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 HEARING BRIEF

Plaintiffs, by and through their attorneys, David A. Lane and Andy McNulty, hereby file this response to Defendant's Hearing Brief and state as follows:

1. Post-*Virginia* "real" differences cannot justify discrimination based on sex-stereotyping.

The Court's recitation of the current state of equal protection jurisprudence in its Order on Defendant's Motion to Dismiss [Doc. 37] is correct. The clear holding of *United States v. Virginia*, 518 U.S. 515, 531 (1996) (and its precedential impact) is that differences between the genders cannot be used "to create or perpetuate the legal, social, and economic inferiority" of one sex, however, they may be used to "compensate" one sex for the disabilities or inequities that that sex has historically suffered. *Id*. at 531. Importantly, *Virginia* held that sex stereotyping by the state is impermissible even in the context of "real" differences between the sexes. Since *Virginia*, the Court has expanded and reaffirmed this jurisprudential shift.[1]

[1] *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination*, 85 N.Y.U. L. Rev. 83 (2010).

In *Nguyen v. INS*, 533 U.S. 53 (2001), both the majority and dissent agreed that if the statute had reflected or reinforced sex-role stereotypes, it would have been unconstitutional - even in a case such as this, which involved "real" differences. Although the Court in *Nguyen* viewed the sex-based citizenship statute as a simple reflection of biological realities, it did not contend that biological differences trump or preclude anti-stereotyping analysis. Indeed, the Court held that the statute passed constitutional muster only after declaring (repeatedly) that it did not manifest sex stereotypes. *Id.* at 68-70. Thus, although the statute in *Nguyen* met a different fate than the statute in *Virginia*, the Court did not repudiate the doctrinal developments made in the earlier case; in fact, it reiterated the understanding that sex stereotyping by the state is impermissible even in the context of "real" differences.

Since *Nguyen*, the Court has reinforced its departure from the "real" differences doctrine it more fully elucidated in *Virginia*. In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Court affirmed that there are biological sex differences between men and women, focusing specifically on pregnancy and noting that men and women are differently situated in relation to pregnancy (and that giving birth disables mothers in ways that fathers simply do not experience). The Court cautioned using these "real" differences to implement laws that look as though they are benefitting women, but that are in reality simply based on sex-stereotypes. Particularly, the Court highlighted the potentially invidious discriminatory nature of parental leave. The Court noted "[p]arental leave for fathers … is rare," and even "where child-care leave policies do exist, men … receive notoriously discriminatory treatment in their requests for such leave." *Id.* at 731. Women frequently encounter the opposite form of discrimination: They are encouraged to take "extended" maternity leave, and the fact that they take the leave, or simply the assumption that they will, is then used to justify sex discrimination in hiring, retention, and promotion. In fact, the Court observed that throughout American history, "denial or curtailment of

women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second," and that "this prevailing ideology about women's roles" has justified substantial "discrimination against women when they are mothers or mothers-to-be." *Id.* at 736. The Court signaled that utilizing these "real" differences between men and women to justify laws that ultimately harmed women would violate the equal protection clause, reaffirming its holding in *Virginia*.

2. Section 17-142 is a discriminatory classification based on sex-stereotypes.

Plaintiffs dispute that there are "real" differences that could rationalize the criminalization of the female breast imposed by Section 17-142. *See* Reena N. Glazer, *Women's Body Image and the Law*, 43 Duke L.J. 113, 130 (1993) (noting that, from a physiological perspective, male breasts have the same erotic potential as women's). However, even accepting as true Defendant's claim that there are "real" differences between the male and female breast that could rationalize criminalizing exposure of the female breast while not criminalizing exposure of the male breast, the criminalization of exposure of the female breast is based on sex-stereotypes and, therefore, it cannot pass muster under the Court's evolved equal protection jurisprudence post-*Virginia*.

