Case No. 17-1103

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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

Plaintiffs-Appellees,

v.

CITY OF FORT COLLINS, COLORADO,

Defendant-Appellant.

On Appeal from a ruling granting Plaintiff's Motion for Preliminary Injunction
United States District Court for the District of Colorado
The Honorable R. Brooke Jackson
Civil Action No. 16-cv-01308-RBJ

RESPONSE BRIEF OF PLAINTIFFS-APPELLEES

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ORAL ARGUMENT IS REQUESTED

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES — Page

STATUTES AND MUNICIPAL CODES

OTHER AUTHORITY

1. **Statement of Related Cases**

There are no prior or related appeals in this matter.

2. **Jurisdictional Statement**

Appellees agree with Defendant-Appellant's statement of jurisdiction.

3. **Issues Presented for Review**

- Whether the District Court abused its discretion in granting Plaintiffs-Appellees' Motion for Preliminary Injunction and determining that Plaintiffs-Appellees' had demonstrated: (1) they were likely to succeed on the merits of their Fourteenth Amendment claim; (2) irreparable harm would occur absent injunction, (3) the balance of equities favored granting an injunction, and (4) an injunction is in the public interest.

4. **Statement of Facts**

Plaintiffs-Appellees are women, and an organization of women, who have challenged an ordinance that criminalizes a woman's choice to stand in public with her breasts exposed below the areola while allowing a man to make the same choice. The challenged ordinance, FORT COLLINS, CO., MUN. CODE § 17-142 (2015) (hereinafter "Section 17-142"), was re-enacted after Fort Collins considered the efficacy of the previous version of the ordinance that stated: "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 females are exposed." Aplt. Appx., Vol. I, p. 4.

Fort Collins held multiple City Council meetings to debate Section 17-142. *Id.*, Vol. II, pp. 67-160. During one of these City Council meetings, members of the Fort Collins community expressed a number of concerns. *Id.*, Vol. II, pp. 67-136.[1] Residents who were in favor of repealing the ordinance, or at least in favor of revisions that would have criminalized men and women equally for appearing topless, at public places stated that they were concerned about the objectification of women's bodies that would be perpetuated by Section 17-142 and that disparate treatment would be unconstitutional. *Id.* Those in favor of reinstituting the law also voiced several concerns. The overriding concerns included: women's breasts were inherently sexual and pornographic, repeal of the ordinance would harm Fort Collins' family friendliness, and that morality should prevent women from being able to appear topless in public places in Fort Collins. *Id.* One member of the City Council, Ray Martinez, echoed these concerns, comparing women who would choose to stand at a public place topless to *Playboy* magazine. *Id.*, Vol. II, pp. 142-47. Ultimately, the City Council voted to revise Section 17-142 to state:

[1] Prior to the meeting, both the Fort Collins Women's Commission and Human Rights Commission authored reports recommending that Fort Collins either: revise the ordinance so that it no longer criminalized women, while allowing men to engage in the same activity, or prohibit both sexes from appearing at public places topless. *Id.*, Vol. II, pp. 39-40.

> 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 screening fence, in order to achieve a point of vantage.

FORT COLLINS, CO., MUN. CODE § 17-142(b) (2015). Section 17-142 defined a public place as:

> [A] place in which the public or a substantial number of the public has access, and includes but is not limited to highways including sidewalks, transportation facilities, schools, 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.

FORT COLLINS, CO., MUN. CODE § 17-142(a)(3) (2015). Violation of Section 17-142 is punishable "by a fine not exceeding two thousand six hundred fifty dollars ($2,650.00) or by imprisonment not exceeding (180) days, or by both such fine and imprisonment, in addition to any costs which may be assessed." FORT COLLINS, CO., MUN. CODE § 1-15 (2015).

On May 31, 2016, Plaintiffs-Appellees filed a Complaint and Motion for Preliminary Injunction, asking the District Court to enjoin Section 17-142 for violating their First and Fourteenth Amendment rights. Aplt. Appx., Vol. I, pp. 9-39. After extensive briefing by the parties, *id.*, Vol. I, pp. 22-56, Vol. II, pp. 4-335,

Vol. III, pp. 4-28, the District Court dismissed Plaintiffs-Appellees' First Amendment claim. *Id.*, Vol. III, pp. 50-63. The District Court subsequently scheduled and held a preliminary injunction hearing on Plaintiffs-Appellees' Fourteenth Amendment claim on December 19, 2016. *Id.*, Vol. III, pp. 153-324.

At the hearing, Plaintiffs-Appellees, one expert, and various Fort Collins city officials testified. *Id.* Both Plaintiff-Appellees testified that Section 17-142 made them feel objectified, emotionally distressed that their bodies were being treated as though it was inherently pornographic, and disappointed that they would not make the same choices as their male friends and partners. *Id.*, Vol. III, pp. 170, 222. The negative emotional impact led Mx.[2] Hoagland to leave Fort Collins. *Id.*, Vol. III, p. 169. Plaintiffs-Appellees also testified that they had previously appeared topless in public (Mx. Hoagland in Boulder, Colorado and Ms. Six in New York City) and their choice to appear with their breasts exposed below the areola had not caused any disturbance. *Id.*, Vol. III, p. 172, 222.

