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 REPLY IN SUPPORT OF MOTION TO DISMISS

Defendant City of Fort Collins, Colorado ("the City") hereby files this Reply in Support of Motion to Dismiss, as follows:

ARGUMENT

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

Plaintiffs proclaim the determination of whether Section 17-142 withstands either strict scrutiny or the ***O'Brien*** test requires consideration of evidence outside the pleadings, which is not appropriate on a motion to dismiss. [ECF 31 at p.2]. Plaintiffs do not explain what evidence they might require to oppose the Motion, and do not specify what factual determination requires consideration of materials outside the Complaint. *Compare* ***Free Speech Coalition, Inc. v. AG of the United States***, 677 F.3d 519, 536 (3d Cir. 2012) (cited by Plaintiffs, holding issue of whether statute is narrowly tailored or burdens substantially more speech than necessary to further

government's legitimate interests is "difficult" to assess on motion to dismiss). In reality, the Motion raises the purely legal issue of whether the Complaint states a claim for violation of the right to free speech or equal protection.

A. Section 17-142 Is Not a Content Based Restriction and Strict Scrutiny Does Not Apply

Plaintiffs urge the Court to apply strict scrutiny, based on the assertion Section 17-142 is a content based restriction, rather than the ***O'Brien*** analysis applicable to expressive conduct. [ECF 31 at p.6]. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." ***Reed v. Town of Gilbert***, 135 S. Ct. 2218, 2227 (2015) (citations omitted). Nothing in the Complaint offers any indication Section 17-142 applies to nudity only when it expresses a particular idea or message. To the contrary, the ordinance prohibits almost all public exposure of the female breast, regardless of whether a message is intended to be conveyed or what the contents of that message might be. The only exceptions are venues for artistic performances, which are excluded from the ordinance's definition for "public place"; breast feeding in public places; when a person is undergoing a bona fide emergency medical examination or treatment in a public place; and in public places where nudity is explicitly permitted, such as in bathrooms, shower rooms and other enclosed areas specifically designated for changing clothes. While venues for artistic performances are excepted because they will often involve expressive speech and such an exception is arguably constitutionally required,[1] the latter three exceptions include no form of

[1] Nudity bans that do not contain exceptions for artistic performances are at risk for being struck down pursuant to an overbreadth challenge. *See* ***Schultz v. City of Cumberland***, 228 F.3d 831, 849-50 (7th Cir. 2000) ("Unlike statutes upheld against overbreadth challenges in other

expressive speech. *Compare* ***Reed***, 135 S. Ct. at 2224 (law imposing differing levels of restrictions on outdoor signs based on the message conveyed is content based).

Improperly relying on their own Motion for Preliminary Injunction ("PI Motion") rather than the four corners of the Complaint, Plaintiffs proclaim Section 17-142 is content based in four different ways. [ECF 31 at p.6]. First, Plaintiffs claim the ordinance criminalizes some instances of toplessness but not others, based on each instance's function or purpose. [*Id.* at p.6 n.7]. In reality, there are only four exclusions from the ordinance, as noted above, but none of them is based on the content of the message conveyed. No distinction is drawn between toplessness intended to convey a message such as Plaintiffs', toplessness intended to convey any other message, or toplessness not intended to convey any message at all. A nude sunbather violates the ordinance just as Plaintiffs protesting nude in downtown Fort Collins do.

Second, Plaintiffs assert Section 17-142 "criminalizes certain speakers, but not others, for engaging in identical expressive conduct." [ECF 31 at p.6 n.7]. The PI Motion contends the ordinance criminalizes expressive conduct only from women and girls. [ECF 2 at p.8]. Aside from the fact that going topless, whether by a man or a woman, is not expressive conduct, given the physical difference between male and female breasts and our society's different approach to the two, it is axiomatic that a male taking his shirt off in public is not engaging in "identical expressive conduct" to a female taking her shirt off in public.

