IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

Plaintiffs,

v.

CITY OF FORT COLLINS, COLORADO,

Defendant.

DEFENDANT'S MOTION TO QUASH SUBPOENA TO CITY COUNCIL MEMBER RAY MARTINEZ

Defendant City of Fort Collins, Colorado, through 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 file this Motion to Quash Subpoena, pursuant to Fed. R. Civ. P. 45(d)(3), as follows:

1. Certificate of Compliance: Pursuant to D.C.COLO.LCivR 7.1(a), the parties conferred regarding Defendant's objection to Plaintiffs' plan to call Ray Martinez as a witness in the preliminary injunction hearing in this matter. The parties agreed Defendant would waive service of the subpoena to avoid the cost of service of the subpoena, but would file a motion to quash to address Defendant's objection to the proposed testimony.

2. This matter is set for a hearing on Plaintiffs' Motion for Preliminary Injunction on December 19, 2016, at 1:30 p.m. Plaintiffs propose to call as a witness Ray Martinez, a current

member of the City Council for the City of Fort Collins.

3. Plaintiffs issued a Subpoena to Appear and Testify at a Hearing in a Civil Action (the "Subpoena") to Ray Martinez, dated December 7, 2016. On December 9, 2016, Defendant waived service of the Subpoena, without waiving its objections to Mr. Martinez's proposed testimony.

4. At Defendant's request, Plaintiffs provided counsel for Defendants a list of the following proposed topics of testimony for Mr. Martinez:

(1) The legislative history of Section 17-142.

(2) The governmental interest served by Section 17-142.

[*See* Letter from Andy McNulty to Gillian Dale, 12/7/2016, attached as Exhibit 1]. Plaintiffs are not seeking the testimony of any of the six other council members who voted in favor of the ordinance.

5. Defendant does not believe either topic proposed by Plaintiffs is properly addressed by Mr. Martinez, an individual Councilmember, and requiring Mr. Martinez to travel to Denver to participate in the hearing when the entirety of his testimony will be objected to would subject him to an undue burden under Fed. R. Civ. P. 45(d)(3)(A)(iv). Defendant therefore requests the Subpoena be quashed in its entirety.

6. With respect to the first proposed topic of testimony, the legislative history of Section 17-142 consists of correspondence between members of the public and City Council members, the Agenda Item Summaries produced for each of the two public City Council hearings on the ordinance, public input at the hearings, and the comments of City Council members on record in the course of enacting the ordinance. Defendant intends to introduce at

evidence at the preliminary injunction hearing the written correspondence, the Agenda Item Summaries, a copy of the videotaped meetings, and a transcript of the hearings for the Court's consideration. As a result, the entirety of the ordinance's legislative history will be available to the Court, and there is no reason for any individual to testify to the legislative history.

Commented [A1]: Also, not information Ray has!

7. With respect to the second topic of testimony, the governmental interest served by Section 17-142 is set forth in the ordinance itself and in its legislative history, and it is fundamentally inappropriate to require a City Council member to testify as to his reasons for voting on an ordinance in a particular way. Because Mr. Martinez's testimony is not necessary or proper for either subject proposed by Plaintiffs, Mr. Martinez should not be required to testify and Plaintiff's subpoena should be quashed.

8. It is improper for this Court to assess the purpose of City Council in enacting Section 17-142 based on the testimony of Mr. Martinez. Ordinarily a statement made by a single legislator, even one who is the sponsor of the legislation, should not be given controlling effect in interpreting the meaning of a particular enactment. ***Brock v. Pierce County***, 476 U.S. 253, 263 (1986); ***Weinberger v. Rossi***, 456 U.S. 25, 35 & n. 15 (1982). Courts in Colorado reject reliance on post-enactment interpretation provided by single legislator as evidence of a legislative body's intent. *See, e.g.,* ***Legro v. Robinson***, 328 P.3d 238, 244 n.2 (Colo. App. 2012) (declining to consider post-enactment affidavit from bill's sponsor in interpreting statute); ***Mason Jar Restaurant v. Industrial Claim Appeals Office,*** 862 P.2d 1026, 1030 (Colo. App. 1993) ("The post-enactment recollections of a legislator do not constitute legislative history and are not admissible to establishing legislative intent."); ***Colorado Dept. of Social Services v. Board of County Commissioners of Pueblo County,*** 697 P.2d 1, 21 (Colo. 1985) ("[C]ourts have

generally held that subsequent comments about the intent of a legislature by a member of the legislature that enacted a particular statute are not admissible to establish the legislative intent of the statute."); ***Tracy v. City of Boulder,*** 635 P.2d 907, 910 (Colo. App. 1981) ("The argument that the Council acted under an improper motive in reaching its decision is without merit, as the motivations actuating legislators in making factual determinations are irrelevant so long as such determinations are supported by competent evidence in the legislative record.").

