IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FREE THE NIPPLE – FORT COLLINS, BRITTIANY HOAGLAND, and SAMANTHA SIX, Plaintiffs-Appellees,	)	
v.	)	Case No. 17-1103
CITY OF FORT COLLINS, COLORADO Defendant-Appellant.	)	

OPENING BRIEF

On appeal from a ruling granting Plaintiffs' Motion for Preliminary Injunction, by the Honorable R. Brooke Jackson, in the United States District Court for the District of Colorado, Civil Action No. 16-cv-01308-RBJ.

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PRIOR OR RELATED APPEALS

Defendant-Appellant knows of no prior or related appeals.

JURISDICTIONAL STATEMENT

Plaintiffs Free the Nipple – Fort Collins, Brittiany Hoagland, and Samantha Six, filed this action in the United States District Court for the District of Colorado against Defendant City of Fort Collins, Colorado. Plaintiffs brought claims for violation of the First and Fourteenth Amendments to the United States Constitution and the Equal Rights Amendment of the Colorado Constitution. Plaintiffs also filed a Motion for Preliminary Injunction, seeking to enjoin enforcement of the ordinance at issue during the pendency of the case. The District Court exercised federal question jurisdiction pursuant to 28 U.S.C. § 1331.

On February 22, 2017, the District Court issued an Order granting Plaintiff's Motion for Preliminary Injunction based on their Fourteenth Amendment equal protection claim, and enjoined the City from enforcing the ordinance pending a final trial on Plaintiffs' request for a permanent injunction. The Order did not finally dispose of all claims in this matter, as it only decided the Motion for Preliminary Injunction. However, this Court possesses appellate jurisdiction pursuant to 28 U.S.C. §1292(a), providing jurisdiction over appeals from orders granting injunctions.

ISSUE ON APPEAL

Whether the District Court erred in granting Plaintiffs' Motion for Preliminary

Injunction and enjoining the enforcement of a City ordinance that restricts public exposure of certain parts of female breasts in the City of Fort Collins.

SUMMARY OF THE ARGUMENT

The District Court erred in granting Plaintiffs' Motion for Preliminary Injunction. The District Court's legal analysis of the Plaintiffs' Fourteenth Amendment Equal Protection Clause theory is fundamentally erroneous. The District Court admitted its decision was against the overwhelming weight of federal and state precedent addressing similar challenges to municipal ordinances precluding public female toplessness and that it was "going out on [a] lonely limb." [ECF 53 at p.10]. This Court must reverse the District Court, overturn the preliminary injunction, and allow the City of Fort Collins to enforce its entirely reasonable, appropriate, and non-discriminatory ordinance.

STATEMENT OF THE CASE

Plaintiffs Free the Nipple – Fort Collins ("FTN"), Brittiany Hoagland, and Samantha Six filed their Complaint and Jury Demand (the "Complaint") against the City of Fort Collins, Colorado ("the City") on May 31, 2016. [ECF 1]. The Complaint contains three claims for relief challenging Section 17-142 of the Fort Collins Code of Ordinances, which limits, among other things, public exposure of

women's breasts (the "Ordinance").[1] Plaintiffs claim violation of the right to free speech under the First Amendment, the right to equal protection under the Fourteenth Amendment, and the right to equal protection under the Equal Rights Amendment to the Colorado Constitution. Plaintiffs contemporaneously filed a Motion for Preliminary Injunction, requesting an order enjoining the City from enforcing the Ordinance. [ECF 2].

On August 2, 2016, the City filed a Motion to Dismiss, requesting dismissal of each of Plaintiffs' three claims for relief. [ECF 18]. On the same date, the City filed its Response to Plaintiffs' Motion for Preliminary Injunction. [ECF 19]. Following briefing on the Motion to Dismiss and the Motion for Preliminary Injunction, [ECF 30, 31, 35], on October 20, 2016, the District Court issued an Order granting in part and denying in part the Motion to Dismiss. [ECF 37]. The District Court dismissed Plaintiff's First Amendment claim with prejudice, but denied the Motion to Dismiss with respect to the two equal protection claims. [*See id.* at p.14].

The City filed its Answer to the two remaining claims on November 4, 2016. [ECF 38]. On December 19, 2016, the District Court held a hearing on the Motion for Preliminary Injunction. [*See* Reporter's Transcript, Motion for Preliminary

[1] The Ordinance also prohibits the public exposure of the genitals and buttocks of females and males ten years of age or older.