Third, Plaintiffs claim Section 17-142 was adopted "solely because of Plaintiffs' protests and was aimed explicitly against chilling future protests." [ECF 31 at p.6 n.7]. This assertion is

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cases, the Ordinance contains no explicit exception for expression that contains nudity or sexual depiction but also possesses serious artistic, social or political value.") (citing cases).

contradicted by the Complaint, which states Section 17-142 was in place well before Plaintiffs began their protests, and included a ban on the exposure of female breasts. [ECF 1 at ¶5].

Finally, Plaintiffs add a fourth argument in favor of content based regulation to the Response, claiming the City enacted Section 17-142 "only because female toplessness may generate feelings of outrage or shock among spectators." [ECF 31 at p.6]. Even if this characterization were supported by the allegations in the Complaint (which in fact note reasons other than the "outrage or shock" of viewers), it does nothing to show the restriction is content based. Contrary to the cases cited by Plaintiffs, which held the audience's emotional reaction to a particular message did not render a restriction content neutral, [ECF 31 at pp.6-7], Plaintiffs do not allege the outrage or shock of Fort Collins citizens viewing topless women would have anything to do with the message conveyed, as opposed to the nudity itself. Nothing in the Complaint offers any indication toplessness engaged in for protest would be considered any more outrageous or shocking than toplessness for any other reason.

Plaintiffs do not explain how the ordinance targets any particular message, and do not cite any case subjecting a nudity ban to strict scrutiny as a content based restriction. In contrast, the City cited a multitude of cases, ignored by Plaintiffs, holding restrictions on public nudity are reviewed under ***O'Brien***. [ECF 18 at pp.7-8]. Plaintiffs' effort to invoke strict scrutiny to a content neutral ordinance banning toplessness regardless of any message is unavailing and without support in the controlling legal precedent.

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

Plaintiffs acknowledge that for conduct to be considered protected speech, it must convey a particularized message, and the likelihood must be great the message would be understood by

those who viewed it. [ECF 18 at p.3]. Plaintiffs claim to have "alleged facts showing that Plaintiffs' message is clear to even the casual observer in 2016." [ECF 18 at p.3 (citing ECF 1 at ¶23)]. However, the cited paragraph states only that women across the nation have begun to challenge laws like Section 17-142 by baring their breasts in public and relies on two recent cases and one article describing a handful of protests for similar purposes in other locations. [ECF 1 at ¶23]. None of these references demonstrates the "casual observer" in Fort Collins would understand a topless woman standing on the corner was "advocat[ing] for gender equality by challenging the double standards, hypocrisies, and sexualization of women that supports laws and policies that treat women as inferior to men." [ECF 1 at ¶¶39, 45].[2] In fact, to the extent a casual observer would understand the message being conveyed it was due to the "Plaintiffs' actions of carrying signs and shouting messages supporting equality under the law for women," [ECF 31 at p.4], a message communicated with or without female toplessness.

Notably, in one of the cases cited by Plaintiff, the court did not address whether the message would be understood by those who viewed it because the parties did not address the issue in their briefing, ***Free the Nipple v. City of Springfield***, 153 F. Supp. 3d 1037, 1045 (W.D. Mo. 2015), and in the other case, the court initially found the message would be understood by

[2] Plaintiffs also cite a multitude of other articles describing various topless protests around the country and around the world, [ECF 31 at p.4 n.5], but these materials are not properly considered on a Motion to Dismiss, which is limited to the allegations in the Complaint. In any event, other protests taking place in other parts of the world does nothing to demonstrate the viewers of those protests understood the message there, much less that an observer in Fort Collins would understand Plaintiffs' proclaimed message. Further, if this Court determines to consider Plaintiff's citation to extraneous documents, it should also consider the evidence submitted in the City's Response to Plaintiffs' Motion for Preliminary Injunction, which demonstrates not only that other groups have used nudity to convey entirely different messages, but that one of the Plaintiffs herself articulated an entirely different message in arguing against the ban. [ECF 19 at p.9 n.5, p.12 n.7].

those who viewed it, ***Tagami v. City of Chicago***, 2015 U.S. Dist. LEXIS 90149, *6 (N.D. Ill. 2015), but later reversed its own decision and found the message would not be understood by viewers. ***Tagami v. City of Chi.***, 2016 U.S. Dist. LEXIS 11832, *4-5 (N.D. Ill. Feb. 1, 2016). Plaintiffs make no effort to address either the latter ***Tagami*** ruling or the other case cited by the City, holding the message of protest against exploitation was not likely to be understood by those viewing topless women. ***Craft v. Hodel***, 683 F. Supp. 289, 291 (D. Mass. 1988); *see also* ***Hightower v. City & County of San Francisco***, 77 F. Supp. 3d 867, 879 (N.D. Cal. 2014) ("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.").

