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 HEARING BRIEF

Defendant City of Fort Collins, Colorado (the "City"), 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 Hearing Brief in anticipation of the hearing on Plaintiff's Motion for Preliminary Injunction, on December 19, 2016, at 1:30 p.m., as follows:

ARGUMENT

I. Sex Based Classifications Are Not Limited to Compensation for Historical Inequities

In its Order on the City's Motion to Dismiss, this Court interpreted the Supreme Court's 1996 equal protection rulings as permitting a classification based on "real" differences between men and women only "when such laws 'compensate' one sex for the disabilities or inequities that sex has historically suffered." [ECF 37 at p.12 (citing ***United States v. Virginia***, 518 U.S.

515, 531 (1996))]. Respectfully, the City does not believe the holding of ***Virginia*** is so limiting.[1]

> The particular passage at issue states as follows:
>
> > 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 or for artificial constraints on an individual's opportunity. Sex classifications may be used 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. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.

Virginia, 518 U.S. at 533-34 (citations and internal quotations omitted) (alteration in original)]. While this passage does acknowledge sex-based classifications ***may*** be used to compensate women for prior inequities, it does not state sex-based classification can ***only*** be used to compensate women for prior inequities.[2]

To the contrary, the actual holding of ***Virginia*** is that to support a classification based on gender, the government entity "must show that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." ***Id.*** at 533 (citation and internal quotations omitted) (alteration in original). The Supreme Court in ***Virginia*** expressly acknowledged sex is not a proscribed classification, and while it held inherent differences are no longer accepted as a

[1] In light of the fact that a hearing on the Motion for Preliminary Injunction had already been set when this Court issued the Order on the Motion to Dismiss, the City determined to raise this issue in connection with the hearing instead of filing a Motion to Reconsider.

[2] Although ***Virginia*** did discuss whether the remedial measure of a separate military school for women would eliminate the effects of past discrimination, that discussion took place ***after*** the determination of an equal protection violation arising from the prohibition on women at the Virginia Military Institute. ***Virginia***, 518 U.S. at 547. Here, if the ordinance does not violate women's equal protection rights there is no need to evaluate whether any remedial measure would eliminate the effects of past discrimination.

ground for race or national origin classifications, it also acknowledged: "[p]hysical differences between men and women, however, are enduring: The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." ***Id.*** (citations and internal quotations omitted) (alteration in original).

In fact, since ***Virginia*** the Supreme Court has upheld a sex-based distinction having no relation to compensation for prior inequities in the face of an equal protection challenge. In ***Tuan Anh Nguyen v. INS***, 533 U.S. 53 (2001), the Supreme Court considered whether an immigration law providing different standards for acquiring citizenship by a child born outside of the United States to unwed parents, one of whom is a citizen of the United States and one of whom is an alien. Under the law at issue, if the father was the citizen and the mother was the alien, the child was required to satisfy requirements to establish citizenship not imposed if the mother was the citizen and the father was the alien. ***Id.*** at 59-60. The Supreme Court found no equal protection violation in this differential treatment, noting the reality that contrary to fathers, mothers are always present at the birth of their child and parenthood can be established by the birth itself. ***Id.*** at 68. The Supreme Court rejected the plaintiff's assertion the law embodied a gender-based stereotype, stating:

> There is nothing irrational or improper in the recognition that at the moment of birth -- a critical event in the statutory scheme and in the whole tradition of citizenship law -- the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. This is not a stereotype. *See* ***Virginia***, 518 U.S. at 533 ('The heightened review standard our precedent establishes does not make sex a proscribed classification . . . . Physical differences between men and women . . . are enduring').

Id. Here, there are enduring physical differences between men and women that support the City's distinction between male and female toplessness, as discussed further below.

