No. A23-0158

STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA
Respondent,

v.

ELOISA RUBI PLANCARTE
Petitioner.

BRIEF OF *AMICUS CURIAE* GENDER JUSTICE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

Pursuant to the Order of this Court dated May 14, 2024, granting Gender Justice leave to file a brief as amicus curiae, Gender Justice submits the following.[1]

Gender Justice is a non-profit legal advocacy organization that has been operating in Minnesota since 2010. It advocates for gender equality through the law. As part of its public-interest mission, Gender Justice helps courts, employers, schools, and the public better understand the causes and consequences of gender discrimination. Both through direct representation and by advising courts as *amicus curiae*, Gender Justice advocates for legal interpretations that properly account for all forms of gender bias and effectively ensure equity.

As part of its impact litigation program, Gender Justice represents clients in Minnesota who have experienced gender-based discrimination, including but not limited to discrimination related to pumping and breastfeeding, pregnancy, unlawful sex stereotyping, and transgender status. As an organization dedicated to pursuing gender equality, Gender Justice knows that gender classifications in the law often stem from, and perpetuate, harmful and archaic gender stereotypes. Gender classifications, in addition, can create legal uncertainty and the potential for arbitrary enforcement against Minnesotans whose bodies or gender identifies do not conform with the Court of Appeals' binary stereotyping and sexualization of women's breasts.

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[1] This brief was not authored in whole or in part by counsel for any party. Further, no one other than the amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF FACTS

Gender Justice adopts the statement of facts submitted to this Court in the brief of Appellant Eloisa Plancarte.

ARGUMENT

The Court of Appeals incorrectly interpreted Minnesota's indecent exposure statute, Minn. Stat. § 617.23 (2020), to criminalize the public exposure of one's chest more harshly for women than for men. *See State v. Plancarte*, 3 N.W.3d 34 (Minn. App. 2024). According to the Court of Appeals, the statute criminalizes exposure of breasts, without any factual evidence of lewdness, only if a woman exposes her breasts. *Id.* at 42–43. Such an interpretation is contrary to the statute's plain and unambiguous language and perpetuates harmful sex-stereotyping and disparate treatment of Minnesotans on the basis of sex.

If the Court of Appeals is correct that the indecent exposure statute treats women more harshly than men, then the statute implicates the guarantees of equal protection under the Minnesota and United States constitutions. Yet, despite finding that the indecent exposure statute contains a sex-based classification, the Court of Appeals did not conduct an intermediate scrutiny analysis, instead disposing of Plancarte's equal protection claim by relying on forty-year-old precedent: *State v. Turner,* 382 N.W.2d 252 (Minn. App. 1986). *See Plancarte*, 3 N.W.3d at 44. In doing so, the Court of Appeals disregarded decades of updated precedential caselaw on

the adjudication of claims of disparate treatment based on sex, and affirmed *Turner*'s reliance on inaccurate and harmful generalizations about differences between male and female chests.

This Court should reverse and find that the indecent exposure statute does not subject men and woman to disparate treatment and does not contain a facial presumption that the public exposure of female breasts is inherently lewd. If the Court does find that the correct interpretation of this statute includes an express sex-based classification, it should also find that this classification cannot survive intermediate scrutiny.

I. The Court of Appeals Improperly Reads a Sex-Based Classification into the Indecent Exposure Statute

Minnesota's indecent exposure statute does not prohibit all public nudity. Rather, it forbids "willfully and lewdly" exposing one's body or "private parts" in public. Minn. Stat. § 617.23, subd. 1(1). However, the statute does not define "private parts." *See* Minn. Stat. § 617.23. The Court of Appeals considered whether women's breasts are private parts,' finding this question to be a "close issue." *Plancarte*, 3 N.W.3d at 38–39. Relying heavily on the breast-feeding exemption written in to the statute, the court declared it was "confident" that our legislature intended for private parts to include "a woman's breasts." *Id.* at 38. [2] Additionally, while the statute does not define what constitutes "lewd" conduct, the Court of Appeals found

[2] See infra § I.A for a discussion of how the court's interpretation of the statute is at odds with the State's efforts to destigmatize and promote breastfeeding, and how the exemption does not constitute surplusage under Plancarte's proper interpretation of the statute.

it is inherently "obscene and therefore lewd" when a woman "willfully expose[s] her breasts . . . in a public place where the general public does not expect it, particularly but not exclusively where children are not uncommonly present." *Id. at* 43.

