IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-01308-RBJ-KLM

FREE THE NIPPLE – FORT COLLINS,
BRITTIANY HOAGLAND,
SAMANTHA SIX,

Plaintiffs,

v.

CITY OF FORT COLLINS, COLORADO,

Defendant.

DEFENDANT'S MOTION TO DISMISS

Defendant City of Fort Collins, Colorado ("the City"), by its attorneys, Andrew D. Ringel, Esq., Gillian Dale, Esq., and Christina S. Gunn, Esq., of Hall & Evans, LLC, and Carrie Mineart Daggett, Esq., and John R. Duval, Esq., of the Fort Collins City Attorney's Office, hereby files this Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), as follows:

INTRODUCTION AND PROCEDURAL HISTORY

Plaintiffs Free the Nipple – Fort Collins ("FTN"), Brittiany Hoagland, and Samantha Six filed their Complaint and Jury Demand (the "Complaint") in this matter on May 31, 2016. [ECF 1]. Plaintiffs contemporaneously filed a Motion for Preliminary Injunction ("Motion"), requesting this Court enjoin the City from enforcing the ordinance at issue. [ECF 2]. Plaintiffs requested the issuance of a summons on June 8, 2016, [Doc. 9], which was issued June 9, 2016. [ECF 10]. The City was served with the summons on June 21, 2016. The City then obtained an

extension of time to August 2, 2016, to file its initial responsive pleading and to respond to the Plaintiffs' Motion. [ECF 14].

Plaintiffs' Complaint contains three claims for relief seeking to strike down a Fort Collins ordinance prohibiting women from baring their breasts in public. Plaintiffs claim violation of the right to free speech under the First Amendment, the right to equal protection under the Fourteenth Amendment, and the right to equal protection under the Colorado Equal Rights Act. Defendant now seeks dismissal of each of Plaintiffs' claims for relief.

STATEMENT OF FACTS[1]

1. FTN is an unincorporated association of residents of Colorado who wish to expose their breasts in Fort Collins. [ECF 1, ¶ 10].

2. Plaintiff Brittiany Hoagland is a former resident of Fort Collins and a member of FTN. [ECF 1, ¶ 11].[2]

3. Plaintiff Samantha Six is a resident of Fort Collins and a member of FTN. [ECF 1, ¶ 12].

4. Prior to October 20, 2015, Section 17-142 of the Fort Collins Code of Ordinances provided: "No person shall knowingly appear in any public place in a nude state of undress such that the genitals or buttocks of either sex or the breast or breasts of a female are exposed." [ECF 1, ¶ 18].

[1] These alleged facts are taken from the Complaint and are accepted as true solely for purposes of this Motion to Dismiss. Defendant reserves the right to dispute any of these alleged facts in any future proceedings in this matter, including any proceedings on the Plaintiffs' Motion for Preliminary Injunction.

[2] It is questionable whether Ms. Hoagland has standing to challenge the ordinance at issue now that she no longer lives in Fort Collins.

5. On October 20, 2015, the Fort Collins City Council proposed Ordinance No. 134, which modified Section 17-142, to read as follows:

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

The ordinance defines "public place" as follows:

> [A] place in which the public or a substantial number of the public has access, and includes but i[s] not limited to highways including sidewalks, transportation facilities, school[s], places of amusement, parks, playgrounds and the common areas of public and private buildings and facilities, and shall not include any theater, concert hall, museum, school or similar establishment to the extent the same is serving as a performance venue.

Women who are breastfeeding in places they are legally entitled to be are exempted from the ordinance. [ECF ¶ 30].

6. At the October 20, 2015, City Council meeting, Fort Collins advanced three reasons for the ordinance:

(1) That women who appear in public with their breasts and nipples exposed violate the values of the Fort Collins community, including its sense of decency and family,

(2) That women with exposed breasts impede the right of others to enjoy public spaces, and

(3) That women with exposed breasts constitute pornography, which children cannot legally view.

[ECF, ¶ 31].[3]

7. According to the Plaintiffs, Fort Collins also made "veiled references" to "religious morality" in support of the ordinance. [ECF 1, ¶ 32].

8. One City Councilmember indicated allowing women to appear topless in public would denigrate a woman's respect and value and was counterproductive to the goal of protecting women from assaults. [ECF 1, ¶ 33].