It is especially instructive that, since ***Virginia***, both federal and state courts have applied ***Virginia*** in evaluating equal protection challenges to topless bans applicable only to women, and in each case have rejected the equal protection arguments and upheld the women-only topless bans. For example, in ***Ways v. City of Lincoln***, 331 F.3d 596, 600 (8th Cir. 2003), the Eighth Circuit applied ***Virginia*** to an argument that a nudity ordinance violated the right to equal protection by permitting men to expose their breasts but not women. The court noted that arguably the heightened scrutiny standard of ***Virginia*** did not apply because the "discrimination" was "based on a real physical difference between men and women's breasts, thus men and women were not similarly situated for equal protection purposes." ***Ways***, 331 F.3d at 600 n.3. Nevertheless, the court determined the public nudity ordinance satisfied ***Virginia***'s requirement to show the classification was substantially related to the achievement of important government objectives, citing the "city's interests in preventing the secondary adverse effects of public nudity and protecting the order, morality, health, safety, and well-being of the populace." ***Id.*** at 600.

In ***Buzzetti v. City of New York***, 140 F.3d 134, 135 (2d Cir. 1998), the Second Circuit considered an equal protection challenge to an ordinance applicable to female topless entertainment but not to male topless entertainment. The court set out the standard of review from ***Virginia***, and noted its explicit determination that sex is not a proscribed classification. ***Id.*** at 141. The court noted "[s]tatutes that fairly can be seen as responding to clear sexual differences between men and women are among those laws that courts have upheld, despite the gender-based classifications contained in them." ***Id.*** (citations omitted). Applying those precedents, the court held: "New York City's objectives of preventing crime, maintaining property values, and preserving the quality of urban life, are important. We also believe that the

Zoning Amendment's regulation of female, but not male, topless dancing, in the context of its overall regulation of sexually explicit commercial establishments, is substantially related to the achievement of New York City's objectives." ***Id.*** at 142. The court further observed:

> Given New York City's objective, which is not to oppress either gender's sexuality but to control effects that flow from public reaction to the conduct involved, we must recognize that the public reactions to the exhibition of the female breast and the male breast are highly different. The male chest is routinely exposed on beaches, in public sporting events and the ballet, and in general consumption magazine photography without involving any sexual suggestion. In contrast, public exposure of the female breast is rare under the conventions of our society, and almost invariably conveys sexual overtones. It is therefore permissible for New York City, in its effort to achieve the objectives of the Zoning Ordinance, to classify female toplessness differently from the exhibition of the naked male chest. This does not constitute a denial of equal protection.

Id. at 143; *see also* ***City of Jackson v. Lakeland Lounge***, 688 So. 2d 742 (Miss. 1996) (issued after, but not citing, ***Virginia***, and rejecting Equal Protection Clause challenged to ordinance banning only female toplessness).

In ***C.T. v. State of Indiana***, 939 N.E.2d 626, 627 (Ind. App. 2010), the Court of Appeals of Indiana applied ***Virginia*** in the context of a delinquency petition involving a minor cited with public nudity after baring her breasts in public. The plaintiff argued the state's public nudity statute violated the Equal Protection Clause of the Fourteenth Amendment because it criminalized the public display of female, but not male, nipples. ***Id.*** at 628. After quoting extensively from ***Virginia***, the court first concluded preserving order and morality remained an important governmental objective, and held "the statute furthers the goal of protecting the moral sensibilities of that substantial portion of Hoosiers who do not wish to be exposed to erogenous zones in public." ***Id.*** at 630. The court read the plaintiff's argument as requesting it to "declare by judicial fiat that the public display of fully-uncovered female breasts is no different than the

public display of male breasts, when the citizens of Indiana, speaking through their elected representatives, say otherwise. This we will not do." ***Id.*** at 629-30. The court proceeded to distinguish cases, like ***Virginia***, finding an equal protection violation where sex-based distinctions disadvantaged women:

> It is also well worth noting that there is no indication that the public nudity statute is in any way invidious. The statute does not seem to disadvantage women in any significant way, and, indeed, C.T. does not claim that it does. The public nudity statute does not demean women or materially affect their 'equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.' ***United States v. Virginia***, 518 U.S. 515, 532, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). This is in stark contrast to those cases where an infringement of rights or serious deprivation of opportunities has been the result of a gender-based regulation. *See, e.g.*, ***J.E.B. v. Alabama ex rel T.B.***, 511 U.S. 127, 146, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) (concluding that the Equal Protection Clause prohibits discrimination in jury selection based on gender), ***Miss. Univ. for Women v. Hogan***, 458 U.S. 718, 733, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982) (concluding that state university's policy of excluding males on basis of gender violates Equal Protection Clause). Because Indiana's public nudity statute serves the important governmental objective of preserving order and morality and does not disadvantage women in any significant way, we conclude that it does not run afoul of the Equal Protection Clause. In so doing, we join the overwhelming majority of courts who have rejected similar challenges. *See, e.g.*, ***Ways v. City of Lincoln***, 331 F.3d 596 (8th Cir. 2003); ***Buzzetti v. City of New York***, 140 F.3d 134 (2nd Cir. 1998); ***Biocic***, 928 F.2d at 112 (4th Cir. 1991); ***Craft v. Hodel***, 683 F. Supp. 289 (D. Mass 1988).

Id. at 630.

In ***City of Albuquerque v. Sachs***, 135 N.M. 578, 579 (N.M. App. 2004), the Court of Appeals of New Mexico considered a challenge under the state's Equal Rights Amendment to a city ordinance prohibiting only women from showing their breasts in public. The court found cases from across the country "convincingly make the point that prohibiting public exposure of the female breast but not the male breast does not operate to the disadvantage of women" and does not violate federal and state equal protection provisions. ***Id.*** at 582. Finding such cases

"generally uphold the sex-based distinction on the basis of the differing physical characteristics of men and women," the court was persuaded that "the physical characteristic distinctions made by the City Ordinance do not operate to the disadvantage of women." ***Id.*** at 583. The court observed: "The City Ordinance does not prohibit public nudity by women while allowing public nudity by men. It recognizes that females and males have different anatomies, so the objective is accomplished in a non-discriminatory manner. In this context, we agree with the United States Supreme Court that, 'the two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.' ***United States v. Virginia***, 518 U.S. 515, 533, 135 L. Ed. 2d 735, 116 S. Ct. 2264 (1996) (internal quotation marks and citation omitted). We therefore hold that the City Ordinance does not make an invidious gender classification that operates to the disadvantage of women and it does not violate the New Mexico Equal Rights Amendment." ***Id.***

In ***State v. Vogt***, 775 A.2d 551, 552 (N.J. App. Div. 2001), the Superior Court of New Jersey, Appellate Division, considered an equal protection challenged to a conviction for nudity in a public place. The court determined applying the nudity ban only to women's breasts was based on "an indisputable difference between the sexes," and was substantially related to the important governmental interest in safeguarding the public's moral sensibilities. ***Id.*** at 557. The court specifically rejected the plaintiff's assertion that ***Virginia***'s requirement of an "exceedingly persuasive" showing in support of a gender classification undermined the precedential value of prior cases upholding gender distinctions in topless bans, and held "the State's position with respect to the difference between the exposure of the female breast and that of the male breast exceedingly persuasive." ***Id.*** at 559.

In sum, following ***Virginia***, multiple federal and state courts continue to uphold topless bans applicable only to women in the face of equal protection challenge. The City has not located (nor have Plaintiffs cited) a single case overturning such a ban as a violation of the right to equal protection as a result of ***Virginia***.

