Case No. A23-0158
STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Eloisa Rubi Plancarte,

Appellant.

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA AND MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page

Statutes

TABLE OF AUTHORITIES

Other Authorities

TABLE OF AUTHORITIES

Page

INTEREST OF AMICI CURIAE

Pursuant to the Order of this Court dated May 14, 2024, granting the American Civil Liberties Union of Minnesota (ACLU-MN) and the Minnesota Association of Criminal Defense Lawyers (MACDL) leave to file a brief as amici curiae, ACLU-MN and MACDL submit the following.[1]

ACLU-MN is a private, nonprofit, nonpartisan organization supported by approximately 25,000 individual supporters in the State of Minnesota. Its purpose is to protect the rights and liberties guaranteed to all Minnesotans by the United States and Minnesota Constitutions and laws. ACLU-MN has a longstanding interest in preserving and extending strong constitutional protections for criminal defendants and in ensuring equal protection under the law for people of all genders.

MACDL is the Minnesota Chapter of the National Association of Criminal Defense Lawyers, the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of a crime or other misconduct. MACDL is a nonprofit, statewide organization of defense lawyers seeking to uphold Constitutional rights and ensure liberty and justice for all, particularly from unchecked power of the government against the rights of individuals.

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

SUMMARY OF ARGUMENT

This Court has recognized that, as the state's highest court, it is "independently responsible for safeguarding the rights of [Minnesota's] citizens." *State v. Fuller*, 374 N.W.2d 722, 726 (Minn. 1985) (citation omitted). Minnesota has "a long tradition of affording persons on the periphery of society a greater measure of government protection and support than may be available elsewhere." *Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 30 (Minn. 1995). As the last bastion of protection for civil liberties in this state, this Court has acted to both establish and maintain that tradition, especially in times when the nation was divided on an important issue, because "government must protect the rights of each of its citizens, regardless of the fact that the larger community may hold them in low esteem." *Id.*

The present case calls upon the Court to continue this tradition and protect the rights of women, transgender, and gender nonconforming Minnesotans at a time when their rights under federal law are increasingly under attack. The indecent-exposure statute under which Appellant Eloisa Plancarte was convicted—and the Court of Appeals' interpretation of the same—raises important issues related to due process, women's bodily autonomy, and the rights of this state's transgender and gender nonconforming citizens. The Court of Appeals held that a "woman's fully exposed breasts are 'private parts'" under Minnesota's indecent-exposure statute, Minn. Stat. § 617.23, subd. 1(1). In doing so, the Court of Appeals effectively criminalized half the population's anatomy. But contemporary understandings about gender identity cast doubt on a system that ties the legal privilege of bare breasts

arbitrarily to sex assigned at birth, both as a matter of practical enforcement and basic fairness.

Amici advance two primary arguments. First, Minnesota's indecent exposure statute, Minn. Stat. § 617.23, subd. 1(1), is unconstitutionally vague because, by not defining "private parts," it fails to give persons of ordinary intelligence fair notice that their contemplated conduct is forbidden or how severe their punishment may be. The Court of Appeals compounded, rather than resolved, this vagueness issue by interpreting "private parts" to include women's—but not men's—breasts, leaving individuals who are assigned female at birth and individuals who identify as women to determine, at their own peril, the bounds of what constitutes lewd exposure of their breasts.

Second, as interpreted by the Court of Appeals and as applied to Plancarte, the statute violates the equal protection guarantees of the Minnesota and United States Constitutions by punishing women for exposing their breasts while permitting men to freely engage in the same conduct without any punishment. The gender-based classification does not survive intermediate scrutiny because protecting "moral sensibilities" grounded in archaic stereotypes and unsupported notions about women, men, and sexuality is not an important governmental objective, and criminalizing female anatomy is not substantially related to achieving that objective.

Accordingly, amici urge this Court to abide by its stated obligation to safeguard the rights of this state's citizens and issue a decision holding that Minn. Stat. § 617.23, subd. 1(1) is unconstitutionally vague as to the term "private parts," or alternatively reverse the Court of Appeals and vacate Plancarte's conviction on equal protection grounds.