Injunction, 12/19/2016, Appendix Volume 3, p. 153 ("Hearing Transcript")]. The parties each submitted hearing briefs in relation to the preliminary injunction hearing. [ECF 47, 50, 51]. On February 22, 2017, the District Court issued its Order granting the preliminary injunction and enjoining the City from enforcing the Ordinance. [ECF 53]. The City now appeals.

STATEMENT OF FACTS

1. FTN is an unincorporated association of Colorado residents, the female members of which wish to expose their breasts publicly in Fort Collins. [ECF 1, ¶ 10]. The individual Plaintiffs are members of FTN. [ECF 1, ¶¶ 11-12].

2. Prior to October 20, 2015, Section 17-142 of the Fort Collins Code of Ordinances provided: "No person shall knowingly appear in any public place in a nude state of undress such that the genitals or buttocks of either sex or the breast or breasts of a female are exposed." [ECF 1, ¶ 18].

3. In response to a request from Plaintiff Brittiany Hoagland, the City Council reviewed the prior version of the Ordinance and considered two options for modifying it, one of which would keep the restriction on female toplessness but add exceptions, and the other of which would remove any prohibition on female toplessness. [ECF 1 at ¶25; ECF 19-1].

4. At the October 20, 2015, City Council meeting, the City Council heard

public comment on the proposed revisions to the Ordinance, and the comments were overwhelmingly in favor of maintaining a restriction on public toplessness for women. [ECF 19-2].

5. The City Council also considered evidence of an on-line survey conducted by the City Manager's office in relation to the proposed modifications to the Ordinance, and over 60% of the respondents were in favor of restricting female toplessness. [ECF 19-2, 19-3].[2]

6. At the October 20, 2015, meeting, the City Council advanced Ordinance No. 134, to modify Section 17-142 to clarify the restriction on female toplessness and create an exception for breastfeeding, among other things. [ECF 1, ¶¶29-30].

7. Members of the City Council also received numerous phone calls and email messages from members of the public expressing their opinions relating to the proposed revisions to the Ordinance. [ECF 19-2 at pp.4, 87, 89, 92].

8. Among the concerns expressed by the public and by the City Council in connection with the adoption of the amended Ordinance were concerns about maintaining public order, parental rights to control children's exposure to public

[2] The survey was available to anyone with internet access and therefore was not limited to Fort Collins residents.

nudity, promoting public safety, advancing the quiet enjoyment of private property, and the impact on businesses in the City of Fort Collins. [ECF 19-2, 19-3, 19-4; Hearing Transcript].

9. At a meeting on November 3, 2015, the City Council took additional comment on the proposed revisions to Section 17-142 and voted to adopt the version that is at issue in this lawsuit. [ECF 1, ¶ 38; ECF 19-4].

10. The Ordinance as amended now reads:

> No female who is ten (10) years of age or older shall knowingly appear in any public place with her breast exposed below the top of the areola and nipple while located: (1) in a public right-of-way, in an natural area, recreation area or trail, or recreation center, in a public building, in a public square, or while located in any other public place; or (2) on private property if the person is in a place that can be viewed from the ground level by another who is located on public property and who does not take extraordinary steps, such as climbing a ladder or peering over a screened fence, in order to achieve a point of vantage.

The revised Ordinance defines "public place" as follows:

> [A] place in which the public or a substantial number of the public has access, and includes but i[s] not limited to highways including sidewalks, transportation facilities, school[s], places of amusement, parks, playgrounds and the common areas of public and private buildings and facilities, and shall not include any theater, concert hall, museum, school or similar establishment to the extent the same is serving as a performance venue.

[ECF ¶ 30; ECF 19-5].

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a district court's decision to grant a preliminary injunction for abuse of discretion. ***Fish v. Kobach***, 840 F.3d 710, 723 (10th Cir. 2016) (citing ***Heideman v. S. Salt Lake City***, 348 F.3d 1182, 1188 (10th Cir. 2003)). "An abuse of discretion occurs where a decision is premised on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." ***Id.*** (citations and internal quotations omitted). This Court reviews the district court's factual findings for clear error and its conclusions of law *de novo*. ***Id.*** (citing ***Heideman***, 348 F.3d at 1188).