9. Public comments regarding the ordinance included opinions that allowing women to appear topless in public threatened the "family friendly status of Fort Collins." [ECF 1, ¶ 35].

10. The revised version of Section 17-142 was adopted at a City Council meeting on November 3, 2015. [ECF 1, ¶ 38].

ARGUMENT

I. SECTION 17-142 DOES NOT VIOLATE PLAINTIFFS' FIRST AMENDMENT RIGHTS

A. Plaintiffs' Plan To Protest By Going Topless Does Not Constitute Protected Speech

Plaintiffs' Claim I alleges Section 17-142 violates their right to free speech under the First Amendment to the United States Constitution. [ECF 1, ¶¶ 43-48]. Plaintiffs do not assert nudity alone constitutes free speech, thereby implicitly acknowledging nudity "is protected as speech only when combined with some mode of expression which itself is entitled to first amendment protection." ***Hang On, Inc. v. City of Arlington***, 65 F.3d 1248 (5th Cir. 1995) (citation omitted); *see also* ***Heideman v. S. Salt Lake City***, 348 F.3d 1182, 1190 (10th Cir. 2003)

[3] These are the reasons for Section 17-142 presented by Plaintiffs in the Complaint, which are adopted solely for purposes of this Motion to Dismiss. Defendant will present in detail Fort Collins' complete rationale for the ordinance in its Response to the Plaintiffs' Motion for Preliminary Injunction and at the anticipated preliminary injunction hearing before this Court.

("Appearing nude is not a First Amendment interest in the abstract, but only insofar as nudity is a means by which some message is conveyed.").

Conduct may be considered protected speech when the actor intends to convey a "particularized message" and where the "likelihood [is] great that the message would be understood by those who viewed it." ***Spence v. Wash.***, 418 U.S. 405, 411-12 (1974). Plaintiffs claim they satisfy this standard as they plan to participate in a completely topless protest "to advocate for gender equality by challenging the double standards, hypocrisies, and sexualization of women that supports laws and policies that treat women as inferior to men." [ECF 1, ¶¶ 39 & 45]. Beyond Plaintiff's bald proclamation, however, there is no allegation anywhere in the Complaint supporting the notion that the purported message intended to be conveyed by Plaintiff's toplessness would be understood by those who viewed it. *See* ***Craft v. Hodel***, 683 F. Supp. 289, 291 (D. Mass. 1988) ("[P]ublic nudity cannot be understood to convey a particularized message to those who view it."). To the contrary, women baring their breasts in public might be considered as conveying the exact opposite of the message advocated by Plaintiffs. *See* ***id.*** at 292 ("The plaintiffs would have it that their message of protest against exploitation is conveyed particularly by their nudity. But that is only a matter of perspective. Quite different messages, indeed the precise polar opposites to the messages the plaintiffs offer, are presented on a regular basis when this Court examines the allegedly obscene materials pursuant to forfeiture proceedings under 19 U.S.C. §1305. There the female breast is presented as an object for manipulation, abuse and male domination. In short, public nudity does not convey any specific message, at most it is a medium by which a variety of messages may be conveyed.").

In ***Tagami v. City of Chicago***, 2015 U.S. Dist. LEXIS 90149 (N.D. Ill. July 10, 2015), the court considered an argument that appearing topless at a Go Topless Day event was intended "to convey the message that women, like men, should be allowed to appear bare-chested in public and the act of appearing so protests this prohibition." ***Id.*** at *6. The court initially determined the message was likely to be understood by those who viewed it, based solely on the plaintiff's proclamation of her intent. *See* ***id.*** However, following amendment of the complaint, the court reconsidered this ruling, finding it had previously "bent over backwards to adhere to the low standard for notice pleading when considering whether Tagami's purported message would be understood." ***Tagami v. City of Chi.***, 2016 U.S. Dist. LEXIS 11832, *5 (N.D. Ill. Feb. 1, 2016). Noting the Supreme Court's ruling that public nudity is not inherently expressive, the court found it was "remiss when it considered the verbally communicated message in its consideration of the circumstances." ***Id.*** (citing ***City of Erie v. Pap's A.M.***, 529 U.S. 277, 299 (2000)). The court therefore reversed its prior ruling and dismissed the plaintiff's free speech claim.[4]

Because there does not appear to be any likelihood the particularized message Plaintiffs purport to convey by going topless would be understood by those who view it, their conduct does not constitute protected speech and there is no need to evaluate whether regulation of the conduct is permissible.