In ***Hightower***, the court held "whether those that view conduct are likely to understand its intended message must be evaluated on a case-by-case basis, taking into account the context and circumstances surrounding the conduct, but without regard to any explanatory speech that accompanies it." ***Id.*** at 877. Applying that standard, the court determined two out of the ten protests at issue were likely to be understood as protesting a public nudity ban, because they came in close proximity to the enactment of the ban, and were conducted outside of city hall where the ban was enacted, following a well-publicized civic debate over the ban which the plaintiffs participated in. ***Id.*** at 877-78.[3] The court found no great likelihood the plaintiffs' conduct conveyed the intended message to a passerby in any of the remaining eight protests. ***Id.*** at 878-80. Here, if Plaintiffs were protesting the passage of Section 17-142, within close proximity to its passage, outside of the City Council chambers, following a well-publicized debate about the ordinance, a passerby might be likely to understand the message. The one

[3] Plaintiffs cite ***Hightower*** for its finding of protected expression in these two instances, but ignore the other eight instances where that court found no protected conduct. [ECF 2 a p.5].

protest described by Plaintiffs instead took place two months before the City Council meeting to consider the repeal of Section 17-142, at the corner of College Avenue and Mulberry Street in downtown Fort Collins. [ECF 1 at ¶¶6-7]. There is simply nothing in the Complaint, beyond Plaintiffs' conclusory assertion, indicating a passerby seeing Plaintiffs expose their breasts in downtown Fort Collins would understand they are "decrying the exploitation and sexualization of the female body." [ECF 31 at pp.3-4]. Nor do any of the cases cited by Plaintiffs, finding protected speech in entirely different actions, [ECF 31 at p.5], demonstrate that their display of their breasts would be understood as conveying the message their intended message.

Because there is no great likelihood a passerby viewing a topless woman standing on the corner in downtown Fort Collins will understand she is protesting sexualization and exploitation, or promoting gender equality, or any of the various iterations of the message found in Plaintiffs' briefing, they are not engaged in protected conduct.

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

Alternatively, Plaintiffs argue ineffectually that Section 17-142 fails the ***O'Brien*** test applicable to expressive conduct. The first element of the ***O'Brien*** test is not in dispute.

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

Under the second element, Plaintiffs first assert maintaining the values of the City, including its sense of decency and family, is not a substantial governmental interest, proclaiming "[t]he Supreme Court has rejected morality, or 'decency,' as an important or substantial governmental interest . . . ." [ECF 31 at p.7]. In support, Plaintiffs quote Justice Souter's "controlling precedent" concurrence in ***Barnes*** as stating "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." [ECF 31 at p.7 (purportedly quoting ***Barnes***, 501 U.S. at 581)]. Unfortunately, the language Plaintiffs quote from ***Barnes*** is not found at p.581, and is not from the concurrence, but is instead part of the dissent, and therefore not controlling in any respect. ***Barnes***, 501 U.S. at 590 (White, J., dissenting). Further, this dissent did not assert that morality is not a substantial governmental interest in any context, and instead stated that where a rule specifically targets expressive activity (which Section 17-142 does not), "[c]loser inquiry as to the purpose of the statute is surely appropriate." *See* ***id.*** With respect to the actual concurrence, Justice Souter expressly declined to weigh in on the plurality's determination that morality is a sufficient governmental interest to support a nudity ban, instead finding other justifications for the law at issue in combating the secondary effects of adult entertainment establishments. ***Id.*** at 582 (Souter, J., concurring).