The evidence, both presented at the hearing and historically, supports that the criminalization of female toplessness, but not male toplessness, is based on sex-stereotypes. Just like extended pregnancy leave in *Hibbs*, the sexualization of the female breast has long been the epicenter of sex discrimination in the United States. For instance, there is a long history of sexual harassment in the workplace wherein women's bodies are sexualized. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Jenson v. Eleventh Taconite Co.*, 824 F.Supp. 847, 889 (D. Minn. 1993); *EEOC v. Blue Ox Rest.*, No. 82 C 1985, 1986 U.S. Dist. LEXIS 29263, at *43 (N.D. Ill. Feb. 14, 1986) (finding that the female employees were sexually harassed by unwanted "rubbing [of] their breasts"). Further, there is a long history in the United States of sexualizing the female

breast and blaming women for men's unwanted sexual advances based on their appearance. *See* Vernon R. Wiehe, et al., *Intimate Betrayal: Understanding and Responding to the Trauma of Acquaintance Rape* 32 (1995); Lynda Lytle Holmstrom, *The Victim of Rape: Institutional Reactions* 39 (1978).

Globally, however, there is little history of female breasts as sexual objects. Dr. Roberts testified at the hearing that the sexualization of the breast is a uniquely western and American phenomenon (it is important to note that her testimony on this fact was unrebutted); historical and scientific sources support her testimony. Marilyn Yalom, *A History of the Breast*, 3 (1997) (noting that in many cultures in Africa and the South Pacific, where women have always gone with their breasts uncovered, the breast has not taken on a predominantly erotic meaning and that the assumptions about the female breast's inherent sexuality taken for granted in the United States "prove especially arbitrary when we adopt a historical perspective").[2] Given that the sexualization of the female breast is based purely on sex stereotypes developed in American culture, any "real" differences between the male and female breast cannot justify the discrimination enshrined in Section 17-124 based on the Supreme Court's evolved equal protection jurisprudence. Ultimately, "'[i]nherent 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." *Virginia*, 518 U.S. at 533. Section 17-142 does not celebrate any differences between men and women; it serves only to denigrate women.

3. Defendant cannot justify its discrimination.

[2] Defendant, in its Hearing Brief, cites Wikipedia as proof that breasts are inherently sexual organs. Plaintiffs respectfully ask that this Court not rely on a source that is neither scientific nor reliable. *See* The Colbert Report, *The Word-Wikiality*, COMEDY CENTRAL (July 31, 2006), http://www.cc.com/video-clips/z1aahs/the-colbert-report-the-word---wikiality.

At the hearing, Defendant offered the same justifications that were utilized to justify discrimination against African-Americans in the 1950s and 1960s, *Brown v. Board of Education*, 347 U.S. 483 (1954), and gays and lesbians in the 1980s and 1990s, *Romer v. Evans*, 517 U.S. 620 (1996): namely, that barring discrimination will disrupt the public order and that children will suffer harm as a result. The reasons Defendant advances were also proffered to argue against the admission of women to state universities in the 1950s. *See Virginia*, 518 U.S. at 537-38 ("Debate concerning women's admission as undergraduates at the main university continued well past the century's midpoint. Familiar arguments were rehearsed. If women were admitted, it was feared, they would encroach on the rights of men [and] there would be new problems of government, perhaps scandals[.]") (quotations omitted)).

This Court must determine whether Defendant's justifications are "exceedingly persuasive." *Id.* at 533. In doing so, Defendant must not only show that the government interests allegedly served by Section 17-142 are important, but Defendant also must show that Section 17-142 advances these interests. *Id.* at 535 ("'benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded"). There is "a strong presumption that gender classifications are invalid[.]" *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring). "The burden of justification is demanding and it rests entirely on the State." *Virginia*, 518 U.S. at 553.

3. Fort Collins' interest in public order (presented at the hearing without supporting empirical evidence) cannot justify the facially discriminatory Section 17-142.