[4] Plaintiffs cite the July 2015 ruling in ***Tagami*** in their Complaint, which dismissed the plaintiff's equal protection claim but permitted the free speech claim to proceed. [ECF 1, ¶ 23]. However, the same court later issued a ruling in February of 2016 dismissing the free speech claim and terminating the case. ***Tagami***, 2016 U.S. Dist. LEXIS 11832, at *5-7. This case is now on appeal to the Seventh Circuit.

B. Topless Bans Are Constitutionally Permissible Under *O'Brien*

Even if the action of taking off one's top could be considered protected speech, regulation of such activity is constitutionally permissible under the analysis established in ***United States v. O'Brien***, 391 U.S. 367 (1968). Under ***O'Brien***, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." ***Id.*** at 376. "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." ***Id.*** at 377.

"General prohibitions on public nudity . . . are subject to scrutiny under the framework set forth in ***O'Brien*** for content-neutral restrictions on symbolic speech." ***Heideman***, 348 F.3d at 1193 (quoting ***City of Erie***, 529 U.S. at 289). The courts regularly review challenges to nudity bans, including challenges similar to the one at issue here, under ***O'Brien***. *See, e.g.*, ***Hightower v. City & County of San Francisco***, 77 F. Supp. 3d 867, 880 (N.D. Cal. 2014); ***7250 Corp. v. Board of County Comm'rs***, 799 P.2d 917, 924 (Colo. 1990); ***State v. Turner***, 382 N.W.2d 252, 254 (Minn. Ct. App. 1986) (reviewing claim that ordinance substantially the same as Section 17-142 violated First Amendment under ***O'Brien***). In fact, in ***Tagami,*** cited by Plaintiffs in the Complaint, the court reviewed an ordinance containing the same nudity definition as Section 17-142, and found: "Public nudity laws such as the one at issue have consistently been deemed content-neutral statutes that regulate conduct and not expression. Such regulations are evaluated

under the test set forth in ***United States v. O'Brien***." ***Tagami***, 2015 U.S. Dist. LEXIS 90149 at *6 (collecting cases). Fort Collins' nudity restrictions as articulated in Section 17-142 satisfy each of the tests set out in ***O'Brien***.

i. Section 17-142 is Within the Constitutional Power of the Government

Plaintiffs concede the City can satisfy this element of the ***O'Brien*** test. [ECF 2, at 13]. *See also* ***Heideman***, 348 F.3d at 1197 (expressing "no doubt" nudity ban was within lawful powers of city).

ii. Section 17-142 Furthers an Important or Substantial Governmental Interest

According to the Complaint, the purposes of Section 17-142 include maintaining the values of Fort Collins, including its sense of decency and family; protecting the right of others to enjoy public spaces; protecting children from viewing nudity; promoting respect for women and protecting them from assaults; and maintaining the city's family friendly status. [ECF 1, ¶¶ 31-35]. Similar purposes have regularly been upheld as legitimate governmental purposes for nudity bans. *See, e.g.,* ***Hightower***, 77 F. Supp. 3d at 881 (health, safety, and morals were substantial interests served by nudity ban); ***Ways v. City of Lincoln***, 331 F.3d 596, 600 (8th Cir. 2003) (city's interests in preventing secondary adverse effects of public nudity and protecting order, morality, health, safety, and well-being of populace are important); ***Buzzetti v. City of New York***, 1997 U.S. Dist. LEXIS 4383, *12 (S.D.N.Y. Apr. 8, 1997) (addressing perceived decline in community character due to adult establishments is a substantial government interest); ***City of Tucson v. Wolfe***, 917 P.2d 706, 707 (Ariz. App. 1995) (helping to "maintain a decent society" and "protect public decorum, sensibilities and morals" have long been recognized as legitimate and important legislative goals); ***Turner***, 382 N.W.2d at 254 ("The city's interest in regulation

