id.* While the author does not agree with the allegations and premises proffered by the Solicitor General, the Court's decision was off the mark. The Court noted it would examine VAWA under intermediate scrutiny. *Morrison*, 529 U.S. at 620 ("As our cases have established, state-sponsored gender discrimination violates equal protection unless it '"serves 'important governmental objectives and . . . the discriminatory means employed" are "substantially related to the achievement of those objectives.'"'") (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)). Thus, the Court was focused on the "treatment" of women, not whether laws were being granted equal protection of the laws. *Id.*

33 *See, e.g.*, David A. Strauss, *Foreword*: *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 4 (2015) ("[R]outinely the text, although not flatly inconsistent with the outcome of a case,

the text is plain and unambiguous, there must not be any further interpretation of the text.[34] The Equal Protection Clause 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."[35] The Equal Protection Clause is plain and unambiguous.[36] Moreover, the phrase "equal protection of the laws" is plain and unambiguous.[37] Courts have engaged in judicial activism by interpreting this phrase to be applicable to any law that imposes a disadvantage on any person.[38] In some cases, the Court has erroneously interpreted the Equal Protection Clause into an equal treatment mandate with regard to race, sex, and other judicial-determined classifications.[39]

The Supreme Court has upheld laws that do no treat genders equally.[40] In *Tuan Anh Nguyen v. INS*, the Court upheld a sex-based classification which facilitated the process for nonmarried, citizen mothers rather than nonmarried, citizen fathers to obtain citizenship for children born outside the United States.[41] The Court proclaimed "our most basic biological differences—*such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection*

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has very little to do with the way the case is argued or decided. In most litigated cases, constitutional law resembles the common law much more closely than it resembles a text-based system.").

34 ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 441 (2012) (defining textualism as "[t]he doctrine that the words of a governing text are of paramount concern, and what they convey in their context is what the text means"); Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'").

35 U.S. CONST. amend. XIV, § 1.

36 Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 923 (2013) ("It seems quite obvious that the majority's reading ignored the *Fourteenth Amendment's plain language*.") (emphasis added).

37 *Id.*

38 *See, e.g.*, Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam); Vacco v. Quill, 521 U.S. 793, 799 (1997); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-50 (1985). In *Cleburne*, the Supreme Court claimed that it applied rational basis yet ruled that the ordinance discriminated against the intellectually disabled, which is not a suspect class. *Id.* The Court did not argue that the state's reasoning was not rational. *Id.* Rather, the Court based its opinion on the intellectually disabled being disadvantaged by the ordinance. *Id.*

39 *See* Green, *supra* note 5, at 3.

40 Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding a congressional statute requiring men, but not women, to register for the Selective Service); *see* Michael M. v. Superior Ct., 450 US 464 (1981) (providing the legal roadmap for how to survive a legal challenge). "After some uncertainty as to the proper framework for analyzing equal protection challenges to statutes containing gender-based classifications, this Court settled upon the proposition that a statute containing a gender-based classification cannot withstand constitutional challenge unless the classification is substantially related to the achievement of an important governmental objective." *Id.* at 489-90 (Brennan, J., dissenting) (citation omitted).

41 Tuan Anh Nguyen v. Immigr. Nat'y Serv., 533 U.S. 53, 73 (2001).

superficial."[42] While a male may not be physically needed at the delivery of a baby since males cannot give *birth*, a male is needed to help conceive the child.[43] It is impossible for a female to conceive a baby without a male. The Court furthered its reasoning of treating the genders differently based upon giving birth in *Michael M. v. Superior Court*.[44] In *Michael M.*, the Court upheld a statutory rape law under which only the male was criminally liable.[45] The state argued that it had a "substantial relationship" to the interest of preventing teenage pregnancies.[46] The Supreme Court further remarks "[s]he alone endures the medical risks of pregnancy or abortion."[47] The Court also noted that more women than men experience sexual abuse.[48] Moreover, teenage pregnancies often result in illegitimate children who often become wards of the state, which is a burden on society.[49] Nonetheless, there is an increase in medical risks for women giving birth after the age of thirty-five.[50] With regard to abortion, it is richly ironic that the Court acknowledges the medical risks it presents to women, after holding it is a legal medical procedure,[51] to then cite as a reason to uphold a statute that punishes men but not women for having sex at a certain age. The Court did not discuss any evidence that abortions are safer for non-teenage women than it is for teenage women. The Court avowed:

> [W]e have recognized that in certain narrow circumstances men and women are not similarly situated;[52] in these circumstances a gender classification based on clear differences between the sexes is not invidious, and a legislative classification realistically based upon those differences is not unconstitutional.[53]

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42 *Id.* (emphasis added).

43 RICHARD EVAN JONES & KRISTIN H. LÓPEZ, HUMAN REPRODUCTIVE BIOLOGY (4th ed. 2014).

44 *Michael M.*, 450 U.S. 464.

45 *Id.* at 466.

46 *Id.* at 465.

47 *Id.* at 479.

48 *Id.* at 502 n.8.

49 *Id.* at 470-71.

50 *See* Mayo Clinic Staff, *Pregnancy After 35: Healthy Moms, Healthy Babies*, MAYO CLINIC (Feb. 10, 2022), https://www.mayoclinic.org/healthy-lifestyle/getting-pregnant/in-depth/pregnancy/art-20045756; *Risks of Pregnancy over Age 30*, UNIV. OF ROCHESTER MED. CTR., https://www.urmc.rochester.edu/encyclopedia/content.aspx?ContentTypeID=90&ContentID=P02481 (last visited Mar. 29, 2022); *Having a Baby After Age 35: How Aging Affects Fertility and Pregnancy*, THE AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS (Oct. 2020), https://www.acog.org/Patients/FAQs/Having-a-Baby-After-Age-35-How-Aging-Affects-Fertility-and-Pregnancy?IsMobileSet=false; *Pregnancy After Age 35*, MARCH OF DIMES (Apr. 2020), https://www.marchofdimes.org/complications/pregnancy-after-age-35.aspx.

51 *See* Roe v. Wade, 410 U.S. 113 (1973).

52 *See supra* Section II.

53 *Michael M.*, 450 U.S. at 478.

There is no textualist interpretation of the Equal Protection Clause mandating states to treat people equally. Rather, the Equal Protection Clause prohibits states from denying people the equal "protection of the laws."[54]

IV. CURRENT STATE OF THE LAW

A. Courts That Have Held That Public Female-Only Topless Ban Ordinances Are Constitutional

While the majority of courts hold that public female–only topless ban ordinances are constitutional,[55] the cases have presented a variety of interpretations of the Equal Protection Clause.

1. *The Standard of Review is Not Specified*

a. Minnesota Court of Appeals

In *State v. Turner*, the Minnesota Court of Appeals did not cite the standard of review it used in its analysis of the Equal Protection Clause, despite dedicating a whole section of the opinion to it.[56] In *Turner*, the ordinance at issue is Minneapolis Park Board ordinance PB2-21 (1982) (hereinafter referred to as PB2-21).[57] PB2-21 states:

> No person ten (10) years of age or older shall intentionally expose his *or her own genitals, pubic area, buttocks or female breast below the top of the areola, with less than a fully opaque covering* in or upon any park or parkway, as defined in PB1-1. This provision does not apply to theatrical, musical, or other artistic performances upon any park or parkway where no alcoholic beverages are sold.[58]

The court confuses its analysis of the equal protection clause with classifying on the basis of gender.[59] The court found that the ordinance did

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54 *See* Maltz, *supra* note 9, at 504 ("Section 1 does not mandate equality of rights generally or even equality before the law. It merely requires that states provide 'equal protection of the laws.'") (quoting U.S. CONST. amend. XIV, § 1).

55 Free the Nipple-Fort Collins v. City of Fort Collins, 916 F.3d 792, 805 (10th Cir. 2019) ("We recognize that ours is the minority viewpoint. Most other courts, including a recent (split) Seventh Circuit panel, have rejected equal-protection challenges to female-only toplessness bans.").

56 State v. Turner, 382 N.W.2d 252, 255-56 (Minn. Ct. App. 1986); *see supra* Section III.

57 *Turner*, 382 N.W.2d at 253.

58 Minneapolis, Minn., Park Board Ordinance 2-21 (1982) (repealed 2020) (emphasis added).

59 *Turner*, 382 N.W.2d at 255-56 ("To withstand constitutional challenge, *gender-based classifications* 'must serve important governmental objectives and must be substantially related to achievement of those objectives.' The Court finds that PB 2-21 is a *legislative classification* based upon clear differences between the sexes. The *classification* is constitutional because men and

not classify on the basis of gender.[60] If an ordinance does not classify on the basis of gender, then an argument that the ordinance violates the Equal Protection Clause cannot be advanced.[61] The court should have highlighted this and dismissed the Equal Protection Clause claim.

In its analysis, the court does not specify what the constitutional standard of review is.[62] The court holds that the ordinance advances a legitimate government interest, but then discerns that protecting societal norms is a legitimate legislative goal.[63] There is a distinction between an interest[64] and a goal.[65] By applying an Equal Protection Clause analysis, the court undercuts it's initial ruling that female nudity ordinances do not classify on the basis of gender.[66]

2. *A Constitutional Standard of Review is Not Triggered Under Either the U.S. Constitution or State Constitution and Does Not Classify on the Basis of Gender*

a. Washington Supreme Court

In *Seattle v. Buchanan*, the Washington Supreme Court held that a public female-only topless ban ordinance does not classify on the basis of gender.[67] As such, the court correctly held that a challenge to a public nudity

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women are not similarly situated in the area covered by PB 2-21. PB 2-21 is not a pretext for invidious discrimination. PB 2-21 serves two important governmental objectives, controlling public nudity and preserving societal norms. The *gender classification* is substantially related to achieving those objectives. Therefore, PB 2-21 is constitutional and does not violate the Equal Protection Clause.") (emphasis added) (citations omitted).

60 *Id.*

61 Tagami v. City of Chicago, 875 F.3d 375, 379-80 (7th Cir. 2017).

62 Timothy J. Strom, *The Standard of Review Does Matter: Evidence of Judicial Self-Restraint in the Illinois Appellate Court*, 34 S. Ill. U. L.J. 73, 73 (2009) ("Each issue on appeal is subject to a standard of review, which dictates the degree of deference that the reviewing court will afford to the lower court's decision. The standard is sometimes said to represent a measure of 'how wrong' the lower court's decision must be to warrant reversal. The standard of review is so significant that the rules of most reviewing courts (including those of Illinois) specifically require the appellant to identify the appropriate standard of review for each issue addressed in the opening brief.").

63 *Turner*, 382 N.W.2d at 256.

64 *Legal Interest*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "legal interest" as "[a]n interest that has its origins in the principles, standards, and rules developed by courts of law as opposed to courts of chancery").

65 *Goal*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/goal?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited Jan. 14, 2022) (defining "goal" as "the end toward which effort is directed").

66 *Turner*, 382 N.W.2d at 256.

