No. 16-1441

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Sonoku Tagami,
Plaintiff-Appellant,

v.

City of Chicago, et al.,
Defendant-Appellees.

Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division
Case No. 14-cv-09074
The Honorable Judge Sharon Johnson Coleman

BRIEF FOR *AMICUS CURIAE* ACLU OF ILLINOIS IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

ROGER BALDWIN FOUNDATION OF ACLU, INC.
Lorie A. Chaiten
John A. Knight
Jenna G. Prochaska
Attorneys for Amicus Curiae, ACLU of Illinois
150 N Michigan Ave Ste 600
Chicago IL 60601
(312) 201-9740

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-1441

Short Caption: Sonoku Tagami v. City of Chicago

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[✔] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

American Civil Liberties Union of Illinois

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Roger Baldwin Foundation of ACLU, Inc.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Lorie A. Chaiten Date: 11/29/2017

Attorney's Printed Name: Lorie A. Chaiten

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

Address: Roger Baldwin Foundation of ACLU, Inc.
150 N Michigan Ave Ste 600, Chicago IL 60601

Phone Number: 312-201-9740 Fax Number: 312-288-5225

E-Mail Address: lchaiten@aclu-il.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-1441

Short Caption: Sonoku Tagami v. City of Chicago

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[✔] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

American Civil Liberties Union of Illinois

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Roger Baldwin Foundation of ACLU, Inc.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ John A. Knight Date: 11/29/2017

Attorney's Printed Name: John A. Knight

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: Roger Baldwin Foundation of ACLU, Inc.
150 N Michigan Ave Ste 600, Chicago IL 60601

Phone Number: 312-201-9740 Fax Number: 312-288-5225

E-Mail Address: jknight@aclu-il.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-1441

Short Caption: Sonoku Tagami v. City of Chicago

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[✔] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

American Civil Liberties Union of Illinois

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Roger Baldwin Foundation of ACLU, Inc.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Jenna G. Prochaska Date: 11/29/2017

Attorney's Printed Name: Jenna G. Prochaska

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

Address: Roger Baldwin Foundation of ACLU, Inc.
150 N Michigan Ave Ste 600, Chicago IL 60601

Phone Number: 312-201-9740 Fax Number: 312-288-5225

E-Mail Address: jprochaska@aclu-il.org

rev. 01/15 GA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF INTEREST

The American Civil Liberties Union of Illinois ("ACLU") is a statewide, non-profit, non-partisan organization of more than 65,000 members. The ACLU is dedicated to the defense and promotion of the principles embodied in the U.S. Constitution, the Illinois Constitution, and state and federal civil rights laws. Through litigation, advocacy, and public education, the ACLU and its affiliated organizations nationwide, representing 1.6 million members, work to strengthen and defend civil rights and liberties and to ensure that all people have equal opportunity to participate fully in civil society, regardless of their gender, gender identity, or sexual orientation.

ARGUMENT

This Court erred in conflating the standards for reviewing Plaintiff's First Amendment and Equal Protection claims and dismissing both based on nothing more than the purportedly "self-evident" goals of promoting "traditional moral norms and public order." *Tagami v. City of Chicago*, No. 16-1441, slip op. at 7 (7th Cir. Nov. 8, 2017). For the reasons set forth in the dissent and in Plaintiff's Petition for Rehearing and Suggestion for Rehearing *En Banc*, the Court's First Amendment ruling is contrary to precedent and should be reversed. *Amicus* focuses its brief on the Court's error in dismissing, without consideration of evidence, Plaintiff's argument that a law that prohibits women, but not men, from exposing their breasts in public violates the Equal Protection clause.

The majority correctly recognized that the challenged Chicago ordinance, Chi. Mun. Code § 8-8-080, classifies on the basis of sex and therefore must be reviewed under intermediate scrutiny; however, it ignored that standard and relied on "traditional moral norms and public order" to justify the ordinance. *Id*. The Court's ruling defies decades of precedent requiring the government to prove an exceedingly persuasive justification for gender-based classifications and rejecting discriminatory laws based on stereotypes. As the U.S. Supreme Court recently explained, there once was a time "when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (citations omitted). "Today, [however,] laws of this kind are subject to review under the heightened scrutiny that now attends 'all gender-based classifications." *Id*. It is this searching scrutiny, and the rejection of justifications based on gender stereotypes, that create the opportunity for all to participate in the professional, familial, social and educational spheres of society, free from popular assumptions about their capacity to do so.

