IN THE SUPREME COURT OF OHIO

City of Bowling Green	:	
	:	**Case No. _____**
Appellee,	:	
	:	**On Appeal from the Wood County**
v.	:	**Court of Appeals, Sixth Appellate**
	:	**District**
Lorien D. Bourne,	:	
	:	
Appellant.	:	**Court of Appeals Case No. WD-07-007**
	:	
	:	

MEMORANDUM IN SUPPORT OF JURISDICTION
OF *AMICUS CURIAE* NATURIST ACTION COMMITTEE

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EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents two important and substantial constitutional questions of great general and state-wide interest. The first question is whether prosecutorial overreach, through the creative misapplication of a statute that is related only peripherally to the crime charged, will be allowed to criminalize conduct that the General Assembly has chosen not to criminalize. Not only has the General Assembly not criminalized the conduct in question, but it has addressed and specifically declined to make such conduct illegal. The second question is whether, in analyzing statutes that clearly discriminate on the basis of sex to the detriment of women, the Courts of this State will properly follow the mandate of the United States Supreme Court which requires that gender-based government action have an exceedingly persuasive justification and that the burden to demonstrate that justification be placed entirely on the State.

In this case, Lorien Bourne was arrested and convicted merely for appearing topfree[1] at a Bowling Green city park. It was not an ostentatious or salacious display; on a warm day she simply engaged in a picnic without a shirt on, as any man is able to do without fear of arrest. Ms. Bourne was not charged with indecent exposure under the Bowling Green Codified Ordinance 133.06, which directly parallels O.R.C. §2907.09, but instead was charged with disorderly conduct under section 132.04(A)(5), which directly parallels O.R.C. §2917.11(A)(5). The relevant portion of the Ordinance reads:

1. In the naturist community, the word "topfree" is usually used to describe the condition that results from choosing to be free of a shirt or other covering above the waist. It applies to both men and women. This distinguishes the non-sexual, casual exposure of the breasts from the sexually-charged atmosphere associated with such entities as topless bars.

> No person shall recklessly cause inconvenience, annoyance, or alarm to another, by doing any of the following: . . . Creating a condition that is ***physically*** offensive to persons or that presents a risk of physical harm to persons or property, by any act that serves no lawful and reasonable purpose of the offender. (*Emphasis added*.)

By affirming Ms. Bourne's conviction, the Court of Appeals has rendered the word "physically" in the phrase "physically offensive" a nullity.

This case presents an opportunity for this Court to ensure that the statutes of this state are used for their intended purposes, and are not used to expand powers of the State to criminalize conduct beyond the plain language of Ohio's statutes. Even though this portion of the disorderly conduct statute requires "physically offensive" conduct, some Ohio courts have joined the Wood County Court of Appeals in interpreting that statute as if the word "physically" is absent. See, for instance, *State v. Bailey,* No. C-010641 (Hamilton Cty., June 21, 2002), in which sexually-oriented comments were deemed "physically offensive," and *State v. Norris,* 2004-Ohio-6031 (Ashtabula Cty., November 12, 2004), in which trespassing was considered "physically offensive." In neither instance, nor in the instant case, is there any physical element involved. From the 1974 Committee Comments regarding the disorderly conduct statute, 134 v H 511 (Eff. 1-1-74), it is clear that the word "physically" is an integral part of the statute; the confusion on the part of the Courts of Appeal dictates that this point be clarified by this Court, and that the use of this statute be constrained to comport with its intended purpose.

On numerous occasions, the General Assembly has considered criminalizing the non-sexual exposure of the female breast, and has always declined to do so. Allowing this decision to stand because of the creative mis-interpretation of the disorderly conduct ordinance presents a gross miscarriage of justice and flouts the clear intent of the General Assembly.