67 City of Seattle v. Buchanan, 584 P.2d 918, 921 (Wash. 1978) ("We have already shown that the law does not classify or discriminate on the basis of sex."); *See* Tagami v. City of Chicago, 875 F.3d 375, 379-80 (7th Cir. 2017).

ordinance does not merit a constitutional standard of review under either the U.S. Constitution or the state constitution.[68]

In *Buchanan*, defendants exposed their breasts while swimming and sunbathing at the Seattle Arboretum.[69] Seattle ordinance No. 102843, section 12A.12.150 "LEWD CONDUCT" states:

> (1) As used in this section a 'lewd act' is:
>
> (a) *an exposure* of one's genitals or *female breasts*;
>
> (b) *the touching, caressing or fondling of* the genitals or *female breasts*; or
>
> (c)sexual intercourse as defined in Section 12A.04.140(1)(c); or
>
> (d) masturbation; or
>
> (e) urination or defecation in a place other than a washroom or toilet room.
>
> (2) A person is guilty of lewd conduct if he intentionally performs any lewd act in a public place or at a place and under circumstances where such act could be observed by any member of the public.
>
> (a) 'Public place' has the meaning defined in section 12A.12.020(1)(a).
>
> (3) The owner, manager or operator of premises open to the public wherein alcoholic beverages are sold, served or consumed is guilty of permitting lewd conduct if he intentionally permits or causes any lewd act on said premises.
>
> (4) This section shall not be applied to artistic or dramatic performances in a theatre or a museum.[70]

The court examined the ordinance at issue through legislative history and did not review it to determine if the language is plain.[71] The court rejects the argument that female breasts are a secondary sex characteristic, and, as such, the ordinance at issue classifies on the basis of sex.[72] The *Buchanan* court retorts that the legislative history does not indicate that there was concern with "the size or shape of female breasts" when the law was enacted.[73] The court could have first looked to the plain language of the

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68 *Buchanan*, 584 P.2d at 921-22 ("Since no compelling state interest was served by this classification, *it was invalid under the equal protection clauses of the federal and state constitutions*.") (emphasis added).

69 *Id.* at 918.

70 Seattle, Wash., Crim. Code Ordinance 102,843 (Dec. 3, 1974) (emphasis added).

71 *Buchanan*, 584 P.2d 918; *see infra* note 126.

72 *Buchanan*, 584 P.2d at 919-20 ("At the trial, the appellants offered testimony of a physician, Dr. Charles Cowan, who said that there is no difference in the composition of the flesh of male and female breasts; that the breasts do not form a primary sex characteristic but a secondary one, and that the degree of development of the breasts does not determine sex.").

73 *Id.* at 919-21.

statute itself.[74] It did not have to examine legislative history.[75] Since the court found that the language of the ordinance was plain and unambiguous, [76] and it did not classify on the basis of gender,[77] it could have ended its analysis at that point.

The *Buchanan* court could have focused on the ordinance itself to determine that it does not classify on the basis of gender. The ordinance prohibits "the touching, caressing or fondling of female breasts," but not male breasts.[78] As such, the ordinance is categorizing female breasts as private parts. The Seventh Circuit asserted that "[a]n unwanted touching of a person's *private parts*, intended to humiliate the victim or gratify the assailant's sexual desires, can violate a [person's] constitutional rights whether or not the force exerted by the assailant is significant."[79]

b. California Courts of Appeal

The California Courts of Appeal held that a public female-only topless ban ordinance did not violate rights under the Equal Protection Clause of the Fourteenth Amendment nor that said ordinance classifies on the basis of gender.[80] The ordinance at issue states that no person shall:

> Appear, bathe, sunbathe, walk or be in any public park, playground, beach or the waters adjacent thereto, or any place under the jurisdiction of the Board of Recreation and Parks Commissioners, in such a manner that the genitals, vulva, pubis, pubic symphysis, pubic hair, buttocks, natal cleft, perineum, anus, anal region, or pubic hair region of any person, or *any portion of the breast at or below the upper edge of the areola thereof of any*

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74 *See infra* note 126; Seider v. O'Connell, 2000 WI 76, ¶ 43, 263 Wis. 2d 211, 612 N.W.2d 659 ("*The court's analysis begins with the language of the statute*. If the meaning of the statute is plain, we ordinarily stop the inquiry.") (emphasis added).

75 Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT. L. REV. 441, 446-47 (1990) ("Legislators do not have common objectives, so the basis for imputing agreement to them is weaker than the foundation for this technique in private law. . . . Statutes are drafted by multiple persons, often with conflicting objectives. There will not be a single objective, and discretionary interpretation favors some members of the winning coalition over others.").

76 *Buchanan*, 584 P.2d at 594 ("Should a court be called upon to apply the law in one of the hypothesized situations, it would be guided by principles of statutory construction which should enable it to correctly decide whether the particular exposure falls within the prohibition of the ordinance. Two examples are: (1) Courts are obliged to read a statute in the '"animating context of well-defined usage;"' (2) Criminal statutes should be strictly construed in favor of the defendant. These two alone should resolve any ambiguity in the word 'exposure' and 'female breasts' should a doubtful case arise.") (citations omitted).

77 *Id.* at 592 ("The theory is advanced that this ordinance denies the equal protection of the laws to the appellants. We have already shown that the law does not classify or discriminate on the basis of sex.").

78 Seattle, Wash., Crim. Code Ordinance 102, 843 (Dec. 3, 1974).

79 Washington v. Hively, 695 F.3d 641, 643 (7th Cir. 2012).

80 Eckl v. Davis, 124 Cal. Rptr. 685, 698 (Cal. Ct. App. 1975).

> *female person*, is exposed to public view or is not covered by an opaque covering.
> Subdivision (x) further provides: This subdivision shall not apply to children under the age of 10 years. 2. This subdivision shall not apply to live theatrical performances performed in a theater, concert hall, or other similar establishment located on public land.[81]

In *Eckl v. Davis*, the court astutely mentioned that "[n]ature, not the legislative body, created the distinction between that portion of a woman's body and that of a man's torso."[82] The opinion does note that Plaintiffs did not attack the ordinance on its face, but rather analogized that it is discriminatory in the same manner as an ordinance regulating women being able to work as bartenders.[83] The ordinance analogized by Plaintiffs is a false equivalence. Title VII specifically prohibits discrimination against gender. [84] The public topless ban deals with conduct a state can regulate. There is no federal law that provides a right to be nude in public.[85] As the court held that the ordinance at issue does not classify on the basis of gender, it declined to provide a review of the ordinance under a constitutional standard of review.[86]

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81 L.A., Cal., Ordinance 146,360 (July 19, 1974).

82 *Eckl*, 124 Cal. Rptr. at 695.

83 *Id.* (citing Sail'er Inn, Inc. v. Kirby, 485 P.2d 529 (Cal. 1971)).

84 Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) to (d) (2012) ("Title VII of the Civil Rights Act of 1964 bars employment discrimination 'because of . . . sex.'").

85 City of Seattle v. Buchanan, 584 P.2d 918, 922 (Wash. 1978) ("The right to expose the body to the sun in public has not yet been recognized as a right so fundamental that the people must have meant to protect it when they adopted their constitutions."); United States v. Biocic, 928 F.2d 112, 116 (4th Cir. 1991) ("To do so, she invites our attention to the similarity between the feelings of 'wholesomeness,' 'peace of mind in being in the natural,' and 'free-spiritedness' which her discrete and only partial nudity gave her, and the comparable feelings of well-being and freedom protected as fundamental liberty interests in *Griswold* (right to use of contraceptives), and *Roe v. Wade* (right to abortion). This is a valiant and colorful try, but it has long been flatly rejected . . . ."); *see also* Debra Cassens Weiss, *Nudity is Not a Human Right, European Court Rules in Case of ' Naked Rambler'*, AM. BAR ASS'N J. (Oct. 29, 2014, 9:47 AM CDT), http://www.abajournal.com/news/article/nudity_is_not_a_human_right_european_court_rules_in_case_of_naked_rambler ("A British man nicknamed the 'naked rambler' after an unclothed trek across the United Kingdom *does not have a legal right to appear naked in public*, the European Court of Human Rights ruled on Tuesday.") (emphasis added).

86 *Eckl*, 124 Cal. Rptr. at 695 ("Plaintiffs further contend that the ordinance denies women equal protection of the law because 'they are not granted the privilege granted men to sunbathe and swim with their breasts uncovered.' . . . *But with respect to the ordinance challenged in the present case, we are not concerned with a classification based upon sex with relation to a fundamental right such as the right to pursue a lawful profession*.") (emphasis added) (citation omitted).

3. *Intermediate Scrutiny is Triggered Under the U.S. Constitution and Silent as to Whether it Classifies on the Basis of Gender*

a. United States Court of Appeals for the Fourth Circuit

In *United States v. Biocic*, the court conflates classifying on the basis of gender with whether a public female–only topless ban ordinance violates the Fourteenth Amendment's Equal Protection Clause.[87] These are two separate issues.[88] In fact, even more astounding is the fact that the court did not perform any analysis as to whether the ordinance classifies on the basis of gender.[89]

Ms. Biocic raised an Equal Protection Clause claim on the grounds that the female-only topless ban ordinance discriminated against women.[90] Ms. Biocic was on the beach on the Chincoteague National Wildlife Refuge when she decided to partake in nude sunbathing.[91] She was charged with violating a federal regulation, which states:

> "Any act of indecency or disorderly conduct as defined by State or local laws is prohibited on any national wildlife refuge."[92]

The local law violated was § 9.3 of the Accomack County Code, which makes it

> unlawful for any person to knowingly, voluntarily, and intentionally appear . . . in a place open to the public or open to public view, in a state of nudity.[93] State of nudity is defined as "a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a fully opaque

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87 *Biocic*, 928 F.2d at 114 ("At various stages of this case, Ms. Biocic has raised a number of challenges, constitutional and non-constitutional, to the application of this federal regulation, assimilating the local law's definition of prohibited conduct, to convict her. These seem to have included a first amendment overbreadth claim, a due process vagueness claim, an equal protection claim, and a hybrid 'privacy-penumbra'/ninth amendment claim. On this appeal, she seems to have confined her challenges to: (1) a claim of vagueness, in violation of the due process clause; (2) *a claim of denial of equal protection in violation of the due process clause*; and (3) a claim apparently grounded in the privacy jurisprudence of *Griswold v. Connecticut*, and *Roe v. Wade*, which specifically invokes the ninth amendment's 'guarantee of personal liberty rights.'") (emphasis added) (citations omitted).

88 *See* Tagami v. City of Chicago, 875 F.3d 375, 379-80 (7th Cir. 2017).

89 *Biocic*, 928 F.2d at 115 ("*We assume, without deciding*, as did the district court, that a distinction based upon anatomical differences between male and female is gender-based for equal protection analysis purposes.") (emphasis added).

90 *Id.*

91 *Id.* at 113 ("'To get some extra sun,' as she put it, she removed the top of her two-piece bathing suit, fully exposing her breasts.").

92 *Id.* at 113; 50 C.F.R. § 27.83 (1976).

93 *Biocic*, 928 F.2d at 113.

> covering, *or the showing of the female breast with less than a fully opaque covering on any portion thereof below the top of the nipple*.[94]

The Fourth Circuit rejected Ms. Biocic's argument,[95] but its reasoning is muddled. The court held that upholding morals is an important government interest, yet it hedges this reasoning.[96] After noting that Ms. Biocic pointed out to changing attitudes in society about the exposure of female breasts, the court acknowledges "[t]hat public morals are not static in this realm."[97] First, the court provided no statutory interpretation as to the ordinances.[98] However, the court is dismissing originalism[99] as a canon of construction with no basis.[100] The court provided no reasoning as to why the public morals term of the ordinances should not be interpreted as to the time they were enacted.[101]

In the concurring opinion, the court notes that it may have been persuaded by Ms. Biocic if she pursued her arguments[102] even though her arguments are meritless.[103] The judge could have raised the arguments *sua*

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94 *Id.* at 113; ACCOMACK COUNTY, VA., CODE § 58-2 (1982) (original version at § 9-3).