9. Federal courts follow the same rule. *See, e.g.*, ***United States v. Nelson***, 277 F.3d 164, 186 (2d Cir. 2002) (eschewing reliance on passing comments of one legislator and casual statements from floor debates in interpreting statute); ***Chicksasaw Nation v. United States,*** 208 F.3d 871, 883 (10th Cir. 2000), *aff'd*, 534 U.S. 84 (2001) ("[T]he comments of a single senator, made years after the statute at issue was enacted, are of little value in interpreting the statute."); ***National Paint & Coatings Assoc. v. City of Chicago,*** 147 F.R.D. 184, 185 (N.D. Ill. 1993) ("[T]his court will not permit any inquiry into the subjective motivations of individual legislators."); ***DeVargas v. Mason & Hanger-Silas Mason Co.***, 911 F.2d 1377, 1386 (10th Cir. 1990) (declining to consider floor statements of congressmen on issue not addressed by statute itself); ***Las Vegas v. Foley***, 747 F.2d 1294, 1297 (9th Cir. 1984) (preventing inquiry into motives of legislators where individuals may vote for statute for variety of reasons and "[t]he diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile"); ***Munoz Vargas v. Romero Barcelo,*** 532 F.2d 765, 766 (1st Cir. 1976) ("It is well settled that if legislation serves a legitimate purpose on its face, it may not be challenged by questioning the motives of the legislators. This principle cannot be circumvented by pursuing an action against the individual

legislators, etc., who caused the legislation to be enacted.") (citations omitted); ***Tenney v. Brandhove***, 341 U.S. 367, 377 (1951) ("The holding of this Court in ***Fletcher v. Peck***, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.").

10. One federal district court explained the difficulties with assigning a legislative intent based on the comments of a single member of a legislative body in the following terms:

> [E]specially where the law or policy under review is the result of an institutional process, such as a vote of a multi-member legislature, council or board rather than an action taken by an individual decision maker, the purpose of the disputed law or policy should normally be discerned from the plain meaning of the words used; the official legislative history, if any; the manner in which the law or policy has been interpreted and applied (if such demonstrable experience is available); and, lastly, the general social condition or historical background which led up to the adoption of the law or policy. The individual, and quite possibly varied, purposes or intentions of the several operative decision makers, especially when those views are known with respect to less than a majority of those voting or deciding, would have little or no probative value.

Adler v. Duval County School Board, 851 F.Supp. 446, 451 (M.D. Fla. 1994), *aff'd in part and vacated in part on other grounds*, 112 F.3d 1475 (11th Cir. 1997) (citations omitted).

11. Fundamentally, the subjective motive of any member of the City Council to vote in favor of Section 17-142 is irrelevant to this Court's evaluation of its legality or constitutionality. ***United States v. O'Brien***, 391 U.S. 367, 382-83 (1968) (courts will not strike down an otherwise constitutional statute the basis of an alleged illicit legislative motive). In ***Missouri Knights of the Ku Klux Klan v. Kansas City, Missouri,*** 723 F.Supp. 1347, 1352 (W.D. Mo. 1989), a federal district court described the important distinction between evaluations of the motive of individual or groups of legislators and the legislative intent behind a particular enactment as follows:

> There has been much confusion in these proceedings surrounding 'legislative purpose' and 'legislative motive.' They are not synonymous, although the distinction has not always been made clear in the cases on the issue. Legislative motive or, more specifically, the motive an individual legislator has for voting for a particular piece of legislation is irrelevant and will not be grounds to invalidate an otherwise constitutional law or resolution.
>
> However, legislative motive should not be confused with legislative purpose. The latter is an essential inquiry in determining if a particular governmental restriction of speech is justified under the applicable rule of decision. The phrase 'legislative purpose' is used interchangeably with 'governmental interest' or 'legislative interest' but nonetheless simply describes the legitimate interest of the legislature that is being advanced by the subject legislation. . . . The governmental purpose or interest advanced by Resolution No. 62655 is a relevant inquiry and will be investigated by this Court in its analysis of the resolution's constitutionality. Why any particular councilman voted for the resolution, however, will be irrelevant to the issue of the resolution's constitutionality.