must be balanced against appellant's right to free expression. The park board enacted PB2-21 to further what the park board perceived to be a legitimate governmental interest, protecting societal norms. The ordinance was carefully drawn to exclude nudity in artistic expression, thereby avoiding regulation of protected expression.") (citation omitted); ***Seattle v. Buchanan***, 584 P.2d 918, 920 (Wash. 1978) ("When the legislative intent is viewed in light of the obvious purpose of the ordinance -- to protect the public morals and its concern for the privacy of intimate functions -- common knowledge tells us, as it undoubtedly told the trial judge, that there is a real difference between the sexes with respect to breasts, which is reasonably related to the preservation of public decorum and morals. Governmental bodies have a right to enact laws to maintain a decent society.") (citing ***Paris Adult Theatre I v. Slaton***, 413 U.S. 49 (1973)).[5]

iii. Section 17-142 is Unrelated to the Suppression of Free Expression

Contrary to Plaintiffs' bald assertion that the reasons advanced for the Fort Collins nudity ordinance "demonstrate that the ordinance target Plaintiffs' expressive activity," [ECF 1, ¶ 36], the reasons cited on their face relate to the preservation of society's sense of morality and decency, not to prohibiting any particular message purportedly conveyed by going topless.[6] In addition, on its face, the ordinance does not prohibit any particular message, but simply prohibits

[5] Of interest, when this case was decided in 1978, it was already being argued concepts of morality were changing and public exposure of the female breast was becoming "increasingly less offensive." ***Buchanan***, 584 P.2d at 920-21. However, almost 40 years later, the comments noted in the Complaint demonstrate many people still consider exposure of the female breast to be inappropriate. [ECF 1, ¶¶ 31-35]. In any event, as ***Buchanan*** observed, this argument "attacks the wisdom and necessity of the ordinance, matters which the courts lack the constitutional authority to decide." ***Id.*** at 921.

[6] Much of Plaintiffs' Complaint consists of legal argument and analysis which is not something this Court must credit in considering this Motion. *See, e.g.*, ***Swabb v. Zagg, Inc.,*** 797 F.3d 1194, 1201 (10th Cir. 2015) (noting legal conclusions in a complaint are not taken as true); ***Dronsejko v. Thornton,*** 632 F.3d 658, 666 (10th Cir. 2011) (same).

public toplessness, regardless of any intended message. In ***Heideman***, the Tenth Circuit recognized "a general prohibition on nudity is unrelated to the suppression of free expression because such a law prohibits a class of conduct, the act of appearing nude in public, without reference to any element of expression." ***Heideman***, 348 F.3d at 1192 (quoting ***Barnes v. Glen Theatre***, 501 U.S. 560, 566, 570-71 (1991)); *see also* ***Hightower***, 77 F. Supp. 3d at 881 (nudity ordinance regulates conduct regardless of expressive nature); ***7250 Corp.***, 799 P.2d at 925 (county nude entertainment ordinance unrelated to suppression of free expression and instead intended to address secondary effects of establishments on residential neighborhoods).

iv. Section 17-142's Incidental Restriction on First Amendment Freedoms Is No Greater Than Is Essential to the Furtherance of the Governmental Interest

Under the fourth ***O'Brien*** factor, the ordinance's incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of the various interests described in Complaint, including protecting the City's values and promoting safety. Plaintiffs cite to no alternative methods that would adequately address the concerns expressed in enacting the ordinance, and Plaintiffs have multiple alternative methods of expressing their message, such as holding signs or writing messages on t-shirts at rallies instead of baring their breasts.

In similar contexts, the courts have regularly upheld nudity bans under this ***O'Brien*** factor. *See, e.g.*, ***Hightower***, 77 F. Supp. 3d at 881 ("Defendants' legitimate interest in protecting the unsuspecting passerby from nudity as well as the other stated interests would be achieved less effectively, indeed defeated, absent §154's restriction on public nudity."); ***City of Erie***, 529 U.S. at 301 ("The fourth and final ***O'Brien*** factor -- that the restriction is no greater than is essential to the furtherance of the government interest -- is satisfied as well. The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de*

minimis. The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message.") (plurality opinion); ***Heideman v. S. Salt Lake City***, 165 Fed. Appx. 627, 633 (10th Cir. 2006) (requirement that dancers wear G-strings and pasties has a *de minimis* effect on ability to communicate message of eroticism, and therefore nudity ban "presents a restriction no greater than is necessary to further the City's stated interest in decreasing the likelihood of unsanitary conditions, unlawful sexual activity and sexually transmitted diseases").