This case also presents an important opportunity to ensure that the heightened scrutiny standard laid out by the United States Supreme Court regarding sexual discrimination is followed by Ohio courts. Heightened scrutiny, as presented in *United States v. Virginia*, 518 U.S. 515 (1996) and subsequent cases, clearly requires that the City of Bowling Green must demonstrate that the justification for their discrimination be "exceedingly persuasive," *id.*, 518 U.S. at 533, and ***not*** rely on outdated stereotypes based on "fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women v. Hogan*, 458 U. S. 718, 725 (1982). Instead, the Court of Appeals merely cited one case that predated the *Virginia* decision (which relied on stereotypes or mere traditions regarding the effect of either displaying or observing bare breasts) and three cases in which female breasts were explicitly sexualized (all strip club cases). In fact, in one of the cited strip club cases (which again pre-dated *Virginia*), *Hang On, Inc. v. Arlington*, 65 F.3d 1248 (C.A.5 1995), the Fifth Circuit Court of Appeals explicitly derided the necessity of demonstrating the justification for male/female distinctions, saying, "Courts need no evidence to prove self-evident truths about the human condition — such as water is wet. Nor should they tarry long with such foolishness and, in the process, trivialize constitutional values intrinsic to our society." *Id*., at 1257. The Wood County Court of Appeals has implicitly endorsed that view with its opinion. Such disregard for United States Supreme Court precedent necessitates review by this Court.

In sum, the resolution of these two substantial and general issues is important to ensure that statutes are used for their intended purposes, and that proper constitutional standards are adhered to. *Amicus curiae* respectfully request that this Court accept jurisdiction.

STATEMENT OF THE INTEREST OF THE *AMICUS CURIAE*

Naturism is a way of life in harmony with nature characterized by the practice of nudity, with the intention of encouraging body acceptance, self-respect, respect for others and respect for the environment. The Naturist Action Committee (NAC) is the non-profit nationwide adjunct to The Naturist Society, a membership organization with more than 27,000 members world-wide. http://www.naturistsociety.com/. The Naturist Action Committee is a grass roots organization that relies on the involvement and participation of individual naturists and groups at local levels. Its mission is "[t]o advance and protect the rights and interests of naturists throughout North America." http://www.naturistaction.org/.

Throughout its sixteen year history, the Naturist Action Committee has advanced the concept of body acceptance as an important and worthwhile personal and societal goal. Bodies come in all shapes, sizes and colors, and accepting the bodies of others is closely related to issues of respect and the recognition of individual liberties. Accepting our own bodies is often more difficult, especially for women. The bodies of women have been objectified, idealized, and manipulated by others beyond a point attainable by most individuals. The negative impact to self image and self esteem is often devastating. A benefit of nude recreation is that it allows people to see what real bodies look like and to experience self-acceptance. Although it is not nudity *per se*, the mere non-sexual exposure of a female's upper torso is an element of incremental body acceptance. Topfreedom does not impact morality in a negative way. To the contrary, it allows individuals to gain and express a greater acceptance for their own bodies.

NAC offers an *amicus* memorandum in this case because of the unique insight and guidance that it can provide to the Court, in addition to its obvious interest in the outcome. Among those with an interest in this case, the Naturist Action Committee is in the unique position

of having witnessed, first hand, the General Assmbly as it considered and rejected proposals that would have made female topfree equality illegal. NAC provided input to the General Assembly on the issue, and watched carefully as the General Assembly declined to criminalize the non-sexual exposure of the female breast. In addition, the leadership of NAC is in the unique position of having been directly involved in *People v. Santorelli*, 600 N.E.2d 232, 80 N.Y.2d 875 (N.Y. 1992), a case that affirmed the legality of non-commercial female topfree equality in the State of New York. The information we provided regarding the benign nature of non-sexual topfree equality allowed that Court to perform the thorough examination required by heightened scrutiny.

NAC has no relation to any of the individuals or organizations involved in this litigation.

STATEMENT OF THE CASE AND FACTS

This case arose when Lorien D. Bourne picnicked on September 16, 2006, in Bowling Green's City Park. At the picnic, she, along with other women and men, removed their shirts. Thereafter, only the women were arrested and charged with disorderly conduct under Bowling Green City Ordinance 132.04(A)(5). Ms. Bourne was found guilty by the judge of the trial court; she then appealed to the Wood County Court of Appeals, which affirmed her conviction.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The General Assembly has specifically declined to make the non-sexual exposure of the female breast a criminal act. Criminalizing such conduct by labeling it "a condition that is physically offensive to persons" defies the legislative intent and perverts the plain meaning of the disorderly conduct statute.