In reaching these conclusions, the court found that the unambiguous policy of the indecent exposure statute is ". . . to curb the offense or annoyance or even fear others may experience when they view lewd conduct." *Id.* at 38 (quoting *Fordyce v. State*, 994 N.W.2d 893, 900 (Minn. 2023)). Yet the *Plancarte* majority cited no factual record in support of the proposition that women's breasts are a universal source of fear and offense, cited no legislative history for this proposition, and indeed, the three judges on this panel did not agree that this proposition is true. *See, e.g.*, *id.* at 50 (Bratvold, J., dissenting) (disagreeing with the majority's contention that a "woman's intentional display of her fully exposed breasts" in a public place "constitutes willful and lewd exposure of her private parts" under the indecent exposure statute). Naked presumptions about morality are not an accepted basis for statutory construction. *See* Minn. Stat. § 645.08 (2022); Minn. Stat. § 645.16 (2022).

In determining how to interpret a statute, the court can consider "the object to be attained" and "the consequences of a particular interpretation." Minn. Stat. §§ 645.16(4), (6). These considerations weigh heavily against the Court of Appeals' interpretation.

A. The Court's Interpretation Undermines the State's Efforts to Destigmatize Breastfeeding

By reinforcing the harmful stereotype that female breasts are, above all else, sexual objects and inherently lewd, the Court of Appeals' ruling stigmatizes and discourages public breastfeeding. Minnesota's indecent exposure statute explicitly excludes individuals who are breastfeeding in public. Minn. Stat. § 617.23, subd. 4 (2020). The Court of Appeals relied on this exemption in finding that "female breasts" are "private parts" under the statute, reasoning that the breastfeeding exclusion is significant because the legislature would not have included it unless female breasts are "private parts." *See Plancarte*, 3 N.W.3d at 38–39 (majority opinion) (discussing Minn. Stat. § 617.23, subd. 4). According to the majority's reasoning, a woman breastfeeding her child "in a public place where the general public does not expect it" would be lewd, and it is only the explicit breastfeeding exception that protects her from criminal prosecution. *See id.* at 43.

The majority's interpretation is that a woman's breasts are inherently and predominantly sexual, even when they are used for feeding an infant child, and that in the absence of an express exemption it would be criminal. This is not only incorrect, but it perpetuates a barrier to public breastfeeding; stigma and embarrassment associated with breastfeeding. *See* Off. of the Surgeon Gen., U.S. Dep't of Health & Hum. Servs., *The Surgeon General's Call to Action to Support Breastfeeding* 13 (2011); Ingrid Johnston-Robledo et al., *Reproductive Shame: Self-Objectification and Young Women's Attitudes Towards Their Reproductive Functioning*, 46

Women & Health 25, 32 (2007) (concluding that, among young American women, self-objectification was correlated with the belief that public breastfeeding is indecent and that public breastfeeding would be embarrassing). This can make lactating parents feel uncomfortable breastfeeding in public and lead some to stop breastfeeding altogether. *E.g.*, Katherine A. Dettwyler, *Beauty and the Breast: The Cultural Context of Breastfeeding in the United States*, *in* Breastfeeding: Biocultural Perspectives 167 (Patricia Stuart-Macadam & Katherine A. Dettwyler eds, 1995) (arguing that the portrayal of female breasts as being for sexual pleasure has limited women's ability to successfully breastfeed); Ruowei Li et al., *Why Mothers Stop Breastfeeding: Mothers' Self-Reported Reasons for Stopping During the First Year*, 122 Pediatrics 69, 72 (2008) (finding that 18.6% of mothers who ceased breastfeeding within the first two months after giving birth reported public breastfeeding as a substantial reason for stopping).

Our legislature has taken repeated strides to promote and destigmatize breastfeeding. Over the past decade, for example, it has strengthened protections for lactating parents in the workplace. *See generally* Sara Jane Baldwin, *Pregnancy and Pumping Protected: A Closer Look at New Workplace Protections for Pregnant and Pumping Employees in Minnesota*, Ramsey Cnty. Bar Assoc. (Feb. 13, 2024), https://www.mnbar.org/ramsey-county-bar-association/news/announcements/2024/02/13/pumping-pregnancy-and-policy. State and

county-level programs actively encourage and support breastfeeding. *See, e.g., WIC Peer Breastfeeding Support Program*, MN. Dep't of Health (Jan. 2022), https://www.health.state.mn.us/docs/people/wic/localagency/reports/bf/info/2022peer.pdf (describing how the Minnesota Department of Health's peer counseling program helps support breastfeeding initiation, exclusivity and duration); Ramsey Cnty, *Celebrate Minnesota Breastfeeding Awareness Month* (Aug. 8, 2023), https://www.ramseycounty.us/content/celebrate-minnesota-breastfeeding-awareness-month. Indeed, breastfeeding has numerous health benefits for nursing parents and infants. *E.g.*, Ctr. for Disease Ctrl., *Breastfeeding Benefits Both Baby and Mom* (Dec. 14, 2023), https://www.cdc.gov/breastfeeding/features/breastfeeding-benefits.html.

