IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-1308

FREE THE NIPPLE – FORT COLLINS, an unincorporated association,
BRITTIANY HOAGLAND, and
SAMANTHA SIX,

Plaintiffs,

v.

CITY OF FORT COLLINS, COLORADO,

Defendant.

PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION[1]

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1. Plaintiffs' toplessness is First Amendment protected expressive activity.

Defendant makes no contention that Plaintiffs' conduct is obscene. Rather, Defendant contends that Plaintiffs' conduct is not expressive activity deserving of First Amendment protection. Conduct is First Amendment-protected expression when "an intent to convey a particularized message [i]s present and the likelihood [i]s great that the message would be understood by those who view it." *Texas v. Johnson*, 491 U.S. 397 (1989) (quotations omitted). It is clear from Plaintiffs' Complaint that they have a sincere intent to communicate a message against the exploitation and sexualization of women's bodies and Defendant does not dispute their intent in its response. Therefore, the only question for this Court is whether Plaintiffs particularized message is likely to be understood by the population of Fort Collins, Colorado.

[1] The arguments and authorities contained in Plaintiffs' Response to Defendant's Motion to Dismiss, which has been filed contemporaneously with this Reply, are incorporated herein by reference pursuant to Fed. R. Civ. P. 10(c).

Plaintiffs' message is clear to even the casual observer in 2016 and certainly the casual observer in Fort Collins, Colorado. Defendant notes that 6,800 individuals voted in its online opinion poll and that forty-nine individuals spoke during the public comment period about female toplessness. [Doc. 19], *Defendant's Response to Plaintiffs' Motion for Preliminary Injunction*, p. 3. At the very least 6,849 individuals understand Plaintiffs' message. Moreover, topless protest for the purpose of decrying the exploitation and sexualization of the female body is currently ubiquitous in the United States and abroad.[2]

Defendant's reliance on the female toplessness of the protest involved here does not serve to remove the cloak of protection afforded by the First Amendment. The Supreme Court has held that "[nudity] alone does not place otherwise protected material outside the mantle of the First Amendment." *Schad v. Mt. Ephraim*, 452 U.S. 61, 65-66 (1981). In fact, the Court has stated that

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[2] *See* Free the Nipple (WTFilms 2014); Bruce Finley, *Hundreds of topless people parade through central Denver urging equality*, THE DENVER POST (August 28, 2016 5:09 pm), http://www.denverpost.com/2016/08/28/hundreds-of-topless-people-parade-through-central-denver-urging-equality/; Deborah Acosta, *The Fight to Free the Nipple*, THE NEW YORK TIMES (January 26, 2016), http://www.nytimes.com/2016/01/25/fashion/free-the-nipple-video.html?_r=0 (noting that the phrase "Free the Nipple" was prevalent on social media in 2015, outstripping other gender-related terms); Matt Stevens, *Venice prepares for annual topless parade and protest*, THE LOS ANGELES TIMES (August 28, 2016 10:45 am), http://www.latimes.com/local/lanow/la-me-ln-venice-beach-topless-20160828-snap-story.html; Associated Press, *Women bare breasts for gender equality on GoTopless Day*, THE WASHINGTON POST (August 28, 2016 8:36 pm), https://www.washingtonpost.com/national/women-bare-breasts-for-gender-equality-on-gotopless-day/2016/08/28/a075724c-6d80-11e6-993f-73c693a89820_story.html; James Dunn, *Hundreds strip off in a 'Free the Nipple' protest on Brighton Beach in a bid to make breasts more accepted in society*, THE DAILY MAIL (June 8, 2016 11:29 p.m.), http://www.dailymail.co.uk/news/article-3631707/Hundreds-strip-Free-Nipple-protest-Brighton-Beach-bid-make-breasts-accepted-society.html (describing topless protest on Bright, England organized to promote women's right to go topless in public); Allison P. Davis, *Amber Rose, Populist Slut Hero of Our Time*, NEW YORK MAGAZINE (October 5, 2015 6:40 p.m.), http://nymag.com/thecut/2015/10/amber-rose-populist-slut-hero-of-our-time.html# (discussing the Los Angeles Amber Rose SlutWalk, during which marchers walked topless to protest in support of women's rights and equality issues); Megan Gibson, *Will SlutWalks Change the Meaning of the Word Slut?*, TIME MAGAZINE (Friday, August 12, 2011), http://content.time.com/time/nation/article/0,8599,2088234,00.html, (discussing the Toronto SlutWalk, which protests against victim-blaming culture that sexualizes the female body, including women's breasts).