The issue of the casual, non-sexual exposure of the female breast first arose in Ohio with two cases in the early 1990s. In *State v. Parenteau*, 55 Ohio Misc.2d 10, 564 N.E.2d 505

(Hamilton Cty. Mun. Ct., 1990), Pamela Parenteau was acquitted of public indecency when the trial court noted that the statute prohibited the exposure of "private parts" and that under the plain meaning of the statute, breasts are not private parts. In *State v. Jetter*, 74 Ohio App.3d 535, 599 N.E.2d 733 (Hamilton Cty., 1991), the Hamilton County Court of Appeals upheld the dismissal of a public indecency charge against Kimberly Jetter, again noting that breasts are not private parts under the plain meaning of the statute.

As the knowledge of these two court cases spread, some women began to feel more comfortable appearing topfree on the beaches and in the parks of Ohio, enjoying a freedom that their male counterparts had enjoyed for decades. NAC is aware of early topfree usage at Caesar Creek State Park, Alum Creek State Park, and Edgewater Beach at Cleveland Lakefront State Park. Almost all of the topfree usage was without incident. However, after a few complaints at Caesar Creek State Park, in 1995 then-Representative George Terwilleger, introduced House Bill 188 to the 121st General Assembly. During committee testimony then-Warren County prosecutor Tim Oliver, while testifying for the bill, acknowledged that there was no other statute that could be used to prosecute female topfree usage of the beach.[2] HB 188 was reported from the House Agriculture and Natural Resources Committee without ever passing the House of Representatives. In 1997 the bill was re-introduced during the 122nd General Assembly as House Bill 112. Although the bill passed the House, it did not garner sufficient support in the Senate and again failed. The bill was never revived in subsequent sessions of the General Assembly.

In 2002, House Bill 469 was introduced into the 124th General Assembly. As introduced, the bill targeted nudity at strip clubs, but also contained a provision that added exposure of female

2. "Prosecutor: Crack down on topless sunbathers," Associated Press, *The Cincinnati Post*, April 27, 1995, p. 14A. "Lawmakers Want Bill to Bar Bare Breasts on Beaches," by Tim Miller, *Dayton Daily News*, April 27, 1995, p. 1B.

breasts to prohibitions contained in the public indecency statute. However, that particular provision was quickly removed in sub-committee. Even then, House Bill 469 failed to move out of committee. The bill, ***without any provision criminalizing female topfree equality***, was reintroduced into the 125th General Assembly in 2004 as House Bill 428 and eventually passed the House, but was not considered in the Senate. The bill was reintroduced into the 126th General Assembly in 2005 as House Bill 23, where it passed the House and Senate and was finally signed into law. 151 v. H 23 (Eff. 8-17-06). Again, the bill contained no provision criminalizing female topfree equality.

Meanwhile, women throughout the State were exercising their reaffirmed rights, and members of the General Assembly were certainly aware of it. Topfree beach use continued at the aforementioned State Parks, and also occurred at other State Parks, such as Mentor Highlands State Park.[3] Women who marched topfree in a Gay Pride Parade in Columbus were arrested and charged with public indecency. However, the charges were eventually dropped, and each woman was awarded approximately $3,000 for false arrest.[4] A female student was arrested and charged with public indecency for sunning topfree on a hot day at Ohio University; the charges were subsequently dismissed.[5] There were topfree marches to the Statehouse.[6]

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3. "The Bottom Line on Going Topless," by Tom Feran, *The Cleveland Plain Dealer*, July 13, 2001, p. 1E.
4. "Breast-Baring Counts Dropped Against 5," *The Columbus Dispatch*, August 4, 1995, p. 3B. "City Attorney Candidates Debate Settlement in Arrest Case", by Doug Caruso, *The Columbus Dispatch*, October 23, 1997, p. 1C. "To Some, Going Topless a Matter of Pride," by Alice Cervantes, *The Columbus Dispatc*h, June 26, 2005, p. 6B.
5. "March at OU Tops Off Protest Over Public Indecency Charge," by Mary Beth Lane, *The Columbus Dispatch*, June 8, 2000, p. 8C. "Case Dropped in Topless Incident," *The Athens News*, July 5, 2000.
6. "Now Marchers Carry Concerns to the Statehouse," by Dean Narciso, *The Columbus Dispatch*, July 23, 1995, p. 6B.

