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 RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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 Response to Plaintiffs' Motion for Preliminary Injunction, as follows:

INTRODUCTION

Plaintiffs filed their Complaint on May 31, 2016, against the City challenging the constitutionality of Fort Collins Municipal Code § 17-142. [ECF 1]. The Complaint asserts the following claims: (1) violation of the First Amendment to the United States Constitution; (2) violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; (3) violation of the Equal Rights Amendment contained in Article II, §29 of the Colorado Constitution. [*Id.*] In conjunction with the Complaint, Plaintiffs also filed a Motion for

Preliminary Injunction ("Plaintiffs' Motion"). [ECF 2]. Defendant now respectfully submits this Response to Plaintiffs' Motion for Preliminary Injunction.[1]

STATEMENT OF RELEVANT FACTS

1. Prior to October 20, 2015, Fort Collins Municipal Code § 17-142, stated: "No person shall knowingly appear in any public place in a nude state or state of undress such that the genitals or buttocks of either sex or the breast or breasts of a female are exposed." [Agenda Item Summary provided to City Council, Ex. A., at 1].

2. Plaintiffs Brittany Hoagland and Samantha Six complained the ordinance prohibited them from appearing topless in public. Upon receipt of complaints about the City's public indecency ordinance, the City Council reviewed the existing ordinance and requested staff bring forth new options to update it, including to allow an exception for breastfeeding mothers. [Ex. B, October 20, 2015, Fort Collins City Council Meeting Transcript, at 3].

3. The City conducted an online public opinion poll to gather public input regarding Section 17-142. [Ex. B, at 3]. The poll ran for a week from October 5, 2015 through October 12, 2015. [*Id.*]

[1] Contemporaneously with this Response, the City has also filed a Motion to Dismiss. The arguments and authorities contained in the Motion to Dismiss are incorporated herein by reference pursuant to Fed. R. Civ. P. 10(c). Much of the legal discussion set forth below is similar to what is presented in the Motion to Dismiss. Defendant does not present the applicable law in that fashion to burden this Court, but rather based on the anticipation this Court will review the Plaintiffs' Motion and this Response prior to reviewing the Motion to Dismiss for procedural reasons pursuant to Fed. R. Civ. P. 65.

4. The online public opinion poll generated close to 9,000 responses, 6,800 of which were from unique IP addresses. [Ex B., at 3; Survey Results, Ex. C[2]]. When the approximately 2,000 duplicate IP addresses were removed (to exclude multiple votes from the same device), the results of the poll were 60.9% in support of the City's then-existing ordinance and 36.7% in support of amending the ordinance to allow public toplessness.[3] [Ex. B, at 3-4; Ex. A, at 8-9].

5. The public opinion poll also allowed for respondents to submit comments. [Ex. B, at 4; Ex. C, comments received in response to survey.]

6. The general themes of the comments received were: 1) family values and modesty if toplessness is allowed within the City, including a handful that pondered their ability to stay in Fort Collins if such an ordinance were passed; 2) support for a third option of having men forced to keep their shirts on; 3) individuals in support of changing the ordinance cited "getting with the times"; 4) individuals who questioned the value of looking at the issue at all. [Ex. B, at 4-5].

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[2] The survey results are maintained in a spreadsheet which contains more than 20 columns and approximately 6800 lines and is in a format which could not be attached as an exhibit through Pacer. Defendant has attached the spreadsheet as a PDF document, set to 11"x17" pages. Although the column headings are visible, Defendant has redacted three columns of information (columns L, M and N) which include the unique IP Address of the device that submitted the response and its longitude and latitude, as the City believes this information constitutes sensitive, personal information of non-parties that should not be filed publicly. Additionally, Defendant did not include within Exhibit C three columns of information which 1) contain information largely duplicative of column I, related to the website from which the responder linked to the survey, and 2) indicate which internet browser (e.g. Internet Explorer, Mozilla) was used to respond to the survey. This information is inconsequential to the parties' preliminary injunction arguments and would have at least doubled the length of the Exhibit, which is already very large. If the Court so desires, Defendant can either provide a copy of the spreadsheet attached as Exhibit C in 11"x17" paper copies or in its original format.

[3] Throughout this Response, reference to "toplessness" refers to women baring their unclothed breasts publicly. Unless otherwise stated, the term "toplessness" in this Response does not refer to men.

7. In addition to the poll results, City councilmembers also received numerous phone calls and emails about the issue. [Ex. B, at 4].