ARGUMENT

I. THE INDECENT EXPOSURE STATUTE IS UNCONSTITUTIONALLY AND INCURABLY VAGUE, AND THEREFORE VOID.

A. The statute is unconstitutionally vague because it fails to give persons of ordinary intelligence fair notice that their contemplated conduct is forbidden.

Under the due process clauses of the Minnesota and United States constitutions, "criminal statutes must be sufficiently clear and definite to inform a person of ordinary intelligence what conduct is punishable and how severe the punishment might be." *State v. Simmons*, 258 N.W.2d 908, 910 (Minn. 1977); *see also Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Both constitutions specifically prohibit "obscenity conviction[s] if the defendant does not have fair warning of what [is] prohibited." *State v. Davidson*, 481 N.W.2d 51, 56 (Minn. 1992) (citing *State v. Welke*, 216 N.W.2d 641, 648 (Minn. 1974)). Crucially, "where a statute imposes criminal penalties, the standard of certainty [of the statute's meaning] is higher." *Kolender*, 461 U.S. at 358 n.8. Section 617.23 is unconstitutionally vague because the operative term "private parts" is too vague to put defendants on notice of what conduct is prohibited. A review of the plain language of the statute, common usage, usage of terms by Minnesota courts, and the Court of Appeals' own comments about the statute's ambiguity confirm that the statute is too vague to pass constitutional muster.

Plancarte was charged under Minnesota's indecent exposure law, which criminalizes "willfully and lewdly expos[ing one's] body, or the private parts thereof." *State v. Plancarte*, 3 N.W.3d 34, 37 (Minn. App. 2024), *rev. granted* (May 14, 2024)

(alteration in original). The statute itself does not define "private parts." *Id.* at 38. The Court of Appeals noted that neither the Minnesota Supreme Court nor the Minnesota Court of Appeals has addressed the issue of whether breasts are "private parts" for the purposes of Minn. Stat. § 617.23. *Id.* The Minnesota Court of Appeals upheld Plancarte's conviction based on little more than its "confiden[ce] that the legislature intended" female breasts to be included in its scheme of "private parts." *Id.*

The court went on to acknowledge that the question was a "close issue," and implicitly acknowledging the statute vagueness. *Id.* at 39. In the past, this Court has considered a lower court's difficulty in interpreting a term as evidence that a statute is vague. *State v. Newstrom*, 371 N.W.2d 525, 529 (Minn. 1985). Even assuming the Court of Appeals' assertions about the legislature's intent in drafting Minn. Stat. § 617.23 to be true, the State fails to satisfy the "higher" standard of certainty required of criminal statutes under the Due Process clauses of the United States and Minnesota constitutions. *Kolender*, 461 U.S. at 358 n.8.

In evaluating whether a statute is void for vagueness, this Court has frequently relied heavily on "common and approved usage" of terms. *See State v. Robinson*, 539 N.W.2d 231, 237 (Minn. 1995) (in which the Court laid out a process to determine whether a statute was unconstitutionally vague, starting with statutory interpretation and "common and approved usage" of terms). As the Court of Appeals acknowledged, a review of the "common usage" of the term "private parts" "does not provide a clear answer here." *Plancarte*, 3 N.W.3d at 39. The Court of Appeals began its inquiry on this question by reviewing the dictionary definition for "private parts." *Plancarte*, 3 N.W.3d at 39. The

court stated that the Oxford English Dictionary is quite clear, defining private parts as "the external organs of sex, the pudenda." *Oxford English Dictionary* 516 (2d ed. 1991). This is consistent with other dictionaries' definitions. For instance, the *American Heritage Dictionary* defines "private parts" as "[t]he external organs of sex and excretion." *American Heritage Dictionary of the English Language* 1396 (4th ed. 2000). The *Random House Webster's Dictionary* similarly defines "private parts" as "[e]xternal genital organs." Dictionary definitions overwhelmingly favor Plancarte: most unambiguously confirm that breasts are not "private parts."

