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.

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS[1]

Plaintiffs, by and through their counsel David A. Lane, Andy McNulty, and Jessica Peck, hereby submit the following Response to Defendant's Motion to Dismiss and state in support:

1. Standard of Review

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is allowed only where the complaint fails to state a claim upon which relief can be granted. This Court must accept as true "all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff." *Kerber v. Qwest Group Life Ins. Plan*, 647 F.3d 950, 959 (10th Cir. 2011) (Rule 12(b)(6)); *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971) (Rule 12(b)(1)). A complaint survives such an attack if it contains "enough facts to state a claim that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556

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

U.S. 662, 678 (2009). "Technical fact pleading is not required, but the complaint must still provide enough factual allegations for a court to infer potential victory." *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2009). Importantly, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotation marks omitted).

2. Claim I states a claim under the free speech clause of the First Amendment.

Defendant does not dispute that Plaintiffs wish to protest at public places. Plaintiffs demonstrate in their Motion for Preliminary Injunction that Section 17-142 is a content-based[2] restriction of First Amendment protected expression that is not narrowly tailored to a compelling government interest and, even if deemed to be content-neutral, would fail the more deferential standard for restrictions on expressive activity outlined in *O'Brien*. Plaintiffs respectfully incorporate those arguments here and provide additional authority below.[3]

Regardless, determining that that the ordinance could withstand strict scrutiny, or even the more deferential *O'Brien* standard, would require resorting to evidence outside the pleadings and those materials necessarily embraced by the pleadings, which is not appropriate at this stage. *See Free Speech Coal., Inc. v. AG of the United States*, 677 F.3d 519, 536 (3d Cir. 2012).

2.1 Plaintiffs' topless protest is First Amendment protected expression.

Defendant makes no contention that Plaintiffs' toplessness is obscenity and therefore not subject to the protections of the First Amendment. Rather, Defendant contends that Plaintiffs'

[2] Time, place, and manner analysis is not appropriate for Section 17-142 as it is a content-based restriction on Plaintiffs' expressive activity and Plaintiffs respectfully ask this Court to forgo a time, place, and manner analysis and evaluate Section 17-142 according to the strict scrutiny analysis as used in *Texas v. Johnson*, 491 U.S. 397 (1989).

[3] Defendant has not disputed that Plaintiffs wish to protest topless at traditional public for a in its motion to dismiss. Plaintiffs, therefore, forgo a discussion of the forum status of Plaintiffs future protest.

activity is not expressive activity but is conduct not deserving of First Amendment protection. The Supreme Court has ruled that even expression "which is sexually oriented but not obscene is fully protected by the Constitution." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 78 (1973). Plaintiffs speech is not even sexually oriented; it is protesting the sexual orientation that is ascribed to women's bodies by men. It is protected expression.

Conduct[4] is expression entitled to the full protections of the First Amendment when it, like Plaintiffs' topless protest, has "an intent to convey a particularized message was present and the likelihood was great that the message would be understood by those who view it." *Johnson*, 491 U.S. at 397 (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, [Doc. 1], at ¶ 2, 4, 21, 22, 26, and Defendant does not dispute Plaintiffs' intent in its Motion to Dismiss. Therefore, the only question for this Court is whether Plaintiffs particularized message is likely to be understood by the population of Fort Collins, Colorado. Based on the well-plead facts of Plainitffs' complaint, Plaintiffs message is likely understood.

Plaintiff has alleged facts showing that Plaintiffs' message is clear to even the casual observer in 2016. [Doc. 1], at ¶ 23. Topless protest for the purpose of decrying the exploitation

[4] The conduct vs. speech dichotomy advanced by Defendant is misleading. For example,

> The government could not shut down the theaters on the ground that what actors do is conduct, not speech, with the result that a production of King Lear by the Royal Shakespeare Company would be outside the scope of the First Amendment but a nonobscene pornographic movie within it.

Miller v. Civil City of S. Bend, 904 F.2d 1081, 1099 (7th Cir. 1990) (Posner, J., concurring).

and sexualization of the female body is currently ubiquitous in the United States and abroad.[5] Plaintiffs' actions of carrying signs and shouting messages supporting equality under the law for women only serves to enhance their argument that their toplessness is readily understood as a protest against double standards, hypocrisies, and sexualization of the feminine upper body that underlie government efforts to censor feminine breasts.