"when nudity is combined with expressive activity, its stimulative and attractive value certainly can enhance the force of expression[.]" *Barnes v. Glen Theatre*, 501 U.S. 560, 581 (1991) (Souter, J., concurring). And that is true in this instance, Plaintiffs' toplessness during their protest enhances the force of their expression. Plaintiffs' toplessness is an integral part of the emotions and thoughts that their protest wishes to evoke on its viewers. The sight of a fully clothed protester generally will have a far different impact on a spectator than that of a topless protester. "The nudity is itself an expressive component of the [protest], not merely incidental 'conduct.'" *Barnes v. Glen Theatre*, 501 U.S. 560, 592 (1991). That Plaintiffs' utilize toplessness to convey their message about the exploitation and sexualization of women's bodies does not remove their speech from the specter of First Amendment protection.

1.1 Defendant has not demonstrated that Section 17-142 furthers an important or substantial governmental interest.

Defendant states that the government interests advanced by Section 17-142 are: "(1) maintaining the values of Fort Collins, including its sense of decency and family; (2) protecting the right of others to enjoy public spaces; (3) protecting children from viewing nudity; (4) promoting respect for women and protecting them from assaults; and (5) maintaining the city's family friendly status. [Doc. 19], p. 15.

While evaluating a statewide topless dancing ban pursuant to the more deferential *O'Brien* analysis, the Supreme Court has rejected morality, or a "sense of decency and family," as an important or substantial governmental interest and stated, "simple references to the State's general interest in promoting societal order and morality are not sufficient justification for a statute which concededly reaches a significant amount of protected expressive activity." *Barnes v. Glen Theatre*, 501 U.S. 560, 581 (1991) (Souter, J., concurring) (Justice Souter's concurrence was the narrowest majority opinion and can, therefore, be read as controlling precedent in *Barnes*).

Defendant cites pre-*Lawrence* caselaw in support of its response for the proposition that morality is an important or substantial interest sufficient to justify impingement of a fundamental right. However, post-*Lawrence*, the Supreme Court has failed to recognize that "decency" or "morality" or "family-friendliness" (or however Defendant would like to phrase this vague, puritanical interest) as a government interest that is insufficient when fundamental rights, like the First Amendment, are implicated. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (holding that "an interest in protecting the traditional moral teaching reflected in heterosexual marriage laws" was not a governmental interest compelling enough to uphold a law that burdened the fundamental right to marriage); *McDonald v. City of Chi.*, 561 U.S. 742, 895 (2010) (holding that a city's "own moral code" was insufficient to justify the restriction of Second Amendment rights). "Morality," however articulated, is a governmental interest that can no longer, in the post-*Lawrence* landscape, undergird a law that impinges on an individual's First Amendment rights.

Plaintiff has found no caselaw recognizing "protecting the right of others to enjoy public spaces" as an important or substantial government interest. Moreover, the Supreme Court has never recognized an important or substantial governmental interest in protecting children from viewing nudity. *Erznoznik v. Jacksonville*, 422 U.S. 205, 213-14 (1975) ("Clearly all nudity cannot be deemed obscene even as to minors."). It has, however, recognized that protecting children from obscenity is an important or substantial governmental interest. *See Ginsburg v. New York*, 390 U.S. 629 (1968). Defendant does not claim that Plaintiffs topless appearance is obscene and Plaintiffs do not wish to engage in obscenity at public places; if they did, there are laws that prevent them from doing so. *See* C.R.S. § 18-7-301 (Public Indecency); C.R.S. § 18-7-302 (Indecent Exposure). "The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited[,]" rather, it sweepingly forbids display of female breasts, "irrespective of

context or pervasiveness." *Erznoznik*, 422 U.S. at 213-14. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Id*. Protecting children from nudity cannot form the basis for justifying Section 17-142 and, even if it could, Section 17-142 does not prohibit men from appearing topless. If Section 17-142 were truly concerned with protecting children from public nudity, it would prevent all public nudity.

Finally, it is unclear how Section 17-142 promotes respect for women, as it makes them second class citizens with regards to appearing topless in public. It is also unclear how Section 17-142 prevents assault on women, as it does not criminalize assault on women or create more substantial penalties for such assault. Section 17-142, instead, engages in victim-blaming; Defendant is essentially stating that women who would appear topless (or dress in any state that Defendant would consider immoral) bring assault upon themselves. If Defendant truly cared about respecting women, it would not engage in slut-shaming and victim-blaming, and it certainly would not subjugate women by reauthorizing Section 17-142, a sex-based classification. Promoting women is a laudable governmental interest and it is an objective that Plaintiffs wish to advance with their protest. Section 17-142 does not advance this interest.