Dr. Tomi-Ann Roberts, the chair of the psychology department at Colorado College and an expert in psychology and gender studies also testified. *Id.*, Vol. III, pp. 189-218. She stated that laws like Section 17-142 perpetuate the sex stereotype that the female breast is inherently sexual and result in the increased sexual

[2] The honorific Mx. is a gender-neutral title utilized in connection with non-binary individuals.

objectification of women. *Id.*, Vol. III, pp. 191-93, 198. She also testified that laws that perpetuate the sexual objectification of women harm women; significant research suggests that increased objectification results in greater instances of sexual violence and sexual assault against women, an increase in depression, anxiety, and eating disorders among women, and decreased academic performance among women. *Id.*, Vol. III, 194-96. Dr. Roberts stated that objectification also negatively impacts men, causing them to have more sexist beliefs and a greater likelihood to believe sexual assault is acceptable. *Id.*, Vol. III, pp. 196. Finally, Dr. Roberts testified that there is no evidence that exposure to non-sexual nudity has negative effects on children and, at least one study, suggesting that when children are exposed to non-sexual nudity it leads to: later than average engagement in sexual activity, more positive sexual experiences, lowered instances of drug use, and lessened proclivity to engage in petty theft. *Id.*, Vol. III, p. 197.

Defendant-Appellant called various Fort Collins officials to justify Section 17-142's discrimination. Fort Collins' Deputy City Manager, Jeff Mihelich, testified that one of the principal concerns in enacting Section 17-142 was preventing distracted driving caused by Fort Collins residents ogling topless women. *Id.*, Vol. III, pp. 249-51. Another concern was the protection of children. *Id.*, Vol. III, p. 251. The only evidence Mr. Mihelich could provide that Section 17-142 advanced these interests was an anecdote about a trip he once took to Boulder,

wherein he was distracted while driving by a woman who was legally walking down the street topless. *Id.*, Vol. III, pp. 250-51. But, even regarding this anecdotal evidence, Mr. Mihelich admitted on cross examination that a woman who would chose to wear a bikini or other "legal" garb, as well as advertisements depicting sexualized images of women near a public roadway, would also be a distraction for drivers. *Id.*, Vol. III, pp. 275-76.

Fort Collins' Assistant Chief of Police Jerry Shiager testified that Section 17-142 served Fort Collins' interest in maintaining public order. *Id.*, Vol. III, p. 288. Chief Shiager testified that without Section 17-142 "people reacting to seeing a woman topless in public could lead to arguments and even a breach of the peace kind of situation." *Id.*, Vol. III, p. 288. Chief Shiager cited no empirical, or even anecdotal, data to support this assertion. *Id.*, Vol. III, pp. 293-95.

None of the Fort Collins' officials who testified at the preliminary injunction hearing presented any empirical, quantitative, or qualitative evidence that Section 17-142 advanced any governmental interest, nor stated that Fort Collins considered empirical evidence when it chose to re-enact Section 17-142. *Id.*, Vol. III, pp. 250-51, 276-78. Ultimately, the testimony of the witnesses called by Defendant-Appellant at the hearing proved that Section 17-142's prohibitions were based on the notion that women's breasts are inherently sex objects. *Id.*, Vol. III, pp. 280, 291, 304-05.

The District Court granted Plaintiffs'-Appellees' Motion for Preliminary Injunction. *Id.*, Vol. III, pp. 141-52. The District Court held that all four preliminary injunction factors weighed strongly in Plaintiffs-Appellees' favor. *Id.* The District Court began by determining that it was clear that Section 17-142 discriminates against women on its face. *Id.*, Vol. III, p. 145. It also acknowledged that, while there are differences between the male and female breast, those differences could not account for the enactment of Section 17-142; the District Court held that Section 17-142, instead, perpetuates sex stereotypes. *Id.*, Vol. III, pp. 147-49. The Court determined that Fort Collins had not shown Section 17-142 was substantially related to an important government interest, finding that "the evidence Fort Collins has presented about these governmental interests amounts to little more than speculation." *Id.*, Vol. III, p. 145.

Defendant-Appellant has appealed this Order.

5. **Summary of the Argument**

The District Court did not abuse its discretion in finding that Plaintiffs-Appellees were likely succeed on the merits of their Fourteenth Amendment claim. Section 17-142 discriminates against women on its face and perpetuates sex stereotypes; specifically, Section 17-142 entrenches: (1) the stereotype that the exposure of the female breast is inherently sexual and (2) preconceived notions about appropriate dress for men and women. Equal protection jurisprudence

dictates that classifications perpetuating sex stereotypes are unconstitutional, even when there are alleged "real" differences between the sexes. Further, Defendant-Appellant has not met its burden showing that Section 17-142 substantially advances any of the governmental interests that it asserted. Some of these interests have not been recognized as important government interests. Others were invented by Defendant-Appellant *post hoc*, and in response to litigation. The evidence in the record demonstrates that the others are not substantially related to, or advanced by, Section 17-142.

Finally, the District Court did not abuse its discretion in ruling that: (1) the violation of Plaintiffs-Appellees constitutional rights is an irreparable injury itself sufficient to justify imposition of an injunction, (2) the balance of harms weighs in favor of issuance of an injunction, and (3) that it is in the public interest to enjoin the unconstitutional Section 17-142.

6. **Argument**

6.1 The standard of review applicable to this Court's review of the District Court's Order.

In this Circuit, an appeal of a district court's decision to issue a preliminary injunction is evaluated under the abuse of discretion standard. *See AG of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 775 (10th Cir. 2009). "The standard for abuse of discretion is high. The state must show that the district court committed an error of law (for example, by applying the wrong legal standard) or committed clear

error in its factual findings." *Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202, 1205 (10th Cir. 2003). This Court has previously characterized an abuse of discretion as "'an arbitrary, capricious, whimsical, or manifestly unreasonable judgment.'" *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) (quoting *Winnebago Tribe of Neb*, 341 F.3d at 1205-06). This Court "will not disturb a trial court's [preliminary injunction] decision unless that court has. . . exceeded the bounds of permissible choice in the circumstances." *Frymire v. Ampex Corp*, 61 F.3d 757, 773 (10th Cir. 1995).