That female toplessness is involved in Plaintiffs' protest 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); *see also Brandt v. Bd. of Educ. of City of Chicago*, 480 F.3d 460, 465 (7th Cir. 2007) ("[P]arading in public wearing no clothing at all can, depending on the circumstances, convey a political message."). The "particularized message"

---

[5] *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).

Plaintiffs seek to communicate, *Spence v. Washington,* 418 U.S. 405, 411 (1974), is entitled to the same First Amendment protection as wearing a black armband to protest the war in Vietnam, *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503 (1969), wearing a jacket with a crude slogan, *Cohen v. California,* 403 U.S. 15 (1971), or the "display of a red flag as an invitation or stimulus to anarchistic action." *Stromberg v. California,* 283 U.S. 359,366 (1931); *see also Preminger v. Peake*, 536 F.3d 1000, 1007 (9th Cir. 2008) (observing that "voter registration is speech protected by the First Amendment").

Moreover, "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*, 501 U.S. at 592. Plaintiffs are not protesting the continued operation of Guantanamo Bay, they are protesting the exploitation and sexualization of women's bodies by men. Toplessness is a direct action that is related to their message and can be understood by the general populace.

It is only because female toplessness may generate feelings of outrage or shock among spectators that Fort Collins seeks to regulate such expressive activity, apparently on the assumption that spectators' reaction may lead to thoughts about the female anatomy and its sexualized role in society which would somehow affect the "family-friendly" nature of Fort Collins. [Doc. 1] at ¶ 31. But generating thoughts, ideas, and emotions is the essence of communication. Like altering or burning the American flag, Plaintiffs protest is meant to disturb

the status quo in a way that is directly related to their message. That Plaintiffs' attempt to start a conversation about the exploitation and sexualization of women's bodies involves toplessness does not remove it from First Amendment protection.

2.2 Section 17-142 is content-based and subject to strict scrutiny.[6]

Plaintiffs plead that the newest iteration of Section 17-142 was enacted in response to Plaintiffs' protest. [Doc. 1], at ¶ 25. In Plaintiffs' Motion for Preliminary Injunction, Plaintiffs explain that their conduct is protected by the First Amendment and that the new ordinance is content-based in three different ways.[7] *See* [Doc. 2], at 8-9. There is, however, a fourth reason why Section 17-142 is content based: it is only because female toplessness may generate feelings of outrage or shock among spectators that Fort Collins enacted Section 17-142 to regulate such expressive activity. This is represented by the government interests advanced by Fort Collins: 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, and women with exposed breasts impede the right of others to enjoy public spaces. [Doc. 1], at ¶ 31; [Doc. 18], at ¶ 6. A law that criminalizes one person's speech based on another person's reaction is the very definition of content based. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (holding that a law "would not be content neutral if it were concerned with undesirable effects that arise from 'the direct

[6] Again, determining that that the ordinance could withstand strict scrutinywould require resorting to evidence outside the pleadings and those materials necessarily embraced by the pleadings, which is not appropriate at this stage. *See Free Speech Coal., Inc. v. AG of the United States*, 677 F.3d 519, 536 (3d Cir. 2012). Regardless, based on the facts plead in Plaintiffs' complaint construed in the light most favorable to Plaintiffs, Section 17-142 cannot withstand strict scrutiny.

[7] The ordinance is content based because: (1) it criminalizes some instances of toplessness, but not others, based on each instance's function or purpose, *see, e.g., Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015); (2) it criminalizes certain speakers, but not others, for engaging in identical expressive conduct, s*ee, e.g., Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994); and (3) it was adopted by Defendant solely because of Plaintiffs' protests and was aimed explicitly against chilling future protests. *See Reed*, 135 S. Ct. at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

impact of speech on its audience'") (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ([l]isteners' reaction to speech is not a content-neutral basis for regulation"); *Johnson*, 491 U.S. at 412 (holding that this principle applies to expressive conduct; a statute regulating flag desecration was content based because it punished the expressive conduct based on "the emotive impact of [the] speech on its audience"). Section 17-142 is a content-based restriction on First Amendment expressive activity and, therefore, strict scrutiny is the appropriate standard of review.