The Court of Appeals' ruling that exposed female breasts are inherently lewd—a decision it made, in large part, because of the legislature's very recognition that public breastfeeding is not indecent and so should never be prosecuted under the indecent exposure statute—impedes efforts to promote public breastfeeding. As the dissent argued, the majority's construction of the statute is not required; "[t]he legislature's decision to exempt breastfeeding from criminal sanction means that breastfeeding is not lewd. The legislature did not say that nude breasts are lewd if those breasts are not involved in breastfeeding." *Plancarte*, 3. N.W.3d at 50 (Bratvold, J., dissenting). This Court should instead adopt the dissent's understanding of the breastfeeding exemption, which avoids unnecessary entanglement with the constitution, is

consistent with the plain language of the statute, and is also in line with Minnesota's interest in promoting public breastfeeding.

B. The Court of Appeals' Interpretation Perpetuates Discrimination and Harmful Sex-Based Stereotypes

Relying upon generalizations and stereotypes about women's bodies to justify disparate treatment causes serious harm. Generalizations "have a constraining impact" that can "creat[e] a self-fulfilling cycle of discrimination." *Sessions v. Morales-Santana*, 582 U.S. 47, 63 (2017) (alteration in original) (quoting *Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003)). By upholding indecent exposure statutes that apply disparately to men and women, courts reinforce the sexual objectification of women. *E.g.*, *Eline v. Town of Ocean City,* 7 F.4th 214, 226–27 (4th Cir. 2021) (Gregory, J., concurring) (internal citations omitted) ("By treating women's breasts (but not those of men) as forbidden in public sight, these laws may reduce women's bodies to objects of public gaze, reproduce the Victorian-era belief that women should be seen but not heard, and reinforce stereotypes that sexually objectify women rather than treating them as people in their own right."). This court-sanctioned sexual objectification strips individuals of the autonomy to define the sexual meaning of their own bodies. Virginia Milstead, *Forbidding Female Toplessness: Why "Real Difference" Jurisprudence Lacks "Support" and What Can Be Done About It*, 36 U. Tol. L. Rev. 273, 297 (2004) ("When courts assume the sexual nature of women's breasts, without considering the multiple meanings breasts can take on and the instruments of significance they may be to women, courts deny women's ability to define

the meanings of their own bodies."). The sexual objectification of women has been linked to higher rates of sexual assault and violence. *See Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 803 (10th Cir. 2019) (crediting evidence that the sexual objectification of women is linked to higher rates of sexual assault and violence in young girls). The "sex-object stereotype" of female breasts can lead to "negative cognitive, behavioral, and emotional outcomes" for people of all genders. *Id*. (citation omitted).

Further, relying upon such generalizations and stereotypes about women's breasts to determine what the "norms" of a given community are and whether those norms have been violated perpetuates this discrimination. Societal norms are "as likely to reflect longstanding biases as they are reasonable distinctions." *Tagami v. City of Chicago*, 875 F.3d 375, 383 (7th Cir. 2017) (Rovner, J., dissenting) ("[W]hen the law imposes a different code of dress on women . . . it is quite possible that women will be treated differently—in the workplace, in the public square, on the subway—precisely because they are required to dress differently."); *see also, Morales-Santana*, 582 U.S. at 62 (noting that the Supreme Court views laws that rely on overbroad generalizations with suspicion). The Court of Appeals' interpretation harms a constitutionally, *In re Durand*, 859 N.W.2d 780, 784 (Minn. 2015) (holding that gender-based classifications are subject to intermediate scrutiny review), and statutorily, Minn. Stat. § 363A.02 (2022) (describing how it is the public policy of the state to secure for persons freedom from sex discrimination), protected class and should be overturned.