While Defendant-Appellant vaguely presents the District Court's ruling as legal error, the District Court's legal conclusions flow from its factual findings that Defendant-Appellant presented no evidence that Section 17-142 furthers a substantial government interest. This Court reviews the District Court's factual findings for clear error. Defendant-Appellant has not met the high burden of showing that the District Court's fact findings were clearly erroneous.

6.2 The District Court did not abuse its discretion in determining that Section 17-142 discriminates on its face.

Defendant-Appellant does not contend that Section 17-142 is a gender-neutral law in its brief. And it would be a folly to do so, as Section 17-142 explicitly criminalizes the exposure of the female breast below the areola while

allowing men to make the exact same sartorial choice without risking criminal sanction.[3] Therefore, Defendant-Appellant must justify its discrimination.

6.3 The District Court correctly determined that Section 17-157 is a classification rooted in sex stereotypes, not "real" differences between the sexes.

6.3(a) ***Section 17-142 perpetuates the sex stereotype that the exposure of women's breasts is inherently sexual.***

The District Court assumed as true Defendant-Appellant's claim that there are "real" differences between the male and female breast, but correctly held that these real differences were not the basis for enacting the current version of Section 17-142. Aplt. Appx., Vol. III, pp. 147-148.[4] Instead, the District Court (rightly) held that Section 17-142 "discriminates against women based on the generalized notion that, regardless of a woman's intent, the exposure of her breasts in public

[3] A law that facially dictates that a man may do X while a woman may not, constitutes, without more, a classification based on sex. "[T]he absence of a malevolent motive does not convert a facially discriminatory [law] into a neutral [law] with a discriminatory effect. Whether [a law] involves disparate treatment through explicit facial discrimination does not depend on why the [defendant] discriminates but rather on the explicit terms of the discrimination." *UAW v. Johnson Controls, Inc*., 499 U.S. 187, 199 (1991).

[4] Plaintiffs dispute that there are "real" differences between the erotic potential of the male and female breast, but for purposes of this appeal accept as true the District Court's assumption. *See* Jack Morin, *Male Breast: Overlooked Erogenous Zone*, 20 MEDICAL ASPECTS OF HUMAN SEXUALITY 85, 128 (1986); Robert Wildman et al., *Note on Males' and Females' Preferences For Opposite-Sex Body Parts, Bust Sizes, and Bust-Revealing Clothing*, 38 PSYCHOL. REP. 485-86 (1976).

(or even in her private home if viewable by the public) is necessarily a sexualized act." Aplt. Appx., Vol. III, p. 148.

The sexualization of the female breast has long been at 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, including their breasts, are sexualized, and that sexualization has historically been used to subjugate women. *See e.g. Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Jenson v. Eveleth 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").

Moreover, one does not need to look far in American popular culture to determine that the female breast is stereotyped as a sex object. *See* Stephanie Nicholl Berberick, *The Objectification of Women in Mass Media: Female Self-Image in Misogynist Culture*, The New York Sociologist, Vol. 5, 2010. However, there is little history of female breasts as sexual objects globally. Dr. Roberts testified at the hearing that the sexualization of the breast is a uniquely western and American phenomenon. Aplt. Appx., Vol. III, pp. 196-97. Historical and scientific sources support her testimony. Marilyn Yalom, *A History of the Breast*, 245, 3 (1997) (noting that in many cultures 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").[5] The sexualization of the female breast, which is perpetuated by Section 17-142, is based purely on American sex stereotypes. *See* Aplt. Appx., Vol. III, pp. 192-96.

Furthermore, the evidence in the record supports the District Court's finding that Section 17-142 was enacted to reinforce the sex stereotype that women's breasts are sex objects, and that a woman's exposure of her breast is necessarily a sexualized act. The public comments solicited from Fort Collins residents at the October 20, 2015, City Council meeting demonstrate that Section 17-142 is based on the sex stereotype that the female breast is a sex object. Aplt. Appx., Vol. II, pp. 50, 67-136 (As many citizens stated: "A female's chest is a reproductive sex organ that was developed to let males know they are ready for sex . . . Morally, we are – we as females – we are known growing up that the breasts are used for two things: sexual desire for men and for breast-feeding . . . I can't see how you would be more objectified as to walk down the street topless. You're not wearing anything.

[5] Defendant-Appellant, in its Opening Brief, cites Wikipedia as proof that breasts are inherently sexual. Plaintiffs-Appellees 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.

A man is not going to look at you as the beautiful person that you are made to be if he's completely distracted by your breasts. It's not appropriate. It's not decent. It's not right. And I think that everybody in this community knows that."). At that same meeting, Ray Martinez, a member of the City Council that seconded the motion that resulted in the enactment of Section 17-142, equated the public exposure of female breasts to pornography. Aplt. Appx., Vol. II, pp. 144-47.[6]

At the preliminary injunction hearing, Dr. Tomi-Ann Roberts, an expert in both psychology and gender studies, testified that Section 17-142 was clearly a policy based on the sex stereotype that women's breasts are sexual objects, but men's breasts are not. Aplt. Appx., Vol. III, pp. 191-193. Dr. Roberts also testified that Section 17-142, by requiring that women cover their breasts or risk criminalization, psychologically sends a message that the female breast "is naughty, it's dangerous, it's bad." Aplt. Appx., p. 192. And that the psychological

[6] "Councilperson Martinez: Do – do magazines showing nudity – is there an age limit to what person can buy it? Purchase it? Like Playboy, for example, that shows breasts? // Ms. Scurlock: Yes. I believe the State law prohibits the sale of pornography to minors. . . . // Councilperson Martinez: Obscenity. That's considered obscenity for people under the age of 18. So how do we control that if kids are walking downtown, high schoolers or whoever and a woman decides to go topless if we pass this? We have no way of controlling that. What's the difference? I mean a picture versus live obscenity? . . . I don't want Fort Collins to be a strip club. I want there to be a strip club somewhere else. Not Fort Collins becoming one." The irony of Councilperson Martinez's comments is that strip clubs are permitted to operate in the City of Fort Collins under Section 17-142. Exposure of the female breast is acceptable in Fort Collins, but only when it is for the erotic pleasure of men.

purpose of the sexualization of the female breast is to "keep women in their place." Aplt. Appx., p. 192. It is clear from the evidence in the record that Fort Collins' criminalization of female toplessness is based on sex-stereotypes.