95 *Biocic*, 928 F.2d at 116 ("This is a valiant and colorful try, but it has long been flatly rejected, and we are not prepared to depart from that view of the matter at this point.").

96 *Id.* at 118 n.4. The court considers Ms. Biocic's arguments and finds them irrelevant to the inquiry when it writes:

> Ms. Biocic attacks the basic premise that this is an accurate assessment of the current state of moral sensibilities on the matter. She cites in support of the contrary proposition a number of extra-legal sources, including *Sports Illustrated*, that seem to indicate a growing, perhaps already achieved, acceptance by many of the "state of nudity" here in issue. And she points to the undeniable fact that the female breast has from time immemorial been the subject of high artistic expression in great, publicly displayed sculpture and painting. That public morals are not static in this realm, and that artistic depictions of the female breast have indeed long been accepted, cannot be gainsaid. But for our limited purpose—which is only to inquire whether intentional exposure of the full female breast in public places at the whim of the actor is at this time constitutionally protected against any governmental restrictions—the two points are beside the point.

Id.

97 *Id.*

98 *Id.* at 114.

99 SCALIA & GARNER, *supra* note 34, at 435 ("[O]riginalism: 1. The doctrine that words are to be given the meaning they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect.").

100 *Id.*

101 *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) ("[T]he main danger in judicial interpretation . . . of any law . . . is that the judges will mistake their own predilections for the law.").

102 *Biocic*, 928 F.2d at 116 n.1 (Murnaghan, J., concurring) ("Biocic has not pursued her First Amendment argument, apparently accepting the district court judge's finding that her conduct was 'utterly lacking in any speech element.'").

103 *Id.* The concurring opinion notes that Ms. Biocic did not perfect her First Amendment argument. *Id.* Perhaps this is applicable to each of her arguments. "*Had she raised a more valid First Amendment claim* based on expression, *I note that a conviction for indecency which was not*

sponte but declined to do so.[104] Biocic points to a magazine and artistic expressions of public nudity as support for her argument that the changing societal attitudes should result in the ordinance being found unconstitutional.[105] The court notes that public nudity is outside the scope of the ordinance's definition of nudity.[106] And Ms. Biocic was engaged in nude sunbathing, and not partaking in an artistic expression.[107] Moreover, artistic expression is not a defense to public morals.

Nevertheless, the Fourth Circuit should not have undercut their reasoning with regard to public morals. The court should not have remained silent as to whether a public female-only topless ban ordinance classifies on the basis of gender. The court skipped over this threshold argument[108] with no reason or explanation. If the court insisted on doing an Equal Protection Clause analysis, rational basis is the apropos constitutional standard of review.

4. *Intermediate Scrutiny is Triggered Under the U.S. Constitution and it Does Classify on the Basis of Gender*

a. United States Court of Appeals for the Seventh Circuit

In *Tagami v. City of Chicago*, the Seventh Circuit held that a public female-only topless ban should be reviewed under intermediate scrutiny, and it does classify on the basis of sex.[109] Ms. Sonoku Tagami ("Tagami"), was fined for violating a public female-only topless ban ordinance by walking around the streets of Chicago with paint on her bare breasts, as she was supporting GoTopless, Inc. by participating in their annual "GoTopless Day."[110] The ordinance at issue states:

> Any person who shall appear, bathe, sunbathe, walk or be in any public park, playground, beach or the waters adjacent thereto, or any school facility and the area adjacent thereto, or any municipal building and the areas adjacent thereto, or any public way within the City of Chicago in such a manner that the genitals, vulva, pubis, pubic hair, buttocks, perineum,

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obscene would fail because 'expression which is indecent but not obscene is protected by the First Amendment.'" *Id.* (emphasis added).

104 Allan D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477 (1958).

105 *Biocic*, 928 F.2d at 116 n.4.

106 *Id.* at 114 ("'[N]udity' as thus defined is expressly excluded from the ordinance's reach when practiced in dramatic productions and other forms of legitimate artistic expression.").

107 *See infra* Section VI. A. 1.

108 *See* Tagami v. City of Chicago, 875 F.3d 375, 379-80 (7th Cir. 2017).

109 *Id.* at 380 ("Still, a law that classifies on the basis of sex is compatible with the Equal Protection Clause if the classification serves important governmental objectives and the 'discriminatory means employed are substantially related to the achievement of those objectives.'").

110 *Id.* at 377-80.

> anus, anal region, or pubic hair region of any person, *or any portion of the breast at or below the upper edge of the areola thereof of any female person, is exposed to public view or is not covered by an opaque covering*, shall be fined not less than $100.00 nor more than $500.00 for each offense.[111]

The Seventh Circuit incorrectly held that intermediate scrutiny is the appropriate standard of review for an Equal Protection Clause challenge to the ordinance because it is similar to the *O'Brien* test.[112] The *O'Brien* test is applicable to First Amendment challenges.[113] The *O'Brien* analysis is apropos with regard to Plaintiff's First Amendment challenge to the ordinance.[114] Moreover, a textualist interpretation of the Equal Protection Clause means that intermediate scrutiny is not applicable to a public female-only topless ban ordinance.[115] Rational basis is the appropriate standard of review for an Equal Protection Clause challenge to a public female-only topless ban ordinance.

The court is unpersuaded by the Defendant's argument[116] that the ordinance at issue does not classify on the basis of gender simply because it contains the phrase "of any female person."[117] The court's analysis is rather perfunctory,[118] as it did analyze the ordinance through the rational basis standard of review nor whether it similarly situates the genders.[119] Per the court's reasoning, the Violence Against Women Act[120] or a state law setting

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111 CHI., ILL., CODE § 8-8-080 (1978).

112 *Tagami*, 875 F.3d at 380.

113 James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1, 24 (2008) ("Content-neutral regulations of speech must be justified by some intermediate test, either the O'Brien test or some version of the time, place, and manner test.").

114 *Tagami*, 875 F.3d at 378.

115 *See generally* GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 862-63 (10th ed. 1980 & Supp. 1983) ("Efforts to expand the category of . . . 'quasi-suspect' classification . . . is one of the strands of the 'new equal protection.'"). The aforementioned classifications of "sex," "alienage," and "illegitimacy," trigger intermediate scrutiny, and, sometimes, heightened scrutiny. *Id.*

116 *Tagami*, 875 F.3d at 379-80 ("Moving now to the equal-protection claim, the City advances a *threshold argument* that its public-nudity ordinance does not actually classify by sex, so the Equal Protection Clause is not implicated at all.") (emphasis added); cases cited *supra* note 2.

117 *Id.* at 380 ("On its face, the ordinance plainly does impose different rules for women and men. It prohibits public exposure of 'the breast at or below the upper edge of the areola thereof *of any female person*.'").

118 *Id.* ("This strikes us as a justification for this classification rather than an argument that no sex-based classification is at work here at all.").

119 *See supra* Section II.

120 Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended at 42 U.S.C. §§ 8, 16, 18, 20, 28). The Violence Against Women Act was originally enacted as part of the Violent Crime Control and Law Enforcement Act of 1994. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). Subsequently, Congress amended, reauthorized, and expanded some of its provisions in 1996 and 2000. *See* Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491 (2000); Pub. L. No. 104-201, 110 Stat. 2655 (1996) (codified as amended at 18 U.S.C. § 2261A).

aside contracts for women[121] would classify on the basis of gender solely because of the text. The argument is *circulus in demonstrando* (circular reasoning),[122] as it relies on a premise to assume the truth of the conclusion instead of supporting it. Paraphrasing the court, 'the ordinance classifies on the basis of gender because it specifically mentions a gender. If an ordinance specifically mentions a gender, it classifies on the basis of gender.' To properly determine if the ordinance at issue, or the aforementioned laws classify on the basis of gender, the court needs to apply the rational basis standard of review and then determine if the genders are similarly situated.

B. Courts That Have Held That Public Female-Only Topless Ban Ordinances Are Unconstitutional

1. *The Standard of Review is Rational Basis, Yet the Court Applies a Scrutiny Standard*

a. New York Court of Appeals

In *People v. Santorelli*, the New York Court of Appeals engaged in judicial activism when it did not cite a canon of construction when interpreting a state law[123] which prohibited a woman from exposing their breasts, including the areola, as inapplicable to the facts of the case and therefore reversed the lower court.[124] In *Santorelli*, the law at issue states:

> A person is guilty of exposure if he appears in a *public place* in such a manner that the private or intimate parts of his body are unclothed or exposed. *For purposes of this section, the private or intimate parts of a female person shall include that portion of the breast which is below the top of the areola.* This section shall not apply to the breastfeeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment.
>
> Exposure of a person is a violation.

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121 N.Y. EXEC. LAW § 311 (McKinney 2015).

122 DOUGLAS WALTON, PLAUSIBLE ARGUMENT IN EVERYDAY CONVERSATION 206-07 (1992) ("A is true because B is true; B is true because A is true. Wellington is in New Zealand. Therefore, Wellington is in New Zealand.").

123 Max Birmingham, *Whistle While You Work: Interpreting Retaliation Remedies Available to Whistleblowers in the Dodd-Frank Act*, 13 FLA. AGRIC. & MECH. U. L. REV. 1, 15 (2017) ("If a court performs statutory interpretation without a canon of construction, it is admitting that there is no legal basis for its interpretation.").

124 People v. Craft, 509 N.Y.S.2d 1005, 1007 (N.Y. City Ct. 1986), *rev'd*, 564 N.Y.S.2d 695 (Monroe Cnty. Ct. 1991), *rev'd sub nom.*, 80 N.Y.2d 875 (N.Y. 1992).

> Nothing in this section shall prevent the adoption by a city, town or village of a local law prohibiting exposure of a person as herein defined in a public place, at any time, whether or not such person is entertaining or performing in a play, exhibition, show or entertainment.[125]

Statutory interpretation starts with a plain meaning interpretation.[126] The *Santorelli* court did not even attempt to perform a statutory interpretation analysis, and instead cited commentary[127] and an inadequate court opinion, which also relied on said commentary, as to the purpose of the law.[128] In *People v. Price*,[129] the entire opinion states:

> The order of the Appellate Term should be reversed, and the information dismissed. Statutes punishing indecent exposure, though broadly drawn, must be carefully construed to attack the particular evil at which they are directed. Section 245.01 of the Penal Law was aimed at discouraging "topless" waitresses and their promoters. It should not be applied to the noncommercial, perhaps accidental, and certainly not lewd, exposure alleged. Certainly, legislation may not control the manner of dress, absent commercial exploitation of exposure, or absent conduct or dress under circumstances creating or likely to create public disorder.
>
> Order reversed, etc.[130]

In a shocking development, the concurring opinion in *Santorelli* calls out the majority for flawed reasoning when it claimed that the law is not applicable to the facts in the case:

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125 N.Y. PENAL LAW § 245.01 (McKinney 1989) (emphasis added).

126 Caminetti v. United States, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms."); *see also* Seider v. O'Connell, 2000 WI 76, ¶ 43, 263 Wis. 2d 211, 612 N.W.2d 659 ("*The court's analysis begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry*. Nonetheless, it is often valuable to examine the statute in context. Context usually refers to the relationship with other statutes.") (emphasis added).