The public order arguments advanced by Defendant cannot justify laws that discriminate on the basis of sex, including Section 17-142, because Defendant has not established that: (1)

public order is a valid governmental interest in Fourteenth Amendment jurisprudence and (2) Section 17-142 advances public order in any way.

First, Defendant has couched a government interest in morality in the terms of "public order[,]" arguing that Section 17-142 would help maintain public order by preventing outrage at such a violation of community norms. This is not a compelling government interest that can justify a discriminatory law under the current Fourteenth Amendment jurisprudence. "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice[.]" *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. at 216 (Stevens, J., dissenting)) (further stating that "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack"); *see also Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 745-46 (5th Cir. 2008) (holding, in a challenge pursuant to the Fourteenth Amendment, that "[t]hese interests in 'public morality' cannot constitutionally sustain the statute after *Lawrence*"); *In re Kandu*, 315 B.R. 123, 148 (Bankr. W.D. Wash. 2004) ("Basing legislation on moral disapproval of same-sex couples may be questionable in light of *Lawrence*."). The argument from public order is simply a modified reiteration of the bare public morality argument. It is an argument from popular prejudice. The United States Supreme Court confronted the public order argument, in a racial context, more than two decades ago. In *Palmore v. Sidoti*, 466 U.S. 429 (1984), in which custody of a white child was taken away from a mother because she married an African-American man, the Court unequivocally enunciated the principle that while the Constitution must live with prejudice, it cannot ratify it. Using popular antipathy against a group to justify policies that encourage and institutionalize that antipathy is the worst sort of vicious circle and would -- if generalized to racial, gender, or religious groups -- throw the country back to the days of American apartheid.

Defendant's argument at the hearing regarding the unwanted exposure to female toplessness (and such exposure's offense to a majority of the town citizen's sensibilities) has been made previously and rejected by the United States Supreme Court in the context of the Fourteenth Amendment's protections. *See Loving v. Virginia*, 388 U.S. 1 (1967); *Romer*, 517 U.S. at 629; *United States v. Windsor*, 133 S.Ct. 2675 (2013); *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). In fact, the Supreme Court has consistently refused to burden individual rights out of concern for the protection of "unwilling recipients." *See e.g., Carey v. Population Servs. Int'l*, 431 U.S. 678, 700-02 (1977); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71-72 (1983); *Cohen v. California*, 403 U.S. 15, 21 (finding the burden falls on the viewer to "avoid further bombardment of their sensibilities simply by averting their eyes"); *Boos v. Barry*, 485 U.S. 312, 322 (1988) (holding there is a "longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience"); *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 771-72 (1994) (striking down provision that banned displays of images observable to those inside abortion clinic); *National Socialist Party v. Skokie*, 432 U.S. 43 (1977). Moreover, every legislative attempt to provide equality for all citizens carries with it the price of alienating those who oppose such equality. Affording African-Americans the ability to secure decent housing or public accommodations meant that white racists were more likely to face situations in which they had to associate with people they hated. In the context of gender, the Supreme Court has found that the state's compelling interest in equality of the sexes outweighs the incidental burdens placed on the associational and expressive freedoms of those who opposed such equality. *See New York State Club Ass'n v. City of N.Y.*, 487 U.S. 1 (1988); *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

The Supreme Court has specifically held that, in the context of the Fourteenth Amendment, discrimination cannot be justified by relying on private biases (which underlie Defendant's

asserted interest in maintaining "public order"). In *Palmore*, 466 U.S. at 429, a white mother who had married an African-American man was stripped of the custody of her children, based upon the harm state officials believed would come to the children from societal disapproval of interracial marriages. *Id*. at 430-31. The Supreme Court, without disputing that children of interracial marriages might suffer social prejudice, unequivocally refused to permit that prejudice to be used as a reason for removing the children from their mother's custody. *Id*. at 432. The now famous maxim of *Palmore* is that "private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.* at 433. This principle was extended to gender discrimination in *J.E.B. v. Alabama ex rel T.B.*, wherein the Court used the same reasoning to hold that the equal protection clause forbids peremptory challenges to jurors on the basis of gender. 511 U.S. at 130-31. The Court held that intentional gender discrimination is unconstitutional where "the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *Id.* at 131. Accepting at face value Defendant's assertions that the maintenance of public order would allow private biases to justify discrimination in contravention of Supreme Court precedent.