Plaintiffs also cite ***De Weese v. Palm Beach***, 812 F.2d 1365 (11th Cir. 1987), as rejecting a town's reliance on "history, tradition, identity or quality of life" in support of a law prohibiting males from jogging shirtless. In reality, ***DeWeese*** found the record did not support a history or tradition of requiring men to wear shirts "when toplessness is appropriate to the physical activity being undertaken," ***id.*** at 1367, and here Plaintiffs do not dispute there is a history and tradition in the City of prohibiting women from publicly baring their breasts. In any event, the town in ***DeWeese*** expressly disclaimed reliance on morality in enacting the ordinance at issue, ***id.*** at 1368 n.7, and as a result the case is inapposite.

Plaintiffs next argue decency, morality, or family-friendliness cannot justify a public nudity ban following ***Lawrence v. Texas***, 539 U.S. 558 (2003), a case which dealt with neither a public nudity ordinance nor free speech. [ECF 31 at p.8]. ***Lawrence*** held a statute criminalizing

homosexual conduct engaged in by two consenting adults in the privacy of their own home violated the right to liberty under the Due Process Clause of the Fourteenth Amendment. ***Lawrence***, 539 U.S. at 564. ***Lawrence*** itself makes clear the limits of its holding:

> The present case ***does not involve minors***. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It ***does not involve public conduct*** or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. ***The petitioners are entitled to respect for their private lives.*** The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.

Id. at 578 (emphases added).

Lawrence's focus on private conduct is also emphasized in another case cited by Plaintiffs, ***Reliable Consultants, Inc. v. Earle***, 517 F.3d 738, 745 (5th Cir. 2008). That case rejected "public morality" as a basis for a state's obscene devices statute, citing "the ***Lawrence*** holding that public morality cannot justify a law that regulates an individual's ***private sexual conduct*** and does not relate to prostitution, the potential for injury or coercion, ***or public conduct***." (Emphasis added). In fact, ***Reliable*** expressly rejected Plaintiffs' proposed application of ***Lawrence***, noting: "Our holding in no way overtly expresses or implies that public morality can never be a constitutional justification for a law. We merely hold that after ***Lawrence*** it is not a constitutional justification for this statute." ***Reliable***, 517 F.3d at 745 n.36. Plaintiffs cite to no case holding these interests are not substantial in the context of public behavior inevitably exposed to children and non-consenting adults.

In contrast to Plaintiffs' reliance on mis-cited or distinguishable case law, the City cited multiple cases finding a substantial government interest in morality, decency, and societal norms in the context of topless bans, [ECF 18 at pp.8-9, 16-18], which Plaintiffs fail to distinguish.[4]

Plaintiffs next argue Section 17-142 does not advance the City's interest in morality because it permits women to be toplessness in front of others in their own homes.[5] This argument is defeated by Plaintiffs' own citation to ***Lawrence***, which bars morality as a consideration when attempting to legislate private consensual behavior. Moreover, anyone who does not want to be exposed to the breasts of someone who likes to be topless in their home can choose not to visit them; that person should not have to remain in the confines of their own home to avoid being exposed to the strangers' breasts in public. *See* ***Boyd***, 592 S.E.2d at 774 ("Statutes prohibiting public nudity are of ancient origin and reflect moral disapproval of people appearing in the nude among strangers in public places. For this reason, it has been the traditional view that

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[4] *See also* ***Bushco v. Shurtleff***, 729 F.3d 1294, 1304 (10th Cir. 2013) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and [the U.S. Supreme Court has] upheld such a basis for legislation.") (quoting *Barnes*, 501 U.S. at 569); ***Williams v. Morgan***, 478 F.3d 1316, 1318 (11th Cir. 2007) (public morality remains a legitimate rational basis for legislation after Lawrence); ***Egolf v. Witmer***, 421 F. Supp. 2d 858, 871 (E.D. Pa. 2006) ("'The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals,' and has long been upheld as the basis for legislation.") (quoting ***Barnes***, 501 U.S. at 569) (affirmed on qualified immunity grounds in ***Egolf v. Witmer***, 526 F.3d 104 (3d Cir. 2008)); ***Boyd v. County of Henrico***, 592 S.E.2d 768, 775 (Va. App. 2004) ("Sufficient government interests justifying content-neutral regulations include 'preventing harmful secondary effects,' ***Erie***, 529 U.S. at 293, and 'protecting order and morality,' ***Barnes***, 501 U.S. at 569, both classic expressions of state police powers.").