During the entire time period from *Parenteau* to today, the General Assembly had ample opportunity to change the public indecency law to criminalize female topfree equality, but in its wisdom, declined to do so. At no time was it suggested that female topfree equality was a form of disorderly conduct; disorderly conduct was not mentioned in any of the committee hearings on the previously-mentioned bills. Yet, Ms. Bourne was convicted of disorderly conduct merely for reaffirming the right that women have been continually exercising throughout the state. The conviction of Ms. Bourne is an example of creative prosecutorial overreach and a flouting of the legislative intent that should not be allowed to stand. As the Ohio Supreme Court said in *Kulch v. Structural Fibers Inc.*, 78 Ohio St.3d 134, 158, 677 N.E.2d 308, 326 (Ohio 1996), regarding a whistleblowing case:

> As indicated immediately above, the legislative history of R.C. 4113.52 clearly reveals that the General Assembly considered and rejected the notion of providing a wider range of statutory civil remedies for qualifying whistleblowers who are discharged or disciplined in violation of the statute.

In Ms. Bourne's case, the legislative history clearly reveals that the General Assembly considered and rejected the notion of criminalizing female topfree equality.

In addition to ignoring the legislative intent, Ms. Bourne's conviction also should not stand because the sight of a bare female breast simply cannot be "*physically* offensive." While such a sight may be offensive to some, the disorderly conduct statute requires *physical* offense, not some other kind of offense, such as *intellectual* offense, *emotional* offense, *moral* offense, or even *visual* offense. The committee comments from when the disorderly conduct statute was adopted in 1974 make that abundantly clear. The relevant portion of O.R.C. §2917.11(A)(5) says,

> No person shall recklessly cause inconvenience, annoyance, or alarm to another, by doing any of the following: . . . Creating a condition that is physically offensive to persons or that presents a risk of physical harm to persons or property, by any act that serves no lawful and reasonable purpose of the offender.

The corresponding portion of the committee comments says the following:

> The gist of the first part of the section is perversely causing inconvenience, annoyance, or alarm to another in any of the listed ways: . . . relieving oneself in an improper spot; and exploding a firecracker at someone's feet.

134 v H 511 (Eff 1-1-74). The example given of something that is physically offensive is urine. It is inconceivable to place the mere sight of a bare breast in the same category. While the already-cited Ohio cases describing sexually-oriented comments and trespassing as "physically offensive" are undoubted erroneous, other Ohio Courts of Appeal have properly distinguished "physically offensive" conduct: being belligerent and agitated is *not* physically offensive conduct, *Newburgh Heights v. Halasah*, 133 Ohio App.3d 640, 729 N.E.2d 464 (Cuyahoga Cty., May 20, 1999); depositing dog feces on a neighbor's yard *is* physically offensive conduct, *State v. Rice*, 2002-Ohio-3951 (Allen Cty., August 2, 2002); spitting onto a police officer's car *is* physically offensive conduct, *City of Kent v. Dawson*, No. 2000-P-0094 (Portage Cty., June 8, 2001); sending leaky garbage through the mail *is* physically offensive conduct, *Commonwealth v. Troy*, 2003 Pa.Super. 340, 832 A.2d 1089 (Pa.Super. September 11, 2003) (Pennsylvania's disorderly conduct statute contains the same "physically offensive" element as Ohio's). In all these examples, the physically offensive conduct involved a noxious substance of some sort — that is what "physically offensive" requires. Early use of the phrase was interpreted in *Seymour v. Seymour*, 56 Misc 2d 546, 548, 289 NY Supp 2d 515, 518 (N.Y.Fam.Ct. 1968) to refer to such things as "loosening noxious materials within a confined area." Other states then adopted statutes containing the "physically offensive" language and have relied upon the *Seymour* interpretation. (*See, e.g., Oregon v. Clark*, 39 Or.App. 63, 591 P.2d 752 (Or.App. 1979)).