8. On October 20, 2015, the City Council considered two options to update Section 17-142. A copy of the options provided to the City Council is contained in Exhibit A, but generally, the first option did not allow women to be topless and the second option did. [*See* Ex. B, at 3; Ex. A, at 20-25].

9. The Fort Collins City Manager's Office prepared an "Agenda Item Summary" packet for City councilmembers and presented a PowerPoint presentation in conjunction with a description of the options. [*See* Ex. A].

10. At the October 20, 2015 meeting, forty-nine members of the public spoke about the proposed amendments to the ordinance. [*See* Ex. B, at 7-75]. Forty-one residents spoke against allowing public toplessness; seven individuals spoke in favor of toplessness (three of whom included the two individual Plaintiffs and Brittany Hoagland's husband); and one did not offer a specific opinion. [*Id.*]

11. The most prominent theme of comments by residents who spoke against toplessness related to moral concerns, although many other opinions were expressed which are summarized in the following non-exhaustive list of the sentiments expressed at the meeting:

- The proposed amendment would highlight an idea of sameness rather than actually promoting empowerment of women.
- Empowerment of women can occur without the need for public exposure of the breasts.
- Public exposure of women's breasts does not symbolize empowerment of women.
- Women's breasts are different from male breasts, both in terms of their sexual nature and physiological makeup.

- The rights of individuals who do not wish to be exposed to this form of public nudity would be abridged.

- If public toplessness is allowed in downtown Fort Collins, individuals will not go downtown to restaurants or for shopping in order to avoid it, and may go instead to other neighboring cities.

- Children would be at risk for exposure to public toplessness. Early exposure to nudity could result in negative long-term effects for children.

- Women's breasts are not allowed to be publicly displayed in publications or videos, such as on magazine covers. Similarly, children should not be allowed to see more nudity on the streets than they would be allowed to see on television or movies based on motion picture and television content rating systems.

- The fact that other communities allow public toplessness does not mean Fort Collins must; the community should be allowed to set its own standards for public nudity.

- Photographs of naked women could be taken without their permission and be posted on the Internet.

[*See* Ex. B, at 7-75].

12. Following public comment, Mayor Wade Troxell, Mayor pro tem Gerry Horak and other councilmembers made comments on the record. In addition to their own thoughts about the proposed amendments, councilmembers noted their votes were influenced by: the online public opinion poll and public comment at the meeting [*see, e.g.*, Ex. B, at 89, 91, 92, 94, 97]; emails and phone calls from members of the public they had received [*see, e.g.*, *Id.*, at 87, 89, 92]; conversations with family, friends and community members about the topic [*see, e.g.*, *Id*. at 89, 94].

13. The City Council unanimously voted to amend Section 17-142 to accept Option 1 (prohibiting public toplessness) with additional language defining the portions of the breast (below the top of the nipple) which must be covered. [Ex. B, at 87, 98-99.]

14. The City Council considered the issue again on November 3, 2015, when a required second reading of the Ordinance, containing the amendments, was presented. [Transcript of November 3, 2015, Fort Collins City Council Hearing, Ex. D at 2].

15. Members of the public were again allowed to comment on the proposed amendment. At the November 3, 2015 hearing, nine members of the community spoke. [*Id*., at 3-19.] Again, both individual Plaintiffs and the husband of Brittany Hoagland spoke against the amendment adopted by the City Council on October 21, 2016. [*Id*., at 2-3, 7-11]. Four other individuals spoke in favor of public toplessness and two residents spoke against allowing it. [*Id*., at 3-19].

16. Ultimately, the City Council again voted unanimously to enact the amendments to Section 17-142, which now provides as follows:

> **Sec. 17-142. - Public nudity.**
>
> (a) No person who is ten (10) years of age or older shall intentionally expose any portion of his or her genitals or buttocks while that person is located:
>
> (1) In a public right-of-way, in a 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 screening fence, in order to achieve a point of vantage.
>
> (3) As used in this Section, *public place* shall mean a place to which the public or a substantial number of the public has access, and includes but it not limited to highways including sidewalks, transportation facilities, school, 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.

> (b) 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 a 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 screening fence, in order to achieve a point of vantage.
>
> (3) Public place in this Section shall be defined as in Section (a)(3) above.
>
> (c) The prohibition in subsection (a) does not extend to:
>
> (1) Persons undergoing bona fide emergency medical examinations or treatment; or
>
> (2) Persons located in dressing rooms, shower rooms, bathrooms, or in other enclosed areas specifically designated for changing clothes or in which nudity is explicitly permitted; or
>
> (d) The prohibition in subsection (b) does not extend to women breastfeeding in places they are legally entitled to be.