Apart from sex-stereotyping based on entrenched cultural expectations, there is no objective reason, or evidence in the record, that demonstrates why the exposure of female breasts should be considered any more offensive than the exposure of their male counterparts. Aplt. Appx., p. 217 ("[Mr. McNulty]: Dr. Roberts, based on your expert opinion, is the female breast inherently pornographic in any way? // [Dr. Roberts]: Absolutely not."). The belief that the female breast, but not the male breast, is sexual is "a suspect cultural artifact rooted in centuries of prejudice and bias toward women." *People v. Santorelli*, 80 N.Y.2d 875, 880-83 (1992). Simply put, Section 17-142 presupposes that exposure of the female breast below the areola is inherently lewd based on sex stereotypes about female breasts, and nothing more. *See* Aplt. Appx., Vol. III, p. 193.

6.3(b) ***Section 17-142 perpetuates the sex stereotype that women should dress with their breasts covered below the areola while men should have the freedom to dress otherwise.***

An entirely separate basis for finding that Section 17-142 was enacted based on sex stereotypes is that Section 17-142 operates on the impermissible assumption that women should dress (and be allowed to dress) in a certain fashion and men should dress (and be allowed to dress) in another. The facts and holding of *Price*

Waterhouse v. Hopkins illustrate how Section 17-142 is rooted in sex stereotypes. 490 U.S. 228 (1989); *see Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004) (holding that claims premised on *Price Waterhouse* sex stereotyping theory sufficiently constitute claim of sex discrimination pursuant to § 1983). The plaintiff, a female senior manager in an accounting firm, was denied partnership in the firm, in part, because she was considered "macho." *Price Waterhouse*, 490 U.S. at 235. She was advised that she could improve her chances for partnership if she were to "dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* (internal quotation marks omitted). In other words, the plaintiff was penalized for her dress not conforming to sex stereotypes. Six members of the Court agreed that this penalization constituted unlawful sex stereotyping - that is, discrimination because the plaintiff failed to *act* like a woman. *Id.* at 250-51 (plurality opinion of four Justices); *id.* at 258-61 (White, J., concurring); *id.* at 272-73 (O'Connor, J., concurring) (accepting plurality's sex stereotyping analysis and characterizing the "failure to conform to [gender] stereotypes" as a discriminatory criterion).

Other court decisions post-*Price Waterhouse* affirm that sex stereotyping based on preconceived notions about the appropriate dress for men and women is intolerable sex discrimination. *See e.g.*¸ *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) ("After *Price Waterhouse*, an employer who discriminates against

women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex."); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 221 (2d Cir. 2005) (recognizing that one can fail to conform to gender stereotypes either through behavior *or* through appearance); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 262-63 (3d Cir. 2001) (stating that a plaintiff may be able to prove a claim of sex discrimination by showing that the "harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender").[7]

Pursuant to Section 17-142, men, but not women, are allowed to make the choice of completely exposing their breasts in public. They are allowed to do so because it is the gender norm for men, but not women, to appear in public with their breasts exposed. However, it is within gender norms for women to expose *portions* of their breasts, and Section 17-142 does not criminalize exposure of these portions of the female breast, i.e. cleavage. *See* Aplt. Appx., Vol. III, p. 201 ("[Mr.

[7] Several pre-*Price Waterhouse* cases also support this principle. *See Doe v. Belleville*, 119 F.3d 563, 580-81 (7th Cir. 1997) (holding that "Title VII does not permit an employee to be treated adversely because his or her *appearance* or conduct does not conform to stereotypical gender roles"), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998) (emphasis added); *Carroll v. Talman Federal Savings & Loan Ass'n of Chicago*, 604 F.2d 1028, 1029 (7th Cir. 1979) (finding a policy that required women to wear employer-issued uniforms, but permitting men to wear business attire of their own choosing, to be impermissible sex discrimination).

Ringel]: And as a result of the sexualization of the female breast, American society has decided that because society considers the female breast a sexual organ, that it must be covered when women go out in public, true? // [Dr. Roberts]: Well, it must be covered in certain ways. We really love to see pillows of cleavage, and we do – from selfies to the Victoria Secret fashion show, we very, very careful presentations of women's breasts in purely and only a sexualized manner.").

In sum, Section 17-142 patently draws on "archaic and stereotypic notions[.]" *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982). Section 17-142 communicates Fort Collins' view of what is both "normal" and preferable with regard to the dress of men and women. By doing so, Section 17-142 was enacted to reinforce "traditional" but "inaccurate . . . assumptions about the proper roles of men and women." *Hogan*, 458 U.S. at 726. Section 17-142 unconstitutionally enshrines this sex stereotyping into law.

6.4 The District Court did not abuse its discretion in determining that sex classifications entrenching sex stereotypes are unconstitutional.

Equal protection jurisprudence, from its inception, has rejected classifications based on sex stereotypes as unconstitutional in violation of the Fourteenth Amendment. *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination*, 85 N.Y.U. L. Rev. 83 (2010). Eradicating the legal impact of such stereotypes has been a concern of constitutional sex-discrimination jurisprudence for the last several decades. In one of the first cases

that established sex discrimination violates the Fourteenth Amendment, *Frontiero v. Richardson*, the Court struck down legislation requiring only female service members to prove that their spouses depended upon them financially in order to receive certain benefits for married couples. 411 U.S. 677, 691 (1973) (plurality opinion). The plurality applied heightened scrutiny to sex-based classifications by referring to the pervasiveness of gender stereotypes. *See id*. at 683-86 (noting a tradition of "'romantic paternalism'" that "put women[] not on a pedestal, but in a cage"). It went on to hold that gender-based classifications are "inherently suspect," because they are often animated by "stereotyped distinctions between the sexes." *Id*. at 685, 688.