II. THE DISTRICT COURT ERRED IN GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION PURSUANT TO THEIR FOURTEENTH AMENDMENT EQUAL PROTECTION CLAIM

A. FACTORS APPLICABLE TO MOTIONS FOR PRELIMINARY INJUNCTION

In reviewing a motion for a preliminary injunction, a court considers the following four factors:

> (1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest.

Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001). Where the requested relief

would disturb the status quo, a "heightened burden requirement applies" and the movant "must demonstrate not only that the four requirements for a preliminary injunction are met but also that they weigh heavily and compellingly in his favor." ***Id.*** This type of injunction, as well as one that affords the movant all the relief she could recover after a trial on the merits, is "disfavored" and therefore "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." ***Awad v. Ziriax***, 670 F.3d 1111, 1125 (10th Cir. 2012) (quoting ***Summum v. Pleasant Grove City***, 483 F.3d 1044, 1048-49 (10th Cir. 2007)). In such cases, "[a] district court may not grant a preliminary injunction unless the moving party makes a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." ***Id.***

B. PLAINTIFFS DO NOT HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCEEDING ON THE MERITS

The District Court's Order found Plaintiffs had a substantial likelihood of succeeding on the merits of their equal protection claim under the Fourteenth Amendment to the United States Constitution. [ECF 53 at p.10].[3] The District Court

[3] In light of its ruling on the federal claim, the District Court declined to consider Plaintiffs' claim under the Equal Rights Amendment of the Colorado Constitution. [ECF 53 at p.10 n.4]. Accordingly, only the Plaintiffs' Fourteenth Amendment Equal Protection claim is before this Court on appeal.

candidly admitted it was "going out on [a] lonely limb" by finding an equal protection violation in an ordinance prohibiting only female toplessness, and by rejecting the reasoning of the vast majority of courts finding no such violation. [ECF 53 at p.10]. The District Court's ruling is founded on a fundamental misunderstanding of the holding of ***United States v. Virginia***, 518 U.S. 515 (1996), as well as a misapprehension of the purpose and effect of the Ordinance, and must therefore be overturned.

i. The Equal Protection Clause Permits Gender Based Distinctions Where Men and Women are Not Similarly Situated

In applying the Equal Protection Clause, the Supreme Court recognizes "the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways," but instead prohibits only "the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." ***Reed v. Reed***, 404 U.S. 71, 75-76 (1971) (citations omitted). "A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." ***Id.*** at 76 (citation and internal quotation omitted).

Where a classification is based on gender, it withstands an equal protection

challenge if it serves important governmental objectives and is substantially related to achievement of those objectives. ***Craig v. Boren***, 429 U.S. 190, 197 (1976). Topless bans that apply to women but not to men are reviewed under this equal protection standard. *See* ***Craft v. Hodel***, 683 F. Supp. 289, 299 (D. Mass. 1988) (because federal regulation permitting only males to appear shirtless in national parks distinguished between males and females, it must serve important government objectives and be substantially related to achievement of those objectives) (citing ***Craig***, 429 U.S. at 190). Because the Equal Protection Clause does not require things which are different in fact to be treated in law as though they were the same, the Supreme Court has consistently upheld statutes "where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." ***M. v. Superior Court***, 450 U.S. 464, 469 (1981) (plurality opinion); *see also* ***id.*** at 481 ("[T]he Constitution surely does not require a State to pretend that demonstrable differences between men and women do not really exist.") (Stewart, J., concurring).

The fundamental requirement of ***any*** cognizable gender discrimination claim is ***invidious discrimination***, not simply a classification on the basis of gender. *See* ***J.E.B. v. Ala. ex. rel. T.B.,*** 511 U.S. 127, 136-37 (1994) (exercise of preemptory challenges on the basis of gender precluded under the Equal Protection Clause based

on "our asserted commitment to eradicate invidious discrimination from the courtroom"); ***Parham v. Hughes,*** 441 U.S. 347, 351 (1979) ("In the absence of invidious discrimination, however, a court is not free under the aegis of the Equal Protection Clause to substitute its judgment for the will of the people of a State as expressed in the laws passed by their popularly elected legislature."); ***Watson v. Kansas City,*** 857 F.2d 690, 696-97 (10th Cir. 1988) ("In ***Feeney,*** the plaintiff challenged a veteran's preference policy which favored men at a rate of ninety-eight percent. Notwithstanding such an adverse impact on women, the Court rejected the plaintiff's gender-based discrimination claim because she could not show that the classification was adopted to purposefully discriminate against women. Here we have no evidence of either adverse impact or discriminatory purpose.") (citations omitted).

ii. There Are Inherent Biological Differences Between Male and Female Breasts

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. [ECF47-1 (Breast, https://en.wikipedia.org/w/index.php?title=Breast&oldid=754681966 (last visited

Dec. 13, 2016) (citations omitted throughout)].[4] Female 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 genitalia. ***Id.***

Wikipedia's Breast article contains this 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

[4] Notably, this article entitled "Breast" relates solely to female breasts, and there is no separate article from this source relating to the male breast. *See* ***id.***

> 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 décolleté (plunging neckline) gowns and blouses which show cleavage.