2. Section 17-142 is a sex-based classification that is not substantially related to an important governmental interest.

Defendant does not dispute that Section 17-142 is a sex-based classification. Since Section 17-142 is a classification based solely on sex, Defendant has the burden of showing an "exceedingly persuasive justification," *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981), that Section 17-142 "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quotations and citations omitted).

At the outset, it is important to note that nearly every case cited by Defendant in response to Plaintiffs Equal Protection argument was decided pre-*United States v. Virginia*. In the post-*Virginia* landscape, Section 17-142 does not meet intermediate scrutiny.

The Supreme Court has stated that sex classifications may be used in limited circumstances:

> to compensate women for particular economic disabilities [they have] suffered,[] to promote equal employment opportunity, [] to advance full development of the talent and capacities of our Nation's people.

Virginia, 518 U.S. at 533-34 (quotations and citations omitted). Defendant does not contend that Section 17-142 is aimed at any of these ends. Section 17-142 is instead "used, as [classifications based on sex] once were to create or perpetuate the legal, social, and economic inferiority of women." *Id.* (citation omitted).

Moreover, Defendant has made no showing in its response that the gender-based classification is substantially and directly related to the government interest it does allege Section 17-142 advances. Defendant simply cites to Court decisions from the 1970s, 1980s, and 1990s in an attempt to support their assertion that society accepts applying different standards to male and female breasts and, therefore, such standards are constitutionally sound. This lies in direct contrast to the Supreme Court's reasoning in *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982), wherein the Court stated that "the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females[]" and "[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions." *Id.* Defendant's justifications for Section 17-142 rests on archaic and stereotypic notions, particularly the contention that allowing women to walk around topless would destroy the family-friendly community of Fort Collins "is a

judgment hardly proved, a prediction hardly different from other 'self-fulfilling prophec[ies], once routinely used to deny rights or opportunities.'" *Virginia*, 518 U.S. at 542-43 (quoting *Mississippi Univ. for Women*, 458 U.S. at 730). Defendant's implicit generalization that men would sexualize topless women at public places "rel[ies] on overbroad generalizations about the different... preferences of males and females[,]" which the Supreme Court has said is forbidden in justifying sex-based classifications. *Virginia*, 518 U.S. at 533.

Section 17-157 is not realistically based on differences between the sexes. "Physiologically, men's and women's breasts have the same erotic potential, with virtually identical anatomy, except that women's breasts are obviously more developed. Similarities include a rich supply of nerve endings, especially within the nipple and surrounding areola. In addition, the nipples in both sexes have erectile capacity." Jack Morin, Male Breast: Overlooked Erogenous Zone, 20 Medical Aspects of Human Sexuality 85, 128 (1986). [3] Apart from entrenched cultural expectations, there is really no objective reason why the exposure of female breasts should be considered any more offensive than the exposure of their male counterparts. Any belief that the female breast is sexual whereas the male breast is not is "a suspect cultural artifact rooted in centuries of prejudice and bias toward women." *People v. Santorelli*, 80 N.Y.2d 875, 880-83 (1992).

"Inherent differences between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex[.]" *Virginia*, 518 U.S. at 533 (quotations omitted). Instead of celebrating any differences between men and women, Section 17-142 criminalizes women and, therefore, cannot withstand intermediate scrutiny.

[3] It is important to also note that research has shown that the male chest is the body part most sexually stimulating to women. Robert Wildman et al., Note on Males' and Females' Preferences For Opposite-Sex Body Parts, Bust Sizes, and Bust-Revealing Clothing, 38 Psychol. Rep. 485-86 (1976).

3. Section 17-142 violates the Equal Rights Amendment to the Colorado Constitution.

Plaintiffs alleged in their Complaint that Section 17-142 violates the Colorado Equal Rights Amendment ("ERA"), a separate provision of the Colorado Constitution from its Equal Protection Clause. *See* [Doc. 1]; *Compare* Colo. Const., Art. II, Section 29 (1973), *with* Colo. Const., Art. II, Section 25 (1973). Since its enactment, courts in Colorado have held that all sex-based classifications are subject to strict scrutiny under the Equal Rights Amendment. *See R. McG. v. J.W.*, 200 Colo. 345 (Colo. 1980); *Colo. Civil Rights Com. v. Travelers Ins. Co.*, 759 P.2d 1358, 1363 (Colo. 1988). As Section 17-142 cannot withstand even intermediate scrutiny under the Fourteenth Amendment, let alone the strict scrutiny to be applied under the Equal Rights Amendment, it is unconstitutional.

For the reasons stated above Section 17-142 cannot withstand strict scrutiny review.

4. Conclusion

For the reasons set forth above, Plaintiffs are entitled to a Preliminary Injunction, enjoining enforcement of Section 17-142.

DATED this 1st day of September, 2016.

Respectfully submitted,

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