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.

REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANT'S HEARING BRIEF

Defendant City of Fort Collins, Colorado (the "City"), through its undersigned counsel, hereby respectfully submits this Reply to Plaintiffs' Response to Defendant's Hearing Brief:

1. First, Plaintiffs argue post-***United States v. Virginia,*** 518 U.S. 515 (1996), "real" differences cannot justify discrimination based on sex-stereotyping. [*See* Plaintiffs' Response, at 1-3]. Plaintiffs over-interpret ***Virginia***. Initially, Plaintiffs ignore the Supreme Court's specific language celebrating the "inherent differences between men and women." [*See* Hearing Brief, at 2]. Next, Plaintiffs also inappropriately and exclusively rely on a law review article for their contention the Supreme Court has "expanded and reaffirmed this jurisprudential shift." Indeed, as Defendant has argued, the gravamen of the Equal Protection doctrine precluding sex-stereotyping derives from the antiquated traditional notion that men and women have separate spheres—the workplace for men and the home for women. It is this underlying principle that is

the heart of the Equal Protection issue before this Court, as recognized in the Plaintiffs' cited article. *See, e.g.,* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination,* 85 N.Y.U.L.Rev 83, 140-43 (2010). Nothing about ***Virginia*** or any other decision from the Supreme Court has embraced Plaintiffs' remarkable notion that ***any*** distinction between men and women grounded in their inherent differences is constitutionally infirm. Rather, the question is narrower and focuses on whether the distinction inappropriately perpetuates the historical separate-spheres dichotomy between the sexes to such an extent that it denigrates women. The City's Ordinance simply does not do so.

2. Second, Plaintiffs' Response completely ignores the six cases cited by the Defendant decided ***after Virginia*** where both federal and state courts have applied ***Virginia*** in evaluating equal protection challenges to topless bans applicable only to women all upholding such a ban. [*See* Hearing Brief, at 4-8]. Plaintiffs' persistent inability to distinguish this precedent, and the other precedent reaching the same conclusion, should not be ignored by this Court. All but one decision from any court has upheld topless bans on Equal Protection grounds.[1] Plaintiffs have not provided this Court with any basis to depart from this overwhelming and consistent precedent.

3. Third, Plaintiffs suggest the City's Ordinance constitutes a discriminatory

[1] The one contrary decision is a 1991 New York county court decision that is of questionable precedential value. *See* ***People v. David***, 585 N.Y.S.2d 149 (N.Y.Co.Ct. 1991). ***David*** was decided by the County Court of New York, Monroe County which is an intermediate appellate court. While this Court would be bound by a decision of the highest court of a state interpreting state law, this is a trial court where no such deference is shown, particularly on a matter of the interpretation of the United States Constitution. *See, e.g.,* ***TMJ Implants, Inc. v. Aetna, Inc.,*** 498 F.3d 1175, 1171 (10th Cir. 2007) ("A federal court must follow the state's highest court in pronouncing or construing the state's common law, statutory law, or constitutional law. But it owes no deference to state-court interpretation of the United States Constitution."). It is noteworthy that ***David*** appears to have been cited in only a single opinion. The City directs this Court to the comprehensive legal analysis provided in the numerous decisions reaching the contrary conclusion in contrast to ***David's*** truncated analysis.

classification based on a sex-stereotype because according to the Plaintiffs there are not any "real" biological or physiological differences between men's and women's breasts. Initially, this Court should adopt the Fifth Circuit's acknowledgment in this context that there are in fact significant differences between men's and women's breasts in terms of biology and physiology that are not simply based solely on the Plaintiffs' idea of the traditional social construct. *See* ***Hang On, Inc. v. City of Arlington,*** 65 F.3d 1246, 1257 (5th Cir. 1995). Moreover, the City has previously provided this Court with ample precedent and evidentiary support for this unremarkable proposition. [*See* Hearing Brief, at 8-12]. Regardless of whether there is any merit to Plaintiffs' contention that sex-stereotyping explains the different treatment of men's and women's breasts in the United States as a matter of academic study and social discourse, the City has sufficiently established there are legitimate non-sex-stereotype biological and physiological differences between men's and women's breasts. So long as there is some basis for a legislative distinction due to the "inherent differences between men and women," it is justified under the Fourteenth Amendment's Equal Protection Clause.

4. Fourth, Plaintiffs' persistent attempt to link the City's Ordinance to the civil rights movement represents an inappropriate analogy. [*See* Plaintiffs' Response, at 4]. Fundamentally, as established by the City at the hearing, the ***only*** thing the City's Ordinance prevents Plaintiffs from doing is going topless in public in the City. Unlike the broad-based restrictions on social and economic participation and mobility at issue in the cases cited by Plaintiffs, there is no economic impact on Plaintiffs from the Ordinance whatsoever. And any purported social impact on the Plaintiffs is limited to one activity alone. Despite Plaintiffs' rhetoric, careful consideration of the type of discrimination at issue in the civil rights movement and what is at

issue here demonstrates these fundamental differences.[2]