Id. Therefore, the sexualization of women's breasts is not solely a product of societal norms, but of biology.

Research has demonstrated that after puberty the tactile sensitivity of all areas of a woman's breasts is significantly greater than a man's. [ECF 47-2 (J.E. Robinson & R.V. Short, Changes in breast sensitivity at puberty, during the menstrual cycle, and at parturition, British Medical Journal (1977) 1, 1188-1191)]. 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. [ECF 47-3 (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))].

In the City Council hearing relating to the proposed revision of the Ordinance, testimony was taken 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. [ECF 47-4 (excerpts from Fort Collins City Council Meeting, 10/20/2015, Agenda Item 18, at 11:21-12:6, 12:24-13:3)]. 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].

iii. Topless Bans Applicable Only to Women Recognize the Inherent Differences Between Male and Female Breasts

These physiological and sexual distinctions between male and female breasts provide either implicit or explicit support for the myriad decisions upholding female toplessness bans in the face of equal protection challenges. In one of those cases, the municipal defendant presented evidence of such distinctions, including a physician'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); *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 breast, is a mammary gland, in rejecting an equal protection challenge to a state law defining nudity to include only the female breast).

However, it does not appear necessary to have expert testimony to demonstrate the inherent biological differences between males and females in upholding a topless ban applicable only to women, as recognized by numerous federal and state courts across the country. *See, e.g.*, ***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. In this regard, men and women are not 'similarly situated,' and the ordinance therefore raises no impermissible gender classification."); ***Hang On, Inc.***, 65 F.3d at 1256-57 (describing trial testimony regarding the difference between male and female breasts, but noting: "Courts need no evidence to prove self-evident truths

about the human condition–such as water is wet. Nor should they tarry long with such foolishness and, in the process, trivialize constitutional values intrinsic to our society."); ***Craft***, 683 F. Supp. at 299-300 (rejecting argument that regulation reflected archaic and stereotypic notions and perpetuated cultural stereotypes equating the female breast with sexual fantasies, and instead holding regulation "simply recognizes a physical difference between the sexes which has implications for the moral and aesthetic sensitivities of a substantial majority of the country")[5]; ***Dydyn v. Department of Liquor Contro***l, 531 A.2d 170, 175 (Conn. App. 1987) ("Although the plaintiffs attempt to blur the clear distinction, there can be no doubt that in our society female breasts, unlike male breasts, constitute an erogenous zone and are commonly associated with sexual arousal."); ***Turner***, 382 N.W.2d at 255-56 (rejecting claim that prohibition on exposure of female breasts creates an unconstitutional gender-based classification, in light of differences between male and female breasts); ***Eckl v. Davis***, 51 Cal. App. 3d 831, 124 Cal. Rptr. 685, 696 (1975) ("Nature, not the legislative body, created the distinction between that portion

[5] ***Craft*** involved a regulation applicable to a national park, *see* 36 C.F.R. §7.67, and a finding that the Ordinance constitutes an equal protection violation would implicate other federal regulations relating to public nudity on federal lands. *See, e.g.*, 36 C.F.R. §7.87, 36 C.F.R. §261.2.

of a woman's body and that of a man's torso.").[6]

Additionally, courts have recognized that regardless of the physical differences between the sexes, our society continues to apply different standards to male and female breasts, and laws recognizing those standards do not violate the Constitution. *See, e.g.*, ***Buzzetti v. City of New York***, 1997 U.S. Dist. LEXIS 4383, *16-17 (S.D.N.Y. April 8, 1997) ("One does not have to be either a psychologist or a sociologist to recognize that, if it were widely known that ten topless women were walking down Park Avenue and ten topless men were walking down Madison Avenue, the effect on the traffic on Park Avenue would be substantially greater than on Madison Avenue. . . . [E]ven if we accept arguendo the view of plaintiffs' expert that the male and female breast are equally erotic, that does not change the fact that in our culture the public display of female breasts will have far different secondary effects than the public display of male breasts. Rightly or wrongly, our society continues to recognize a fundamental difference between the male and female