2.3 Defendant has not demonstrated that Section 17-142 furthers an important or substantial governmental interest.[8]

Plaintiffs' allege in their Complaint that there are four government interests asserted for Section 17-142, namely: (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) promoting respect for women and protecting them from assaults; and (4) protecting children from viewing nudity. [Doc. 18], at ¶ 31.

The Supreme Court has rejected morality, or "decency," as an important or substantial governmental interest and stated, while evaluating a statewide topless dancing ban pursuant to the more deferential *O'Brien* analysis, that "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*, 501 U.S. at 581 (Souter, J., concurring) (Justice Souter's concurrence was the narrowest majority opinion and can, therefore, be read as controlling precedent in *Barnes*); *see also De Weese v. Palm Beach*, 812 F.2d

[8] Again, determining that that the ordinance could withstand the more deferential *O'Brien* standard would require resorting to evidence outside the pleadings and those materials necessarily embraced by the pleadings, which is not appropriate at this stage. *See Free Speech Coal., Inc. v. AG of the United States*, 677 F.3d 519, 536 (3d Cir. 2012).

1365, 1369 (11th Cir. 1987).[9] Defendant cites primarily pre-*Lawrence* case law 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); *McDonald v. City of Chi.*, 561 U.S. 742, 895 (2010); *United States v. Windsor,* 133 S. Ct. 2675 (2013). And other lower courts have followed suit. *See, e.g., Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 745–47 (5th Cir. 2008) (concluding that *Lawrence* stands at least in part for the proposition that public morality cannot serve as a legitimate state interest to support a law banning the advertising and sale of sex toys). "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.

Even if this Court recognizes "morality" as an important or substantial government interest, Section 17-142 does not advance this interest. Fort Collins female residents are still free to cohort in a state of toplessness in their own homes in front of relatives and friends; it is difficult to see why Fort Collins' interest in morality is any less in that situation, especially if, as Fort Collins seems to suggest, female toplessness is inherently evil. Defendant's argument that the

[9] In *De Weese*, the Eleventh Circuit struck down an ordinance that forbade men from appearing topless at public places. The governmental interest asserted was "maintaining the [t]own's identity, history, tradition, and quality of life." *Id*. at 1367. The Court found that such an interest was "a mere circumlocution for enforcing the town fathers' view of the proper fashion for personal dress" and "the town fathers' distaste for the personal dress of [the plaintiff]... is simply not a legitimate government interest." *Id*. at 1368. In reaching its result, the Court "found no case that sustained, or even addressed, the authority of a state or municipality to regulate the dress of its citizens at large[,]" and ultimately held "the Town's interest in regulating the dress of its citizens at large, in the form of prohibiting male joggers from appearing in public without a shirt, is so manifestly weak that" it could not withstand even rational basis review. *Id*. at 1369.

secondary effects of Plaintiffs' speech justify the ordinance is also unpersuasive. Defendant has "not offered an iota of evidence" showing that Plaintiffs' topless protest would lead to the harming of Fort Collins "family-friendliness." *Foxxxy Ladyz Adult World, Inc. v. Vill. of Dix*, 779 F.3d 706, 716 (7th Cir. 2015). And on a Rule 12(b)(6) motion to dismiss, this Court is required to accept the facts as alleged by Plaintiffs.

Defendant analogizes Plaintiffs' protest to topless dancing at adult establishments through its citations, which only serves to illustrate the sexist underpinnings of Section 17-142. There is no evidence that women, who only wish to be treated equally, standing topless in the City of Fort Collins will have the same effect on a town's "morality" or "family-friendliness" as a business that is selling erotic entertainment. Even so, the fact that Section 17-142 carves out an exception for topless dancing shows that it is not tailored to advancing the interests that Defendant asserts. If Defendant was concerned with the "family-friendliness" of Fort Collins, Section 17-142 would attempt to prevent topless dancing. Instead, it allows this activity which is aimed at the sexualization of women, while prohibiting women from standing topless at public places in simple protest of such sexualization.

No case has recognized "protecting the right of others to enjoy public spaces" as an important or substantial government interest in the First Amendment context. 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." *Erznoznik*, 422 U.S. at 213-14. Rather, it sweepingly forbids display of all female breasts, "irrespective of context or pervasiveness." *Id.* "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 making it underinclusive. 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 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 and protecting them from assault 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.