(Citations omitted); *see also* ***Rhames v. City of Biddeford***, 204 F. Supp. 2d 45, 52 (D. Me. 2002) (declining to consider motivation of one out of nine city councilors for enacting ordinance).

12. In ***Grossbaum v. Indianapolis-Marion County Building Authority,*** 100 F.3d 1287 (7th Cir. 1996), *cert. denied*, 520 U.S. 1230 (1997), the Seventh Circuit refused to consider the argument that a local rule banning displays by private individuals or groups was enacted in retaliation for a legal challenge to a prior rule banning displays of religious items which resulted in the earlier rule being overturned. The Seventh Circuit identified several reasons for this institutional reluctance by the courts to decide constitutional claims based on an interpretation of the motives of legislators:

> A number of factors explain this reluctance to probe the motives of legislators and administrators. For starters, the text of the Constitution prohibits many government actions but makes no mention of governmental *mentes reau* (i.e., guilty minds). The First Amendment, for example, forbids Congress and (through the Fourteenth Amendment's Due Process Clause) the States from making laws abridging the freedom of speech—a far different proposition that prohibiting the intent to abridge such freedom. . . . Just as we would never uphold a law with

> unconstitutional effect because its enactors were benignly motivated, an illicit intent behind an otherwise valid government action indicates nothing more than a failed attempt to violate the Constitution.
>
> Beyond these theoretical objections to investigating motive, practical considerations also suggest caution. Governmental actions may be taken for a multiplicity of reasons, and any number of people may be involved in authorizing the action. . . . Moreover, once a court finds an illicit motive, may the legislature or administrative body ever take the same action again without the imputation of improper intent?

Id. at 1293 (citations and internal quotations omitted); *see also* ***O'Brien***, 391 U.S. at 384 ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.").

13. As the above precedents demonstrate, it is inappropriate for this Court to attempt to evaluate the subjective motivation of any individual member of the City Council in determining the legality or constitutionality of Section 17-142. Instead, the proper focus of this Court's analysis should be the objective evidence of the purpose of the ordinance, including its language, its legislative history, the effect of the ordinance, relevant statutes and case law, and facts surrounding the enactment of the ordinance. ***Foley***, 747 F.2d at 1297 ("The relevant governmental interest is determined by objective indicators as taken from the face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment of the statute, the stated purpose, and the record of proceedings."). As a result, this Court should prohibit Plaintiffs from inquiring into the subjective motivation of Mr. Martinez at the preliminary injunction hearing in this matter.

14. Because the individual motivation of any single legislator is not relevant to the analysis of the constitutionality of Section 17-142, Plaintiffs should not be permitted to call Mr. Martinez as a witness. Defendant therefore requests that the Subpoena to Mr. Martinez be

quashed, in its entirety.

WHEREFORE, for all of the foregoing reasons, Defendant City of Fort Collins, Colorado, respectfully requests that this Court quash the December 7, 2016, subpoena issued to City Council Member Ray Martinez, preclude his testimony at the preliminary injunction hearing before this Court, and enter all such additional relief as the Court deems just and appropriate.

Dated this 15th day of December, 2016.

Respectfully submitted,

/s/ Gillian Dale
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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on the 15th day of December, 2016, I electronically filed the foregoing **DEFENDANT'S MOTION TO QUASH SUBPOENA TO CITY COUNCIL MEMBER RAY MARTINEZ** 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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December 7, 2016

VIA EMAIL

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RE: *Free the Nipple, et al. v. Fort Collins.*

Dear Counsel:

I am writing, at your request, to identify the subjects upon which we will seek testimony from Fort Collins, Colorado City Council Member Ray Martinez during the December 19, 2016 Preliminary Injunction hearing in the matter of *Free the Nipple, et al. v. Fort Collins*. We will elicit testimony from City Council Member Ray Martinez in the following areas:

1. The legislative history of Section 17-142.
2. The governmental interest served by Section 17-142.

Please let me know if you should have any questions or concerns.

Sincerely,

KILLMER, LANE & NEWMAN, LLP

Andy McNulty

cc: Brittiany Hoagland
Samantha Six

* Also admitted to practice in California
* Also admitted to practice in New York
* Lic. in New York only
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EXHIBIT
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