The majority's disregard of the applicable standard deprived the Plaintiff of the right to present her case – and to require that the City prove that an important governmental interest is served by penalizing women, but not men, who show their breasts in public. The longstanding "tradition" of discriminating against women in this manner is insufficient to shield the ordinance from constitutional review. *See Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (adopting Justice Stevens' analysis in his dissent in *Bowers v. Hardwick* explaining that the "fact that the governing

majority . . . has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice"); *see also Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (citing *Lawrence* in striking down, under the Equal Protection and Due Process clauses, a law that prohibited same-sex marriage). The majority's decision throws decades of established precedent into doubt and puts at risk the rights of future litigants who seek to foster equality by overcoming gender-based stereotypes that long have limited opportunity for many Americans.

I. The Majority Erred in Affirming Dismissal of Plaintiff's Equal Protection Claim Without Requiring the City to Demonstrate an Exceedingly Persuasive Justification

Although the majority recognized that heightened scrutiny must be applied to gender classifications, it contravened that standard by concluding that the City's asserted interest – upholding "traditional moral norms and pubic order" – was "self-evident," and that nothing further was required to uphold the ordinance against an equal protection challenge. Slip op. at 7-9. This conclusion was incorrect as a matter of established law.

As the Supreme Court has made clear, government actors are prohibited from drawing sex-based classifications without proving an "exceedingly persuasive justification." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (citations omitted); *United States v. Virginia*, 518 U.S. 515, 524 (1996) ("VMI"). For such a classification to pass muster, "the defender of the challenged action must show 'at least that the classification serves important governmental objectives and that the

discriminatory means employed are substantially related to the achievement of those objectives.'" *VMI*, 518 U.S. at 524 (quoting *Hogan*, 458 U.S. at 724). This burden is "demanding and . . . rests entirely on the State." *Id.* at 533.

Contrary to the Court's assumptions here, *see* slip op. at 7 (extolling the long pedigree of the challenged ordinance), the government cannot meet this burden where outdated notions of gender roles and morality underlie the challenged classification. *See, e.g.*, *Morales-Santana*, 137 S. Ct. at 1690-91 (holding that the government was unable to justify gender differentiation in the Immigration and Nationality Act when "[h]istory reveals [that] what lurks behind [the distinction]" is "habitual, but now untenable, assumptions" about gender roles). In *J.E.B. v. Alabama ex rel. T.B.*, the Supreme Court held that gender-based peremptory challenges could not be justified by archaic arguments that women were "too fragile and virginal to withstand the polluted courtroom atmosphere;" and that trials "sometimes require consideration of indecent conduct, . . . references to intimate sex relationships, and other elements that would prove humiliating, embarrassing and degrading to a lady." U.S. 127, 132-33 (1994) (internal quotations omitted). *See also VMI*, 518 U.S. at 556 n.20 (rejecting purported justification for male only college based on argument that "adversative training [would destroy] any sense of decency that still permeates the relationship between the sexes") (internal quotation omitted).

As the Supreme Court stated last term, a gender-based classification "must substantially serve an important governmental interest *today*, for 'in interpreting

the [e]qual [p]rotection [guarantee], [we have] recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.'" *Morales-Santana,* 137 S. Ct. at 1690 (quoting *Obergefell*, 135 S. Ct. at 2603). *See also VMI*, 518 U.S. at 545, 550.

At bottom, the City and the majority seem to want to keep the ordinance in place because of discomfort with seeing women's breasts in public – based on historic notions of morality tied to the sexualization of female, but not male, breasts. However, this intuition is precisely the kind that the Supreme Court repeatedly has held requires close interrogation to determine whether the distinction between sexes is based on a real difference or historic stereotypes.