Two years later, the Court applied this heightened level of scrutiny to a Utah statute setting a lower age of majority for women and concluded that the statute could not be sustained by the stereotypical assumption that women tend to marry earlier than men. *See Stanton v. Stanton*, 421 U.S. 7, 14 (1975). The Court again rejected gender stereotypes, holding that "'old notions'" about men and women's behavior provided no support for the State's classification. *Id*. at 14. That same year, the Court confronted a provision of the Social Security Act that allowed certain benefits to widows while denying them to widowers and, in accordance with its other decisions, used heightened scrutiny to strike at gender stereotype, concluding that "the Constitution also forbids gender-based differentiation"

premised on the stereotypical assumption that a husband's income is always more important to the wife than is the wife's to the husband. *See Weinberger v Wiesenfeld*, 420 U.S. 636, 637, 645 (1975).

In each of these foundational cases, the Court concluded that discriminatory state action could not stand on the basis of gender stereotypes, even in the face of purportedly "real" differences between men and women. *See also Craig v. Boren*, 429 U.S. 190, 199 (1976) (explaining that "the weak congruence between gender and the characteristic or trait that gender purported to represent" necessitated applying heightened scrutiny); *Orr v. Orr*, 440 U.S. 268, 282 (1977) ("Legislative classifications which distribute benefits and burdens on the basis of gender carry the risk of reinforcing stereotypes about the 'proper place' of women[.]").

Since early equal protection jurisprudence, the Court has time and again reiterated that the Fourteenth Amendment does not tolerate classifications based on gender stereotypes, even when there are determined to be "real" differences between the sexes. *See Hogan*, 458 U.S. at 726 (explaining that "the purpose" of heightened scrutiny is to ensure that sex-based classifications rest upon "reasoned analysis rather than . . . traditional, often inaccurate, assumptions about the proper roles of men and women."); *J.E.B. v. Alabama*, 511 U.S. 127, 138 (1994) (internal quotation marks omitted) (declaring unconstitutional a government attorney's use

of peremptory juror strikes based on the presumption that potential jurors' views would correspond to their sexes).

A few decades later, in the landmark equal protection decision *United States v. Virginia*, 518 U.S. 515, 531 (1996), the Court explicitly held that sex stereotyping by the state is impermissible even in the context of "real" differences between the sexes. *Id* at 531. The Court found that any justification for a discriminatory law "must not rely on overbroad generalizations about the different talents, capacities, or *preferences* of males and females." *Id.* at 533 (emphasis added). The Court ultimately found that "'[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." *Id.* at 533.

Since *Virginia*, the Court has expanded and reaffirmed its intolerance for sex stereotyping in lawmaking and indicated that governmental reliance on gender-based stereotypes is dispositive in its equal protection analysis even in cases that uphold the government's challenged action under heightened scrutiny.

For example, 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); however, the Court cautioned against 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. *Id.* at 731.

In *Nguyen v. INS*, the Court concluded that an immigration statute burdening unwed fathers and mothers unequally survived intermediate scrutiny because the statute did not rely on gender stereotypes. 533 U.S. 53, 68 (2001). 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 obviate anti-stereotyping analysis. Indeed, the Court held that the statute passed constitutional muster only after declaring (repeatedly) that it did not instantiate sex stereotypes. *Id.* Both the majority and dissent viewed the statute's reliance on gender-based stereotypes as determinative of its validity. *See id.* at 88-91 (O'Connor, J., dissenting) (finding that the statute was fatally flawed because it relied on stereotypes about the relative parenting abilities of fathers and mothers).

Just this term, the Supreme Court's decision in *Sessions v. Morales-Santana*, solidified that classifications based on sex-stereotyping violate equal protection. No. 15-1191, 2017 WL 2507339 (U.S. June 12, 2017). In *Morales-Santana*, the Court held that laws relying on "overbroad generalizations about different … preferences of males and females" is viewed with suspicion. *Id.*, 2017 WL

2507339, at *11 (citations omitted). The Court struck down the statute as unconstitutional, in part because of its "provenance in traditional notions of the way women and men are[.]" *Id.*, 2017 WL 2507339, at *13.

The notion underlying the Supreme Court's anti-stereotyping doctrine in Fourteenth Amendment cases is simple, but compelling: "[n]obody should be forced into a predetermined role on account of sex," or punished for failing to conform to prescriptive expectations of what behavior is appropriate for one's gender. *See* Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 1 (1975). In other words, laws that give effect to "pervasive sex-role stereotype[s]" about the behavior appropriate for men and women are damaging because they restrict individual choices by punishing those men and women who do not fit the stereotyped mold. *Hibbs*, 538 U.S. at 731, 738.

Thirty plus years of equal protection jurisprudence supports the legal principle that classifications rooted in traditional gender roles and stereotypes about genders and their preferences cannot be justified based upon overbroad generalizations about the sexes. *See e.g., Stanton*, 421 U.S. at 14; *Hogan*, 458 U.S. at 726; *J.E.B*, 511 U.S. at 138; *Virginia,* 518 U.S. at 533; *Nguyen* 533 U.S. at 68. Instead, the justification must be genuine. *Virginia,* 518 U.S. at 524. If a state actor cannot defend a sex-based classification by relying upon overbroad generalizations, it follows that sex-based stereotypes are also insufficient to sustain

a classification. *See J.E.B.*, 511 U.S. at 138 (rejecting the state's reliance on sex-based stereotypes as a defense to the discriminatory use of peremptory challenges during jury selection).