[Current Fort Collins Municipal Code § 17-142, Ex. E].

STANDARD OF REVIEW

A preliminary injunction is an extraordinary remedy that should only be issued if a plaintiff can unequivocally and clearly establish all of the required elements. ***Kikumura v. Hurley***, 242 F.3d 950, 955 (10th Cir. 2001); ***SCFC ILC, Inc. v. Visa USA, Inc***., 936 F.2d 1096, 1098 (10th Cir. 1991). "A party seeking a preliminary injunction must prove that all four of the equitable factors weigh in its favor: specifically, prove that (1) it is substantially likely to succeed on the merits; (2) it will suffer irreparable injury if the injunction is denied; (3) its threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction

would not be adverse to the public interest." ***Sierra Club, Inc. v. Bostick,*** 539 Fed. Appx. 885, 888-889 (10th Cir. Okla. 2013) (internal citation omitted). Because a preliminary injunction is an extraordinary remedy, the movant's right to relief must be clear and unequivocal. ***Dominion Video Satellite, Inc. v. Echostar Satellite Corp.***, 356 F.3d 1256, 1260 (10th Cir. 2004); ***Wilderness Workshop v. United States Bureau of Land Management***, 531 F.3d 1220, 1224 (10th Cir. 2008). "Moreover, when a preliminary injunction would alter the status quo, such as the injunction at issue in this case, the movant bears a heightened burden and 'must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." ***General Motors Corp. v. Urban Gorilla***, LLC, 500 F.3d 1222, 1226 (10th Cir. 2007) (*quoting* ***O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft***, 389 F.3d 973, 976 (10th Cir. 2004) (en banc, per curiam), *aff'd* 546 U.S. 418 (2006)); ***Ro Da Drilling v. Siegal***, 552 F.3d 1203, 1209 (10th Cir. 2009).

ARGUMENT

I. PLAINTIFFS CANNOT SUCCEED ON THE MERITS OF THEIR CLAIMS

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

1. Section 17-142 Regulates Conduct, Not Speech

Plaintiffs allege Section 17-142 violates their right to free speech under the First Amendment to the United States Constitution. [ECF 2, p. 5]. Plaintiffs do not assert nudity alone constitutes free speech, thereby 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) ("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."). Instead, Plaintiffs allege "appearing topless at public places to protest the exploitation and sexualization of the female body" constitutes expressive conduct. [ECF 2, p. 5].

The Supreme Court has "extended First Amendment protection only to conduct that is inherently expressive." ***Rumsfeld v. Forum for Academic and Institutional Rights,*** 547 U.S. 47, 66 (2006). "Being 'in a state of nudity' is not an inherently expressive condition." ***City of Erie v. Pap's A.M tdba "Kandyland,*** 529 U.S. 277, 289 (2000). While nude dancing may be expressive, "nudity *per se* is not." ***Barnes v. Glen Theatre***, 501 U.S. 560, 581 (1991) (Souter, J, *concurring).*[4]

Plaintiffs attempt to evade this settled precedent by arguing their conduct is protected because they choose to present themselves topless in public "in order to convey their message against systemic, invidious gender discrimination and the censorship of the female body." [ECF 2, p. 6]. 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). However, Plaintiffs' Motion contains no actual facts to support their bald proclamation the purported message intended to be conveyed by Plaintiff's toplessness would be understood by those who viewed it.[5] [*See* ECF 2, p. 4 (adopting facts set forth in Complaint)]. *See* ***Craft v. Hodel***, 683 F.

[4] Although Justice Souter's opinion in ***Barnes*** was a concurrence, it provides the narrowest vote for the result, and thus states the holding of the Court. *See* ***Tily B., Inc. v. City of Newport Beach,*** 69 Cal.App. 4th 1, 16 (1999).

[5] Much the opposite, one of the Plaintiffs' statements during the November 3, 2015, Fort Collins City Council Meeting suggests Plaintiffs intended message is broader than merely protesting sexualization of women, and also relates to "erasure discrimination" and suicide rates among trans and gender-nonconforming individuals. Ex. D, p. 10, Statement of Brittany Hoagland:

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.").