Common usage in Minnesota caselaw also fails to provide defendants with the constitutionally required level of certainty. As the Court of Appeals acknowledged, a review of Minnesota caselaw yields "mixed results" on the issue: testimony and court opinion in Minnesota caselaw alternately describe breasts as within and outside the category of private parts in testimony and dicta. *Plancarte*, 3 N.W.3d at 39. *See also State v. Morales-Mulato*, 744 N.W.2d 679, 683 (Minn. App. 2008) (excluding breasts from private parts), *rev. denied* (Minn. Apr. 29, 2008); *State v. Bryant*, 378 N.W.2d 108, 109 (Minn. App. 1985) (in which counsel described private parts as "breasts" and "vaginal or crotch area[.]"), *rev. denied* (Minn. Jan. 23, 1986). Notably, a review of the caselaw demonstrates that a majority of common usage—as reflected in descriptions of testimony—treats "breasts" and "private parts" as distinct categories. *See In re Knops*, 536 N.W.2d 616, 617 (Minn. 1995) ("K.B. revealed Knops had touched her on her 'private parts,' breasts, and buttocks[.]"); *see also State v. Galloway*, No. A13-1449, 2014 WL 3891812, at *1 (Minn. App. Aug. 11, 2014) ("J.R. testified that appellant touched her breasts, 'private

parts,' and 'butt[.]'"); *State v. DeLaCruz*, No. C4-02-155, 2003 WL 282413, at *1 (Minn. App. Feb. 5, 2003) ("DeLaCruz touched her 'private part' and 'breasts[.]'"). Minnesota caselaw is, at best, vague on the question of whether breasts are "private parts" but strongly suggests that breasts are excluded from the definition. This falls far short of the constitutionally required "higher" level of certainty necessary for criminal statutes. *Kolender*, 461 U.S. at 358 n.8.

There are compelling reasons to conclude that the common usage of the term "private parts" as used in Minn. Stat. § 617.23 unambiguously excludes breasts, including both testimony in Minnesota Supreme Court cases and dictionary definitions. However, Plancarte needs only show that the term falls short of the "higher" level of certainty required by the United States and Minnesota constitutions. *Kolender*, 461 U.S. at 358 n.8. As the Minnesota Court of Appeals acknowledged, there is no clear consensus on whether breasts are "private parts" in common usage. *Plancarte*, 3 N.W.3d at 38. The statute does not define the term. *Id.* Nor is Minnesota caselaw uniform in its references to the term in testimony, court transcripts, or direct usage by the court.

And though courts may cure vagueness in a statute by placing a limiting construction on its terms consistent with the legislature, *Newstrom*, 371 N.W.2d at 529, no such limiting instruction can cure the vagueness inherent in Minn. Stat. § 617.23. Even if this Court applied a limiting construction to the statute adopting the Court of Appeals' inclusion of "female breasts" as private parts, the term is still too vague to put defendants on notice of the prohibited conduct.

First, "breast" is anatomically imprecise. The term fails to distinguish between the entire breast, the areola, and the nipple. By way of illustration, an individual who is topless except for nipple covers has no way of knowing if their conduct is prohibited under the limiting construction. The problem is compounded when individuals with mastectomies or individuals with breast tissue whose nipples have been surgically removed are considered. It remains unclear if their conduct is covered under the term "female breasts."

Next, the term fails to account for the realities of gender diversity; the construction gives no clarity as to whether transgender men fall under the statute—either pre- or post-surgery. Far from being a solution to the vagueness problems in the original statute, adopting the term "female breasts" as a limiting construction to the term "private parts" only raises new vagueness problems because the notion that "female breasts" are uniquely lewd or indecent is premised on harmful and outmoded ideas about women's bodies. No saving construction can remedy this flaw, and any attempt to do so will only raise new problems.

Consequently, this Court should declare the serious ambiguities in the statute as unconstitutionally vague.