127 *Compare* People v. Santorelli, 600 N.E.2d 232, 233 (N.Y. 1992) ("Penal Law § 245.01, when originally enacted, 'was aimed at discouraging "topless" waitresses and their promoters.'") (citation omitted), *with*, Harris v. Comm'r, 178 F.2d 861, 864 (2d Cir. 1949) ("It is always a dangerous business to fill in the text of a statute from its purposes . . . .").

128 *Santorelli*, 600 N.E.2d at 235 n.2 (Titone, J., concurring) ("Significantly, the allegation in Price was that the defendant had been observed on a public street wearing a fishnet pullover which left portions of her breasts visible, prompting the Court to observe that, absent certain conditions, 'legislation may not control the manner of dress.' *That consideration is obviously not relevant here*, where appellants' conduct was obviously intended as a political, rather than a fashion, statement.") (emphasis added) (citation omitted).

129 People v. Price, 307 N.E.2d 46, 46 (N.Y. 1973) (per curiam).

130 *Id.* at 46-47 (citations omitted).

> [T]he Court bypasses appellants' equal protection argument by holding that Penal Law § 245.01 simply does not apply "in these circumstances." That maxim is unhelpful here, however, since both the language and the history of Penal Law § 245.01 demonstrate quite clearly that the conduct with which appellants were charged is precisely the type of behavior that the Legislature intended to outlaw when it enacted Penal Law § 245.01.[131]

Neither the *Santorelli* court nor the *Price* court argue that the language of the law is unambiguous.[132] To go beyond the plain meaning, there needs to be a legal basis, such as an argument of absurdity.[133] The *Price* court maintains that the statute is not meant to address a woman in public who is topless, yet it clearly states that it does.[134] The law has the term "public place" in it, clearly specifies female breasts, and even includes exceptions for breastfeeding and artistic performances.[135] The court provides no statutory interpretation or legal basis for going beyond the plain language of the law.[136]

The *Santorelli* court confesses that rational basis is the appropriate constitutional standard of review for the law at issue.[137] In an absolute stunning display of judicial activism, the court opines that the "statute and the rationale for that decision are different" as a basis for not upholding the law.[138] Rational basis does not factor in the purpose of the law, even as the court declares what it is.[139] Rational basis means that the law will be upheld if it is "rationally related to a legitimate government purpose."[140] The court observes that the government also acted as activists by not doing their job in defending the law.[141] Notwithstanding, the court could have raised it *sua*

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131 *Santorelli*, 600 N.E.2d at 234.

132 *Id.* at 232; *Price*, 307 N.E.2d 46.

133 Transcript of Oral Argument at 53, Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767 (2018) (No. 16-1276). Mr. Chief Justice Roberts stated, "[t]he cases where you're allowed to move beyond the defined term are when if you stick to it, it really makes a mess of the whole thing." *Id.* The Court held that interpreting the statute according to the plain meaning will not lead to an absurdity argument. *Somers*, 138 S. Ct. 767, 778-79 ("Applying the statutory definition here, they variously charge, would 'create obvious incongruities,' 'produce anomalous results,' 'vitiate much of the [statute's] protection,' and, as the Court of Appeals put it, narrow clause (iii) of §78u-6(h)(1)(A) 'to the point of absurdity' . . . . We next address these concerns and explain why they do not lead us to depart from the statutory text.") (citations omitted).

134 *Price*, 307 N.E.2d 46.

135 *Id.*

136 *Id.*

137 *Santorelli*, 600 N.E.2d at 233-34 ("Despite the People's virtual default on the constitutional issue, we must construe a statute, which enjoys a presumption of constitutionality, to uphold its constitutionality if a *rational basis* can be found to do so.") (emphasis added).

138 *Id.* at 234.

139 *Rational Basis Test*, JRANK.ORG, https://law.jrank.org/pages/9651/Rational-Basis-Test.html (last visited Jan. 8, 2022).

140 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES § 9.2.1, at 651 (2d ed. 2002); *see, e.g.*, Fed. Commc'ns Comm'n v. Beach Commc'ns, Inc., 508 U.S. 307, 314 n.6 (1993).

141 *Santorelli*, 600 N.E.2d at 233 ("*Despite the People's virtual default on the constitutional issue*, . . . [w]e must construe a statute . . . to uphold its constitutionality if a rational basis can be found to do

sponte.[142] For further illustration of the court's misapplication of rational basis, the court mistakenly claims that the government has "the burden of proving that there is an important government interest at stake and that the gender classification is substantially related to that interest."[143] The case it cites conducted its analysis of the law at issue with regard to the Equal Protection Clause under scrutiny, and not rational basis.[144] Even the concurring opinion noted that the majority opinion was lacking, to say the least, with regard to the Equal Protection Clause analysis.[145]

C. Courts That Have Held That Have Not Come to a Decision as to Whether Public Female-Only Topless Ban Ordinances Are Constitutional

1. *The Court Granted a Preliminary Injunction Against a Public Female-Only Topless Ban Ordinance but Did Not Issue a Ruling on the Merits*

a. United States Court of Appeals for the Tenth Circuit

In *Free the Nipple–Fort Collins v. City of Fort Collins, Colorado* ("*Free the Nipple—Fort Collins*"), the Tenth Circuit engaged in procedural posturing with regard to the constitutionality of a public female-only topless ban ordinance.[146] The ordinance at issue states:

> No female who is ten (10) years of age or older shall knowingly appear in any public place with her breast exposed below the top of the areola and nipple while located: (1) In a public right-of-way, in a natural area, recreation area or trail, or recreation center, in a public building, in a public square, or while located in any other public place; or (2) On private property if the person is in a place that can be viewed from the ground level by another who is located on public property and who does not take extraordinary steps, such as climbing a ladder or peering over a screening fence, in order to achieve a point of vantage . . . . The prohibition [on female

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so.") (emphasis added); *id.* at 236 (Titone, J., concurring) ("The analysis may have been made somewhat more difficult in this case because of the People's failure to offer any rationale whatsoever for the gender-based distinction in Penal Law § 245.01.").

142 Vestal, *supra* note 104.

143 *Santorelli*, 600 N.E.2d at 233 (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).

144 *Hogan*, 458 U.S. at 723-24 ("We begin our analysis aided by several firmly established principles. Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to *scrutiny* under the Equal Protection Clause of the Fourteenth Amendment. That this statutory policy discriminates against males rather than against females *does not exempt it from scrutiny or reduce the standard of review*.") (emphasis added) (citation omitted).

145 *Santorelli*, 600 N.E.2d at 234 (Titone, J., concurring) ("*The majority has attempted to short-circuit this equal protection inquiry* by holding that Penal Law § 245.01 is inapplicable to these facts.") (emphasis added).

146 Free the Nipple-Fort Collins v. City of Fort Collins, 916 F.3d 792 (10th Cir. 2019).

> toplessness] does not extend to women breastfeeding in places they are legally entitled to be.[147]

Any person who violates this ordinance "shall be guilty of a misdemeanor" and "shall be punished" by a fine of up to $2,650, or up to 180 days in jail, or both.[148]

The Tenth Circuit did not review the constitutionality of the public female-only topless ban ordinance because it did not rule on the merits.[149] Plaintiff sought a preliminary injunction against the ordinance at issue, which the district court granted.[150] The Tenth Circuit did not, however, create a circuit split with its ruling.[151] In *Free the Nipple–Fort Collins*, the court held that "[t]his appeal presents *a narrow question*: did the district court reversibly err in issuing the preliminary injunction."[152] The Tenth Circuit reviewed the district court's opinion *de novo*, and in a two to one decision held that the preliminary injunction favors the Plaintiff and the district court did not abuse its discretion.[153] Hence, the Tenth Circuit was not afforded the opportunity to review the matter with either a full record, including trial, or a dispositive motion. As such, the Tenth Circuit has not ruled on the merits with regard to the constitutionality of the public female-only topless ban ordinance.

V. SECONDARY ARGUMENTS THAT PUBLIC FEMALE-ONLY TOPLESS BAN ORDINANCES ARE CONSTITUTIONAL

A. State Powers of the Tenth Amendment

While the United States Supreme Court has, at one point, downplayed the Tenth Amendment as a truism,[154] it did pronounce that the framers of the

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147 FORT COLLINS, COLO., MUNICIPAL CODE § 17-142(b), (d) (2015) (emphasis added).

148 *Id.* § 1-15(a).

149 *Free the Nipple-Fort Collins*, 916 F.3d at 814.

150 *Id.* at 795.

151 United States v. Biocic, 928 F.2d 112, 116 (4th Cir. 1991) (upholding the public female-only topless ban ordinance at issue); Tagami v. City of Chicago, 875 F.3d 375, 380 (7th Cir. 2017) (upholding the public female-only topless ban ordinance at issue); Free the Nipple-Springfield Residents Promoting Equal. v. City of Springfield, 923 F.3d 508, 512 (8th Cir. 2019) (upholding the public female-only topless ban ordinance at issue). *Contra* Debra Cassens Weiss, *8th and 10th Circuits Split Over Female Topless Ban*, AM. BAR ASS'N J. (May 8, 2019, 7:00 AM CDT), https://www.abajournal.com/news/article/8th-circuit-upholds-female-topless-ban-10th-circuit-ruled-the-other-way.

152 *Free the Nipple-Fort Collins*, 916 F.3d at 795 (emphasis added).

153 *Id.* at 807.

154 U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *cf.* U.S. CONST. amends. I-X (placing limits upon the federal government and enumerating specific substantive guarantees); United States v. Darby, 312 U.S. 100, 124 (1941) ("The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national

Constitution intended for there to be broad rights and powers reserved by the states although they are not enumerated in the Bill of Rights.[155] In certain instances, the Court has afforded protection to liberties that are not specifically enumerated in the Constitution.[156] Notwithstanding, "*[p]ublic nudity, however, is not a substantial constitutional right*."[157] This allows for local governments to prohibit public nudity, which means that public female-only topless ban ordinances are constitutional.

In the Tenth Amendment, the phrase "or to the people" creates "a triangular relationship among the federal government, state governments, and the people."[158] "The people" is not individual persons, but rather local government.[159] Judge Thomas Cooley clearly defined the separation between the federal government, state government, and local government when he articulated that "the constitution [was] adopted in view of a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country. The liberties of the people [were] generally . . . supposed to spring from and be dependent upon that system."[160] Local governments are afforded a significant autonomy under state law.[161] It is within the constitutional right of local governments to enact public female-only topless ban ordinances.

B. Malum In Se

Public nudity is considered a *malum in se* offense because it is a trespass against public morals.[162] "Public indecency—including *public nudity*—has

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and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.").

155 Griswold v. Connecticut, 381 U.S. 479, 492 (Goldberg, J., concurring) ("The Ninth Amendment simply shows the intent of the Constitution's authors that other *fundamental personal rights* should not be denied such protection . . . simply because *they are not specifically listed in the first eight constitutional amendments*.") (emphasis added).

156 *See, e. g.*, *Griswold*, 381 U.S. 479 (protecting the right of access to contraception); Roe v. Wade, 410 U.S. 113 (1973) (protecting the right to abortion); Obergefell v. Hodges, 576 U.S. 644 (2015) (protecting the right to marry).

157 Craft v. Hodel, 683 F. Supp. 289, 302 (D. Mass. 1988).

158 Jay S. Bybee, *The Tenth Amendment Among the Shadows: On Reading the Constitution in Plato's Cave*, 23 HARV. J.L. & PUB. POL'Y 551, 565 (2000).