C. The Court of Appeals' Ruling Harms Transgender and Nonbinary Minnesotans and Minnesotans Who Do Not Neatly Fit Into Sex-Based Stereotypes

Additionally, the Court of Appeals' interpretation of the indecent exposure statute harms Minnesotans whose gender identities and/or bodies do not fit into sex-based stereotypes. These Minnesotans are also constitutionally, *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553, 569 (Minn. App. 2020) (holding that classifications based on transgender status are subject to intermediate scrutiny review), and statutorily, Minn. Stat. § 363A.02 (describing the public policy of the state to secure freedom from discrimination on the basis of gender identity), protected. Both the concurring and dissenting judges in this case recognized these concerns. *See Plancarte*, 3 N.W.3d at 50 (Bratvold, J., dissenting) (questioning how the majority's interpretation of the indecent exposure statute would apply to transgender Minnesotans); *id.* at 46 (Schmidt, J., specially concurring) ("Like the dissent, I am concerned that this statute could, on its face, be improperly used to attack non-lewd conduct of transgender women and transgender men. The statute could also be interpreted to criminalize non-lewd conduct of a breast cancer survivor who had her breasts surgically removed. . . . [T]hese concerns are not currently accounted for in the statute."). Nonetheless, the majority asserted that its opinion was based on circumstances involving "an adult female with exposed, intact breasts," so it refused to address how its interpretation of the indecent exposure statute applies to "outlier" Minnesotans. *Id.* at 39 n.2 (majority opinion).

The majority ignores the reality that many Minnesotans' bodies and gender identities do not comport with the binary generalizations and stereotypes about sexuality that the court relied upon. It forces these Minnesotans to determine whether the Court of Appeals, and law enforcement, would find their bodies to be inherently lewd, which in itself is a highly degrading endeavor.

1. The Ruling Harms Transgender and Nonbinary Minnesotans

The Court of Appeals' ruling creates uncertainty for transgender and non-binary Minnesotans. A Minnesotan could be subject to criminal prosecution for exposing their "female breasts," yet how this gender classification applies to transgender and nonbinary Minnesotans is not clarified by the Court of Appeals' ruling. Does a Minnesotan's legal sex determine whether their breasts are the type that the Court of Appeals thinks are inherently obscene and lewd to expose in public? An individual's legal sex does not necessarily correlate with the presence or absence of breasts.[3] Is a Minnesotan's assigned sex at birth determinative? If so, then a transgender woman who "takes off her top on a hot summer day, or sits topless on her front porch, or swims without a top in the ocean," may do so without fearing criminal liability, while a cisgender woman—whose breasts are aesthetically identical—may not. *See* Luke Boso, *A (Trans)Gender-Inclusive Equal Protection Analysis of Public Female Toplessness*, 18 Law &

[3] For instance, the sex identified on an individual's identification in Minnesota has no bearing on whether they have what appear to be 'female breasts' or not, and Minnesotans need not prove anything about their breasts in order to change their gender marker.

Sexuality 143, 161 (2009). Does a Minnesotan's gender expression determine whether their breasts will be considered lewd or not? Many individuals have a gender expression that falls outside the male-female binary. *See, e.g.*, Katy Steinmetz, *Beyond 'He' or 'She': The Changing Meaning of Gender and Sexuality*, Time (Mar. 16, 2017), https://time.com/magazine/us/4703292/march-27th-2017-vol-189-no-11-u-s/ (discussing the growing number of young people who identify and express themselves as gender nonconforming). There is no clear answer to whom the indecent exposure statute now applies. Individuals in the process of their gender transition may struggle to decide whether they have transitioned 'enough' to be included or excluded from the indecent exposure statute's prohibition. This leaves transgender and non-binary Minnesotans to the degrading process of determining whether their nude bodies will be considered inherently lewd by some third-party, and at the risk of criminal prosecution if they determine incorrectly.

This uncertainty also leaves transgender and nonbinary Minnesotans—who are already disproportionately policed—vulnerable to arbitrary and discriminatory prosecution under the indecent exposure statute. *See Plancarte*, 3 N.W.2d at 46 (Schmidt, J., concurring specially) ("I am concerned that this statute could, on its face, be improperly used to attack non-lewd conduct of transgender women and transgender men."). Transgender and non-binary individuals are already at risk of being misgendered, deadnamed, harassed and abused by the police. Christy Mallory et al., The Williams Inst., *Discrimination and Harassment by Law Enforcement Officers*

in the LGBT Community (Mar. 2015); Jaime M. Grant et al., Nat'l Ctr. for Transgender Equality & Nat'l Gay and Lesbian Task Force, *Injustice At Every Turn: A Report of the National Transgender Discrimination Survey* 5–6 (2011) (finding that 29% of transgender respondents reported being harassed or disrespected by law enforcement, and 6% had been physically assaulted by a police officer). The trans community in particular has been disproportionately profiled and targeted by law enforcement. *See, e.g.*, Leonore F. Carpenter & R. Barrett Marshall, *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 Wm. & Mary J. Women & L. (Special Issue) 5–6 (2017); Amnesty Int'l, *Stonewalled – Still Demanding Respect: Police Abuses Against Lesbian, Gay, Bisexual and Transgender People in the USA* 36 (2006) (reporting that transgender individuals are subject to "repeated and unnecessary" searches by police officers and medical professionals while in police custody). Mistreatment of transgender, non-binary and other LGBTQ+ individuals by police officers harms Minnesotans, weakens community trust, inhibits communication, and undermines effective policing. *See Mallory* et al., *supra,* at 2.