The Supreme Court has cautioned that sex-based classifications "carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women." *Orr v. Orr*, 440 U.S. 268, 283 (1979). Where laws are rooted in gender-based expectations about roles that are supposedly appropriate or moral for women and men, their legal enforcement is incompatible with the Equal Protection clause. *See VMI*, 518 U.S. at 531-34; *J.E.B.*, 511 U.S. at 135 (noting "the real danger that government policies that professedly are based on reasonable considerations in fact may reflect 'archaic and overbroad' generalizations about gender."). Precedent thus demands the searching inquiry of heightened scrutiny to ensure that gender-based assumptions no longer justify disparate treatment and perpetuate inequality. *See VMI*, 518 U.S. at 533-34, 550-51.

In *Frontiero v. Richardson*, the first case in which the Supreme Court expressly subjected a sex-based classification to heightened scrutiny, the Court explained that "our Nation has had a long and unfortunate history of sex discrimination" in which the courts themselves have played a role. 411 U.S. 677, 684-85 (1973) (plurality opinion). In *Frontiero*, the government attempted to justify a benefits scheme that differentiated based on gender by arguing, without evidence, that the scheme's purpose was one of administrative convenience. *Id*. at 688-89. Rejecting this argument, the Court noted that even if the asserted purpose were served, the differential benefits scheme, premised on the gender-based expectation that women were financially dependent on their husbands, could not withstand scrutiny. *Id*. at 689-91.

As the Court later explained in *Hogan*, because of the prevalence of stereotyping in laws that classify based on sex, "the test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females." 458 U.S. at 724-25. "Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions." *Id*.; *see also VMI*, 518 U.S. at 533. Engaging in this demanding scrutiny, the Court in *Hogan* struck a sex-based classification that, at its foundation, perpetuated gender stereotypes. In that case, Mississippi attempted to justify a state statute that prohibited men from enrolling in a state-supported nursing school by arguing that the single-sex admissions policy served to compensate for discrimination against women. 458 U.S. at 727. The Court noted

that the state had made no showing that women lacked opportunity to train to be a nurse, so the gender-based classification was not substantially related to the asserted government interest. *Id.* at 729-30. Rather than compensating for discrimination against women, the Court explained, the classification perpetuated the "stereotyped view of nursing as an exclusively woman's job." *Id.* at 729.

In demanding robust proof of a lawful justification for sex-based classifications, the Supreme Court has rejected the assumptions courts relied on for decades to uphold laws that reinforced gender-based stereotypes. *See, e.g. Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (upholding a state law that made jury duty registration optional for women because "[a] woman [was] still regarded as the center of home and family life"), *overruling recognized in J.E.B.*, 511 U.S. at 134-35 & n.5; *Goesart v. Cleary*, 335 U.S. 464, 466 (1948) (upholding statute prohibiting women from bartending unless they were a bar owner's wife or daughter because "oversight . . . by a barmaid's husband or a father minimizes hazards that may confront a barmaid without" it), *disapproved of by Craig v. Boren*, 429 U.S. 190, 210 n.123 (1976). This Court's refusal to require such a showing here – and its willingness to uphold the challenged ordinance based on nothing more that "traditional norms" runs counter to this body of law.

This Court's decision is also inconsistent with the broader realm of sex discrimination jurisprudence. For example, in *Price Waterhouse v. Hopkins*, a female manager at an accounting firm was told that her chances of making partner would improve if she would "walk more femininely, talk more femininely, dress

more femininely, wear make-up, have her hair styled, and wear jewelry." 490 U.S. 228, 251 (1989). The Supreme Court upheld her employment discrimination claim because her failure to conform to gender stereotypes played a role in an adverse employment action. *Id.* at 250-51. *See also Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 340-42 (7th Cir. 2017) (an employer's firing of a lesbian was grounded in sex stereotypes and therefore violated Title VII); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017) (recognizing that discrimination against persons who are transgender is sex discrimination, since "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.").