None of the cases cited by Plaintiffs save their argument. Plaintiffs' reliance on two Supreme Court cases related to the American flag are distinguishable as the instrumentality (a flag) and the actions (burning or adorning it with a peace sign) bear no resemblance to Plaintiffs' desire to stand topless in a public forum. [ECF 2, pp. 5-6 (*citing* ***Texas v. Johnson***, 491 U.S. 397, 404 (1989); ***Spence v. Washington***, 418 U.S. 405 (1974)]. Even more critically, in both of those cases,

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> I also want to let you know if you pass this, there will be blood on your hands. Erasure discrimination and antagonism kills people.
>
> So the national suicide rate is 4.6 percent. Did you know 41 percent of trans and gender-nonconforming people attempt suicide at least once? Why? It's almost like when you ignore people exist, they don't feel welcome to live. It's almost like when you discriminate against them, others will, too.
>
> Did you know that intersex people are as common as redheads? One in 2,000. Meaning there's 75 people in Fort Collins who you have actively erased, thanks to your unanimous need to censor female bodies.

the state conceded the conduct at issue in each respective case constituted expressive conduct. ***Johnson***, 491 U.S. at 405; ***Spence***, 418 U.S. at 409.

Further, the two cases Plaintiffs cite related to public nudity actually contradict their position. 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,*** 529 U.S. at 299). The court therefore reversed its prior ruling and dismissed the plaintiff's free speech claim.[6]

Finally, Plaintiffs have cherry-picked a portion of the court's ruling in ***Hightower v. City & County of San Francisco***, 77 F. Supp. 3d 867, 878 (N.D. Cal. 2014), without presenting the

[6] Plaintiffs cite the July 2015 ruling in ***Tagami*** in their Motion for Preliminary Injunction, which dismissed the plaintiff's equal protection claim, but permitted the free speech claim to proceed. [ECF 2, pp. 5-6]. 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. Although the matter is currently being appealed to the Seventh Circuit, Plaintiffs have ignored the district court's final ruling.

opinion in its entirety. The ***Hightower*** plaintiffs alleged they had already taken part in ten protests, which included nudity in violation of a local ordinance. ***Id***. at 877. As Plaintiffs point out in their Motion, the ***Hightower*** court determined two of the protests outside of city hall constituted expressive conduct based on a factual analysis including the fact one of the protests took place on the day the ordinance took effect. ***Id***. at 877-78. Plaintiffs in this matter have presented no such factual context which would demonstrate how their toplessness would be distinguishable from any other nudity-based protest. *See* ***id***. at 879 (noting argument that pro-bicycle or pro-environmentalist causes use nudity to express ideas related to their causes).[7] Indeed, for all of the other eight protests (including one at city hall), the ***Hightower*** court determined merely appearing in a state of nudity did not constitute expressive conduct. ***Id***. ("It is not evident that one in the nude would be perceived as trying to convey a political message. Even if it were, it is not clear what that particular message would have been.")

2. Even if Plaintiffs' Public Toplessness is Considered Protected Speech, Because Section 17-142 Is Not Content-Based, the *O'Brien* Test Applies

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

[7] Such causes are not uniquely Californian. For example, a group called "World Naked Bike Ride 2016 Denver" has announced it is in the planning stages for an event intended to "support positive body image and recognize[] the damage done to our world by the use of fossil fuels/foreign oil." [*See* Facebook page of World Naked Bike Ride 2016 Denver, Ex. F].

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). Plaintiffs argue unpersuasively that strict scrutiny is appropriate.[8] Tellingly, Plaintiffs do not cite a single challenge to a nudity ban where strict scrutiny was applied. 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, 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

[8] Section 17-142 is content neutral because it does not ban toplessness based upon the content of expressive conduct; toplessness is banned whether or not it is expressive. ***Hightower v. City & County of San Francisco***, 77 F. Supp. 3d 867, 880 (N.D. Cal. 2014). Plaintiffs' argument the ordinance's exception for breastfeeding is content based because police officers would have to determine the purpose of expressive conduct by breastfeeding mothers is a farce. [*See* ECF 2, p. 9]. And their argument that the amendments to the ordinance were adopted solely in response to their protests ignores the fact they specifically requested the City review the ordinance, and an ordinance prohibiting exposure of women's breasts existed prior to the events alleged in Plaintiffs' Complaint.

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).