[5] Contrary to Plaintiffs' inflammatory proclamation, nothing in the Complaint or the ordinance offers any indication the City views female toplessness as "inherently evil," [ECF 31 at p.8], and any rational person reviewing the ordinance would understand female breasts are considered private rather than evil. The ordinance also prohibits the public display of both male and female genitals, but Plaintiffs do not suggest such restriction is inappropriate or indicates the City views such body parts as "inherently evil."

whatever natural law construct exists to support the right to appear *au naturel* at home, that right is relinquished when one sets foot outside.") (citations and internal quotations omitted).

Plaintiffs also criticize the City for failing to offer evidence Plaintiffs' planned protests would harm the City's "family-friendliness," [ECF 31 at p.9], even though the City is not permitted to offer evidence with its Motion. Nevertheless, Plaintiffs themselves allege family-friendliness was one of the multiple justifications listed for the ordinance, and common sense dictates parents might be reluctant to take their children to downtown Fort Collins knowing women are free to walk around the streets topless. *See* ***Craft v. Hodel***, 683 F. Supp. 289, 294 (D. Mass. 1988) (government has substantial interest in shielding population from offensive conduct such as public nudity); ***Young v. Am. Mini Theatres***, 427 U.S. 50, 71 (1976) (plurality opinion) (city's interest in preserving quality of urban life "must be accorded high respect").

Plaintiffs next attack the City's purported analogy between their planned protest to topless dancing, [ECF 31 at p.9], but the City only cited topless dancing cases for their legal analysis of nudity bans, and nowhere asserted Plaintiffs' conduct was analogous. Nor does Plaintiffs' reliance on the purported exception for topless dancing establishments, [*id.*],[6] undermine the ordinance's effort to address family-friendliness, given topless dancing occurs in private facilities where children are excluded and non-consenting adults need not frequent.

Turning to the right of others to enjoy public spaces, Plaintiffs incorrectly proclaim no case has recognized this as an important or substantial government interest in the First Amendment context. [ECF 31 at p.9]. Plaintiffs ignore the City's citations to ***Craft v. Hodel***, 683

[6] The ordinance does not actually contain an exception for topless dancing establishments, but instead excludes "any theater, concert hall, museum, school or similar establishment to the extent the same is serving as a performance venue" from the definition of "public place." [ECF 1 at ¶30].

F. Supp. 289, 293 (D. Mass. 1988), which upheld "preservation of the Seashore as a beach available for the enjoyment of all persons" as a substantial governmental interest supporting a nudity ban, and ***United States v. Biocic***, 928 F.2d 112, 115-116 (4th Cir. 1991), stating "[t]he 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."[7]

Plaintiffs next assert "the Supreme Court has never recognized an important or substantial governmental interest in protecting children from viewing nudity." [ECF 31 at p.9]. Plaintiffs cite ***Erznoznik v. Jacksonville***, 422 U.S. 205, 213-14 (1975), but the case does not actually say that. Instead, ***Erznoznik*** struck down a law prohibiting the showing of films containing nudity by a drive-in movie theater when its screen was visible from a public place. ***Erznoznik*** noted "the city's undoubted police power to protect children," and found "[i]t is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults." ***Id.*** Nevertheless, the Supreme Court held the law was overly broad because it "sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture

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[7] *See also* ***People v. Hollman***, 500 N.E.2d 297, 301 (N.Y. 1986) ("Riis Park is a public beach dedicated to the recreation of the public, including New York families. Congress, in its wisdom, set aside all of Riis Park for that purpose. The effect of the nude sunbathers' repeated appearance at Bay 1 was to foreclose its use by others."); ***Chapin v. Southampton***, 457 F. Supp. 1170, 1176 (E.D.N.Y. 1978) ("[N]ot only is a public beach an unlikely and unnecessary showcase for nude expression, but also nudity there significantly intrudes upon others who did not seek it out and may be offended by it.").

in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach." ***Id.*** at 213.