Because Section 17-142 satisfies each of the tests set out in ***O'Brien***, it does not violate Plaintiff's First Amendment rights and this claim must be dismissed as a matter of law.

C. Topless Bans Are Also Constitutionally Permissible Under The Time, Place, And Manner Analysis

As noted above, even if nudity is considered speech, most courts evaluate free speech challenges to nudity bans under the ***O'Brien*** framework. However, some courts have considered such challenges to nudity bans under the time, place and manner analysis described in ***Clark v. Community for Creative Non-Violence***, 468 U.S. 288 (1984). *See, e.g.*, ***Craft v. Hodel***, 683 F. Supp. 289, 291 (regulation prohibiting exposure of women's breasts at national park was not based on content or subject matter of speech and must "be evaluated under the tests applied to time, place and manner impingements of speech"). In ***Heideman***, 348 F.3d at 1192, the Tenth Circuit noted "the Supreme Court's analysis of restrictions on nude dancing combines two lines of First Amendment doctrine that, while in principal distinct, have become effectively merged." The Tenth Circuit described the distinction between the two doctrines as follows: "[T]he former – the '***O'Brien*** test' – applies to generally applicable regulations of both non-expressive and

expressive conduct, not targeting or singling out expressive conduct, while time, place, or manner regulations can be directed specifically at expression (such as billboards or street demonstrations), so long as the governmental purpose is unrelated to disagreement with the message and there are adequate alternative channels of communication." ***Id.*** at 1193. Here, the ordinance at issue applies to both non-expressive and expressive conduct, and does not single out expressive conduct, and therefore the City believes ***O'Brien*** provides the proper analysis. Nevertheless, to any extent the time, place and manner analysis applies, it would also require dismissal of this claim as a matter of law.

Under the time, place and manner test, a law is valid if is justified without reference to the content of the speech, is narrowly tailored to serve a significant governmental interest, and leaves open ample alternative channels for communication of the information. ***Clark***, 468 U.S. at 293. In ***Craft***, the court considered an argument similar to Plaintiffs, that plans to appear topless at a national park were intended "to provide expressions of opposition to the exploitation and inequitable treatment of women in American society." ***Craft***, 683 F. Supp. At 292. Dubiously assuming the plaintiffs' "shirtfree appearances" constituted expressive conduct protected by the First Amendment, the court nevertheless found the restriction to be a reasonable restriction on the manner of expression under ***Clark***. ***Id.*** at 292-96. The court found the regulation at issue was content neutral because it banned female nudity irrespective of the message it conveyed; it served substantial government interests of preservation of the natural environment and promotion of aesthetics, preservation of the area as available for the enjoyment of all persons, and protection of the public from the offensiveness of public nudity; it was narrowly tailored to serve the substantial government interests; and the regulation left open ample alternative

channels of communication. ***Id.*** The court therefore concluded "the prohibition of the use of public nudity as a mode of expression is constitutionally tolerable under the time, place and manner regime established by the Regulation." ***Id.*** at 291.

Similarly, here, the ordinance is content neutral because it bans nudity irrespective of the message it conveys; it serves substantial government interests of preservation of values, promotion of safety, ensuring the City's public places are available for the enjoyment of all persons, and protection of the public from the offensiveness of public nudity; it is narrowly tailored to serve the substantial government interests; and it leaves open ample alternative channels of communication. As a result, Section 17-142 does not violate Plaintiffs' First Amendment rights under the time, place and manner analysis either.

II. SECTION 17-142 DOES NOT VIOLATE PLAINTIFFS' RIGHT TO EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT

Plaintiffs' Claim II alleges Section 17-142 violates their right to equal protection under the Fourteenth Amendment to the United States Constitution. [ECF 1, ¶¶ 49-53]. In applying the Equal Protection Clause, the Supreme Court recognizes "the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways," but instead prohibits only "the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." ***Reed v. Reed***, 404 U.S. 71, 75-76 (1971) (citations omitted). "A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." ***Id.*** at 76 (citation and internal quotation omitted).

i. Gender Classification Does Not Violate the Right to Equal Protection When Realistically Based on Differences Between the Sexes