3. Topless Bans Are Constitutionally Permissible under *O'Brien*

Plaintiffs' Motion outlines the four factors considered under ***O'Brien.*** [ECF 2, at 12.] Fort Collins' nudity restrictions as articulated in Section 17-142 at issue in this case satisfy each of these inquires set out in ***O'Brien***.

a. 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).

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

As demonstrated in the statement of facts, the City Council heard a range of views from the community during the October 20, 2015, hearing, through emails and phone calls and from the online opinion poll. Generally, the themes of the purposes of Section 17-142 included but were not limited to moral opposition to public exposure of women's breasts by members of the community, empowerment of women is not necessarily symbolized by public toplessness and can occur without the need for exposure of the breasts, physiological and cultural differences between male and female breasts, the abridgment of rights of those who do not wish to be exposed to public nudity and risk to children from exposure to public nudity. While Plaintiffs' Motion refers solely to "an interest in morality" as the Plaintiffs' articulation of the ordinance's purpose [ECF 2, at 13], the Complaint alleges 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]. And indeed, such an articulation of the ordinance's purpose is supported by the record before the City Council. 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)).[9]

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

There is no support for Plaintiffs' assertion the ordinance prohibiting toplessness targeted their alleged expressive activities. Fort Collins Municipal Code Section 17-142 existed long before Plaintiffs began their public displays of nudity in Fort Collins, and it prohibited nudity or public display of the genitals or buttocks of either sex and the breasts of a female. Indeed, the reasons for the amendment cited by the City 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. In addition, on its face, the ordinance does not prohibit any particular message, but simply prohibits 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***, 501 U.S. at 566 & 570-71); *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).

[9] Of interest, when ***Slaton*** 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 and contained in the record before the City Council 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.

d. 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 the Complaint, including protecting the City's values and promoting safety. The two alternative methods suggested by Plaintiffs do not adequately address the concerns expressed in enacting the ordinance. For instance, Plaintiffs suggest "an educational initiative" without any detail of the content, extent, funding or any logistics of such a program – much less how such an initiative could ever protect from the stated purposes of the ordinance. Plaintiffs other proposal, "simply [] warning the public about Plaintiffs' protests ignores (among others) the critical facts that not every individual who might avail themselves of the freedom to stand topless on the street may provide the City of notice of their intent; and that Plaintiffs themselves lodged their protests "at the corner of College Avenue and Mulberry Street in downtown Fort Collins without shirts," ostensibly to achieve maximum visibility in the City's busy business district. [ECF 1, at ¶7]. This is the exact concern expressed by numerous residents in the October 20, 2015, hearing regarding amendment to the ordinance--that residents would stop attending Fort Collins' downtown business district for shopping and restaurants if they were concerned they would be exposed to unwanted nudity. [Ex. B, at pp. 9, 11, 19-21, 36-37, 58.] Furthermore, 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.

4. 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 it 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.

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

Plaintiffs also allege Section 17-142 violates their right to equal protection under the Fourteenth Amendment to the United States Constitution. [ECF 2, at 14-15]. 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).

1. 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: "[c]ourts 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 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.").[10]

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

[10] 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.

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 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.").

2. 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); ***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.").

3. 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 2, at 5-6], 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 cannot prevail on a claim for violation of the right to equal protection.

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

Plaintiffs also claim Section 17-142 violates their right to equal protection under the Equal Rights Amendment to the Colorado Constitution. [ECF 2, at 15-16]. 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 I. B, 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 her breast 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). Therefore, for all of these reasons, Plaintiffs cannot prevail on their claim for violation of the Equal Rights Amendment to the Colorado Constitution.

II. PLAINTIFFS WILL NOT SUFFER IRREPARABLE INJURY IN THE ABSENCE OF PRELIMINARY INJUNCTIVE RELIEF

To constitute irreparable harm, an injury must be certain, great, actual "and not theoretical." ***Heideman v. S. Salt Lake City***, 348 F.3d 1182, 1189 (10th Cir. 2003). Plaintiffs have failed to

present any evidence to suggest they will suffer irreparable harm in the absence of a preliminary injunction. Plaintiffs allege where First Amendment rights, are at issue, irreparable harm should essentially be assumed. [*See* Plaintiffs' Motion, at 16-17]. However, as explained more fully above, Plaintiffs do not have a First Amendment right to public nudity.