[6] In ***People v. David***, 152 Misc. 2d 66, 68 (N.Y. County Ct. 1991), the court upheld an equal protection challenge to a public nudity law, finding "[m]ale and female breasts are physiologically similar except for lactation capability." The City as unable to locate any other authority adopting this reasoning, which is inconsistent with the overwhelming weight of authority presented herein. Indeed, other than the District Court in this case, this New York County Court decision represents the only decision striking down a female toplessness ban on equal protection grounds known to counsel for the City.

breast."); ***City of Seattle v. Buchanan***, 584 P.2d 918, 920 (Wash. 1978) ("We are unable to agree that the legislative body could only have been interested in the size or shape of female breasts when it included them among the parts of the human body which should not be exposed in public. It is manifest from a reading of the section as a whole that the City Council was concerned with those body parts and functions which, according to society's common sense of decency, should be kept private. These include the eliminative functions and the procreative functions. With respect to the latter, it was found to be in the public interest to order concealed, in addition to the genitals, the female breasts, which, unlike male breasts, constitute an erogenous zone and are commonly associated with sexual arousal.").

iv. Topless Bans Applicable Only to Women are Substantially Related to an Important Government Interest

At the City Council hearings relating to the revised Ordinance, the Council heard from dozens of citizens about the myriad concerns they had with permitting adult females to go topless in public without restriction. [ECF 19-2, 19-3]. At the preliminary injunction hearing, the City presented evidence of the various issues considered by the City in proposing revisions to the Ordinance and by the decision makers in voting on the proposed revisions. [*(Appendix cite to PI hearing transcript)*]. The City urges this Court to review the entire transcript of the City Council hearing and the preliminary injunction hearing to gain a full and complete

understanding of the governmental issues at stake, but for purposes of this brief those issues will be summarized as maintaining public order, supporting parental rights to control children's exposure to public nudity, promoting public safety, advancing the quiet enjoyment of private property, and the impact on businesses in the City of Fort Collins.[7]

The courts have regularly and consistently found, in light of the differences between male and female breasts, that prohibition of exposure of only female breasts is substantially related to an important government interest. *See, e.g.*, ***State v. Vogt***, 775 A.2d 551, 557 (N.J. App. Div. 2001) ("Restrictions on exposure of the female breast are supported by the important governmental interest in safeguarding the public's moral sensibilities, and this ordinance is substantially related to that interest."); ***J&B Social Club***, 966 F. Supp. at 1139 ("Assuming, however, that [distinction between male and female breasts in nudity ordinance] is 'gender-based' for equal protection purposes, the court finds that the distinction is substantially related to an important governmental interest."); ***City of Tucson v. Wolfe***, 917 P.2d

[7] Significantly, Plaintiffs nowhere argue that complete nudity should be permitted for either or both sexes, and they do not challenge that portion of the Ordinance prohibiting exposure of the genitals and buttocks of both males and females. If there is a legitimate public interest in barring public exposure of human genitalia, and if in fact female breasts have a sexual function that male breasts do not, then the legitimate governmental interest must necessarily extend to public exposure to female breasts.

706, 707 (Ariz. App. 1995) ("Other jurisdictions considering equal protection challenges to similar legislation have rejected them. Likewise, we believe that the ordinance at issue here encompasses more than mere sexual stereotyping and . . . given the community standard for decency expressed by the community's legislatures both local and statewide, the ordinance is substantially related to an important governmental interest in regulating the public decency and order.") (citations and internal quotations omitted); ***State v. Chiello***, 1995 R.I. Super. LEXIS 135, *21-22 (R.I. Super. Ct. 1995) ("This Court, like the others which have examined the same issue, finds that there is no equal protection problem presented by the provision in the West Warwick ordinance which prohibits the displaying of women's breasts. In so holding, the Court recognizes that in certain circumstances men and women are not similarly situated, and that the gender classification contained in the West Warwick ordinance is substantially related to these differences which are inherent between men and women.") (citations and internal quotations omitted); ***United States v. Biocic***, 928 F.2d 112, 115-116 (4th Cir. 1991) ("The 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.