Where a classification is based on gender, it withstands an equal protection challenge if it serves important governmental objectives and is substantially related to achievement of those objectives. ***Craig v. Boren***, 429 U.S. 190, 197 (1976). Shirtless bans that apply to women but not to men are reviewed under this equal protection standard. *See* ***Craft***, 683 F. Supp. at 299 (because federal regulation permitting only males to appear shirtless in national parks distinguished between males and females, it must serve important government objectives and be substantially related to achievement of those objectives) (citing ***Craig***, 429 U.S. at 190). Because the Equal Protection Clause does not require things which are different in fact to be treated in law as though they were the same, the Supreme Court has consistently upheld statutes "where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." ***M. v. Superior Court***, 450 U.S. 464, 469 (1981) (plurality opinion); *see also* ***id.*** at 481 ("[T]he Constitution surely does not require a State to pretend that demonstrable differences between men and women do not really exist.") (Stewart, J., concurring).

Both federal and state courts have consistently recognized that a nudity ban applicable only to female breasts realistically reflects the inherent biological differences between males and females. *See, e.g.*, ***J&B Social Club # 1 v. City of Mobile***, 966 F. Supp. 1131, 1139 (S.D. Ala. 1996) ("It is apparent to the naked eye, and this court takes judicial notice, that female breasts are quite often different from male ones. In this regard, men and women are not 'similarly situated,' and the ordinance therefore raises no impermissible gender classification."); ***Hang On, Inc.***, 65 F.3d at 1256-57 (describing trial testimony regarding the difference between male and

female breasts, but noting: "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."); ***Craft***, 683 F. Supp. at 299-300 (rejecting argument regulation reflected archaic and stereotypic notions and perpetuated cultural stereotypes equating the female breast with sexual fantasies, and instead holding regulation "simply recognizes a physical difference between the sexes which has implications for the moral and aesthetic sensitivities of a substantial majority of the country"); ***Dydyn v. Department of Liquor Contro***l, 531 A.2d 170, 175 (Conn. App. 1987) ("Although the plaintiffs attempt to blur the clear distinction, there can be no doubt that in our society female breasts, unlike male breasts, constitute an erogenous zone and are commonly associated with sexual arousal."); ***Turner***, 382 N.W.2d at 255-56 (rejecting claim that prohibition on exposure of female breasts creates an unconstitutional gender-based classification, in light of differences between male and female breasts); ***Eckl v. Davis***, 51 Cal. App. 3d 831, 124 Cal. Rptr. 685, 696 (1975) ("Nature, not the legislative body, created the distinction between that portion of a woman's body and that of a man's torso.").[7]

Courts have also recognized that regardless of the physical differences between the sexes, our society continues to apply different standards to male and female breasts, and laws recognizing those standards do not violate the Constitution. *See, e.g.,* ***Buzzetti***, 1997 U.S. Dist. LEXIS 4383 at *16-17 ("One does not have to be either a psychologist or a sociologist to

[7] In ***People v. David***, 152 Misc. 2d 66, 68 (N.Y. County Ct. 1991), the court upheld an equal protection challenge to a public nudity law, finding "[m]ale and female breasts are physiologically similar except for lactation capability." Fort Collins was unable to locate any other authority adopting this reasoning. Fort Collins respectfully suggests this minority view is inconsistent with the great weight of authority presented above and should not be adopted by this Court.

recognize that, if it were widely known that ten topless women were walking down Park Avenue and ten topless men were walking down Madison Avenue, the effect on the traffic on Park Avenue would be substantially greater than on Madison Avenue. . . . [E]ven if we accept arguendo the view of plaintiffs' expert that the male and female breast are equally erotic, that does not change the fact that in our culture the public display of female breasts will have far different secondary effects than the public display of male breasts. Rightly or wrongly, our society continues to recognize a fundamental difference between the male and female breast."); ***Buchanan***, 584 P.2d at 920 ("We are unable to agree that the legislative body could only have been interested in the size or shape of female breasts when it included them among the parts of the human body which should not be exposed in public. It is manifest from a reading of the section as a whole that the City Council was concerned with those body parts and functions which, according to society's common sense of decency, should be kept private. These include the eliminative functions and the procreative functions. With respect to the latter, it was found to be in the public interest to order concealed, in addition to the genitals, the female breasts, which, unlike male breasts, constitute an erogenous zone and are commonly associated with sexual arousal.").