B. The statute fails to give persons of ordinary intelligence fair notice of how severe their punishment may be.

In addition to providing persons of ordinary intelligence of what conduct is punishable, the due process clauses of the United States and Minnesota constitutions require criminal statutes to be sufficiently clear to inform persons "how severe the punishment [for the prohibited conduct] might be." *Simmons*, 258 N.W.2d at 910. In

Simmons, the Minnesota Supreme Court vacated and remanded a sentence due to imprecision in how the statute defined penalties for second offenses. *Id.*

Minn. Stat. § 617.23 similarly includes heightened penalties for repeat offenses of both Minn. Stat. § 617.23 and "sections 609.342 to 609.3451, or a statute from another state in conformity with any of those sections." Minn. Stat. § 617.23, subd. 2(2). A third offense of misdemeanor indecent exposure results in a felony, meaning such an offender is required to register under Minnesota's Predatory Offender Registry. Minn. Stat. § 243.166, subd. 1b.

Compulsory registration under the Predatory Offender Registry is a severe penalty. However, vagueness in the statute—and, more specifically, vagueness in what constitutes an offense under Minn. Stat. § 617.23—may mean that individuals of reasonable intelligence lack notice that their conduct could result in their compulsory registration on Minnesota's Predatory Offender Registry. As discussed at length, the term "private parts" is unconstitutionally vague. Moreover, the term "female breasts" is also unconstitutionally vague. This means that individuals with prior misdemeanor convictions for indecent exposure under Minn. Stat. § 617.23, subd. 1(1) are at risk of a felony conviction and registration on the Predatory Offender Registry for simply baring an unspecified amount of their breasts.[2] The severity of this penalty, when combined with the statute's lack of

[2] A requirement that a person whose felony conviction for indecent exposure under Minn. Stat. § 617.23, subd. 1(1)—and resultant requirement that they register on the Predatory Offender Registry—was based on mere exposing of some unspecified portion of their breasts would likely run afoul of Minnesota's prohibition on cruel *or* unusual punishments.

clarity in what constitutes an offense that can result in those enhanced penalties, undercuts the basic constitutional principle that individuals should be able to understand what conduct will result in a penalty, and the severity of that penalty. Because Minn. Stat. § 617.23, subd. 1(1) fails to clearly lay out what behavior will result in a conviction—and, accordingly, what behavior may trigger enhanced penalties—it is unconstitutionally vague.

C. The statute is unconstitutionally vague because it encourages arbitrary arrests and convictions.

The void-for-vagueness doctrine requires criminal statutes to define the prohibited conduct "in a manner that does not encourage arbitrary and discriminatory enforcement." *State v. Krawsky*, 426 N.W.2d 875, 878 (Minn. 1988) (quoting *Kolender*, 461 U.S. at 357). In *Kolender*, the United States Supreme Court found that a statute which gave police "full discretion" to determine whether suspects had provided sufficiently reliable identification was void for vagueness because it encouraged arbitrary enforcement. 461 U.S. at 360–62. Similarly, in the absence of a clear definition of "private parts," Minn. Stat. § 617.23 gives

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Minn. Const. Art. 1, Sec. 5. Minnesota prohibition's is more protective than its federal analog. *See, e.g.*, *State v. Hassan*, 977 N.W.2d 633, 641 (Minn. 2022) ("[T]he distinction between Article I, Section 5, and the Eighth Amendment is 'not trivial.' Because the Minnesota Constitution prohibits cruel punishments that are not unusual, it provides more protection than the United States Constitution." (quoting *State v. Mitchell*, 577 N.W.2d 481, 488 (Minn. 1998)).

Registration is required for a minimum of 10 years. Minn. Stat. § 243.166, subd. 6(a). Failure to register—including failure to update one's address, employment information, or other details—can lead to a five-year extension of the registration period, as well as a prison sentence of up to five years for the first violation and a minimum two-year prison sentence for the second violation. *Id.* at subds. 5(a)-(c), 6(b). These harsh requirements and penalties are disproportionate to the offense of exposing one's breasts.

law enforcement an unconstitutionally minimal amount of guidance for determining whether a defendant has violated the statute. It puts law enforcement in the position of attempting to determine whether any given breast—or any portion thereof—appears to be female enough to be lewd or obscene unless covered—a standard far too vague and subjective to provide the notice due process requires or sustain criminal liability. *See* Jessica A. Clarke, *They, Them, and Theirs*, 192 Harv. L. Rev. 894, 936 (2019) (observing that "[w]hether sex or gender should be defined based on genetics, hormones, morphology, physiology, psychology, elective choice, documentary evidence such as birth certificates, public perceptions, something else, or not at all—is a difficult question to answer in general.").