Secondly, at the hearing, Defendant presented no empirical data regarding the negative effects on the public order that would be caused by enjoining Section 17-142. When public order is used as a justification for enacting a law with no empirical evidence supporting it, there is no principled way to distinguish bare moral interests from invidious prejudice. Without the requirement that a moral interest be reasonably connected to some empirical effect on the public welfare, Defendant's interest in public order is nothing more than an aggregation of private biases dressed up in righteous rhetoric. The most compelling and perhaps obvious illustration of this point is found in the "miscegenation" laws that once existed in many states. Those laws were a reflection of deeply held beliefs about the immorality of interracial sexual relationships. Often,

those moral beliefs were cast in terms of public order. In *Loving*, however, the Supreme Court, unanimously and definitively repudiated any legitimate government interest in such laws. At issue in *Loving* was a Virginia statute that prohibited so-called interracial marriages. *Loving*, 388 U.S. at 1. The plaintiffs in *Loving* were Mildred Jeter, an African-American woman, and Richard Loving, a white man, who were married in the District of Columbia and then returned to reside in Virginia. Subsequently, Jeter and Loving were charged and convicted of violating Virginia's ban on intermarriage. In considering Jeter and Loving's challenge to Virginia's statutory ban on intermarriage, the Court found that there was "patently no legitimate overriding purpose" for the classification at issue. *Id.* at 11. Because of the invidious nature of the classification, the Virginia statute was struck down. *Id.* at 12; s*ee also Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993) (invalidating under the Free Exercise Clause a municipal ordinance directed against a minority religious practice deemed "inconsistent with public morals, peace, or safety" when the law was under-inclusive as to both peace and safety). Defendant's justifications for Section 17-142 suffer the same infirmary as the justification raised in *Loving*: they are backed by nothing more than personal predilections that lend themselves to invidious discrimination.

There is nothing distinguishing the moral disapproval, in this instance couched as a concern about upsetting "public order," that justifies laws discriminating on the basis of sex, like Section 17-142, from laws, like the one in *Loving*, that discriminate on the basis of race; Defendant has presented no evidence that its assertions that Section 17-142 would upset the public order have any empirical basis At the hearing, the instinctive response of Defendant, and the Court, was that discrimination on the basis of race is irrational while discrimination on the basis of sex is not. That response, however, begs the question. The point at issue is why racial discrimination is irrational, even when supported by centuries of the strongest and most intensely felt moral convictions of a large majority of the public, but discrimination on the basis of sex is

rational. In fact, the reason why racial discrimination is generally considered irrational and invidious is that laws that discriminate on the basis of race inflict considerable harm and realize no discernible benefit to the public welfare. The same can be said of Section 17-142. Defendant has presented no empirical evidence that Section 17-142 provides benefit to citizens of Fort Collins. Plaintiffs, on the other hand, presented evidence of the harms imposed on themselves, other women in Fort Collins, and society by the continued discrimination written into Section 17-142.

Ultimately,

> [m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

Lawrence v. Texas, 539 U.S. 558, 582, 123 S. Ct. 2472, 2486 (2003) (O'Connor, J., concurring) (citing *Department of Agriculture* v. *Moreno,* 413 U.S. 528, 534 (1973); *Romer* , 517 U.S. at 634-635). Plaintiffs ask this Court to reject Defendant's "public order" justification for Section 17-142 as an invalid government interest. However, even assuming "public order" is a valid justification for discrimination; Section 17-142 does not advance this interest.