ii. Prohibition of Only Female Breasts is Substantially Related to an Important Government Interest

The courts have also regularly found, in light of the differences between male and female breasts, that prohibition of exposure of only female breasts is substantially related to an important government interest. *See, e.g.,* ***State v. Vogt***, 775 A.2d 551, 557 (N.J. App. Div. 2001) ("Restrictions on exposure of the female breast are supported by the important governmental interest in safeguarding the public's moral sensibilities, and this ordinance is substantially related

to that interest."); ***J&B Social Club***, 966 F. Supp. at 1139 ("Assuming, however, that [distinction between male and female breasts in nudity ordinance] is 'gender-based' for equal protection purposes, the court finds that the distinction is substantially related to an important governmental interest."); ***City of Tucson v. Wolfe***, 917 P.2d 706, 707 (Ariz. App. 1995) ("Other jurisdictions considering equal protection challenges to similar legislation have rejected them. Likewise, we believe that the ordinance at issue here encompasses more than mere sexual stereotyping and . . . given the community standard for decency expressed by the community's legislatures both local and statewide, the ordinance is substantially related to an important governmental interest in regulating the public decency and order.") (citations and internal quotations omitted); ***State v. Chiello***, 1995 R.I. Super. LEXIS 135, *21-22 (R.I. Super. Ct. 1995) ("This Court, like the others which have examined the same issue, finds that there is no equal protection problem presented by the provision in the West Warwick ordinance which prohibits the displaying of women's breasts. In so holding, the Court recognizes that in certain circumstances men and women are not similarly situated, and that the gender classification contained in the West Warwick ordinance is substantially related to these differences which are inherent between men and women.") (citations and internal quotations omitted); ***United States v. Biocic***, 928 F.2d 112, 115-116 (4th Cir. 1991) ("The important government interest is the widely recognized one of protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous zones. These still include (whether justifiably or not in the eyes of all) the female, but not the male, breast."); ***United States v. Biocic***, 730 F. Supp. 1364, 1366 (D. Md. 1990) ("In the present case, this Court concludes that

the regulation of the public exposure of the female breast, given the historical approach to the subject and the objectives of the community in protecting its moral values, is substantially related to an important governmental interest."); ***Craft***, 683 F. Supp. at 300-01 (because community standards consider female breasts to be an intimate part of the human body, the exposure of which constitutes nudity, gender distinction is substantially related to the government objective of protecting the public from invasions of its sensibilities); ***Turner***, 382 N.W.2d at 256 (nudity ordinance serves important governmental objectives of controlling public nudity and preserving societal norms, and a gender classification based on "clear differences between the sexes" is substantially related to achieving those objectives); ***Buchanan***, 584 P.2d at 921 ("There being such a difference between the breasts of males and females (however undiscernible to the naked eye of some), and that difference having a reasonable relationship to the legitimate legislative purpose which it serves, the ordinance does not deny equality of rights or impose unequal responsibilities on women. It applies alike to men and women, requiring both to cover those parts of their bodies which are intimately associated with the procreation function."); ***Eckl***, 124 Cal. Rptr. at 696 ("Unlike the situation with respect to men, nudity in the case of women is commonly understood to include the uncovering of the breasts. Consequently, in proscribing nudity on the part of women it was necessary to include express reference to that area of the body. The classification is reasonable, not arbitrary, and rests upon a ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike.").

iii. Other Courts Have Routinely Rejected Equal Protection Challenges to Laws Prohibiting the Exposure of Only Female Breasts

Not surprisingly based on the above precedent, claims of equal protection violation premised on nudity bans covering female breasts, but not male breasts, have routinely been rejected. *See, e.g.*, ***City of Albuquerque v. Sachs***, 92 P.3d 24, 28 (N.M. App. 2004) (cases decided throughout the United States "convincingly make the point that prohibiting public exposure of the female breast but not the male breast does not operate to the disadvantage of women" and does not violate federal or state equal protection clauses); ***State v. Vogt***, 775 A.2d 551, 557 (N.J. App. Div. 2001) ("This issue has been litigated often elsewhere, the overwhelming majority of cases holding that laws banning female (but not male) toplessness do not violate federal or state equal protection guidelines."); ***City of Jackson v. Lakeland Lounge***, 688 So. 2d 742, 751 (Miss. 1996) ("The federal courts on many occasions have held that denying females the right to expose their breasts, but not males, did not violate either the First Amendment or the Equal Protection Clause."); ***Moore v. Coffeyville***, 1993 U.S. Dist. LEXIS 9705, *17 (D. Kan. June 16, 1993) ("Legislation which prohibits the display of the naked breasts of women, while allowing men to do so, have frequently been challenged on equal protection grounds. And that legislation has been universally upheld.").