It was in this context the Supreme Court used the language quoted by Plaintiffs, "Clearly all nudity cannot be deemed obscene even as to minors." ***Id.*** Plaintiffs remove this quote from its context, a restriction on the showing of a film, and ignore the Supreme Court's express distinguishing of the type of law at issue in this case: "Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. In this respect ***such nudity is distinguishable from the kind of public nudity traditionally subject to indecent-exposure laws***." ***Id.*** at 211 n.7 (emphasis added).[8]

Plaintiffs next proclaim Section 17-142 is underinclusive because it does not prohibit men from appearing topless, stating if the City were "truly concerned with protecting children from public nudity, it would prevent all public nudity." [ECF 31 at p.10]. Although it would not seem necessary to explain the difference between a topless man and a topless woman, it is nevertheless discussed in detail in the Motion. [ECF 18 at pp.14-16].

Finally, Plaintiffs deny understanding how Section 17-142 might prevent women from assault. [ECF 31 at p.10]. Once again, one need only resort to common sense to recognize the removal of women's shirts on the streets of a college town might increase incidents of groping or

[8] *See also* ***Egolf v. Witmer***, 421 F. Supp. 2d 858, 872 (E.D. Pa. 2006) (government's interest in regulating conduct through public nudity ban is undeniably important and is greatest when acting to protect children) (citing ***City of Erie v. Pap's A.M.***, 529 U.S. 277, 296 (2000)); ***Close v. Lederle***, 424 F.2d 988, 990 (1st Cir. 1970) (college can remove nude paintings in corridor used by general public, including children, in order to protect captive audience from assault upon individual privacy); ***Interstate Circuit v. Dallas***, 390 U.S. 676, 690 (1968) ("[B]ecause of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults.").

worse, and the fact such actions are, in fact, criminalized, [*see id.* (complaining the ordinance does not criminalize assault or increase the penalties for assault)], does not undermine the City's interest in preventing them from occurring. *See* ***Barnes***, 501 U.S. at 583 (Souter, J., concurring) (interest in preventing sexual assault and other criminal activity sufficient to justify nudity ban).

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

Plaintiffs assert Section 17-142 "specifically targets Plaintiffs' expressive activity of appearing topless at public places," [ECF 31 at p.11], but the cited paragraphs show no such thing. [*Id.* (citing ECF 1, ¶¶31-36)]. Instead, the reasons for the ordinance described in the Complaint are equally applicable to any form of public nudity (with limited exceptions), regardless of what message is conveyed, or whether any message is conveyed at all. [*See id.*] Plaintiffs cannot dispute a nude sunbather would be subject to the ordinance just the same as Plaintiffs protesting on a street corner, and their repeated proclamations that the ordinance targets expressive activity are unsupported by their own allegations.

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

Plaintiffs do not address ***O'Brien's*** fourth prong in their Response, but claim in their PI Motion that the City "could advance its interests with less restrictive means, such as through an educational initiative, or simply by warning citizens about Plaintiffs' protests." [ECF 2 at p.14]. Plaintiffs neglect to explain how an educational initiative could address the reasons for the ban, and even if Plaintiffs pledged to notify the City of any planned future protests, this would do nothing to allow unwilling citizens to avoid exposure to any other group or individual who elected to bare their breasts in public. Nor do Plaintiffs address the cases cited by the City, finding nudity bans satisfied this element of the ***O'Brien*** test. [ECF 18 at pp.10-11].

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

Although the parties agree that the time, place and manner analysis does not apply, to any extent the Court determines to apply it, the ordinance survives scrutiny for the reasons discussed in the Motion. [ECF 18 at pp.11-13].

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

Plaintiffs agree a classification based on gender survives equal protection challenge if it serves important government objectives and is substantially related to achievement of those objectives. [ECF 31 at p.11]. Plaintiffs rely primarily on ***United States v. Virginia***, 518 U.S. 515 (1996) ("VMI"), first asserting the case demonstrates this issue cannot be decided on a motion to dismiss. ***VMI*** involved a challenge to a military college's refusal to admit female students, and considered whether the changes to personal privacy processes, physical education requirements, and the "adversative environment" necessitated by the admission of women justified the ban. ***VMI***, 518 U.S. at 524. While these issues could conceivably require testimony to evaluate, Plaintiffs fail to explain what testimony would be required to demonstrate the difference between female and male breasts. In fact, in one case cited by the City where testimony, including expert testimony, was elicited on this issue, the court mocked the effort: "Courts need no evidence to prove self-evident truths about the human condition–such as water is wet." ***Hang On, Inc. v. City of Arlington***, 65 F.3d 1248, 1256-57 (5th Cir. 1995); *see also* ***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.").