II. Section 17-142 is Premised On Biological Differences Between Men and Women

Although the morphological structure of human breasts is identical between males and females until puberty, during puberty female sex hormones and growth hormones promote the growth and development of the breasts. Breast, https://en.wikipedia.org/w/index.php?title=Breast&oldid=754681966 (last visited Dec. 13, 2016) (citations omitted throughout) (printed version attached hereto as Exhibit 1). Breasts are composed principally of adipose, glandular, and connective tissues, and hormone receptors in these tissues cause their size and volume to fluctuate in response to hormonal changes at thelarche (sprouting of the breasts), menstruation, pregnancy, lactation, and menopause. ***Id.*** Although the primary function of female breasts is the feeding of an infant, they also have social and sexual characteristics. ***Id.*** Female breasts can figure prominently in a woman's perception of her body image and sexual attractiveness. ***Id.*** In Western culture, breasts have a hallowed sexual status, arguably more fetishized than either sex's gentialia. ***Id.***

Wikipedia's Breast article contains the following further description of female breasts:

> Breasts and especially the nipples are among the various human erogenous zones. They are sensitive to the touch as they have many nerve endings; and it is common to press or massage them with hands or orally before or during sexual activity. Some women can achieve an orgasm from such activities.
>
> Research suggests that the sensations are genital orgasms caused by nipple stimulation, and may also be directly linked to 'the genital area of the brain.'

> Sensation from the nipples travels to the same part of the brain as sensations from the vagina, clitoris and cervix. Nipple stimulation may produce uterine contractions, which then produce a sensation in the genital area of the brain. In the ancient Indian work the *Kama Sutra*, light scratching of the breasts with nails and biting with teeth are considered erotic. During sexual arousal, breast size increases, venous patterns across the breasts become more visible, and nipples harden. Compared to other primates, human breasts are proportionately large throughout adult females' lives. Some writers have suggested that they may have evolved as a visual signal of sexual maturity.
>
> Many people regard the female human body, of which breasts are an important aspect, to be aesthetically pleasing, as well as erotic. Research conducted at the Victoria University of Wellington showed that breasts are often the first thing men look at, and for a longer time than other body parts. The writers of the study had initially speculated that the reason for this is due to endocrinology with larger breasts indicating higher levels of estrogen and a sign of greater fertility, but the researchers said that 'Men may be looking more often at the breasts because they are simply aesthetically pleasing, regardless of the size.'
>
> Many people regard bare female breasts to be erotic, and they can elicit heightened sexual desires in men in many cultures. Some people show a sexual interest in female breasts distinct from that of the person, which may be regarded as a breast fetish. A number of Western fashions include clothing which accentuate the breasts, such as the use of push-up bras and decollete (plunging neckline) gowns and blouses which show cleavage.

Id. Significantly, this Breast article from Wikipedia relates to female breasts, and there is no separate article relating to the male breast.

Research has demonstrated that after puberty the tactile sensitivity of all areas of a woman's breasts is significantly greater than a man's. J.E. Robinson & R.V. Short, Changes if breast sensitivity at puberty, during the menstrual cycle, and at parturition, British Medical Journal (1977) 1, 1188-1191 (attached as Exhibit 2). In a seminal study of human sexual interactions, it was reported that 98% of couples engaged in manual stimulation of the female breast, and 95% engaged in oral stimulation of the female breast, but there was no discussion of stimulation of the male breast. Data from Alfred Kinsey's studies, Kinsey Institute at Indiana

University, http://www.indiana.edu/~kinsey/research/ak-data.html#foreplay (last visited December 15, 2016) (printout attached as Exhibit 3).

In this case, the City Council heard testimony from a graduate student at Colorado State University, explaining that women's breasts were developed to signal men that they were fertile and ready for sex, and that female areola release pheromones that attract males, signaling sex. [Fort Collins City Council Meeting, 10/20/2015, Agenda Item 18, at 11:21-12:6, 12:24-13:3 (relevant portions attached as Exhibit 4)]. By contrast, he stated that male nipples are "as important to the body as an appendix, simply being left-over DNA in an embryo before sex is even determined in utero." [***Id.*** at 12:7-9]. As a result, he testified, "we cannot say that male and female chests are equal." [***Id.*** at 12:10-11].