159 David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 516 (1999).

160 People *ex rel.* Leroy v. Hurlbut, 24 Mich. 44, 98 (Mich. 1871).

161 David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 390 (2001) ("As a formal legal matter, the federal Constitution does not treat local governments as anything approximating coequal sovereigns.").

162 Truet v. State, 57 So. 512, 512 (Ala. Ct. App. 1912) ("It is a nuisance and punishable at common law because it is an act *malum in se*, when committed as alleged in the indictment, affecting the public morals. A public nuisance, because it is violative of the rules of propriety, noxious to moral sensibilities, outrages decency, shocks, and is offensive to those feelings of chastity that people of

long been an offense at common law."[163] Historically, common law has been developed with moral principles championed by religious beliefs.[164] Modest dress for women is a belief in many religions.[165] The public female-only topless ban ordinances do not call for the modest dress espoused by some religions. Rather, public nudity ordinances merely state that women cover their areolas and areas immediately around.

The common law offense known as indecent exposure was historically defined as a person being nude in public.[166] State police powers provide broad authority, which include protecting public health, safety, and morals.[167] Public nudity will corrupt the morals of a substantial majority of the country.[168] Suppressing public nudity also prevents the degradation of the person exposed.[169]

The government has the right to protect its citizens from the unwanted exposure of public nudity.[170] Courts have repeatedly held that the government has a substantial interest in protecting public sensibilities and

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ordinary respectability entertain, and has a tendency to corrupt the public morals."); *see also* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 568 (1991) ("*Public nudity was considered an act* malum in se. Public indecency statutes . . . reflect moral disapproval of people appearing in the nude among strangers in public places.") (emphasis added) (citation omitted).

163 *Barnes*, 501 U.S. at 573 (emphasis added).

164 Eckl v. Davis, 124 Cal. Rptr. 685, 694-96 (Cal. Ct. App. 1975).

165 To adhere to the Catholic religion, Pope Pius XII stated that women should cover their upper arms and shoulders, that their skirts should cover at least as far as the knee, and that the neckline should not reveal anything. Regina Doman Schmiedicke, *Modesty and Beauty—the Lost Connection*, U. CONCOURSE, Feb. 5, 1999, at 4, 6, http://theuniversityconcourse.com/pdfs/IV,4.pdf. In Judaism, women cover their hair because "women who obey these laws ascribe various meanings to the act of head-covering: it is a sign of marriage, or of identification with the tribe; a symbol of piety and humility; an act of deference to the Divine Will; [and] a sign of sexual modesty." Susan Weiss, *Under Cover: Demystification of Women's Head Covering in Jewish Law*, 17 NASHIM: J. JEWISH WOMEN'S STUD. & GENDER ISSUES 89, 89 (2009).

166 Rex v. Crunden (1809) 170 Eng. Rep. 1091 (KB); LeRoy v. Sidley (1664) 82 Eng. Rep. 1036 (KB).

167 *Barnes*, 501 U.S. at 569; *see also* Crownover v. Musick, 509 P.2d 497, 511 (Cal. 1973) ("First, it cannot be doubted that the governmental entities in the instant cases have the inherent constitutional power to regulate nude conduct in bars, restaurants and other public places. *It is clear that such regulations are justified by considerations of public morals and general welfare* to mention two, *and the very elasticity of the police power gives it the capacity* to meet the reasonable current requirements of a changing world.") (emphasis added) (citations omitted); City of Seattle v. Buchanan, 584 P.2d 918, 919 (Wash. 1978) ("The appellants do not deny the right of a municipal legislative body to enact laws for the protection of the public peace, order and morals. They concede that a legislative body may enact laws which apply only to the members of one sex, provided that they are based on actual differences between the sexes.").

168 Craft v. Hodel, 683 F. Supp. 289, 300 (D. Mass. 1988) ("The Regulation does not serve to perpetuate a socially and culturally developed stereotype. It simply recognizes a physical difference between the sexes which has implications for the moral and aesthetic sensitivities of a substantial majority of the country.").

169 *Barnes*, 501 U.S. at 591 (White, J., dissenting).

170 United States v. Biocic, 928 F.2d 112, 116 (4th Cir. 1991) ("The important government interest is the widely recognized one of protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous zones.").

morals from public nudity.[171] These statutes *today* consider the female breast an erogenous body part. Government morality-based statutes mandating that both male and female genitalia be cloaked in public pass constitutional muster. Courts have widely employed the same reasoning—that these ordinances are substantially related to the important governmental purpose of preventing the adverse effects of public nudity and protecting order and morality. Accordingly, public female-only topless ban ordinances proscribe the bare minimum to protect public welfare and morals.[172]

C. Differences Between a Male Breast and a Female Breast

Quite simply, the female breast is an erogenous body part which warrants concealment in public.[173] These topless bans proscribe what is necessary to protect public welfare and morals. "Rightly or wrongly, our society continues to recognize a fundamental difference between the male and female breast."[174] These public nudity bans trace their history to ancient origins.[175]

Female breasts are starkly different than male breasts, with criminal cases showing their treatment differs too. There are several cases where defendants have been charged with groping the breast of a female.[176] When

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171 *See, e.g.*, People v. Craft, 509 N.Y.S.2d 1005, 1009 (N.Y. City Ct. 1986), *rev'd*, 564 N.Y.S.2d 695 (Monroe Cnty. Ct. 1991), *rev'd sub nom.*, 80 N.Y.2d 875 (N.Y. 1992) ("[T]he government's . . . objective . . . to protect the general public from being accosted by offensive conduct in public places . . . is a legitimate one, and an important one.") (citations omitted); State v. Turner, 382 N.W.2d 252, 255 (Minn. Ct. App. 1986) ("Protection of society's norms is a legitimate legislative goal"); *cf*. Bowers v. Hardwick, 478 U.S. 186, 195 (1986) (holding that a majority's moral sentiments may provide an adequate basis for prohibiting "victimless" conduct).

172 Tagami v. City of Chicago, 875 F.3d 375, 379 (7th Cir. 2017) ("To defend the ordinance against this facial challenge, the City invokes its general interest in preserving health, safety, and traditional moral norms. More particularly, the City argues that *the ordinance protects unwilling members of the public—especially children—from unwanted exposure to nudity*.") (emphasis added).

173 *See generally* Kimberly J. Winbush, Annotation, *Regulation of Exposure of Female, But Not Male, Breasts*, 67 A.L.R. 5th 431 (1999) (acknowledging that courts have recognized the female breast constitutes an erogenous zone).

174 Buzzetti v. City of New York, 140 F.3d 134, 138 (2d Cir. 1998).

175 Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

176 *See, e.g.*, Fall v. Ind. Univ. Bd. of Trs., 12 F. Supp. 2d 870, 879 (N.D. Ind. 1998) ("Rather, Cohen, in his office with the door closed, forcibly grabbed and kissed the Plaintiff while forcing his hand inside her blouse to *grope her breasts, a very private and intimate part of a woman's body*.") (emphasis added); Peddle v. Sawyer, 64 F. Supp. 2d 12, 14-15 (D. Conn. 1999) ("From April through September, 1995, Officer Cephas engaged in a course of conduct in which he would regularly *grope* Ms. Peddle in the *breast* and groin areas . . . . In that position, Officer Cephas repeatedly singled out Ms. Peddle for pat searches, during which *he groped her breasts* and groin . . . Officer Cephas would then *grope Ms. Peddle's breast* and groin areas.") (emphasis added); People v. McRoberts, No. C04962, 2007 WL 2456094, at *2 (Cal. Ct. App. Aug. 30, 2007) ("After asking her whether she had a boyfriend, he bent down and with his finger, traced a flower that was drawn on her leg, and then reached down her shirt and *groped her breasts*.") (emphasis added).

men are groped, it is with regard to their genitalia, and not their breasts, being touched.[177]

In modern times, society continues to recognize the female breast as an erogenous body part. This recognition extends to undergarments, entertainment, and athletics. Consumerism regarding differences between male and female breasts also demonstrates an industry existing almost entirely for women. Women wear bras for several reasons, including to *cover* and support their breasts. In a twelve-month period, which ended in May 2019, women spent approximately $7.2 billion on bras.[178] While some men may wear bras, for example if they develop breasts,[179] it is not a societal norm as it is for women to wear bras.

The Motion Picture Association of America ("MPAA") rejected a proposed movie poster of the film "*Sin City: A Dame to Kill For*" because it showed "nudity—*curve of under breast and dark nipple*/*areola* circle visible through sheer gown" of actress Eva Green.[180] In contrast, the theatrical release posters for both *Magic Mike* and *Magic Mike XXL* feature several men with their bare chests and nipples exposed.[181] The MPAA did not object to either of the two male posters.[182]

In Olympic sports, female swimmers and female beach volleyball players cover their breasts and nipples.[183] By contrast, male swimmers and male beach volleyball players bare their chests and expose their nipples.[184]

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177 Wheeler v. Aventis Pharms., 360 F. 3d 853, 856 (8th Cir. 2004) ("Several other interviewees revealed that they witnessed Wheeler groping—or attempting to *grope*—various *male employees*. . . . John Lewis explained to Wheeler that several of her co-workers had stated that, on numerous occasions, *she had touched her male co-workers' genitalia*.") (emphasis added).

178 *Shopping for a Bra is More About Comfort Than Sexiness, Reports NPD*, NPD (Aug. 6, 2019), https://www.npd.com/wps/portal/npd/us/news/press-releases/2019/shopping-for-a-bra-is-more-about-comfort-than-sexiness--reports-npd/.

179 Brendan Pierson & Nate Raymond, *Jury Says J&J Must Pay $8 Billion in Case over Male Breast Growth Linked to Risperdal*, REUTERS (Oct. 8, 2019, 4:51 PM), https://www.reuters.com/article/us-johnson-johnson-risperdal-verdict/jj-must-pay-8-billion-in-case-over-male-breast-growth-linked-to-risperdal-jury-idUSKBN1WN2HK.

180 Oliver Gettell, *MPAA Quashes Eva Green 'Sin City' Poster: Too Much Curve and Nipple*, L.A. TIMES (May 30, 2014, 10:30 AM PT), https://www.latimes.com/entertainment/movies/moviesnow/la-et-mn-eva-green-sin-city-poster-mpaa-rating-20140530-story.html (emphasis added).

181 Nestor Bentancor, *First MAGIC MIKE: XXL Poster (AKA Channing Tatum's Naked Torso)*, DESDE HOLLYWOOD, http://www.desdehollywood.com/first-magic-mike-xxl-poster-aka-channing-tatums-naked-torso/ (last visited Jan. 5, 2022).

182 Danny Walker, *Magic Mike XXL Poster CENSORED: Australian Promo One-Sheet Seemingly Covers Star's Glistening Torsos*, MIRROR (July 18, 2015), https://www.mirror.co.uk/tv/tv-news/magic-mike-xxl-poster-censored-6095250.

183 Harriet Johnston, *From See-Through Triathlon Unitards to Leopard Print Running Shorts that Leave VERY Little to the Imagination-All the Male Athletes Daring to Bare at Tokyo Olympics After Row over Female Competitors' Attire*, DAILY MAIL.COM (July 27, 2021, 21:12 EDT), https://www.dailymail.co.uk/femail/article-9830613/The-male-athletes-daring-bare-Tokyo-Olympics-row-female-competitors-attire.html.