The Court of Appeals' interpretation of the indecent exposure statute threatens to disproportionately harm transgender and non-binary Minnesotans, and this Court should not adopt such a construction.

2. The Ruling Harms Minnesotans Without "Intact" Female Breasts

Similarly, the Court of Appeals' ruling creates uncertainty for cisgender and transgender Minnesotans alike who do not have so-called "intact" female breasts. Again, the Court of Appeals claimed it had "no occasion to discuss the 'non-lewd conduct of a breast cancer survivor who had her breasts surgically removed,'" as its decision was made regarding a woman with "intact" breasts. *Plancarte*, 3 N.W.3d at 39 n.2. It is unclear what the Court of Appeals means by "intact" female breasts or on what basis it might find that "non-intact" breasts are not sexually arousing and obscene to expose. Is it no longer obscene for a cisgender woman who had a double mastectomy to expose her breasts because the Court of Appeals no longer sexually objectifies her in the same way? A cisgender man with gynecomastia[4] may have significantly larger breasts than a cisgender woman with breast hypoplasia,[5] yet the Court of Appeals' interpretation of the indecent exposure statute would impose potential criminal liability only on the woman. The Court of Appeals' reliance on binary generalizations and stereotypes about women's bodies and sexualities creates uncertainty for all Minnesotans who do not have stereotypical "intact" "female breasts."

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[4] Gynecomastia is the overdevelopment of breast tissue in individuals assigned male at birth. *See generally Gynecomastia*, Johns Hopkins Med., https://www.hopkinsmedicine.org/health/conditions-and-diseases/gynecomastia (last visited July 9, 2024).

[5] Breast hypoplasia is a condition causing postpubertal underdevelopment of breast tissue in individuals assigned female at birth. *See generally Tubular Breasts*, Cleveland Clinic, https://my.clevelandclinic.org/health/diseases/tubular-breasts (last visited July 9, 2024).

II. II. If The Indecent Exposure Statute Does Contain a Sex-Based Classification, The Classification Cannot Survive Intermediate Scrutiny

The Court of Appeals failed to apply a canon of statutory construction that is directly on point: the canon of constitutional avoidance. "The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means of choosing between them*." *Gustafson v. Comm'r of Hum. Servs.,* 884 N.W.2d 674, 681 (Minn. App. 2016) (quoting *Clark v. Martinez*, 543 U.S. 371, 385 (2005)) (emphasis in original). Despite acknowledging that two constructions of the statue were supported by traditional methods of statutory interpretation and made it a "close issue," *Plancarte*, 3 N.W.3d at 39, the Court of Appeals chose to interpret the statute as containing a sex-based classification that—as the next section details—cannot survive intermediate scrutiny. When faced with more than one possible construction of the indecent exposure statute, this Court should consider how the canon of constitutional avoidance supports finding the statute does not mandate disparate treatment based on sex.

If the Court of Appeals is correct, the indecent exposure statute criminalizes the exposure of Minnesotans' chests based on sex. A cisgender man and a cisgender woman wearing identical clothes, engaging in the same conduct at the same public place, do not face the same criminal liability under the indecent exposure statute. If the indecent exposure statute does expressly classify based on gender, as the Court of Appeals found, then Plancarte's equal protection

challenge must be analyzed under intermediate scrutiny. *See, e.g.*, *In re Durand*, 859 N.W.2d at 784 ("We apply intermediate scrutiny to gender-based classifications."); *N.H.*, 950 N.W.2d at 569 ("If the [equal protection] challenge . . . implicates quasi-suspect classifications such as gender, we apply intermediate scrutiny . . . ."") (citation omitted); *see also Free the Nipple-Fort Collins,* 916 F.3d at 799–800 (finding intermediate scrutiny applies to a public-nudity ordinance that required women to cover their breasts but allowed men to go topless). Under intermediate scrutiny, the State has the burden of proving that the sex-based classification serves an important governmental objective, and that the classification is substantially related to achieving the objective. *E.g.*, *N.H.*, 950 N.W.2d at 569; *Craig v. Boren*, 429 U.S. 190, 197 (1976). The State cannot meet this burden.