These still include (whether justifiably or not in the eyes of all) the female, but not the male, breast."); ***United States v. Biocic***, 730 F. Supp. 1364, 1366 (D. Md. 1990) ("In the present case, this Court concludes that the regulation of the public exposure of the female breast, given the historical approach to the subject and the objectives of the community in protecting its moral values, is substantially related to an important governmental interest."); ***Craft***, 683 F. Supp. at 300-01 (because community standards consider female breasts to be an intimate part of the human body, the exposure of which constitutes nudity, gender distinction is substantially related to the government objective of protecting the public from invasions of its sensibilities); ***Turner***, 382 N.W.2d at 256 (nudity ordinance serves important governmental objectives of controlling public nudity and preserving societal norms, and a gender classification based on "clear differences between the sexes" is substantially related to achieving those objectives); ***Buchanan***, 584 P.2d at 921 ("There being such a difference between the breasts of males and females (however undiscernible to the naked eye of some), and that difference having a reasonable relationship to the legitimate legislative purpose which it serves, the ordinance does not deny equality of rights or impose unequal responsibilities on women. It applies alike to men and women, requiring both to cover those parts of their bodies which are intimately associated with the procreation function."); ***Eckl***, 124 Cal. Rptr. at

696 ("Unlike the situation with respect to men, nudity in the case of women is commonly understood to include the uncovering of the breasts. Consequently, in proscribing nudity on the part of women it was necessary to include express reference to that area of the body. The classification is reasonable, not arbitrary, and rests upon a ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike.").

v. Courts Reviewing This Issue Have Overwhelmingly Upheld Nudity Ordinances Applicable to Female, But Not Male, Breasts

Throughout the United States, claims of equal protection violation premised on nudity bans covering female breasts, but not male breasts, have routinely and consistently been rejected. *See, e.g.,* ***City of Albuquerque v. Sachs***, 92 P.3d 24, 28 (N.M. App. 2004) (cases decided throughout the United States "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 or state equal protection clauses); ***State v. Vogt***, 775 A.2d 551, 557 (N.J. App. Div. 2001) ("This issue has been litigated often elsewhere, the overwhelming majority of cases holding that laws banning female (but not male) toplessness do not violate federal or state equal protection guidelines."); ***City of Jackson v. Lakeland Lounge***, 688 So. 2d 742, 751 (Miss. 1996) ("The federal courts on many occasions have held that denying females the right to expose their breasts, but not males, did not violate either

the First Amendment or the Equal Protection Clause."); ***Moore v. Coffeyville***, 1993 U.S. Dist. LEXIS 9705, *17 (D. Kan. June 16, 1993) ("Legislation which prohibits the display of the naked breasts of women, while allowing men to do so, have frequently been challenged on equal protection grounds. And that legislation has been universally upheld.").

Notably, even in a recent case cited by Plaintiffs in the Complaint, [ECF 1, ¶ 23], the United States District Court for the Northern District of Illinois granted a motion to dismiss directed at the plaintiff's equal protection claim based on the applicability of a nudity ordinance to only female breasts. *See* ***Tagami v. City of Chicago***, 2015 U.S. Dist. LEXIS 90149, *9 (N.D. Ill. July 10, 2015). There, the court found: "Tagami's equal protection claim fails because, while the Ordinance permits men but not women to appear bare-chested in public, Tagami fails to allege how this distinction places artificial constraints on a woman's opportunity, or how the Ordinance is used to create or perpetuate the legal, social, and economic inferiority of women." (Citations and internal quotations omitted).[8]

[8] ***Tagami*** is presently on appeal to the Seventh Circuit, and briefing and oral argument have been completed but to date an opinion has not issued. *See* ***Tagami v. City of Chicago***, Seventh Circuit Case No. 16-1441.

vi. The Supreme Court's Decision in VMI Does Not Support an Equal Protection Violation Here

In denying the City's Motion to Dismiss with respect to the equal protection claim, the District Court interpreted the Supreme Court's decision in ***United States v. Virginia***, 518 U.S. 515 (1996) ("VMI"), to permit 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 ***VMI***, 518 U.S. at 531)]. However, the holding of ***VMI*** is not so limited and does not actually support the District Court's analysis or conclusion. The particular passage at issue states:

> 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.