Section 17-142 is a classification based on tired sex stereotypes and overbroad generalizations, both about the sexual nature of women's (but not men's) breasts and the preferences of men and women. It is an unconstitutional classification based on sex stereotypes.

6.5 The District Court did not abuse its discretion in finding that the evidence in the record demonstrates that Section 17-142 does not further an important or substantial governmental interest.

Defendant-Appellant has the burden of showing that Section 17-142 "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 533 (quotations and citations omitted). There is "a strong presumption that gender classifications are invalid[.]" *J.E.B.*, 511 U.S. at 152. "The burden of justification is demanding and it rests entirely on the State." *Virginia*, 518 U.S. at 553.

Defendant-Appellant's proffered justifications, that Section 17-142 helps maintain public order and protects children, are the same as those utilized to justify discrimination against African-Americans in the 1950s and 1960s, *see Briggs v. Elliott*, 98 F. Supp. 529, 535 (D.S.C. 1951), *rev'd by Brown v. Board of Education*, 347 U.S. 483 (1954), and to justify discrimination against gays and lesbians in the

1980s, 1990s, and 2000s. *See Evans v. Romer*, No. 92- CV-7223, 1993 WL 518586, at *2 (Colo. Dist. Ct. Dec. 14, 1993), *rev'd by Romer v. Evans*, 517 U.S. 620 (1996); *see also Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J. dissenting) (justifying a law that discriminated against gays and lesbians by stating that "[m]any Americans do not want persons who openly engage in homosexual conduct as . . . scoutmasters for their children, as teachers in their children's schools[.]"). Those arguing against the admission of women to the University of Virginia in the 1950s also advanced these same justifications. *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)).

The District Court, based on the evidence in the record, held that Section 17-142 is not substantially related to the achievement of these objectives. Aplt. Appx., Vol. III, pp. 145-46. This Court must determine whether the District Court abused its discretion in finding that that Section 17-142 does not advance the interests Defendant-Appellant contends it does and, instead, simply entrenches the sex stereotype that the exposure of the female breast below the areola is inherently sexual. *Virginia*, 518 U.S. at 533, 535 (stating that "'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").

At the preliminary injunction hearing and in Defendant-Appellant's Opening Brief to this Court, Defendant-Appellant has not presented any evidence, empirical or otherwise, that Section 17-142 furthers the interests Defendant-Appellant now proffers. Instead, Defendant-Appellant attempts to support its assertion that society simply accepts applying different standards to male and female breasts and, therefore, such standards are constitutionally sound by string citing old cases. Plaintiffs-Appellees acknowledge this authority (although, it is important to note, that none of the authority cited by Defendant-Appellant is binding on this Court, or was binding on the District Court when it enjoined Section 17-142). These decisions, however, were based on the acceptance of outdated stereotypes about the male and female breast. As the District Court recognized, we should not accept

> a stereotypical distinction "rightly or wrongly," or that something passes constitutional muster because it has historically been a part of "our culture." We would not say, rightly or wrongly, we should continue to recognize a fundamental difference between the ability of males and females to serve on juries. *See J.E.B.*, 511 U.S. at 127. Or between male and female estate administrators. *See Reed v.* Reed, 404 U.S. 71 (1971). Or between military cadets. *See Virginia*, 518 U.S. 515. Or between the ability of males and females to practice law. *Bradwell v. People of State of Ill.*, 83 U.S. 130 (1872). Nor should we here.

Aplt. Appx., Vol. III, pp. 149-50.

Plaintiffs-Appellees ask that this Court disregard the justifications accepted in the nonbinding authority cited in Defendant-Appellant's briefing given the current state of equal protection jurisprudence, which more closely examines whether justifications for discrimination are empirically supported, or rooted in outmoded stereotypes about the abilities and preferences of the sexes. Modern equal protection jurisprudence rejects classifications based on, and supported by, sex stereotypes. *See* Section 6.4, *supra*.

The necessity of a contemporary evaluation of government interests that purport to justify different treatment based on sex is highlighted by the fact that six of eight participating Supreme Court justices found an equal protection violation in 2017 when just six years earlier an equally divided court affirmed a decision finding no equal protection violation in the exact same statutes. *See United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008), *aff'd*, 564 U.S. 210 (2011), abrogated by *Morales-Santana*, 2017 WL 2507339.[8] The District Court did not

[8] The following passage from the Supreme Court's decision in *Obergefell*, which overturned bans on same-sex marriage that had been in existence (and upheld as constitutional) for decades, should give this Court further reason to examine whether the cases cited by Defendant-Appellant were correctly decided (and the cited passage certainly rebuts Defendant-Appellant's argument that this Court should simply follow outdated precedent, rather than apply modern Equal Protection principles, which demonstrate that those decisions should be repudiated):

abuse its discretion in finding that Section 17-142 only serves the purpose of perpetuating the sex stereotype that exposure of the female breast is inherently sexual, and does not aid in the maintenance of public order or substantially protect children.

6.5(a) ***Defendant-Appellant offers unpermitted post hoc justifications for its discrimination.***

Initially, in its response to Plaintiffs-Appellees' Motion for Preliminary Injunction, Defendant-Appellant advanced five governmental interests that were served by Section 17-142, including: "(1) maintaining the values of Fort Collins,

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> This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers*, a bare majority upheld a law criminalizing same-sex intimacy. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the *Bowers* Court. That is why *Lawrence* held *Bowers* was "not correct when it was decided." Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.
>
> A ruling against same-sex couples would have the same effect—and, like *Bowers*, would be unjustified under the Fourteenth Amendment.