4. Section 17-142 does not protect children.

The second justification advanced by Defendant for the discrimination enshrined in Section 17-142 was also utilized by the defendants in *Brown* and *Romer*: namely, that children will suffer if discrimination is no longer tolerated. *See Evans v. Romer*, No. 92- CV-7223, 1993 WL 518586, at *2 (Colo. Dist. Ct. Dec. 14, 1993) (enumerating state's asserted compelling interests in state constitutional amendment invalidating all existing and future gay rights ordinances as, inter alia, "promoting the physical and psychological well-being of our children"). Like in *Brown* and *Romer*, the evidence presented at the hearing did not illustrate that the interests of children are served by discrimination. The only evidence presented at the preliminary injunction

regarding children's exposure to nudity illustrates that there are no negative effects for children who view nudity and there may be, in fact, positive effects on children who view non-sexual toplessness (like the toplessness Plaintiffs wish to engage in). Dr. Roberts testified as much, and her expert testimony was unrebutted by Defendant. *See* Paul Okami, et al., *Early Exposure to Parental Nudity and Scenes of Parental Sexuality ("Primal Scenes"): An 18-Year Longitudinal Study of Outcome*, Archives of Sexual Behavior, Vol. 27, No. 4 (1998).

Further, Section 17-142 enshrines gender discrimination, which has a negative effect on children as evidenced by Dr. Roberts' testimony at the preliminary injunction hearing. Enshrined gender discrimination has a particularly negative effect on young girls, who are astute in recognizing discrimination and feel its effects more dramatically. *See* Cristina Spears Brown, *Children's Perceptions of Gender Discrimination*, Developmental Psychology, Vol. 40(5), Sep. 2004, 714-726. Not only does Section 17-142 fail to advance a purported interest in protecting children, it may, in fact, harm them.

5. The enhancement of traffic safety is not served by the gender-based distinction in Section 17-142.

Defendant raised the justification that the City's interest traffic safety is served by Section 17-142 at the hearing through the testimony of Jeff Mihelich, the Fort Collins' Deputy City Manager. While traffic safety is certainly a legitimate government interest, there is no evidence that this interest is advanced by Section 17-142's discrimination. The Supreme Court has found that even statistically significant evidence that a gender-based regulation would affect traffic safety could not justify sex-based discrimination when it would only result in a 2% reduction in traffic violations. *See Craig v. Boren*, 429 U.S. 190, 201-202 (1976). At the hearing, Defendant presented *no* empirical evidence at the hearing that Section 17-142 would have an effect on traffic safety, let alone a statistically significant effect of 2% on traffic safety. In fact, the City's witness

who testified that traffic safety would be compromised by the appearance of topless women at public places conceded that a scantily clad woman standing adjacent to a roadway, who was in compliance with Section 17-142, would have the same negative effect on traffic safety as a topless woman. Section 17-142 does nothing to further the City's asserted interest in traffic safety.

3. Fort Collins has no legitimate interest in regulating the personal dress of its female citizens at large.

Former Justice John Paul Stevens, while sitting as a circuit judge on the Seventh Circuit, noted that blanket restrictions on personal dress and grooming are readily be condemned as unconstitutional, stating

> We do not have a case in which the sovereign insists that every citizen must wear a brown shirt to demonstrate his patriotism. Fortunately, intervention of the federal judiciary has not been required during the brief history of our Republic in order to avoid intolerable instances of required conformity like that following the Manchus' invasion of China in 1644, or the official prohibition of beards during the reign of Peter the Great.

Miller v. Sch. Dist., 495 F.2d 658, 665 n.25 (7th Cir. 1974). Other courts have acknowledged that an intrusion into the personal rights of citizens' dress, like the one imposed by Section 17-147, cannot withstand even rational basis review.