5. Fifth, Plaintiffs argue the City has not supported its public order argument. [*See* Plaintiffs' Response, at 5-10]. Plaintiffs suggest the public order argument is some sort of improper effort to impose the City's morality on the Plaintiffs.[3] As detailed at the hearing through the testimony of Deputy City Manager Jeff Mihelich, Assistant Chief of Police Jerome Schiager, and Manager of Pools Megan Greer, the City does possess a legitimate non-discriminatory basis to believe public order will be detrimentally impacted by allowing topless women anywhere in the City at any occasion, event or location. Plaintiffs' disagreement with the wisdom of the City's consideration of public order is not the equivalent of demonstrating its illegitimacy. Plaintiffs suggest the City has the burden of providing empirical data to support its conclusion that there will be potential negative impacts on public order is illusory. [*See* Plaintiffs' Response, at 8]. Tellingly, Plaintiffs offer absolutely no precedent suggesting a municipality must present empirical data to support a statutory classification on public order or any other grounds. In this instance, because of the long-standing existence of this Ordinance, it was simply not possible for the City to present data about what would occur in Fort Collins if the Ordinance did not exist and women appeared topless publicly.

---

[2] Similarly, Plaintiffs' reliance on First Amendment precedent to suggest the Plaintiffs' anticipated actions of being topless require nothing more than the City's citizens to avert their eyes in similar fashion as First Amendment activity are inapposite in light of this Court's conclusion the Plaintiffs' are not engaged in activity protected by the First Amendment. [*See* Plaintiffs' Response, at 7; Order, at 6-9 (ECF 37)].

[3] Plaintiffs' citations for the proposition government cannot institutionalize private biases or morality are far afield from the actual context of this case. [*See* Plaintiffs' Response, at 7-10]. Importantly, none of the cases Plaintiffs rely upon arise in an Equal Protection context involving a gender classification, none of them involve a topless ban for women or anything analogous, and no prior decision cited by the parties addressing a topless ban in the context of an Equal Protection challenge has ever even implied, let alone held that such a classification constituted an impermissible governmental effort to impose private morality on the public.

6. Sixth, Plaintiffs suggest the City has not justified the Ordinance on the basis of the protection of children. [*See* Plaintiffs' Response, at 10-11]. To the contrary, the City presented evidence at the hearing about the many distinctions made related to the exposure of children to different things in society and how society has also developed many mechanisms to provide parents with information to allow them to make informed decisions as to what their children will be exposed to. The City does not have the burden of establishing actual harm to children from public exposure to the breasts of strangers. Rather, the City's justification of the Ordinance on this basis was to suggest the non-discriminatory intent behind the Ordinance and the rationality for differentiating between what children and adults are ready to view and experience and the importance of allowing parents to make many such decisions for their own children rather than allowing Plaintiffs to do so as the lowest common denominator.

7. Seventh, Plaintiffs contend the City has no legitimate interest in regulating the personal dress of women. [*See* Plaintiffs' Response, at 12-13]. In reality, however, the City is not attempting to legislate particular dress or grooming requirements on anyone as was the issue in the cases cited by Plaintiff. Rather, the City's Ordinance regulates public female toplessness based on the biological differences between male and female breasts for the legitimate governmental concerns of maintaining public order, to protect children, public safety, the quiet enjoyment of private property, and the commercial business interests of the City's downtown, all as articulated with supporting evidence at the hearing before this Court.[4]

[4] Cognizant of this Court's page limitation for replies, this Court's preference for concise briefs, and the prior briefing before this Court, the City does not address every argument raised in the Plaintiffs' Response. The City stands by its arguments, authorities and evidence previously presented to this Court on all such issues. The failure to address a particular argument specifically should not be construed as acquiescence to the argument in any respect whatsoever.

Dated this 6th day of January, 2017.

Respectfully submitted,

/s/ Andrew D. Ringel
Andrew D. Ringel, Esq.
Gillian Dale, Esq.
Christina S. Gunn, Esq.
HALL & EVANS, L.L.C.
1001 Seventeenth Street, Suite 300
Denver, CO 80202-2052
Phone: 303-628-3300
Fax: 303-628-3368
ringela@hallevans.com
daleg@hallevans.com
gunnc@hallevans.com

/s/ John Duval
Carrie M. Daggett, Esq.
John R. Duval, Esq.
Fort Collins City Attorney's Office
300 LaPorte Avenue
Fort Collins, CO 80521
Phone: 970-221-6520
Fax: 970-221-6327
cdaggett@fcgov.com
jduval@fcgov.com

ATTORNEYS FOR DEFENDANT CITY OF FORT COLLINS, COLORADO

CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on the 6th day of January, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

David A. Lane, Esq.
dlane@kln-law.com

Andy McNulty, Esq.
amcnulty@kln-law.com

Jessica K. Peck, Esq.
jessica@jpdenver.com

/s/ Nicole Marion, Legal Assistant to
Andrew D. Ringel, Esq.
Hall & Evans, L.L.C.
1001 Seventeenth Street, Suite 300
Denver, CO 80202-2052
Phone: 303-628-3300
Fax: 303-628-3368
ringela@hallevans.com

ATTORNEYS FOR DEFENDANT