When reviewing the constitutionality of a statute under the First Amendment, even "under an intermediate scrutiny standard of review, the government bears the burden of justifying (i.e., both the burden of production and persuasion) the challenged statute." *J & B Entm't v. City of Jackson*, 152 F.3d 362, 370-71 (5th Cir. 1998) (citing *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 664-65). Since Defendant cannot demonstrate that Section 17-142 furthers an important or substantial government interest, Section 17-142 fails the *O'Brien* test.

2.4 Section 17-142's amendment and re-authorization was directly related to the suppression of free expression.

Section 17-142 was enacted specifically to prevent women in Fort Collins from appearing topless at public places for various reasons, reasons which illustrate that Section 17-142 specifically targets Plaintiffs' expressive activity of appearing topless at public places. Plaintiffs' plead as much in their complaint. [Doc. 1], at p. 8 ¶ 31-36. Plaintiffs' topless protest is expression entitled to First Amendment protection and Section 17-142's reauthorization is directly related to the suppression of First Amendment protected expressive activity. Section 17-142 fails three of the *O'Brien* factors. *See O'Brien*, 391 U.S. at 376-77 (holding regulation must meet each of *O'Brien*'s four prongs). Therefore, Plaintiffs state a claim in Count I.

3. Claim II states a claim under the Equal Protection Clause of the Fourteenth Amendment.

Plaintiffs adequately plead that Section 17-142 is a sex-based classification. *See* [Doc. 1], at ¶ 8, 9, 30. 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, 116 S. Ct. 2264, 2275 (1996) (quotations and citations omitted). Plaintiffs allege specific facts that demonstrate that Defendant has no persuasive justification for criminalizing women—and only women—for certain conduct, *see* [Doc. 1], at ¶¶ 51-53, and that the ordinance is unrelated to the achievement of any legitimate governmental interest. *See id*. ¶¶ 29-38, 46-48, 53. Taking Plaintiffs' complaint as true and resolving all factual inferences in their favor, as the Court must do at this stage, Defendant has not met that burden.

At the outset, it is important to note that Defendant asks the Court to resolve the Equal Protection question on a motion to dismiss. In *Virginia*, the district court's ruling on the plaintiff's Equal Protection claim came after a trial that "consumed six days and involved an array of expert witnesses on each side." *Id.* at 523. This Court should reject Defendant's request that this case can be resolved on a motion to dismiss' truncated procedure.

It is also important to note that nearly every case cited in Defendant's Motion to Dismiss was decided pre-*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 and, at the Motion to Dismiss stage, cannot prove that Section 17-142 addresses any of these problems. Section 17-142 is "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 an important government interest. The notion 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). And the generalization that men would

sexualize topless women at public places "rel[ies] on overbroad generalizations about the different talents, capacities, or preferences of males and females[,]" which the Supreme Court has said is forbidden in justifying sex-based classifications. *Virginia*, 518 U.S. at 533.

Non-lewd exposure of the female breast, the exact type of exposure Plaintiffs wish to engage in, is in no way harmful to public health or decency and Defendant has not cited any evidence to indicate as much. Notably, other jurisdictions have found that female breast exposure is not indecent behavior. *See People v. Santorelli*, 80 N.Y.2d 875, 880-83 (1992); *State v. Parenteau*, 55 Ohio Misc 2d 10, 11 (Mun. Ct. 1990); *State v. Jones*, 7 NC App 166 (1970); *State v. Moore*, 194 Ore 232 (Or. 1952); *State v. Crenshaw*, 61 Haw 68, (Haw. 1979); *Duvallon v. State*, 404 So 2d 196 (Fla. Dist. Ct. App. 1981). In Section 17-142 there is an underlying legislative assumption that "a female's uncovered breast in a public place is offensive to the average person in a way that the sight of a male's uncovered breast is not. It is this assumption that lies at the root of the [Section 17-142]'s constitutional problem." *Santorelli*, 80 N.Y.2d at 880-83.

Finally, Defendant's focus throughout its response "is on the male response to viewing topless women; there is no focus on the female actor herself." Reena N. Glazer, *Women's Body Image and the Law*, 43 Duke L.J. 113, 116.

> This inverted structure helps to maintain men's objectification of women. Male power is perpetuated by regarding women as objects that men act on and react to rather than as actors themselves. When women are regarded as objects, a great deal of importance rests on their appearances because their entire worth is derived from the reaction they can induce from men. In order to maintain the patriarchal system, men must determine when and where this arousal is allowed to take place. In this way, the (heterosexual) male myth of a woman's breast has been codified into law.