The factual record in this case reflects a pattern of arbitrary enforcement. As noted by the Court of Appeals, Plancarte had been stopped by law enforcement for exposing her bare breasts at least twice in the week leading up to the incident, and only on July 22 was she cited for both. *Plancarte*, 3 N.W.3d at 45 (Schmidt, J., concurring). In *Kolender*, the Supreme Court suggested that a pattern of officers stopping a suspect without arrest, citation, or charges may be evidence that a statute encourages arbitrary enforcement. 461 U.S. at 354. This pattern of repeated stops that did not always result in charges is precisely what Plancarte faced in the days leading up to her eventual arrest and charging on July 28. Officers stopped—but apparently did not arrest or charge—Plancarte at least once because the statute gives officers "full discretion" to determine whether a woman's breasts are "private parts" under Minn. Stat. § 617.23. Through its lack of clarity on the basic issue of what constitutes a "private part" for the purposes of indecent exposure, Minn. Stat. §

617.23 encourages arbitrary arrests and convictions. Accordingly, the Court should declare this statute void for vagueness.

II. AS INTERPRETED BY THE COURT OF APPEALS AND AS APPLIED TO PLANCARTE, MINNESOTA'S INDECENT-EXPOSURE STATUTE VIOLATES EQUAL PROTECTION GUARANTEES OF THE MINNESOTA AND UNITED STATES CONSTITUTIONS.

The Minnesota and United States Constitutions guarantee all individuals the right to equal protection under the law. *See Fletcher Props., Inc. v. City of Minneapolis*, 947 N.W.2d 1, 20 n.13 (Minn. 2020) (noting that Minnesota's equal protection guarantee is found in the Rights and Privileges Clause in Article 1, Section 2 of the Minnesota Constitution); *see also* U.S. Const. amend. XIV. Though the respective constitutions' equal protection guarantees are grounded in the same principle that similarly situated individuals must be treated equally, this Court "has long recognized that [it] may interpret the Minnesota Constitution to offer greater protection of individual rights than the U.S. Supreme Court has afforded under the federal constitution." *Gomez*, 542 N.W.2d at 30. Circumstances "unique to Minnesota, [and this Court's] precedents," are persuasive rationales for interpreting the Minnesota Constitution to provide more protection. *Id.*

When a challenged statute implicates a fundamental right or a suspect classification, a heightened level of scrutiny applies. *State v. Lee*, 976 N.W.2d 120, 129 (Minn. 2022). Appellate courts give heightened scrutiny to differential treatment based on gender because gender "generally provides no sensible ground for differential treatment." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Accordingly, gender-based

classifications must survive intermediate scrutiny[3]—that is, the classification must "serve important governmental objectives and must be substantially related to achievement of those objectives." *State ex rel. Forslund v. Bronson*, 305 N.W.2d 748, 750 (Minn. 1981); *see also United States v. Virginia*, 518 U.S. 515, 532–33 (1996).

The Court of Appeals specifically interpreted Minn. Stat. § 617.23, subd. 1(1) to mean that "a woman's fully exposed breasts are 'private parts.'" *Plancarte*, 3 N.W.3d at 36, 38. In doing so, it created one rule for women and a different rule for men, depriving individuals who identify as women equal protection of the law by criminalizing their anatomy without justification.

A. Plancarte is similarly situated in all relevant respects to men who fully expose their breasts in public.

In analyzing an equal protection violation, the threshold inquiry is whether the claimant is similarly situated in all relevant respects to others whom the claimant contends is being treated differently. *Lee*, 976 N.W.2d at 125. To answer this question, the Court must determine "whether the law creates distinct classes within a broader group of similarly situated persons or whether those treated differently by the law are sufficiently dissimilar from others such that the law does not create different classes within a group of similarly situated persons." *Fletcher Props., Inc. v. City of Minneapolis*, 947 N.W.2d 1, 22 (Minn. 2020). When determining whether two classes are similarly situated, the Court also

[3] Given ongoing efforts to curtail access to reproductive care, gender-affirming care, and other forms of healthcare based on sex, gender, and gender identity, the Court should consider whether sex-, gender-, and gender identity-based classifications should be subject to strict scrutiny under the Minnesota Constitution.

considers "the position [] of the claimant and all others in light of the broad purpose and operation of the statute." *Lee*, 976 N.W.2d at 128 (alteration in original) (citation omitted).