Obergefell v. Hodges, 135 S. Ct. 2584, 2606 (2015) (citations omitted).

including its sense of decency and family; (2) protecting the right of others to enjoy public spaces; (3) protecting children from viewing nudity; (4) promoting respect for women and protecting them from assaults; and (5) maintaining the city's family friendly status." Aplt. Appx., Vol. II, p. 14. Now, however, Defendant-Appellant attempts to change its justifications for criminalizing Plaintiffs-Appellees free choices. The Supreme Court has explicitly stated that providing hypothesized or *post hoc* justifications "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Virginia*, 518 U.S. at 524. It was clear when Defendant-Appellant first asserted the justifications for Section 17-142 that they were simply *post-hoc* justifications created in response to litigation, given the direct evidence from City Council members that the criminalization of Plaintiffs-Appellees sartorial choices was based solely on concerns of public morality.[9]

[9] The evidence from the preliminary injunction hearing (and from the City Council meetings held in conjunction with the enactment of Section 17-142), however, contradicts Defendant-Appellant's newly asserted justifications for the enactment of Section 17-142 and demonstrates that Section 17-142 is, at its base, motivated by Fort Collins' moral disapproval of women (including Plaintiffs-Appellees) who wish to exercise their agency in a particular way: by having the same choice as men whether to cover their breasts below the areola in public. Section 17-142 is part and parcel of a long line of government regulations that restrict women and girls—and particularly the public appearance of their bodies— on the basis of morality in ways that simply would not be tolerated had they been applied to men. *See De Weese v. Palm Beach*, 812 F.2d 1365, 1369 (11th Cir. 1987) (striking down a town's ban on male toplessness as not rationally related to any government interest).

Then, at the preliminary injunction hearing, Defendant-Appellant changed the important government interests that Section 17-142 was allegedly enacted to further to: (1) maintaining public order and (2) the protection of children. Aplt. Appx., Vol. III, p. 161. The District Court, correctly, analyzed these bases in its order (as they were the only bases that Defendant-Appellant presented anecdotal evidence to support). The District Court determined that these two interests, while legitimate and important, were not served by Section 17-142. Aplt. Appx., Vol. III, pp. 145-146.

Now, on appeal, Defendant-Appellant offers new justifications for Section 17-142, including that it serves governmental interests in: (1) maintaining public order, (2) supporting parental rights to control children's exposure to public nudity, (3) promoting public safety, (4) advancing the quiet enjoyment of private property, and (5) the impact on businesses in the City of Fort Collins. In support of these newly asserted interests, Defendant-Appellant does not cite to specific evidence in the record; instead, Defendant-Appellant asks this Court to read the *entirety* of the City Council hearing and the Preliminary Injunction hearing.

Defendant-Appellant's shifting explanations for Section 17-142 confirm that these rationalizations for discrimination are hypothetical and *post hoc*.[10] Plaintiffs-Appellees ask this Court to disregard these rationalizations.

6.5(b) ***The District Court did not abuse its discretion in determining Section 17-142 is not substantially related to the maintenance of public order.***

6.5(b)(i) *Section 17-142 has no effect on the general public order in Fort Collins.*

Defendant-Appellant has not met its burden in establishing that Section 17-142 substantially serves an interest in maintaining public order. The Supreme Court has specifically held that, in the context of the Fourteenth Amendment, discrimination cannot be justified by relying on private biases. For example, in *Palmore v. Sidoti*, 466 U.S. 429 (1984), 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

[10] That Defendant-Appellant's justifications for their discrimination are *post hoc* and hypothetical is further demonstrated by Section 6.5, *infra*, which demonstrates there is no actual evidence Section 17-142 serves the various government interests Defendant-Appellant has asserted throughout this litigation.

"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*, 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-Appellant's assertions in this case that the maintenance of public order would allow private biases to justify discrimination is in contravention of Supreme Court precedent.

Defendant-Appellant's public order justification amounts to little more an argument from popular prejudice. Defendant-Appellant has presented no evidence that its assertions that Section 17-142 would upset the public order have any empirical basis.[11] The District Court correctly noted that the evidence presented at the Preliminary Injunction hearing by Defendant-Appellant "amounts to little more

[11] Even if there had been evidence at the Preliminary Injunction hearing showing a statistically significant effect on traffic safety, "gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization." *J.E.B.*, 511 U.S. at 139 n. 11. As established, *supra* Section 6.4, Section 17-142 rests on impermissible stereotypes.

than speculation." Aplt. Appx., Vol. III, p. 145. It would not have been difficult for Defendant-Appellant to have presented evidence that public order had been disrupted in some way, shape, or form in the myriad communities across Colorado that have laws allowing both men and women to make the sartorial choice to not cover their breasts in public. *See e.g.* DENVER, CO., MUN. CODE § 38-157.1 (2016); BROOMFIELD, CO., MUN. CODE § 9-16-030 (2016); LAKEWOOD, CO., MUN. CODE § 9.50.080 (2016); ERIE, CO., MUN. CODE § 6-5-1 (2016); BRIGHTON, CO., MUN. CODE § 19-16-52 (2015); COMMERCE CITY, CO., MUN. CODE § 12-5009 (2015); ENGLEWOOD, CO., MUN. CODE § 7-6D-2 (2015); WESTMINSTER, CO., MUN. CODE § 6-4-2 (2016); ARVADA, CO., MUN. CODE § 64-42 (2016); VAIL, CO., MUN. CODE § 6-3C-2 (2016); GREELEY, CO., MUN. CODE § 10.20.010 (2016) (codifying that a woman's right to appear topless at public places is only restricted if an individual commits the act of lewdly fondling his or her breast); GOLDEN, CO., MUN. CODE § 8.04.700 (2015) (codifying that a woman's right to appear topless at public places is only restricted if the woman engaging in toplessness has "intent to arouse or to satisfy the sexual desire of any person"); STEAMBOAT SPRINGS, CO., MUN. CODE § 12-50 (2016) (regulation of toplessness only applies to adult-oriented businesses). Defendant-Appellant, however, presented no such evidence. And the only evidence in the record evinces that there is no indication "in areas where there is no such

ordinance [similar to Section 17-142] that there's mayhem or any kind of public danger." *See* Aplt. Appx., Vol. III, pp. 212. [12]