Plaintiffs also point to three circumstances cited by ***VMI*** as permitting gender classifications, [ECF 31 at p.12], but contrary to Plaintiffs' apparent assertion, ***VMI*** nowhere asserts gender classifications are limited to these circumstances. ***VMI***¸ 518 U.S. at 533-34. To the contrary, ***VMI*** held "[t]he heightened review standard our precedent establishes does not make sex a proscribed classification," and noted that while supposed inherent differences could no longer support a race or national origin classification, "[p]hysical differences between men and women . . . are enduring." ***Id.*** at 533 (citations omitted). Section 17-142 is based on one of the enduring physical differences between men and women, and Plaintiffs cannot rationally assert prohibiting women from attending a prestigious military academy can be compared to prohibiting women from taking off their shirts in public. Nor can Plaintiffs support their bald assertion, unsupported by reference to any factual allegations, that Section 17-142 is used to "create or perpetuate the legal, social, and economic inferiority of women." [ECF 31 at p.12]. If anything, Section 17-142 acknowledges the superiority of women, whose breasts have an appearance and functions men's breasts simply do not.

Contrary to Plaintiffs' assertion "nearly every case" cited in the Motion pre-dates ***VMI***, [ECF 31 at p.12], the City in fact cited multiple cases issued after ***Virginia*** and finding no equal protection violation in a topless ban applicable only to women. [ECF 18 at pp.14-19 (citing ***J&B Social Club***, 966 F. Supp. at 1139; ***Buzzetti v. City of New York***, 1997 U.S. Dist. LEXIS 4383, *16-17 (S.D.N.Y. Apr. 8, 1997); ***State v. Vogt***, 775 A.2d 551, 557 (N.J. App. Div. 2001); ***City of Albuquerque v. Sachs***, 92 P.3d 24, 28 (N.M. App. 2004); ***City of Jackson v. Lakeland Lounge***, 688 So. 2d 742, 751 (Miss. 1996); ***Tagami***, 2015 U.S. Dist. LEXIS 90149 at *9)].

Plaintiffs next argue the City "has made no showing in its response that the gender-based classification is substantially and directly related to an important government interest." [ECF 31 at p.12]. The substantial government interest at issue is addressed above, and in addition the Motion cited a multitude of cases, which Plaintiffs again do not address, finding such an interest in the face of equal protection challenges to topless laws. [ECF 18 at pp.16-18].

Plaintiffs also cite a handful of cases, purportedly standing for the proposition "other jurisdictions have found that female breast exposure is not indecent behavior." [ECF 31 at p.13]. In the only case remotely on point, ***People v. Santorelli***, 80 N.Y.2d 875, 880-83 (N.Y. 1992), the court dismissed criminal charges against women who bared their breasts in public, finding the state made no attempt to demonstrate the law served an important governmental interest, but in any event finding the law didn't apply to the conduct at issue. ***Id.*** at p.876. In this case, the law plainly applies to the conduct proposed by Plaintiffs, and the substantial governmental interest at stake has been argued extensively. Several of the other cases cited by Plaintiffs found no violation of indecent exposure laws targeting the exposure of "private parts" where the term was not specifically defined to include female breasts. ***State v. Parenteau***, 564 N.E.2d 505, 506 (Ohio Mun. Ct. 1990); ***State v. Jones***, 171 S.E.2d 468, 470 (N.C. App. 1970); ***State v. Crenshaw***, 597 P.2d 13, 14 (Haw. 1979). Here, the statute at issue specifically prohibits exposure of female breasts. In ***Duvallon v. State***, 404 So. 2d 196, 197 (Fla. App. 1981), the court overturned a conviction for exposure of sexual organs in a vulgar or indecent manner where defendant was protesting while wearing a large piece of cardboard and the arresting officer testified he saw nothing lewd or lascivious about her conduct. Here, the statute does not require any element of intent. Most puzzling is Plaintiffs' citation to ***State v. Moore***, 241 P.2d 455, 240-43 (Or. 1952), which involved a charge of contributing to the delinquency of a minor and had nothing to do with public exposure of a woman's breasts. In short,