A. The Court of Appeals Disregarded the Intermediate Scrutiny Analysis, Relying Instead On Outdated Caselaw

The Court of Appeals failed to properly analyze Plancarte's equal protection claim, and instead simply deferred to *State v. Turner*. *Plancarte,* 382 N.W.2d 252 (Minn. App. 1986). Almost forty years ago in *Turner*, the Court of Appeals rejected an equal protection challenge to a city ordinance that allowed men, but not women, to sunbathe topless. *Turner*, 382 N.W.2d at 252. The Court of Appeals now maintains that "*Turner*'s holding has withstood the test of time[.]" *See Plancarte,* 3 N.W.3d at 44. But neither the factual underpinnings nor the legal justifications of *Turner* have withstood the test of time, and this Court should not rely upon it for its analysis of Ms. Plancarte's equal protection claim.

1. *Turner* Improperly Relies on Inaccurate Generalizations About 'Differences' Between Male and Female Chests

First, the *Turner* court relied on inaccurate generalizations about differences between male and female chests, sanctioning and perpetuating sex stereotyping and the sexual objectification of women's breasts. In determining what level of scrutiny to apply to a sunbathing ordinance that distinguished between male and female chests, the *Turner* court depended on the so-called "clear differences between the sexes" to find that men and women are not similarly situated for the purposes of an equal protection analysis. *See Turner*, 382 N.W.2d at 255–56. The court insisted that "common knowledge tells us . . . there is a real difference" between male and female breasts, and that female breasts alone "constitute an errogenous [sic] zone and are commonly associated with sexual arousal." *Id.* at 255 (quotation omitted).

However, "[n]either *Turner* nor the foreign jurisdiction it cited relied on any objective information or data to support its analysis of what is erogenous." *Plancarte*, 3 N.W.3d at 57 (Bratvold, J., dissenting). There is no objective data to support the finding that all women's breasts, and only women's breasts, are inherently and predominantly associated with sexual arousal. From an anatomical standpoint, both male and female breasts have the same capacity for sexual arousal. *See, e.g.*, *People v. Santorelli*, 600 N.E.2d 232, 236–37 (N.Y. 1992) (Titone, J., concurring) (citation omitted) (crediting proof that anatomically "the female breast is no more or less a sexual organ than is the male equivalent"); Kachina Allen et al., *Male Urogenital System Mapped Onto the Sensory Cortex: Functional Magnetic Resonance Imaging Evidence*, 17 J. Sex

Med. 603 (2020) (finding that, similar to previous research on women, nipple stimulation in men activated the same area in the brain as genital stimulation); *cf.* Lauri Nummenmaa et al., *Topography of Human Erogenous Zones*, 45 Archives Sexual Behav. 1207 (2016) (concluding that touching practically anywhere on an individual's body, regardless of gender, may trigger sexual arousal). Both male and female breasts can be sexually stimulating to others. *See* Robert Wildman et al., *Note on Males' and Females' Preferences For Opposite-Sex Body Parts, Bust Sizes, and Bust-Revealing Clothing*, 38 Psychol. Rep. 485–86 (1976) (finding that women most often identified the male chest as the most sexually stimulating part of a male body); *see also Williams v. City of Fort Worth*, 782 S.W.2d 290, 297 (Tex. Ct. App. 1989) ("Our court is not authorized . . . to take judicial notice of the concept that the breasts of female topless dancers, unlike their male counterparts, are commonly associated with sexual arousal. Such a viewpoint might be subject to reasonable dispute, depending on the sex and sexual orientation of the viewer."). Whether someone views their own breasts as sexually arousing does not depend on their sex. *E.g.*, *Plancarte*, 3 N.W.3d at 57 n.12 (Bratvold, J., dissenting) (citing Roy Levin & Cindy Meston, *Nipple/Breast Stimulation and Sexual Arousal in Young Men and Women*, 3 J. Sexual Med. 450 (2006)) ("According to Plancarte, nearly one in five women do not consider their breasts to be erogenous and over half of men consider their own chests to be erogenous.").

It is objectively inaccurate to find that only women's breasts are erogenous. *Turner*'s holding is supported only by the court's unquestioning acceptance of the societal 'norm' that

women's breasts alone are inherently and predominantly sexual, *see Turner*, 382 N.W.2d at 255, not by any objective, meaningful difference of biology between male and female breasts. *See also Tagami v. City of Chicago*, 875 F.3d 375, 383 (7th Cir. 2017) (Rovner, J., dissenting) ("[I]t is societal perception rather than form and function that categorically distinguishes the female breast from the male . . . .").