184 *Id.*

In *Buchanan*, the court opines that "[w]ith respect to the latter, it was found to be in the public interest to order concealed, in addition to the genitals, *the female breasts*, *which*, *unlike male breasts*, *constitute an erogenous zone and are commonly associated with sexual arousal*."[185]

VI. SECONDARY ARGUMENTS THAT PUBLIC FEMALE-ONLY TOPLESS BAN ORDINANCES ARE UNCONSTITUTIONAL

A. First Amendment Claims

The freedom of expression found under the First Amendment of the U.S. Constitution is narrow.[186] In S*tate v. Baysinger*, the Indiana Supreme Court weighed in and ruled that expression needs to communicate ideas.[187] If the State of Indiana had a statute or common law suggesting nudity is protected, the result may have been different.[188] However, this is outside the protection of the First Amendment in the U.S. Constitution. Nudity in and of itself does not constitute the expression of ideas. Rather, it is merely conduct.[189]

Challenges to public female-only topless ban ordinances as unconstitutional under the First Amendment have failed to succeed. The Court has proclaimed that "[n]o one would suggest that the First Amendment permits nudity in public places."[190] This turned out to be unprophetic, as numerous cases have argued that public female–only topless ban ordinances are unconstitutional because they violate the First Amendment.[191]

There may be some First Amendment protection with regard to a public female–only topless ban ordinance, but it will be narrow in scope.[192] These

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185 City of Seattle v. Buchanan, 584 P.2d 918, 920 (Wash. 1978).

186 *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (holding that state constitutions might provide "rights in expression" that are "more expansive than those conferred by the Federal Constitution").

187 State v. Baysinger, 397 N.E.2d 580 (Ind. 1979), *reh'g denied*.

188 *See* Hudgens v. Nat'l Lab. Rels. Bd., 424 U.S. 507, 513 (1976) ("[S]tatutory or common law may in some situations extend protection or provide redress against [efforts] to abridge . . . free expression . . . .").

189 Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, *though we view it as only marginally so."*) (emphasis added).

190 Roth v. United States, 354 U.S. 476, 512 (1957) (Douglas, J., dissenting).

191 *See infra* discussion Section VI.

192 City of Seattle v. Buchanan, 584 P.2d 918, 938 (Wash. 1978) (Horowitz, J., dissenting) ("In *Doran* the court held that a First Amendment challenge to an ordinance prohibiting *nude dancing* in *any public place* was likely to succeed on the merits. This form of entertainment, it was noted, *may be entitled to First Amendment protection under some circumstances*.") (emphasis added) (citing Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975).

protections are for conduct that is "inherently expressive."[193] The Court did expound that nude dancing meets the requirement of inherently expressive.[194] However, a key distinguishment is that the nude dancing at issue, and cited in other cases before the Court, take place within a commercial setting.[195]

Only one court, which was overturned on appeal, held that a public female–only topless ban ordinance violates the First Amendment.[196] In *People v. Craft*, the Defendants were arrested for exposing their breasts in a public park as part of a demonstration.[197] The court's reasoning was flawed in determining that the government's interest was not being infringed upon because the language of the statute was plain and unambiguous.[198]

First, the court acknowledged that the language of the statute is plain and unambiguous, and it was an "absolute prohibition."[199] The first step in statutory interpretation is to determine if the language of the statute is plain and unambiguous.[200] If it is, no further analysis is needed. Even if a court feels that the language is too absolute, it is not the court's position to make that determination. "Judicial activism occurs when a court goes beyond the plain meaning of the text that is plain and unambiguous."[201]

The Seventh Circuit ruled that First Amendment claims are imperfect defenses to violations of public female–only topless ban ordinances.[202] In *Tagami v. City of Chicago*, the Plaintiff, Sonoku Tagami, participated in an annual demonstration named "GoTopless Day" by exposing her breasts in public.[203] The Plaintiff argued that this rose to the level of expressive conduct, since her particularized message is that women should have the right

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193 City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) ("[B]eing 'in a state of nudity' is *not* an *inherently expressive* condition . . . . ") (emphasis added).

194 *Id.* ("As we explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection.").

195 *Id.*

196 People v. Craft, 509 N.Y.S.2d 1005, 1012-14 (N.Y. City Ct. 1986), *rev'd*, 564 N.Y.S.2d 695 (Monroe Cnty. Ct. 1991), *rev'd sub nom.*, 80 N.Y.2d 875 (N.Y. 1992).

197 *Id.* at 1007.

198 *Id.* at 1013-14.

199 *Id.* ("Our inquiry here must examine the importance of the governmental interest sought to be achieved, and the absolute prohibition which the statute imposes, and weigh these against the minimal effect on public sensibilities of the symbolic speech which defendants sought to exercise.").

200 Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'").

201 Birmingham, *supra* note 123, at 4.

202 Tagami v. City of Chicago, 875 F.3d 375, 377-78 (7th Cir. 2017) ("Taking the First Amendment claim first, we begin with an obvious point: Chicago's public-nudity ordinance regulates conduct, not speech.").

203 *Id.* at 377.

to bare their breasts in public.[204] The court rejected this argument by noting that a reasonable person would not comprehend the Plaintiff's message by solely looking at her topless.[205] Public nudity in protest of public female–only topless ban ordinances, are not within the ambit of the First Amendment's protection.[206] In *Tagami*, the dissent undercuts its own argument when it holds that just because Tagami included an explanation with her protest, it did not turn her expressive conduct into non-expressive conduct.[207] This is an incorrect interpretation of the law, as the Supreme Court has held that in order to determine if conduct is expressive, it asks whether a reasonable person interpret it as a message of some sort.[208] Assuming *arguendo* that Tagami's nudity is expressive conduct, the Supreme Court has held that constitutional protection for nudity or semi-nudity as a means of expression applies within the context of artistic performances.[209] Tagami, nor the dissent, make any claim that Tagami's nudity was due to an artistic performance.[210] The dissent concedes that Tagami being nude in public is not expressive conduct by saying one cannot "evaluate the expressive content of public nudity divorced from the context in which it occurs."[211]

Withal, the dissent then makes a false equivalence by comparing Tagami[212] with students protesting war by wearing armbands at school.[213] There was no law prohibiting students from wearing armbands, but rather it was school officials asking the students to not wear the armbands.[214] Moreover, there is difference between protesting in public and students protesting on school grounds. In *O'Brien*, the Supreme Court has also found that not all expressive conduct is speech.[215]

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204 *Id.* at 379.

205 *Id.* at 378.

206 *Id.*

207 *Id.* at 381.

208 Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp., 515 U.S. 557, 569 (1995).

209 California v. LaRue, 409 U.S. 109, 117-18 (1992).

210 *See Tagami*, 875 F.3d at 380 (Rovner, J., dissenting).

211 *Id.* at 381.

212 *Id.* ("Accompanying explanations do not turn expressive conduct into non-expressive conduct. Otherwise wearing a black armband would constitute expressive conduct, but wearing an armband and *shouting, 'No more war!' would not*.") (emphasis added). Please note that this is pure speculation by the dissent, as *Tinker* mentions that, though the record did not show that the protesting "armband students shouted, used profane language, or were violent in any manner, detailed testimony . . . shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 517 (1969) (Black, J., dissenting).

213 Tinker, 393 U.S. 503.

214 *Id.* at 504.

215 United States v. O'Brien, 391 U.S. 367, 376 (1968).

Assuming *arguendo* that Tagami's nudity is found to be expressive conduct, it is not certain that it rises to the level of speech. Thus, since it is not speech it would not be afforded First Amendment protections of free speech.

1. Nude Sunbathing

In defense of violating public female–only topless ban ordinances, some parties have made the argument that nude sunbathing does not rise to the level of a violation. Courts have rejected this argument, as it has two fatal flaws.

First, nude sunbathing without an association to another form of expression or communication such as but not limited to dance, literature, performing arts, *inter alia*, does not convey a particularized message.[216] One Federal District Court analogized nude sunbathing to hair length, as both are personal preferences.[217]

The second reason as to why nude sunbathing does not have First Amendment protection is because the time, place and manner restrictions that are normally encompassed within public female–only topless ban ordinances.[218] In order to pass constitutional muster with regard to a time, place and manner restriction, a public female–only topless ban ordinance must:

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216 Erznoznik v. City of Jacksonville, 422 U.S. 205, 211 n.7 (1975) ("Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. In this respect such nudity is distinguishable from the kind of public nudity traditionally subject to indecent-exposure laws.") (citations omitted). "No one would suggest that the First Amendment permits nudity in public places." Roth v. United States, 354 U.S. 476, 512 (1957) (Douglas, J., dissenting).

217 Williams v. Hathaway, 400 F. Supp. 122, 126 (D. Mass. 1975) ("[T]here is little in plaintiffs' conduct that merits First Amendment protection. . . . [Like wearing long hair, nude bathing is] fundamentally individualistic and personal rather than expressive or communicative. In *Thurston*, the Court '[rejected] the notion that plaintiff's hair length is of a sufficiently communicative character to warrant the full protection of the First Amendment.' There is no reason why this Court should decide the present matter any differently.") (citations omitted). On appeal, the First Circuit agreed with the Federal District Court. Williams v. Kleppe, 539 F.2d 803, 806 n.9 (1st Cir. 1976) ("We agree with the district court's conclusion that no rights of free speech can be said to have been involved here. A distinction must be made between groups concerned with discussing and promoting a pleasurable activity, and those gatherings of people merely desiring to pursue that activity where it can take place.") (citation omitted).

218 Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

> (1) be justified without reference to the content of the regulated speech;
> (2) serve a significant or important governmental interest;
> (3) be narrowly tailored to serve that interest; and
> (4) leave open ample channels for communication of the information, the expression of which it restricts.[219]

With regard to the first prong, public female–only topless ban ordinances are content neutral. Public female–only topless ban ordinances are not regulating what a person can or cannot say. Nudity in public does not rise to the level of speech.[220] Assuming *arguendo* it does, public female–only topless ban ordinances are content neutral because the speech may be different. For instance, in *Tagami* the Plaintiff was protesting for women to be able to bare their breasts in public.[221] Other women have gone topless in public to protest the Ku Klux Klan,[222] Brexit,[223] animal rights,[224] and war.[225] Public female–only topless ban ordinances are content neutral since they do not discuss regulating any messages. Regarding the second prong, an important governmental interest is controlling public nudity and protecting societal norms. Being nude in public, including nude sunbathing, is not a fundamental right.[226] As to the third prong, the Supreme Court has held that public female–only topless ban ordinances, even ones that are not expertly drafted, are narrowly tailored.[227] Finally, with respect to the fourth prong, the Court explicitly rejected the argument that a public female–only topless ban ordinance restricts free speech.[228]

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219 *Id.*

220 *See* SCALIA & GARNER; *Kleppe*, 539 F.2d at 806 n.9 ("We agree with the district court's conclusion that no rights of free speech can be said to have been involved here.").

221 Tagami v. City of Chicago, 875 F.3d 375, 377 (7th Cir. 2017).

222 *10 Successful Cases Recognizing Women's Right to be Topless in Certain States or Cities*, GOTOPLESS.ORG (Aug. 26, 2007), https://gotopless.org/news.php?extend.3.

223 Alisha Haridasani Gupta, *Shedding her Clothes in the Name of Economics*, N.Y. TIMES (Jan. 20, 2020), https://www.nytimes.com/2019/10/11/us/-economics-gender-equality.html.

224 *Pictures: PETA Members Naked in Past Protests*, CHI. TRIB., https://www.chicagotribune.com/nation-world/sns-peta-protesters-pictures-photogallery.html, (last visited Mar. 31, 2022).