Plaintiffs fail to cite a single case striking down a topless ban applicable only to females on the grounds it violates the right to equal protection, as compared with the multitude of cases cited by the City upholding such bans in the face of an identical challenge. [ECF 31 at pp.14-19].

Finally, Plaintiffs assert the City's focus "throughout its response" is on the male response to viewing topless women rather than the female actor herself. [ECF 31 at p.13]. Plaintiffs do not cite the Motion, which nowhere even mentions the male response, and in reality women and men may both object to being exposed to women's breasts in public. Nor does Plaintiffs' repeated reference to the non-existent "exemption for topless entertainment" somehow render the ordinance a tool for male subjugation of women. [ECF 31 at pp.13-14]. While Plaintiffs proclaim the differences between female and male breasts is a "cause for celebration," and "not for denigration," [*see id.* at p.14], they fail to explain how an ordinance which bars women from exposing their breasts to an unwilling public, including children, celebrates those differences, and it could just as easily be argued such exposure denigrates women. Certainly the City acted within constitutional bounds in making its assessment.

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

Under the state law equal protection claim, Plaintiffs fault the City for arguing Section 17-142 does not violate Colorado's Equal Protection Clause, instead of the Equal Rights Amendment ("ERA"), [ECF 31 at p.14], but fail to explain how a different conclusion is warranted under the ERA. Under the ERA, "differentiation based on gender must serve an important government objective and be substantially related to that objective." ***In re Estate of Musso***, 932 P.2d 853, 855 (Colo. App. 1997) (citing ***Austin v. Litvak***, 682 P.2d 41 (Colo. 1984)). "The [ERA] prohibits differential treatment that is based 'exclusively on the

circumstance of sex, social stereotypes based on gender, and culturally induced similarities,' but does not prohibit differential treatment based on reasonably and genuinely based physical differences." ***Id.*** (quoting ***People v. Salinas***, 551 P.2d 703, 706 (1976)). In effect, then, the standards applicable to the Equal Rights Amendment are identical to those under the federal Equal Protection Clause, and the analysis remains the same. *See* ***Salinas***, 932 P.2d at 174 (statutory rape statute does not violate ERA because differential treatment of males is "reasonably and genuinely based on physical characteristics unique to just one sex).[9]

Plaintiffs cite to ***Colorado Civil Rights Com. v. Travelers Ins. Co.***, 759 P.2d 1358 (Colo. 1988), requiring employers to include pregnancy in healthcare coverage, [ECF 31 at p.15], but nothing in that case prohibits municipalities from applying topless ordinances solely to women "based on reasonably and genuinely based physical differences." ***Musso***, 932 P.2d at 855. As a result, Plaintiffs describe no violation of Colorado's Equal Rights Amendment and this claim is also subject to dismissal.

[9] Other states have specifically rejected challenges to public nudity laws under equal rights amendments to their state constitutions. *See, e.g.,* ***City of Albuquerque v. Sachs***, 92 P.3d 24, 29 (N.M. App. 2004) (application of public nudity ordinance to only female breasts did not violate New Mexico Equal Rights Amendment); ***Dydyn v. Department of Liquor Control***, 531 A.2d 170, 175 (Conn. App. 1987) (law prohibiting sale of liquor where topless dancing occurs does not violate state equal rights amendment by specifically referring to female anatomy); ***Seattle v. Buchanan***, 584 P.2d 918, 921 (Wash. 1978) (public nudity ordinance requires both men and women to cover parts of bodies "intimately associated with the procreation function" and does not violate Washington's equal rights provision).

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Respectfully submitted,

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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on the 3rd day of October, 2016, I electronically filed the foregoing **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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