VMI, 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.[9]

To the contrary, the actual holding of ***VMI*** 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 same standard applied in the cases discussed above. The Supreme Court in ***VMI*** expressly acknowledged that sex is not a proscribed classification, and while it held inherent differences are no longer accepted as a 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 ***VMI*** the Supreme Court has upheld a sex-based distinction having no relation to compensation for prior inequities in the face of an equal

[9] Although ***VMI*** 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.

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* [***VMI***], 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. [10] In this case, there are enduring physical differences between men and women supporting the Ordinance's distinction between male and female toplessness, as discussed above.

Contrary to the District Court's assumption that ***VMI*** altered the analysis of equal protection claims relating to female only topless bans, [ECF 37 at p.13 n.6],

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[10] In other contexts, courts citing ***VMI*** 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.*, ***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.").

federal and state courts applying ***VMI*** continue to reject equal protection challenges to such laws. For example, in ***Ways v. City of Lincoln***, 331 F.3d 596, 600 (8th Cir. 2003), the Eighth Circuit applied ***VMI*** 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 ***VMI*** 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 ***VMI***'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 ***VMI***, 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 Second Circuit 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, ***VMI***, 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 ***VMI*** 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 ***VMI***, 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 ***VMI***, 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***, 92 P.2d 24 (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 28. 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.*** 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. at 29.

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 challenge to a conviction for nudity in a public place. The court determined that 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 ***VMI***'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 is exceedingly persuasive." ***Id.*** at 559.

By contrast, neither the District Court nor Plaintiffs cited a single case

overturning a females-only topless ban as a violation of the right to equal protection as a result of ***VMI***. Nor does the District Court's reliance on a 2010 law review article discussing the evolution of the Supreme Court's opinions relating to sex-role stereotyping support a determination of a potential equal protection violation here. [ECF 37 at p.12 (citing Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83, 145 (2010))]. The cited article discussed the Supreme Court's eventual rejection of laws that perpetuate the stereotyped notion of men as breadwinners and women as homemakers, thereby limiting women's opportunities to engage in pursuits outside of the home. [*See* ***id.***] However, the Ordinance does nothing to eliminate women's abilities to pursue a career or any other economic opportunity. In fact, the individual Plaintiffs expressly acknowledged they suffered no economic disadvantage as a result of being unable to go topless in public in the City of Fort Collins. [*See* Hearing Transcript at 32:5-34:4; 73:10-74:16]. Contrary to Plaintiffs' bald proclamation, the Ordinance does nothing to "create or perpetuate the legal, social, and economic inferiority of women." [ECF 31 at p.12 (quoting ***VMI***, 518 U.S. at 534]. In short, the Ordinance does not advance the type of sex-role stereotyping discussed in the Franklin article and the ***VMI*** case and the District Court's Order incorrectly relied on this authority.

C. PLAINTIFFS WILL NOT SUFFER IRREPARABLE INJURY IF THE PRELIMINARY INJUNCTION IS OVERTURNED

Initially, if should be noted that "the movant will ordinarily find it difficult to meet its heavy burden of showing that the four factors, on balance, weigh heavily and compellingly in its favor, without showing a substantial likelihood of success on the merits." ***SCFC ILC, Inc. v. VISA USA, Inc.***, 936 F.2d 1096, 1101 n.11 (10th Cir. 1991). Because Plaintiffs cannot establish a substantial likelihood of success on the merits, for all of the reasons discussed above, the remaining three factors wane in significance. Nevertheless, Plaintiffs also have not established that these factors support a preliminary injunction.

Under the first factor, to constitute irreparable harm, an injury must be certain, great, actual "and not theoretical." ***Heideman v. S. Salt Lake City***, 348 F.3d 1182, 1189 (10th Cir. 2003). Plaintiffs have not demonstrated they will suffer any great, actual, and irreparable injury if they are unable to go topless in Fort Collins during the pendency of this matter. Instead, Plaintiffs proclaim irreparable harm must automatically be found if there is an alleged constitutional violation, [ECF 2 at p.16], but they cite only First Amendment cases in support of this proposition.[11] By

[11] Plaintiffs failed to address these three factors at all in their Reply to Defendant's Response to Plaintiff's Motion for Preliminary Injunction, [ECF 30], demonstrating agreement with the City that it is the first prong that is controlling here.

contrast, while the District Court actually cited cases finding irreparable injury in the equal protection context, it cited no cases finding irreparable injury in enforcing a prohibition on public nudity. [ECF 53 at pp.10-11]. Moreover, both Plaintiffs and the District Court rely on the existence of a viable claim for a constitutional violation, and because Plaintiffs are unlikely to succeed on the merits, by their reasoning this prong must also fail.