In this case, the Court of Appeals has effectively, through judicial interpretation, removed the word "physically" from the statute. As the Ohio Supreme Court stated in a case involving the designation of minority business status:

> Given the plain language of R.C. 122.71(E)(1) and its history, we are in no position to modify the clear and unambiguous terms of the statute by rewriting it, under the guise of judicial interpretation, to make it say something far different from what the statute actually says and means. This court is not now, nor has it ever been, a judicial legislature.

Ritchey Produce Co. v. State, 1999-Ohio-262, 85 Ohio St.3d 194, 206, 707 N.E.2d 871, 881 (Ohio 1999). It is unacceptable for the Court of Appeals to have rewritten the disorderly conduct statute by removing this word from the statute. Ms. Bourne's conviction must be reversed. The guidance of this Court is warranted.

<u>Proposition of Law No. 2</u>: When properly examined under the heightened scrutiny of *United States v. Virginia*, 518 U.S. 515 (1996), the selective enforcement of the disorderly conduct statute against female topfree equality is unconsitutional.

When discussing the issue of female topfree equality, the Wood County Court of Appeals disregarded the clear instructions from the United States Supreme Court regarding the application of heightened scrutiny. As per *Virginia, supra*, it was incumbent upon the Court of Appeals to examine carefully the city's rationale for singling out Ms. Bourne:

> Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive".

Id., 518 U.S. at 532-533. Instead, the Court of Appeals cited to out-of-date, pre-*Virginia* opinions, and unjustly and uncritically equated the sexually-charged atmosphere of strip clubs with, literally, a stroll in the park. The instructions from the *Virginia* Court say that outdated stereotypes and assumptions about the differences between men and women are to be carefully examined:

> Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. . . . "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. . . . But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.

Id., 518 U.S. at 533-534. The Court of Appeals merely noted that "The female breast has traditionally been viewed as an erogenous zone." Citing tradition is not good enough, particularly when used to perpetuate the social inferiority of women by removing their option to choose what any man is allowed to choose. The one non-sexual decision cited by the Court of Appeals, *United States v. Biocic*, 928 F.2d 112, 115-116 (C.A.4 1991), even noted that its opinion was based upon the unexamined notion of that's-just-the-way-it-is: "These still include (whether justifiably or not in the eyes of all) the female, but not the male, breast." This is not acceptable; the whole purpose of the judicial review is to determine whether the discrimination is justifiable or not. As Justice O'Connor wrote:

> Sex-based statutes, even when accurately reflecting the way most men or women behave, deny individuals opportunity. Such generalizations must be viewed not in isolation, but in the context of our Nation's long and unfortunate history of sex discrimination. Sex-based generalizations both reflect and reinforce fixed notions concerning the roles and abilities of males and females.

Nguyen v. Immigration and Naturalization Service, 533 U.S. 53, 74 (2001). (Justice O'Connor, *dissenting*; internal citations and quotation marks removed. While this description is in dissent, it nonetheless accurately describes the appropriate standard.)

In the instant case, the burden was on the government to show that their discrimination was closely supported by their proffered justification. It did not, and the Court of Appeals did not enquire further.

Women have been using Ohio's beaches and parks topfree for decades; they are topfree at California's beaches and parks, at Long Island beaches and parks, and at myriad other beaches

across the United States. Across Europe, women enjoy topfree gender equality without the outmoded stereotypical baggage that Bowling Green and the Court of Appeals would impose on Ms. Bourne and other Ohio women. These examples directly counter the idea that there is any exceedingly persuasive justification for this form of gender discrimination. It is wrong to suggest that Ohio must keep it feet firmly planted in its past history of gender discrimination under claims of offending outdated "sensibilities." In *Santorelli, supra*, those in the leadership of NAC provided the information demonstrating the invidiousness of this sort of discrimination; it offers its expertise to do so again in this case.

If the Court of Appeals had properly followed United States Supreme Court precedent, the gender discrimination in this case would not have been allowed to stand. It is appropriate for this Court to guide the lower courts on this important constitutional issue.

CONCLUSION

For the reasons discussed above, this case involves a substantial constitutional question and issues of important public and general interest. The appellant requests that this court accept jurisdiction in this case so that the issues presented will be reviewed on the merits. Due to the obvious error, the *amicus curiae* also suggests that a summary reversal is appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served, by regular U.S. mail, postage prepaid, upon the following persons, this ____ day of December, 2007:

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