Here, the answer is clear: by holding that "private parts" includes only women's breasts, the Court of Appeals created distinct classes—men and women—within a broader group of persons with the same body part. The Court of Appeals failed to advance a compelling explanation for why women's breasts are different than men's breasts such that the two groups are not similarly situated, though earlier in the opinion the Court of Appeals described the statute's policy as "remedy[ing] the mischief of people lewdly exposing themselves to others, that is, to curb the offense or annoyance or even fear others may experience when they view lewd conduct." *Plancarte*, 3 N.W.2d at 38 (citing *Fordyce v. State*, 994 N.W.2d 893, 900 (Minn. 2023)). Both the majority and the concurrence also claimed to be bound by *State v. Turner*, a nearly forty-year-old Court of Appeals decision which held that women's breasts are different than men's breasts simply because it is "common knowledge" that "female breasts, unlike male breasts, constitute an erogenous zone and are commonly associated with sexual arousal." 382 N.W.2d 252, 255 (Minn. App. 1986) (cleaned-up).

This Court is not bound by *Turner* and should not defer to its holding on the similarly situated inquiry as the underlying reasoning runs counter to the foundational principles of equal protection. The statute's policy likewise contradicts equal protection principles to the extent it treats female breasts as inherently "lewd," a notion that is grounded in an oversexualized and archaic view of women's bodies. "[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." *Free the Nipple – Fort Collins v. City of Fort Collins*, 916 F.3d 792, 805 (10th Cir. 2019) (citation omitted). Indeed, the United States Supreme Court has consistently cautioned that equal protection analysis should not embody "archaic and stereotypic notions" about the proper role of women in society. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–25 (1982). Relying on purportedly "common knowledge," as *Turner* and the *Plancarte* court did, requires courts to invoke archaic stereotypes and unsupported notions about women, men, and sexuality—the same stereotypes and biases equal protection law is supposed to prevent. *See* Reena N. Glazer, *Women's Body Image and the Law*, 43 Duke L.J. 113, 128 (1993) ("[T]he concept of 'public sensibility' itself . . . may be nothing more than a reflection of commonly held preconceptions and biases.").

Discriminatory indecent-exposure laws reinforce the oversexualization of the nude female body as well as deeply rooted cultural narratives around women, nudity, and sexuality. *See* Ruthann Robson, *Dressing Constitutionally: Hierarchy, Sexuality, and Democracy from Our Hairstyles to Our Shoes* 73 (Cambridge & New York: Cambridge University Press, 2013) (discussing the hypothesis that "[w]omen's dress provokes (heterosexual) men to sexual violence" underlying "the mandate, whether directly or indirectly enforced, that female dress should not be 'provocative.'"). This reasoning is harmful to both women and to men. Nassim Alisobhani, *Female Toplessness: Gender Equality's Next Frontier*, 8 Irvine L. Rev. 299, 317 (2018) ("These laws tell women that their bodies are obscene, while at the same time telling men that they are unable to trust

their ability to control themselves around persons of the opposite sex."). Such justifications serve only to preserve heterosexual male prerogatives of possession and sexual control. Framing the difference between female and male breasts in terms of erogeneity or sexuality—and justifying the criminalization of women's breasts on that basis—elevates the heterosexual male gaze over the bodily autonomy of women, lending credence to the anachronistic idea that "what might arouse men can only be displayed when men want to be aroused." Robson, *supra*, at 59.