Although Plaintiffs allege their efforts at spreading their message have been chilled, they provide no details whatsoever about whether any efforts at communicating their message in any manner other than standing topless in the public way have been attempted and failed. While Plaintiffs allege they are subject to citation for standing topless in violation of the ordinance, they do not explain or submit any evidence to demonstrate the ordinance otherwise prevents them from engaging in political speech. Plaintiffs remain free to express any message they want. They simply must cover their nipples and lower portion of their breasts while on streets, sidewalks and other public places. *See* ***South Florida Free Beaches, Inc. v. City of Miami***, 734 F.2d 608, 610 (11th Cir. 1991) ("[Plaintiffs] remain able to advocate the benefits of nude sunbathing, albeit while fully dressed.") Consequently, if and to the extent Plaintiffs suffer some slight harm pending a ruling on their claims, it is not "great" or "substantial."

III. THE BALANCE OF EQUITIES TIP IN FORT COLLINS' FAVOR AND AN INJUNCTION IS NOT IN THE PUBLIC INTEREST

Plaintiffs have done nothing beyond hearkening a general drumbeat of "First Amendment Rights" to attempt to show the balance of equity tips in their favor, or that an injunction would benefit the public. Both the balance of equities and the public interest favor Fort Collins. Section 17-142 imposes minimal requirements. It requires only that women cover their breasts below the top of the areola and nipple while located in public spaces or private places where those in public can easily view them. Plaintiffs remain free to be topless on private property. Thus, the burden

on Plaintiffs is simply that they must wear *something* to cover their nipples, areola and lower portion of their breasts, such as a bikini top or brassiere, while they are in public spaces. That burden is negligible.

By contrast, an injunction would impose substantial harms on Fort Collins and the public. An injunction would burden the rights of adults and children who simply wish to walk through the downtown business district (or any other public area) without feeling violated by exposure to women's bare breasts. [*See, e.g.*, Ex. B, at 24-25, 36-37, 46-48.] This is particularly significant because this is the exact area Plaintiffs have previously lodged their protests. [ECF 1, at ¶ 7].

Allowing women to bare their breasts in public in violation of the ordinance without a final opinion as to its Constitutionality would impose a significant burden and irreparable harm on Fort Collins and its citizens. Public toplessness was not allowed prior to the 2015 amendment to Section 17-142. As a result, the City holds a substantial governmental interest in continuing to enforce its existing ordinance to maintain the status quo, and regulating public nudity in the same manner as it has done for many years in the past. Any preliminary injunctive relief granted to Plaintiffs necessarily would disrupt this status quo. As a result, Plaintiffs must meet the heightened burden required for such injunctive relief, and they have not and cannot do so here. ***General Motors,*** 500 F.3d at 1226; ***RoDa Drilling***, 552 F.3d at 1209.

The City's amendment of Section 17-142 did not occur as a result of the blind will of its City councilmembers. Prior to the presentation of the amendment, the City gathered extensive public input regarding the ordinance. [Ex. B, at 3]. The City conducted a week-long online public opinion poll which generated thousands of responses, only 36.7% of which favored allowing public toplessness. [*Id.*, at 3; Ex. A at 8-9]. Councilmembers also received numerous telephone

calls and emails. [Ex. B, at 4, 87, 89, 92]. Additionally, the City collected and categorized public comments provided in association with the public opinion poll. [*Id*., at 4-5]. The City Council also heard live comments from forty-nine members of the public on October 20, 2015, and nine members of the public on November 3, 2015 [Ex. B; Ex. D]. This overwhelming response from the community was repeatedly cited by City councilmembers as a basis for their votes on the amended ordinance. The quantity and fervor of responses the City received from members of the public, as evidenced by comments at the October 20, 2015, hearing, demonstrate the significant interest the public of the City of Fort Collins has in the City's ability to continue regulating public nudity.

CONCLUSION

In conclusion, Plaintiffs cannot meet any of the elements for a preliminary injunction. Critically, because they state no viable claim for a violation of their federal or state constitutional rights, the significant burden on the public of the City of Fort Collins by exposure to public nudity is not warranted pending this Court's final opinion in this matter. The City respectfully requests an evidentiary hearing on Plaintiffs' Motion for Preliminary Injunction to present its position. In relation thereto, Defendant requests a status hearing to discuss the Court's and counsel's schedule, the expectations and parameters for an evidentiary hearing, and the timing of prehearing disclosure of witnesses and exhibits.

WHEREFORE, for all of the foregoing reasons, Defendant City of Fort Collins, Colorado respectfully requests this Court deny Plaintiffs' Motion for Preliminary Injunction, and all additional relief 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 RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** 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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