Indeed, historically the primary physiological difference between "male" and "female" breasts has been lactation capability; that is, the ability to nourish human infants. *E.g.*, *Free the Nipple-Fort Collins*, 916 F.3d at 801; Melissa Conrad Stöppler, *Breast Anatomy*, MedicineNet, (Feb. 20, 2024), https://www.medicinenet.com/breast_anatomy/article.htm (explaining that the structure of male and female breasts are nearly identical, with the exception that male breast tissue lacks the "specialized lobules" that produce milk).[6] Yet even this lactation distinction is not absolute, as people assigned male at birth are in some circumstances capable of lactation. *See, e.g.*, Amy K. Weimer, *Lactation Induction in a Transgender Woman: Macronutrient Analysis and Patient Perspectives,* J. Hum. Lact. (2023) (describing the successful induction of lactation in a transgender woman).

[6] As breastfeeding in public is not lewd under the indecent exposure statute, this "difference" of lactation capabilities has already been addressed by our legislature. *Plancarte*, 3 N.W.3d at 57 (Bratvold, J., dissenting) ("[T]he 'real differences' between men and women that *Turner* relied upon may have been addressed by the breastfeeding exemption, which was adopted in 1998 after *Turner* was decided.").

Further, it is unclear what factual record the majority relied on in determining that societal norms have not changed in the last 40 years, but this is demonstrably incorrect. *See, e.g.,* David Chanen, *Minneapolis Park Board: No More Citations for Women Going Topless In The Parks*, Star Trib. (Nov. 20, 2020), https://www.startribune.com/minneapolis-park-board-no-more-citations-for-women-going-topless-in-the-parks/573135481.

The *Turner* court relied heavily on the so-called "clear differences between the sexes," *Turner*, 382 N.W.2d at 256, but these differences were established by stereotypes and inaccurate generalizations about the sexual nature of female breasts, not any objective data or information. The factual underpinnings of *Turner* have not withstood the test of time.

2. Caselaw Regarding Sex-Based Classifications Has Changed Since *Turner*

Post-*Turner* caselaw about disparate treatment based on sex stereotypes and norms steeped in such stereotypes have evolved dramatically in the past 40 years. In the decades since *Turner* was decided, the U.S. Supreme Court has explicitly recognized that disparate treatment based on sex-stereotyping is a form of prohibited discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (citation omitted) ("[I]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."). Courts have increasingly recognized that laws justified by alleged "differences" between males and females can be and have been used to perpetuate sex-based inequality. *See, e.g.*, *United States v.*

Virginia, 518 U.S. 515, 533 (1996); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination La*w, 85 N.Y.U. L. Rev. 83, 145–46 (2010) ("[E]qual protection law should be particularly alert to the possibility of sex stereotyping in contexts where 'real' differences are involved, because these are the contexts in which sex classifications have most often been used to perpetuate sex-based inequality."). While physical differences may sometimes justify gender-based classifications, *see Nguyen v. Immigr. & Naturalization Serv.*, 533 U.S. 53, 54 (2001) (holding that a statute treating children born abroad to unwed U.S. citizen mothers versus fathers did not violate equal protection in part because "fathers and mothers are not similarly situated with regard to proof of biological parenthood"); *In re Custody of J.J.S.,* 707 N.W.2d. 706, 710 (Minn. App. 2006) (finding that the parents of children born out of wedlock are not similarly situated because "mothers are identifiable while fathers may not be identifiable," and this "inevitable and incontrovertible dissimilarity in their circumstances" means a statute providing sole custody to mothers is not invidious discrimination and is constitutional), relying upon generalizations about anatomical differences alone is insufficient. *Cf. Virginia*, 518 U.S. at 516–17 ("Courts, however, must take 'a hard look' at generalizations or tendencies of the kind [the State] pressed, for state actors controlling gates to opportunity have no warrant to exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females."). Multiple courts have found that gender classifications grounded in generalizations or stereotypes serve no important governmental interest. *E.g.*, *Free*

the Nipple-Fort Collins, 916 F.3d at 801 ("Any law premised on 'generalizations about "the way women are"'—or the way men are—will fail constitutional scrutiny because it serves no important governmental objective."); *Morales-Santana*, 582 U.S. at 62–63 ("No 'important [governmental] interest' is served by laws grounded . . . in the obsolescing view that 'unwed fathers [are] invariably less qualified and entitled than mothers' to take responsibility for nonmarital children.") (alterations in original); *see also Santorelli,* 600 N.E.2D at 236 (Titone, J., concurring) ("One of the most important purposes to be served by the Equal Protection Clause is to ensure that 'public sensibilities' grounded in prejudice and unexamined stereotypes do not become enshrined as part of the official policy of government.").