225 Jeffrey Lais, *CHP Pays Topless Peace Protesters $150K to Settle Civil Rights Lawsuit*, KUMIN SOMMERS, L.L.P. (Mar. 5, 2009), http://www.kuminsommers.com/node/71/.

226 Elysium Inst., Inc. v. County of Los Angeles, 283 Cal. Rptr. 688, 695, 698 (Cal. Ct. App. 1991) ("The fact that the right of privacy in one's home may comprehend the private practice of nudism does not compel a finding that the right to operate a nudist camp in a certain zone is a fundamental right. . . . We conclude that the operation of a nudist camp in any particular zone does not involve a fundamental right under equal protection analysis; to the extent that the ordinance affects a protected right of privacy, such effect is incidental, and strict scrutiny is not appropriate.").

227 Erznoznik v. City of Jacksonville, 422 U.S. 205, 223 (1975) (Douglas, J., concurring) ("In sum, the Jacksonville ordinance involved in this case, although no model of draftsmanship, *is narrowly drawn to regulate only certain unique public exhibitions of nudity* . . . .") (emphasis added).

228 *Id.* ("[I]t would be absurd to suggest that it operates to suppress expression of ideas. By conveniently ignoring these facts and deciding the case on the basis of absolutes the Court adds nothing to First Amendment analysis and sacrifices legitimate state interests. I would affirm the judgment of the Florida Court of Appeal.").

B. Void-For-Vagueness Doctrine

Some defendants have raised the void-for-vagueness doctrine[229] as a defense to the public female–only topless ban ordinances they were charged with violating.[230] The void-for-vagueness doctrine requires that a law be precise enough to give fair warning to actors that might or have engaged in or contemplated conduct which is criminal.[231] The Supreme Court has outlined two reasons as to why a statute may violate the vagueness doctrine: (1) the statute must explicitly state what it mandates, and what is enforceable; and (2) vague and potentially vague terms must be clearly defined.[232] The public female–only topless ban ordinances prohibit women from exposing their breast within the nipple and surrounding areola.[233]

In *Tolbert*, the Plaintiffs were able to successfully argue that the public female–only topless ban ordinance at issue was vague with regard to where the prohibited activity took place, rather than the prohibited activity itself.[234] The ordinance includes the phrase "public place" which it defined as "streets, sidewalks, or highways; transportation facilities; schools; places of amusement; parks; playgrounds; restaurants; nightclubs; cocktail lounges; burlesque houses; bars; cabarets; taverns; taprooms; private fraternal, social,

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229 Anthony G. Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

230 United States v. Biocic, 928 F.2d 112, 114 (4th Cir. 1991) ("The vagueness claim may have both constitutional and non-constitutional prongs. Both (if there be two) are grounded in the point that § 9.3 of the local ordinance does not purport to punish 'indecency,' but only 'public nudity,' which in turn it nowhere defines as 'indecency.' From this, the literalist argument runs, the conduct which § 9.3 proscribes may not properly be considered 'an act of indecency . . . as defined by local law' within contemplation of 50 C.F.R. § 27.83."); Tolbert v. City of Memphis, 568 F. Supp. 1285, 1287 (W.D. Tenn. 1983) ("Plaintiffs raise numerous claims based on the United States Constitution which they believe will entitle them to the relief sought. In particular, the plaintiffs argue . . . (5) that the ordinance is unconstitutionally vague; and (6) that the ordinance is being enforced in a selective, discriminatory, and harassing manner that violates the plaintiffs' rights to due process and equal protection."); City of Seattle v. Buchanan, 584 P.2d 918, 928 (Wash. 1978) ("It will be seen that the prior law, having no statutory definition of the words 'nudity,' 'lewd,' 'indecent,' and 'lewd acts or behavior,' was open to a charge of vagueness.").

231 Skilling v. United States, 561 U.S. 358, 415 (2010) (Scalia, J., concurring) ("A criminal statute must clearly define the conduct it proscribes."); Colautti v. Franklin, 439 U.S. 379 (1979); Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489 (1982).

232 *Skilling*, 561 U.S. at 402-03 ("To satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'") (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

233 Minneapolis, Minn., Park Board Ordinance 2-21 (1982) (repealed 2020); Seattle, Wash., Crim. Code Ordinance 102,843 (Dec. 3, 1974); L.A., Cal., Ordinance 146,360 (July 19, 1974); ACCOMACK COUNTY, VA., CODE § 58-2 (1982) (original version at § 9-3); CHI., ILL., CODE § 8-8-080 (1978); N.Y. PENAL LAW § 245.01 (McKinney 1989); FORT COLLINS, COLO., MUNICIPAL CODE § 17-142(b), (d) (2015).

234 Tolbert v. City of Memphis, 568 F. Supp. 1285, 1291-92 (W.D. Tenn. 1983) (citing the phrase "or any place that allows the consumption of intoxicating beverages on the premises" in the ordinance). "It is conceivable that this phrase could apply to a private residence." *Id.*

golf or country clubs; *or any place that allows the consumption of intoxicating beverages on the premises*."[235] The Plaintiffs were topless dancers, and cited *Doran v. Salem Inn, Inc.*, in which the Court struck down an ordinance because of a vague definition of public places:

> The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in "any public place" with uncovered breasts. There is no limit to the interpretation of the term "any public place." It could include the theater, town hall, opera house, as well as a public market place, street or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the 'Ballet Africains' and a number of other works of unquestionable artistic and socially redeeming significance.[236]

In *Biocic*, the Fourth Circuit held that the public female–only topless ban ordinances at issue were not vague, as the term "public . . . or public view" were not defined.[237] Plaintiff argued that the local ordinance prohibited "public nudity"[238] and the Code of Federal Regulations prohibited "indecency."[239] Black's Law Dictionary defines indecency as "the state or condition of being outrageously offensive, esp. in a vulgar or *sexual way*."[240] It is logical to presume that public nudity is within the scope of indecency.[241] Moreover, the Fourth Circuit cites the Eleventh Circuit, who trumpeted that with regard to indecency that "[w]hile the language may not be absolutely clear, it certainly applies to public nudity."[242]

The vagueness doctrine defense with regard to public female–only topless ban ordinances succeeded when it was argued that the location, not the activity, was vague. In the aforementioned cases that came to this conclusion, the ordinances at issue may have not been found to be vague if they did not provide such convoluted definitions for public places. It is constitutional to prohibit public nudity, specifically concerning females exposing their breast within the nipple and surrounding areola.

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235 *Id.* at 1291 (emphasis added).

236 Doran v. Salem Inn, Inc., 422 U.S. 922, 933 (1975) (citing Salem Inn, Inc., v. Frank, 364 F. Supp. 478 (E.D.N.Y. 1973)).

237 United States v. Biocic, 928 F.2d 112, 118 (4th Cir. 1991) (Murnaghan, J., concurring).

238 ACCOMACK COUNTY, VA., CODE § 58-2 (1982) (original version at § 9-3) ("*Prohibited*. It shall be unlawful for any person to knowingly, voluntarily and intentionally appear in public, or in a public place, or in a place open to the public or open to public view, in a state of nudity or to employ, encourage or procure another person to so appear.").

239 50 C.F.R. § 27.83 (1976) ("Any act of indecency or disorderly conduct as defined by State or local laws is prohibited on any national wildlife refuge.").

240 *Indecency*, BLACK'S LAW DICTIONARY (10th ed. 2014).

241 *See supra* note 163 and accompanying text; Barnes v. Glen Theatre, Inc., 501 U.S. 560, 573 (1991).

242 *Biocic*, 928 F.2d at 115; S. Fla. Free Beaches, Inc., v. City of Miami, 734 F.2d 608, 611 (11th Cir. 1984).

C. Overbreadth Doctrine

The overbreadth doctrine is limited to facial challenges of the First Amendment.[243] The overbreadth doctrine applies when the conduct of the plaintiff is not constitutionally protected, so the challenge proceeds with *jus tertii* standing in order to challenge the law on its face.[244] While the Supreme Court has referred to the overbreadth doctrine as "strong medicine"[245] that should only be imposed "sparingly and only as a last resort,"[246] there are several cases where the Court heard challenges without determining the initial threshold as to whether the plaintiff's own speech was constitutionally unprotected.[247]

The overbreadth doctrine is clearly distinguished from the void-for-vagueness doctrine. The overbreadth doctrine is when a law prohibits a substantial amount of protected conduct.[248] The void-for-vagueness doctrine is when the language of the law may be expanded to the point where there is a reasonable interpretation that conduct is prohibited, despite the law not intending to prohibit said conduct.[249]

In *State v. Turner*, the court professed that the language "exposure of the 'female breast below the top of the areola' by any person over the age of ten (10) years in or on any park or parkway under its jurisdiction and control" is not subject to the overbreadth doctrine.[250] The Appellant claimed the language is overbroad on its face and as it applied to her.[251] These arguments are muddled, as the Supreme Court has held that the "strong medicine" of the overbreadth doctrine should not be used to invalidate a law when it is being alleged as unconstitutional as applied by a challenger before a court.[252] The overbreadth doctrine aims to "strike a balance between competing social

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243 United States v. Salerno, 481 U.S. 739, 745 (1987) ("The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."); *see also* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991).

244 Generally, the conduct of plaintiffs is not constitutionally protected; as such, plaintiffs proceed with *jus tertii* standing in order to challenge the law on its face. *See generally* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359 (1998).

245 Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

246 *Id*.

247 *See, e.g.*, N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13-15 (1988); Boos v. Barry, 485 U.S. 312, 329-32 (1988).

248 People v. Gabriel, 950 N.Y.S.2d 874, 885 (Sullivan Cnty. Ct. 2012).

249 *Id.* ("Not only does this statute criminalize any type of feeding of deer, but broad language like 'placing,' 'exposing,' or 'depositing' creates myriad situations in which one could violate the statute without any intention of feeding deer or moose.").

250 State v. Turner, 382 N.W.2d 252, 255 (Minn. Ct. App. 1986).

251 *Id.* at 254.

252 United States v. Stevens, 559 U.S. 460, 483 (2010) (Alito, J., dissenting).

costs."[253] As such, the *Turner* court was not likely to invalidate the law based upon a challenger bringing forth a claim as applied to her. Furthermore, the court found the Appellant's argument of the law as applied to her unpersuasive.[254] Said argument was that nude sunbathing was artistic, and that the law was overbroad as it prohibited artistic expression.[255] In *Craft v. Hodel*,[256] the court came to the same conclusion as the *Turner*[257] court. In *Hodel*, the court ruled that a public female-only topless ban ordinance is not invalidated by the overbreadth doctrine because it does not contain an exception for nude sunbathing.[258]

The *Tolbert* court misapplied the overbreadth doctrine with regard to public female-only topless ban ordinances. In *Tolbert*, the court conflated the void-for-vagueness doctrine with the overbreadth doctrine.[259] The court held that "the ordinance challenged in the instant case is unconstitutionally overbroad and vague" because the definition of the term public place.[260] The court observes that the definition of the term public place ("any place that allows the consumption of intoxicating beverages on the premises") could reasonably be interpreted to a private residence.[261] The court's reasoning is that the ordinance at issue is the void-for-vagueness doctrine, yet it is claiming it is the overbreadth doctrine.[262]

Public female-only topless ban ordinances are constitutional and do not violate the overbreadth doctrine. Overbreadth doctrine challenges must be based upon actual conduct, and not hypotheticals.[263] Additionally, the overbreadth doctrine has a high burden of proof as "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially

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253 United States v. Williams, 553 U.S. 285, 292 (2008).