The majority's acceptance of "traditional moral norms" to justify the classification here runs counter to a lengthy jurisprudential endeavor to eradicate gender-based discrimination. The level of scrutiny demanded by precedent is essential to suss out whether such historical norms "reflect longstanding biases [or] reasonable distinctions." Slip op. at 15 (Rovner, J., dissenting). By circumventing that analysis, and failing to require an evidentiary justification for the classification at issue, the Court paves the way for a return to the days when governments and private parties were free to rely on arbitrary sex stereotypes and notions of morality to discriminate based on gender.

II. Factual Development is Required to Determine Whether the Classification is Based on Impermissible Sex Stereotypes.

Amicus does not argue that the challenged ordinance is unconstitutional as a matter of law and should have been enjoined in the current litigation posture.

Rather, this case must be remanded to allow for record development and evaluation of the ordinance in accordance with the applicable level of scrutiny. For example, in *Free the Nipple-Fort Collins v. City of Fort Collins*, a federal court enjoined a similar ordinance based on a record of harms associated with sexualizing women's breasts, and not men's, and a demonstration that the ordinance perpetuated a longstanding "stereotype engrained in our society that female breasts are primarily objects of sexual desire whereas male breasts are not." 216 F. Supp. 3d 1126, 1132-33; *see also People v. Santorelli*, 80 N.Y.2d 875, 882 (1992) (Titone, J., concurring) (reviewing evidence noting that there are many places "where the exposure of female breasts on beaches and in other recreational area is commonplace and is generally regarded as unremarkable.").

Based on concerns about the sexualization of women's breasts, and not men's, and the disregard for the true biological difference between women's and men's breasts, the dissent concluded that "[t]he City's claim . . . boils down to a desire to perpetuate a stereotype that female breasts are primarily the objects of desire, and male breasts are not." Slip op. at 13 (Rovner, J. dissenting).

Once the Plaintiff is permitted to put on evidence, and the City is put to the task of meeting its burden of justification with actual evidence rather than assumptions and stereotypic norms, the harms associated with such stereotypes may – as they have in a long line of gender discrimination cases – become apparent, and the "traditional moral norms" revealed as advancing discrimination rather that supporting appropriate differential treatment.

CONCLUSION

For the reason stated herein, *amicus curiae* respectfully requests that this Court grant Plaintiff's Petition for Rehearing and Suggestion for Rehearing *En Banc*.

Dated: November 29, 2017

Respectfully submitted,

s/ Lorie A. Chaiten

Lorie A. Chaiten
John A. Knight
Jenna G. Prochaska
ROGER BALDWIN FOUNDATION OF ACLU, INC.
150 N Michigan Ave Ste 600
Chicago IL 60601
(312) 201-9740
lchaiten@aclu-il.org
jknight@aclu-il.org
jprochaska@aclu-il.org

Attorneys for Amicus Curiae, ACLU of Illinois

CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 29(b)(4) AND 32(g)

The undersigned, counsel for *amicus curiae*, ACLU of Illinois, furnishes the following in compliance with F.R.A.P Rule 29(b)(4) and 32(g):

I hereby certify that this brief conforms to the rules contained in F.R.A.P Rule 29(b)(4) for a brief produced with a proportionally spaced font. The length of this brief is 2,316 words.

Dated: November 29, 2017.

s/ Lorie A. Chaiten

Lorie A. Chaiten
John A. Knight
Jenna G. Prochaska
ROGER BALDWIN FOUNDATION OF ACLU, INC.
150 N Michigan Ave Ste 600
Chicago IL 60601
(312) 201-9740
lchaiten@aclu-il.org
jknight@aclu-il.org
jprochaska@aclu-il.org

Attorneys for Amicus Curiae, ACLU of Illinois

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2017, I electronically filed the foregoing BRIEF FOR *AMICUS CURIAE* ACLU OF ILLINOIS with the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Lorie A. Chaiten

Lorie A. Chaiten
John A. Knight
Jenna G. Prochaska
ROGER BALDWIN FOUNDATION OF ACLU, INC.
150 N Michigan Ave Ste 600
Chicago IL 60601
(312) 201-9740
lchaiten@aclu-il.org
jknight@aclu-il.org
jprochaska@aclu-il.org

Attorneys for Amicus Curiae, ACLU of Illinois