The *Turner* court's justification for why female and male breasts are different is also problematic and unhelpful to the similar-situation inquiry because it reinforces gender conformity norms and fails to account for transgender and gender nonconforming individuals despite our state's express commitment to protecting and upholding the rights of this population. *See, e.g.*, Bill Strande, *Gov. Walz signs 3 bills: 'Trans Refuge', conversion therapy ban and abortion protections*, KARE 11, April 27, 2023, https://www.kare11.com/article/news/politics/gov-walz-signs-3-bills-trans-refuge-conversion-therapy-ban-and-abortion-protections-minnesota/89-7bbe25f9-b045-4ef5-b2b1-ecd9ac7f540b. Indeed, even the indecent-exposure statute's breastfeeding exception arguably does little to dismantle sexualized hierarchy given its express applicability only to "women" in their role as mothers, despite the fact that a transgender man could breastfeed as well but his conduct would not be protected. *See* Minn. Stat. § 617.23, subd. 4 ("It is not a violation of this section for *a woman* to breastfeed.") (emphasis added); *see also* Helen Pundurs, *Public Exposure of the Female Breast: Obscene and Immoral or Free and Equal?*, 14 In the Pub. Interest 1, 19, 23–24, 28 (1994) (discussing regulation of female

breasts as reinforcing compartmentalized "acceptable" female roles). This finds the state creating, supporting, and enforcing regulations that prescribe traditional gender conformity, and penalizing women, transgender or gender nonconforming individuals who depart from that traditional expectation.

Removing stereotypes about sexuality and outdated ideas of gender conformity from the equation, there is no question that women who expose their breasts and men who expose their breasts engage in the same conduct and are therefore similarly situated for the purposes of the indecent-exposure statute. *See Lee*, 976 N.W.2d at 127 (holding that the two classes at issue were similarly situated because they engaged in the same conduct, but one class was subject to a harsher penalty). Indeed, as Judge Bratvold pointed out in her dissent, there are many ways in which female and male breasts are similar. *Plancarte*, 3 N.W.3d at 57 (Bratvold, J., dissenting). For instance, some men consider their breasts to be an erogenous zone, and breast cancer can occur in men as well as women. *Id.* n.12; n.13.

Plancarte has therefore satisfied the first step of the equal protection framework.

B. The gender-based distinction the Court of Appeals created does not survive heightened scrutiny.

Appellate courts give heightened scrutiny to differential treatment based on gender because gender "generally provides no sensible ground for differential treatment." *City of Cleburne*, 473 U.S. at 440. Accordingly, gender-based classifications must survive intermediate scrutiny—that is, the classification must "serve important governmental objectives and must be substantially related to achievement of those objectives." *Forslund*, 305 N.W.2d at 750; *see also Virginia*, 518 U.S. at 532–33. Further, the United States

Supreme Court recently instructed that a gender-based classification "must substantially serve an important governmental interest *today*, for 'in interpreting the [e]qual [p]rotection [guarantee] . . . new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged." *Sessions v. Morales-Santana*, 582 U.S. 47, 59 (2017) (quoting *Obergefell v. Hodges*, 576 U.S. 644, 673 (2015)) (alterations in original). When a statute creates a gender-based classification, the burden of showing that the classification is justified "is demanding and it rests entirely on the State." *Virginia*, 518 U.S. at 533. Indeed, the required justification for a gender classification must be "exceedingly persuasive." *Id.* at 524.

The Court of Appeals identified the statute's policy as "remedy[ing] the mischief of people lewdly exposing themselves to others, that is, to curb the offense or annoyance or even fear others may experience when they view lewd conduct." *Plancarte*, 3 N.W.2d at 38 (citing *Fordyce*, 993 N.W.2d at 900). At the Court of Appeals, the State identified the statute's objectives as "protecting [the] moral sensibilities" of the "segment of society" which believes female toplessness as inappropriate and protecting "society's norms." (Resp. Ct. App. Br. at 6-7 (Aug. 17, 2023).)

These objectives do not justify the indecent-exposure statute's differential treatment of women and men because the stated interests are neither sufficiently important nor are they closely related to serving those interests.

First, a prohibition on public exposure of female—but not male—breasts betrays an underlying assumption that the sight of a female's uncovered breast in a public place is offensive to the average person in a way that the sight of a male's uncovered breast is not.