254 *Turner*, 382 N.W.2d at 256.

255 *Id.* at 255.

256 Craft v. Hodel, 683 F. Supp. 289 (D. Mass. 1988).

257 *Turner*, 382 N.W.2d at 256.

258 *Id.*

259 Tolbert v. City of Memphis, 568 F. Supp. 1285, 1289, 1292 (W.D. Tenn. 1983) ("Finally, as evidenced by the Court's discussion below, it appears that the ordinance directly chills the exercise of First Amendment freedoms and that the ordinance is, on its face, *unconstitutionally vague and overbroad*. In other words, the ordinance appears to be patently unconstitutional. . . . This Court notes, for example, that the following phrase used in the ordinance as part of the definition of 'public place' *is both overbroad and vague*: 'any place that allows the consumption of intoxicating beverages on the premises.' It is conceivable that this phrase could apply to a private residence. The district court concluded, therefore, that the ordinance challenged in this case is unconstitutionally vague.") (emphasis added) (citation omitted). *But see* United States v. Biocic, 928 F.2d 112, 114 (4th Cir. 1991) (making an overbreadth doctrine claim, but dropping it on appeal and pursuing a void-for-vagueness doctrine argument).

260 *Tolbert*, 568 F. Supp. at 1291.

261 *Id.* at 1292.

262 *Id.*

263 United States v. Williams, 553 U.S. 285, 301-02 (2008).

challenged on overbreadth grounds."[264] We have seen courts state that there is no constitutional right, First Amendment or otherwise, to public nudity.[265] We have also seen courts reject arguments that public female-only topless ban ordinances are drafted in an overbroad manner.[266] Granted, public female-only topless ban ordinances vary widely in language. If female topless ordinances are not properly drafted, it is possible for the ordinances to violate the void-for-vagueness doctrine or the overbreadth doctrine. Notwithstanding, as long as public female-only topless ban ordinances are properly drafted (looking to some which the courts have upheld as guidance), courts will continue to uphold them against overbreadth doctrine challenges.

VII. REDUCTIO AD ABSURDUM

In *People v. Santorelli*, the court's reasoning for holding that public female-only topless ban ordinances are unconstitutional is subject to *reductio ad absurdum*.[267] The court then stated that the ordinance at issue, New York Penal Law section 245.01,[268] violated the Defendants' First Amendment rights because the demonstration "was not a repeated occurrence . . . it was a one-time occurrence"[269] as compared with nude sunbathing.[270] However, this

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264 Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984); *see also Williams*, 553 U.S. at 292 (noting that courts should refrain from invalidating a law under the overbreadth doctrine unless it is necessary and that the overbreadth doctrine is designed to to "strike a balance between competing social costs").

265 *See* Rex v. Crunden (1809) 170 Eng. Rep. 1091 (KB); LeRoy v. Sidley (1664) 82 Eng. Rep. 1036 (KB).

266 *See supra* Section VI.; *see also see* United States v. Biocic, 928 F.2d 112, 114 (4th Cir. 1991); City of Seattle v. Buchanan, 584 P.2d 918 (Wash. 1978).

267 *Reductio Ad Absurdum*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("In logic, disproof of an argument by showing that it leads to a ridiculous conclusion."); *see also* Max Birmingham, *The Paper Chase: Should the Principles of Contract Law Govern ERISA Section 302?*, HOFSTRA LAB. & EMP. L.J. 293 (2020) (discussing why the United States Court of Appeals for the First Circuit's ruling that a party having to make additional contributions to a pension plan after it has already met its contractual obligations is subject to *reductio ad absurdum*); Max Birmingham, *Up in the Air: Analyzing Whether the Clean Air Act Preempts State Common Law Claims*, LIBERTY U. L. REV. 55 (2019) (arguing that there will be absurd results if the Clean Air Act does not preempt state common law claims); Max Birmingham, *Paid in Full: Interpreting and Defining "Market Value" Under the Lacey Act*, 25 ANIMAL L. 125, 145-48 (2019) [hereinafter *Paid in Full*] (explaining the absurd results that will ensue if courts accept arguments that, because laypersons do not understand the law, they are therefore immune from being found guilty of violating the law).

268 N.Y. PENAL LAW § 245.01 (McKinney 1989).

269 *Paid in Full*, *supra* note 267, at 145-48.

270 *Id.* at 131-32. In *Craft*, the city court of Rochester stated:

> *Thus, unlike repeated nude sunbathing on a beach*, defendants' conduct did not frustrate the objective of this statute. In the prior discussion it was found that the government's interest in protecting the public's sensibilities was sufficiently important to sustain a gender-specific statute under the equal protection clause. However, that interest does not rise to the dignity or cogency required when faced with this 1st Amendment challenge, because non-obscene speech cannot be prohibited merely to protect the sensibilities of the observers.

clearly violates the mootness doctrine. Voluntary cessation of the challenged conduct does not moot a case unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[271] It is plausible that the Defendant would have another demonstration in the park. The named Defendant, Nikki G. Craft, is the same person as the named Plaintiff in *Craft v. Hodel*, which occurred two years later.[272] The court does not specify whether it is permissible for a one-time occurrence with the Defendants or is it permissible for a one-time occurrence ever.[273] Moreover, if a one-time occurrence permissible, it makes a second-time occurrence seem much more likely. The court does not define repeated. As such, the court cannot set a bright line as to the number of times these occurrences are permissible, especially since the statute provides for an absolute prohibition on said occurrences.

In *Tagami*,[274] the dissenting opinion is also subject to *reductio ad absurdum*. The dissent suggested that public female-only topless ban ordinances are permissible so long as they prohibit nude sunbathing or "swinging topless on a light post to earn money."[275] The dissent goes on to make a false equivalence by comparing public female-only ban ordinances with "streaking across a football field to appear on television."[276] Streaking across a football field (presumably one that has professional or high-level college teams playing since it is on television) is trespassing.[277] Additionally, the qualifying reason of "to appear on television" narrows the scope of when it is unacceptable to streak across a football field, but also opens up the question as to when it is acceptable. Under the court's reasoning that it is okay to violate a public female-only topless ban ordinance by going out into public topless, it is permissible for a person to protest using taxpayer funds for a football field to streak across a football field.

The dissenting opinion's explanation is *petitio principii* (a circular argument sometimes known as "begging the question").[278] The dissenting opinion argues that because Tagami was protesting speech, she may be allowed to be topless.[279] One could argue that a female could protest a public

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People v. Craft, 509 N.Y.S.2d 1005, 1014 (N.Y. City Ct. 1986), *rev'd*, 564 N.Y.S.2d 695 (Monroe Cnty. Ct. 1991), *rev'd sub nom.*, 80 N.Y.2d 875 (N.Y. 1992) (emphasis added).

271 United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 203 (1968).

272 Craft v. Hodel, 683 F. Supp. 289 (D. Mass. 1988).

273 *Id.*

274 Tagami v. City of Chicago, 875 F.3d 375 (7th Cir. 2017).

275 *Id.* at 381.

276 *Id.*

277 *See generally* OHIO REV. CODE ANN. § 2911.21 (West 2021).

278 IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 92 (8th ed. 1990) (explaining that the logical fallacy *petitio principii* is sometimes known as begging the question). This logical fallacy attempts to support a claim with a premise that itself presupposes the claim. *Id.*

279 *Tagami*, 875 F.3d at 380-81 (Rovner, J., concurring) ("In dismissing this case on the pleadings, the majority has declared that there is no set of facts under which Sonoku Tagami's participation in an

female-only ban ordinance by nude sunbathing since there is case law suggesting that female public nudity ordinances prohibit nude sunbathing. Or, if Tagami was partaking in the protest and also 'swinging topless on a light post to earn money' would that be permissible since she is at least protesting? This is now a subjective determination and would inevitably lead to uneven court decisions.

VIII. CONCLUSION

Public female-only topless ban ordinances are constitutional. These ordinances help society protect social mores and norms. The government has the responsibility of protecting public welfare. Within the scope of protecting public welfare, the government can prohibit acts that are *malum in se*. Men and women are different. These differences encompass a number of different biological attributes, including sex chromosomes, certain genes, gonads, sex hormone levels, internal and external genitalia, other secondary sex characteristics.[280] "Physical differences between men and women . . . are enduring: [T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both."[281]

Furthermore, circuit court case law demonstrates there are not valid constitutional arguments against public female-only topless ban ordinances.[282] The term "any person" in the Equal Protection Clause is broad

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annual 'Go Topless Day' protest—an event sponsored by a 501(c)(3) group advocating for gender equality in indecency ordinances—could be viewed as expressive conduct. This, the majority says, is because Tagami's nudity is conduct rather than expressive speech. To support this contention, the majority relies on the fact that Tagami accompanied the baring of her breasts with additional explanatory speech—that is, she and her group explained their conduct, passed out fliers and otherwise voiced the purpose of their protest. According to the majority, the fact that Tagami appeared topless while also expressing her views about nudity 'is strong evidence that the conduct . . . is not so inherently expressive that it warrants [First Amendment] protection.' Conduct is sufficiently expressive when the intent of it is to convey a particularized message and the likelihood is great that those who view the conduct will understand the message.") (citations omitted).

280 *See* Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869, 3875 (2017).

281 United States v. Virginia, 518 U.S. 515, 533 (1996) (citing Ballard v. United States, 329 U.S. 187, 193 (1946)).

282 Almost all courts have held that these topless bans are constitutional, even under varying standards of review, under the U.S. Constitution or a state constitution. Intermediate scrutiny has been applied in many cases. *See, e.g.*, Tagami v. City of Chicago, 875 F.3d 375 (7th Cir. 2017) (applying the U.S. Constitution); Buzzetti v. City of New York, 140 F.3d 134, 138 (2d Cir. 1998) (applying the U.S. Constitution); Craft v. Hodel, 683 F. Supp. 289 (D. Mass. 1988) (applying the U.S. Constitution); City of Tucson v. Wolfe, 917 P.2d 706 (Ariz. Ct. App. 1995) (applying a state constitution); Dydyn v. Dep't of Liquor Control, 531 A.2d 170 (Conn. App. Ct. 1987) (applying a state constitution). Other laws, however, have not triggered any heightened constitutional review. *See, e.g.*, Schleuter v. City of Fort Worth, 947 S.W.2d 920, 925-26 (Tex. App. 1997) (applying a state constitution); City of Seattle v. Buchanan, 584 P.2d 918, 921 (Wash. 1978) (applying a state

and all-encompassing, and it does not mean nor imply gender or any of the "suspect classes" (i.e., race, ancestry, or alienage). The Equal Protection Clause does not guarantee that every person be treated equally. Rather, it prohibits states from denying "equal protection of the laws" to persons within its jurisdiction. To illustrate, a state has a law against fraud. It would violate the Equal Protection Clause if said state only found this law to be applicable to men, and not women. With regard to the First Amendment, public nudity does not rise to the level of speech. Thus, it is outside the scope of First Amendment protections. With the majority of courts agreeing public nudity does not qualify for constitutional protection, public female-only topless ban ordinances are within a state's right to decide how it promotes social norms and protect public welfare.

constitution); Eckl v. Davis, 124 Cal. Rptr. 685, 694-96 (Cal. Ct. App. 1975); Hang On, Inc. v. City of Arlington, 65 F.3d 1248 (5th Cir. 1995).