The *Turner* court found that males and females are not similarly situated because their bodies are inherently different, and it ended the analysis there. *Turner*, 382 N.W.2d at 256 ("The classification is constitutional because men and women are not similarly situated in the area covered by [the ordinance].") Setting aside all the reasons cited above for why the *Turner* court's factual bases for this conclusion were incorrect, *supra* § II.A.1, this Court cannot permit disparate treatment that harms women by merely pointing to "inherent differences" between men and women. *Virginia*, 518 U.S. at 533 ("'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity . . . ."). Rather, the court must take the next step and ensure that if the government is going to make an express

sex-based classification, that it has an "exceedingly persuasive justification" for doing so. *Id.* at 524.

Under Minnesota law, the threshold question of whether two parties are similarly situated is "whether persons in both classifications created by the statute . . . engaged in the same conduct . . . that is the subject of the law." *Schroeder v. Simon*, 985 N.W.2d 529, 552 (Minn. 2023). Here, a cisgender man and a cisgender woman who engage in the exact same conduct—exposing their breasts without additional facts to suggest lewdness—are treated differently by the indecent exposure statute. In other words, "except for the factor of [sex]," Ms. Plancarte is similarly situated to people who legally expose their chests in public, where there is no evidence of lewd conduct. *State v. Holloway*, 916 N.W.2d 338, 347 (Minn. 2018). The government must show that this disparate treatment serves an important governmental objective, and that the classification is substantially related to achieving the objective.

Turner has not withstood the test of time, and the Court of Appeals should have conducted its own intermediate scrutiny of the indecent exposure statute instead of affirming the use of inaccurate generalizations and stereotypes about women's bodies to sanction their disparate treatment under the law.

B. Disparate Treatment Based On Sex, Including Sex-Stereotyping, Does Not Serve Any Important Governmental Objective

As reliance on *State v. Turner* is an inadequate and outdated response to Plancarte's equal protection claim, this Court should subject the indecent exposure statute to intermediate

scrutiny review and find that it fails. The burden is on the State, and they cannot meet this burden.

Gender classifications grounded in generalizations or stereotypes do not serve an important governmental interest. *E.g.*, *Free the Nipple-Fort Collins*, 916 F.3d at 801; *Virginia,* 518 U.S. at 533. Here, the so-called "clear differences between the sexes" that the Court of Appeals accepted by affirming *Turner* were not established by any objective data or information. *Supra* § II.A.1. While there may be a variance between lactation capabilities in those assigned male or female at birth, the Court of Appeals offered no evidence demonstrating why this difference necessitates treating Minnesotans with "female breasts" and Minnesotans with "male breasts" differently under the indecent exposure statute. *See Plancarte,* 3 N.W.3d at 50 (Bratvold, J., dissenting).

Indeed, the Court of Appeals' interpretation threatens to increase stigmatization surrounding breastfeeding and undermine the State's efforts to enable lactating parents to participate fully in society. *See supra* § I.A. It targets and harms members of protected classes. *See supra* § I.B (sex), § I.C (gender identity). The State can achieve any interest it has in avoiding public lewd and obscene displays without degrading gender non-conforming Minnesotans or targeting women and subjecting them to harsher penalties. When it comes to constitutional analysis "[a court's] obligation is to define the liberty of all, not to mandate its own moral code."

Lawrence v. Texas, 539 U.S. 558, 571 (2003) (citation omitted). This Court should reject the Court of Appeals unconstitutional interpretation of the indecent exposure statute.

CONCLUSION

Gender Justice urges this Court to reverse the decision of the Court of Appeals and hold that Minnesota's indecent exposure statute, Minn. Stat. § 617.23, does not criminalize mere exposure of "female breasts" in public.

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CERTIFICATE OF COMPLIANCE

The undersigned certified that this brief complies with the following requirements;

1. This brief was prepared using Microsoft Word Office 365;
2. This brief uses 13-point EB Garamond font and contains 6024 words; and
3. This brief therefore complies with the requirements for an amicus brief under Minn R. Civ. App. P. 132.01, Subd. 3.

Dated: July 10, 2024

s/ Jess Braverman
Jess Braverman

CERTIFICATE OF SERVICE FOR ELECTRONIC FILING

I hereby certify that on July 10, 2024, I electronically filed the foregoing using the Minnesota Supreme Court's efiling system. Participants in the case who are registered for efiling will be served by the efiling system.

Dated: July 10, 2024

s/ Jess Braverman
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