> There is and can be no authority in the state to punish as criminal such practices or fashions as are indifferent in themselves, and the observance of which does not prejudice the community or interfere with the proper liberty of any of its members. No better illustration of one's rightful liberty in this regard can be given than the fashion of wearing the hair. If the wearing of a queue can be made unlawful, so may be the wearing of curls by a lady or of a mustache by a beau, and that state may, at its discretion, fix a standard of hair-dressing to which all shall conform. The conclusive answer to any such legislation is, that it meddles with what is no concern of the state, and therefore invades private right.

De Weese v. Palm Beach, 812 F.2d 1365, 1369 (11th Cir. 1987) (quoting *Ho Ah Kow v. Nunan*, 5 SAWY. 552 (C.C.D. Cal. 1879)); s*ee also Lansdale v. Tyler Junior Coll.*, 470 F.2d 659, 663 (5th Cir. 1972) (en banc) (striking down a junior college regulation prescribing the length of hair for adult college students as unconstitutional).

In *De Weese*, the Eleventh Circuit struck down as not rationally related to a legitimate government interest an ordinance that forbid men from being topless in a beachside town. The interests asserted by the town were "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." *Id.* The Court ultimately held that "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 analysis. *Id*. at 1369. Such a drastic and sweeping prohibition, like the one in *De Weese*, is at issue in this case. The personal predilections of the members of Fort Collins' town council (and its citizens at large) underpin this blanket prohibition of female toplessness and such predilections cannot form the basis for an important government interest.

6. Colorado's Equal Rights Amendment supplies an independent basis for enjoining Section 17-142.

Colorado's Equal Rights Amendment ("ERA") states "[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). Fort Collins is a subdivision of the State of Colorado and it is undeniable that Section 17-142 denies women of a right enjoyed by men simply on the basis of their sex. Since its enactment, courts in Colorado have held that all sex-based classifications are subject to strict scrutiny under the Equal Rights Amendment. *See R. McG. v. J.W.*, 200 Colo. 345 (Colo. 1980); *Colo. Civil Rights Com. v. Travelers Ins. Co.*, 759 P.2d 1358,

1363 (Colo. 1988). As outlined above, Section 17-142 cannot withstand intermediate scrutiny. For the same reasons, Section 17-142 cannot withstand the even more exacting scrutiny required by Colorado's ERA. Even if this Court holds that Section 17-142 does not violate the Fourteenth Amendment of the United States Constitution, it is clear that it violates Colorado's ERA.

6. Enjoining Section 17-142 represents a compromise that will serve Defendant's interests.

Even with the imposition of an injunction, Defendant will be able to prevent female toplessness that upsets the public order and that would harm children through the enforcement of Colorado's Public Indecency and Indecent Exposure statutes. *See* C.R.S. § 18-7-301 (Public Indecency); C.R.S. § 18-7-302 (Indecent Exposure). Colorado's Public Indecency statute criminalizes "[a]ny person who performs... in a public place or where the conduct may reasonably be expected to be viewed by members of the public... [a] lewd exposure of an intimate part... of the body, not including the genitals, done with intent to arouse or to satisfy the sexual desire of any person." C.R.S. § 18-7-301. An "intimate part" is defined as "the external genitalia or the perineum or the anus or the buttocks or the pubes or the breast of any person." C.R.S. § 18-3-401. Colorado's indecent exposure statute criminalizes any person who "knowingly exposes his or her genitals to the view of any person under circumstances in which such conduct is likely to cause affront or alarm to the other person with the intent to arouse or to satisfy the sexual desire of any person." C.R.S. § 18-7-302. Both of these statutes (and the Public Indecency statute, in particular) would prevent any purposefully sexualized exposure of the female breast. Defendant contends that the exposure of a woman's sexualized breasts will jeopardize public order and harm children. Plaintiffs are already prohibited from exposing their breasts in a sexual manner by state law. Section 17-142 is a solution in search of a problem and should be enjoined.

DATED this 26th day of December, 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