Id. Particularly, when laid next to the statute's exemption for topless entertainment Defendant's implication is that "what might arouse men can only be displayed when men want to be aroused." *Id.* By contrast, "men are free to expose their chests … with no consideration of the impact on possible viewers." *Id.* In the end,

> [i]n adopting the statutory standard, no consideration was given to contexts in which women might enjoy going topless for their own reasons, regardless of any effect on male viewers. Nor was any consideration given to the fact that women might not be bothered by the sight of other women's breasts.

Id. Even Defendant's supposed compelling government interests are based on outdated mores that have the consequence of subjugating women.

Any difference between the female breast and the male breast should not be used as justification for criminalizing women who wish to stand topless at public places. "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). Section 17-142 cannot withstand intermediate scrutiny.

4. Claim III states a claim under Colorado's Equal Rights Amendment.

Defendant mistakenly argues that Plaintiffs have asserted a claim in their Motion for Preliminary Injunction that Section 17-142 violates the Colorado Constitution's Equal Protection Clause. Although Plaintiffs do believe that Section 17-142 is a violation of Colorado's Equal Protection Clause, for the reasons explained *supra*, this Court need not decide whether Section 17-142 violates the Colorado Constitution's Equal Protection Clause, as Plaintiffs have alleged in their Complaint and Motion for Preliminary Injunction that Section 17-142 violates the Colorado Equal Rights Amendment, a separate provision of the Colorado Constitution from its Equal Protection Clause. *Compare* Colo. Const., Art. II, Section 29 (1973), *with* Colo. Const., Art. II, Section 25 (1973).

The people of Colorado enacted an Equal Rights Amendment to the Colorado Constitution in 1973, enshrining in law that "[e]quality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions because of sex." Colo. Const., Art. II, Section 29 (1973). In *R. McG. v. J.W.*, 200 Colo. 345 (Colo. 1980), the Colorado Supreme Court

contrasted this provision with the equal protection clause in Article 25 of the Colorado Constitution which requires an intermediate level of scrutiny, observing that if a gender classification falls short of the intermediate level of scrutiny under equal protection principles, it necessarily fails to satisfy the stricter level of judicial scrutiny under the Equal Rights Amendment. Courts in Colorado have since stated that this amendment subjects all laws that are sex-based classifications to strict scrutiny. *See Colo. Civil Rights Com. v. Travelers Ins. Co.*, 759 P.2d 1358, 1363 (Colo. 1988).

In *Colo. Civil Rights Com.*, the Supreme Court of Colorado held that an employer violated the Equal Rights Amendment by excluding from its insurance coverage healthcare expenses incurred during pregnancy because such "disparity in the provision of comprehensive insurance benefits as a part of employment compensation constitutes discriminatory conduct on the basis of sex and the Equal Rights Amendment "prohibits unequal treatment based solely on circumstances of sex." 759 P.2d at 1363 (citing *People v. Salinas*, 191 Colo. 171 (1976)). The Court found the defendant's argument that pregnancy was a voluntary condition unpersuasive. Likewise, Section 17-142 discriminates solely on the basis of sex. That public toplessness is a choice that each woman can make does not save the ordinance. Colorado's ERA mandates that "equality of rights under the law shall not be abridged or denied by the state of Colorado or any of its political subdivisions on account of sex" and, therefore, Section 17-142 violates the ERA.

5. Conclusion

For the reasons set forth above, Plaintiffs have sufficiently pled all of their claims against Defendant. Accordingly, the Defendant's Motion to Dismiss should be denied in its entirety.

DATED this 1st day of September, 2016.

Respectfully submitted,

KILLMER, LANE & NEWMAN, LLP

s/ Andy McNulty

_____

David A. Lane
Andy McNulty
1543 Champa Street, Suite 400
Denver, CO 80202
(303) 571-1000
dlane@kln-law.com
amcnulty@kln-law.com

Jessica K. Peck, Esq.
JESSICA K. PECK, ATTORNEY AT LAW, LLC
Office: 303-331-3413
3773 Cherry Creek North Drive, Suite 575
Denver, CO 80209
jessica@jpdenver.com

Attorneys for Plaintiffs