These physiological and sexual distinctions between male and female breasts provide either implicit or explicit support for the myriad decisions, cited in the Motion to Dismiss briefing, upholding female toplessness bans in the face of equal protection challenges. In fact, in one of those cases the defendant city presented evidence of such distinctions, including a doctor's testimony that distinguishing between male and female breasts in defining nudity was "certainly consistent with what we know medically about human sexual response." ***Hang On, Inc. v. City of Arlington***, 65 F.3d 1248, 1256 (5th Cir. 1995);[3] *see also* ***MJR'S Fare v. Dallas***, 792 S.W.2d 569, 575 (Tex. App. Dallas 1990) (considering expert testimony regarding the physiological and sexual distinctions between male and female breasts, the internal and external differences between male and female breasts, and the fact that the female breast, but not the male

[3] While acknowledging this testimony, the Fifth Circuit also felt compelled to comment on the energy expended on these issues, stating "[c]ourts need no evidence to prove self-evident truths about the human condition – such as water is wet." ***Id.*** at 1257.

breast, is a mammary gland, in rejecting an equal protection challenge to a state law defining nudity to include only the female breast).

In other contexts, courts citing ***Virginia*** continue to acknowledge that the biological differences between men and women may still provide a legal reason for differential treatment of the sexes. *See, e.g.*, ***Nguyen***, 533 U.S. at 64 ("Here, the use of gender specific terms takes into account a biological difference between the parents. The differential treatment is inherent in a sensible statutory scheme, given the unique relationship of the mother to the event of birth."); ***G. G. v. Gloucester Cnty. Sch. Bd.***, 822 F.3d 709 (4th Cir. 2016) ("Thus, Title IX's allowance for the separation, based on sex, of living facilities, restrooms, locker rooms, and shower facilities rests on the universally accepted concern for bodily privacy that is founded on the biological differences between the sexes. This privacy concern is also linked to safety concerns that could arise from sexual responses prompted by students' exposure to the private body parts of students of the other biological sex."); ***Bauer v. Lynch***, 812 F.3d 340, 350 (4th Cir. 2016) ("Men and women simply are not physiologically the same for the purposes of physical fitness programs. The Supreme Court recognized as much in its discussion of the physical training programs addressed in the ***VMI*** litigation, albeit in the context of a different legal claim than that presented today. The Court recognized that, although Virginia's use of 'generalizations about women' could not be used to exclude them from ***VMI***, some differences between the sexes were real, not perceived, and therefore could require accommodations. *See* ***VMI***, 518 U.S. at 550 & n.19. To be sure, the ***VMI*** decision does not control the outcome of this appeal. Nevertheless, the Court's observation therein regarding possible alterations to the physical training programs of the service academies informs our analysis of Bauer's Title VII claims. That is, physical fitness standards

suitable for men may not always be suitable for women, and accommodations addressing physiological differences between the sexes are not necessarily unlawful."); ***Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.***, 97 F. Supp. 3d 657, 670 (W.D. Pa. 2015) ("As such, separating students by sex based on biological considerations—which involves the physical differences between men and women—for restroom and locker room use simply does not violate the Equal Protection Clause.").

In this case, Plaintiffs urge this Court to disregard the differences between male and female breasts, and to treat as equal things that are not. As the Supreme Court observed:

> To fail to acknowledge even our most basic biological differences -- such as the fact that a mother must be present at birth but the father need not be -- risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

Nguyen, 533 U.S. at 73. In this case, Plaintiff urge this Court to disregard the most basic biological differences between the breasts of men and women and instead mechanistically classify Section 17-142's gender distinction as a sex stereotype. Contrary to Plaintiffs' inflammatory characterization and rhetoric, Section 17-142 is not marked by misconception or prejudice and does not show disrespect for women. The difference between men and women in relation to breasts is a real biological one, and equal protection does not forbid cities and states from acknowledging this difference in their public nudity laws.

Dated this 16th day of December, 2016.

Respectfully submitted,

/s/ Gillian Dale

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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on the 16th day of December, 2016, I electronically filed the foregoing **DEFENDANT'S HEARING BRIEF** 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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