Notably, even in a recent case cited by Plaintiffs, [ECF 1, ¶ 23], the court granted a motion to dismiss directed at the plaintiff's equal protection claim based on the applicability of a nudity ordinance to only female breasts. *See* ***Tagami***, 2015 U.S. Dist. LEXIS 90149 at *9. There, the court found: "Tagami's equal protection claim fails because, while the Ordinance permits men but not women to appear bare-chested in public, Tagami fails to allege how this distinction places artificial constraints on a woman's opportunity, or how the Ordinance is used to create or

perpetuate the legal, social, and economic inferiority of women." (Citations and internal quotations omitted).

In this case, Section 17-142 serves important governmental objectives and is substantially related to achievement of those objectives, and the gender classification found in the ordinance is not invidious, but rather realistically reflects the biological differences between male and female breasts and how they are perceived in our culture. As a result, Plaintiffs state no claim for violation of the right to equal protection.

III. SECTION 17-142 ALSO DOES NOT VIOLATE PLAINTIFFS' RIGHT TO EQUAL PROTECTION UNDER THE COLORADO CONSTITUTION

Plaintiffs' Claim III alleges Section 17-142 violates their right to equal protection under the Equal Rights Amendment to the Colorado Constitution. [ECF 1, ¶¶ 54-58]. In addressing equal protection claims under the Colorado Constitution, the Colorado Supreme Court "follow[s] the analytical mode developed by the United States Supreme Court in construing the Equal Protection Clause of the Fourteenth Amendment." ***7250 Corp.***, 799 P.2d at 922 (quoting ***Tassian v. People***, 731 P.2d 672, 674 (Colo. 1987)). Therefore, for all the reasons described above in Section II, Plaintiffs also fail to state any claim for violation of their right to equal protection under the Colorado Constitution.

Other states have likewise found no equal protection violation under their state constitutions from the application of a nudity ban to female breasts but not male breasts. *See, e.g.,* ***City of Albuquerque***, 92 P.2d at 25 (city ordinance prohibiting only women from showing their breasts in public did not violate Equal Rights Amendment of New Mexico Constitution); ***Hang On***, 65 F.3d at 1256 (rejecting equal protection claim premised on application of nudity ordinance to only female breasts under Texas Constitution); ***Dydyn***, 531 A.2d at 175 (rejecting

argument that nudity ordinance creates suspect class under equal protection provision of Connecticut constitution by specifically referring to female anatomy).

Plaintiffs state no claim for violation of the Equal Rights Amendment to the Colorado Constitution, and as a result, this claim should also be dismissed as a matter of law. In the alternative, should this Court dismiss the federal constitutional claims, it could elect not to address this claim and instead dismiss it for lack of jurisdiction. 28 U.S.C. §1367(c)(3).

CONCLUSION

In conclusion, Plaintiffs state no viable claim for violation of their rights to free speech under the First Amendment. Plaintiffs' planned speech is not protected conduct, and even if it was, it survives scrutiny under either the ***O'Brien*** analysis or the ***Clark*** time, place manner analysis. Plaintiffs state no claim for violation of their rights to equal protection under federal or state law because the ordinance is substantially related to the achievement of important governmental objectives and the gender classification is premised on realistic differences between males and females. Each of Plaintiffs' claims is therefore subject to dismissal by this Court as a matter of law.

WHEREFORE, for all of the foregoing reasons, Defendant City of Fort Collins, Colorado respectfully requests this Court issue an Order dismissing Plaintiffs' claims in their entirety, with prejudice, and entering all such additional relief as the Court deems just and appropriate.

Dated this 2nd day of August, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on the 2nd day of August, 2016, I electronically filed the foregoing **DEFENDANT'S MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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