D. THE THREATENED INJURY TO PLAINTIFFS DOES NOT OUTWEIGH THE INJURY TO THE CITY

Similarly, under the third preliminary injunction factor, Plaintiffs cite First Amendment case law, and proclaim the City has no significant interest in enforcing the Ordinance "because it is likely unconstitutional." [ECF 2 at p.17]. Plaintiffs do not attempt to explain how any injury they might sustain from being required to wait to bare their breasts in public until after this matter is concluded outweighs the City's interest in maintaining a law that was supported by the majority of its citizens and unanimously adopted by its City Council. [*See* ECF 19 at pp.28-30]. Further, by their own logic, a finding that the Ordinance is constitutional would cut against this factor.

E. THE INJUNCTION IS ADVERSE TO THE PUBLIC INTEREST

Under the fourth factor, Plaintiffs again invoke case law from the First Amendment context, [ECF 2 at pp.17-18], and fail to explain how restricting Plaintiffs from baring their breasts in public until this matter can be tried is adverse

to the public interest.[12] By contrast, the City explained how being prevented from implementing an Ordinance subject to extensive public comment, enacted unanimously by its City Council members, and on its face not unconstitutional would be adverse to the public interest. [ECF 19 at pp.28-30]. Further, Plaintiffs' continued reliance on the claimed unconstitutionality of the Ordinance once again weighs against their argument should this Court find the Ordinance to be constitutional.

In sum, each of the factors relating to a motion for preliminary injunction, and in particular the most significant factor of likelihood of success on the merits, weighs against the District Court's issuance of a preliminary injunction in this matter, and as a result the District Court's Order should be overturned by this Court.

CONCLUSION

As the Supreme Court observed, "[t]o fail to acknowledge even our most basic biological differences . . . 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

[12] In this context it is worth noting again that the District Court granted the City's Motion to Dismiss the Plaintiffs' First Amendment claim, [ECF 37 at p.14],, rendering the Plaintiffs' continued reliance on First Amendment law to support their claims entirely inapposite.

distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class." ***Nguyen***, 533 U.S. at 73. Plaintiffs here urge this Court to disregard the most basic biological differences between the breasts of men and women and instead mechanistically classify the Ordinance's gender distinction as a sex stereotype. Contrary to Plaintiffs' inflammatory characterization and rhetoric, the Ordinance is not marked by misconception or prejudice and does not show disrespect for women. The Ordinance does not constitute invidious discrimination on the basis of a patriarchal attitude. The difference between men's and women's breasts is a real biological one, and the Equal Protection Clause of the Fourteenth Amendment does not forbid cities and states from acknowledging this difference in their public nudity laws, as the overwhelming majority of federal and state courts have found.

As a result, Defendant City of Fort Collins, Colorado, respectfully requests that this Court reverse the District Court's Order granting Plaintiffs' Motion for Preliminary Injunction, hold that Plaintiffs can state no claim for violation of their right to equal protection under either the federal or state constitutions, dismiss the Plaintiffs' equal protection claims in their entirety with prejudice, and enter all such additional relief as this Court deems just and appropriate.

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant City of Fort Collins believes oral argument may be helpful to this Court in evaluating this appeal.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

The undersigned hereby certifies this Opening Brief is proportionally spaced and is printed in the Font Times Roman with a point size 14 and contains 9,075 words. I relied on my word processor (Office 2013) to obtain the count. This word count excludes those sections not appropriately included in the word count pursuant to Fed.R.App.P.32(a)(7)(B)(iii).

CERTIFICATE OF PRIVACY REDACTIONS

The undersigned hereby certifies this Opening Brief contains all required privacy redactions pursuant to 10th Cir. R. 25.5.

CERTIFICATE OF HARD COPY SUBMISSION

The undersigned hereby certifies the hard copies of this Opening Brief submitted to the Court are exact copies of the version submitted electronically.

CERTIFICATION OF DIGITAL SUBMISSION

The undersigned hereby certifies this document is submitted in Digital PDF and has been scanned for viruses with Sophos End Point Security (updated daily), and is free of viruses.

Respectfully submitted this 19th day of July, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of July, 2017, I electronically filed the foregoing **OPENING BRIEF** using the CM/ECF system which will send notification of such filing to the following e-mail address:

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