It is this assumption that lies at the root of the constitutional problem that the Court of Appeals' interpretation presents. As one court pointed out, protecting public sensibilities "is a tenuous basis for justifying a legislative classification that is based on gender" given the history of social prejudice against that class. *People v. Santorelli*, 600 N.E.2d 232, 236 (N.Y. 1992) (Titone, J., concurring). Indeed, the concept of "moral sensibility" itself, when used in this context, is nothing more than a reflection of commonly held preconceptions and biases. But as noted above, one of the most important purposes to be served by the equal protection guarantee is to ensure that "moral sensibilities" grounded in prejudice and unexamined stereotypes do not become enshrined as part of the official policy of government. *See Morales-Santana*, 582 U.S. at 59.

Viewed against this principle, the Court of Appeals' interpretation of the indecent-exposure statute cannot withstand intermediate scrutiny. Apart from the entrenched cultural expectations discussed above, there is no objective reason why the exposure of female breasts should be considered more offensive than the exposure of male counterparts. Indeed, "there are many societies in other parts of the world—and even many locales within the United States—where the exposure of female breasts . . . is commonplace and is generally regarded as unremarkable." *Santorelli*, 600 N.W.2d at 237 (Titone, J., concurring). At bottom, the decision of the Court of Appeals and the State's position are grounded in discomfort with seeing female breasts in public—based on historic notions of morality tied to the sexualization of female, but not male, breasts. These are not important governmental objectives under today's standards. *Morales-Santana*, 582 U.S. at 59; *see also Free the Nipple-Fort Collins*, 916 F.3d at 804–05 (applying intermediate scrutiny and

holding the city did not demonstrate how female nipples, but not male nipples, disrupted order, posed a specific risk to children, or addressed other professed interests its nudity ordinance claimed to serve).

Next, even if the asserted interests were sufficiently important, the discriminatory means employed are not substantially related to achieving that objective. In other words, the State cannot prove there is an "exceedingly persuasive justification" for punishing women for doing what men are freely allowed to do. *Virginia*, 518 U.S. at 524 (quoting *Miss. Univ. for Women*, 458 U.S. at 724). Banning women from public toplessness is an unnecessary and overbroad means of advancing the stated interests given that "more accurate and impartial lines can be drawn." *Morales-Santana*, 582 U.S. at 63, n.13; *see also Craig v. Boren*, 429 U.S. 190, 208–09, n.22 (1976) (striking down a gender-based differential in the age at which men and women could legally buy 3.2% beer because "the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups").

For example, Minn. Stat. § 617.23, subd. 1(3) already prohibits "engag[ing] in any open or gross lewdness or lascivious behavior, or any public indecency other than behavior specified in this subdivision." Under this subdivision, the State could still prosecute a topless woman to the extent she is behaving lewdly or lasciviously—thereby achieving the statutory purpose—but without relying on an unnecessary gender classification. Accordingly, a person sunbathing topless, or a transgender man breastfeeding in public, would not be subject to criminal liability.

Similarly, the State could achieve its stated objectives through the disorderly conduct statute. *See* Minn. Stat. § 609.72, subd. 1(3) (providing that it is a misdemeanor to "engage[] in offensive, obscene, abusive, boisterous, or noisy conduct" in a public place "knowing or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others").

In short, the State cannot justify a law that discriminates against women by prohibiting them from exposing their bare chests in public as men are routinely permitted to do. The mere fact that the statute's aim is to protect "moral sensibilities" is not sufficient to satisfy the State's burden of showing an "exceedingly persuasive justification" for a classification that, as interpreted by the Court of Appeals and as applied to Plancarte, discriminates on the basis of sex. Accordingly, the gender-based classification that the Court of Appeals read into the indecent-exposure statute violates Plancarte's equal protection rights. The Court of Appeals must be reversed, and Plancarte's conviction vacated.

CONCLUSION

For the forgoing reasons, amici respectfully request that the Court hold that Minn. Stat. § 617.23, subd. 1(1) is unconstitutionally vague as to the term "private parts," or alternatively that it reverse the Court of Appeals and vacate Plancarte's conviction on equal protection grounds.

[Signature Page Follows.]

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CERTIFICATE OF COMPLIANCE

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