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. Defendant-Appellant'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 nearly every state. 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 v. Virginia*, however, the Supreme Court, unanimously and definitively repudiated any legitimate government interest in such laws. 388 U.S. 1

[12] *See also* Aplt. Appx., Vol. III, pp. 172 ("[Mr. McNulty]: Have you ever stood topless in Colorado anywhere? // [Mx. Hoagland]: Yes. // [Mr. McNulty]: And what happened? // [Mx. Hoagland]: There was a lot of apathy. When I was in Boulder during a meet-up group, there was, maybe, 15 of us, and it was a really busy time. We were at a park . . . so there was, like, 75 people constantly coming and going. There was no eyeballing, no stares, just apathy. It was really refreshing compared to what Fort Collins told me to expect."); *id.*, Vol. III, p. 222 ("[Mr. McNulty]: Have you ever stood topless at a public place? // [Ms. Six]: I have. // [Mr. McNulty]: How did other people react to you being topless in the park? // [Ms. Six]: They didn't. If – if anything, it was positive. It was, this is great to see you this way. I wish I would have been able to do this when I was your age. Man, it's hot today. You're making the right choice. Or, you know, positive reinforcement, positive encouragement, positive reactions. Smiles. It was that or nothing at all. People just walked by as if it was an ordinary day.")

(1967). At issue in *Loving* was a Virginia statute that prohibited so-called interracial marriages. *Id.* at 1. The plaintiffs in *Loving* were an interracial couple who were charged and convicted of violating Virginia's ban on intermarriage. *Id.* In considering the 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; *see also Lawrence*, 539 U.S. at 571, 577-78; *Obergefell*, 135 S. Ct. at 2584. 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.

The District Court did not abuse its discretion in finding that, absent any evidence that Section 17-142 has any positive effect on public order, Section 17-142 does not substantially serve an interest in maintaining public order.

6.5(b)(ii) *Section 17-142 has no effect on traffic safety in Fort Collins.*

Defendant-Appellant raised the justification that Fort Collins' interest in ensuring traffic safety is served by Section 17-142 at the preliminary injunction hearing through the testimony of Jeff Mihelich, Fort Collins' Deputy City Manager. While traffic safety is certainly a legitimate government interest, *see*

Craig v. Boren, 429 U.S. 190 (1976), there is no evidence that this interest is advanced by Section 17-142's discrimination.[13]

The Supreme Court has found that even when there is statistically significant evidence that a gender-based regulation would affect traffic safety, statistical evidence could not justify sex-based discrimination when it would only result in a 2% reduction in traffic violations. *Craig*, 429 U.S. at 201-202. In this case, Defendant-Appellant presented *no* empirical evidence at the hearing that Section 17-142 would have an effect on traffic, let alone a statistically significant effect of 2%. In fact, the only witness that testified regarding traffic safety at the hearing conceded that a scantily clad woman standing adjacent to a roadway, who was wearing some sort of covering in compliance with Section 17-142 and all other public decency laws, would have the same negative effect on traffic safety as a woman or girl standing with their breast below the areola exposed. Aplt. Appx., Vol. III, pp. 249-51

The District Court did not abuse its discretion when it found that Section 17-142 does nothing to further Fort Collins' asserted interest in traffic safety.

[13] Even if there had been evidence at the preliminary injunction hearing showing a statistically significant effect on traffic safety, "gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization." *J.E.B.*, 511 U.S. at 139 n. 11. As established, *supra* Section 6.4, Section 17-142 rests on impermissible stereotypes.

6.5(c) ***The District Court correctly held that Section 17-142 does not substantially advance an interest in protecting children.***

The Supreme Court refused to recognize an important or substantial governmental interest in protecting children from viewing non-sexual nudity. *See Erznoznik v. Jacksonville*, 422 U.S. 205, 213-14 (1975) ("Clearly all nudity cannot be deemed obscene even as to minors."). It has, however, recognized that protecting children from obscenity is an important or substantial governmental interest. *See Ginsburg v. New York*, 390 U.S. 629 (1968). Plaintiffs-Appellees do not wish to engage in obscenity at public places; and if they did, there are laws that prevent them from doing so. *See* C.R.S. § 18-7-301 (Public Indecency); C.R.S. § 18-7-302 (Indecent Exposure). Section 17-142 "is not directed against sexually explicit nudity, nor is it otherwise limited[,]" rather, it sweepingly forbids display of female breasts, "irrespective of context or pervasiveness." *Erznoznik*, 422 U.S. at 213-14.

Further, Defendant-Appellant advances the same interest to defend its discrimination that the defendants in *Romer* and *Obergefell* asserted: namely, that children will suffer if discrimination is no longer tolerated. *See Evans*, 1993 WL 518586, at *2 *rev'd, Romer*, 517 U.S. at 620 (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"); *Obergefell v. Wymyslo*, 962 F. Supp.

2d 968, 994 (S.D. Ohio 2013) *rev'd*, *Obergefell*, 135 S. Ct. at 2584 ("Supporters of Ohio's marriage recognition bans have also asserted that children are best off when raised by a mother and father."). Like in *Romer* and *Obergefell*, the evidence in this case does not illustrate that the interests of children are served by discrimination.

The evidence in the record demonstrates that non-sexualized exposure to the female breast does not harm children. *See* Aplt. Appx., Vol. III, p. 203. Children's exposure to parental nudity has no negative effects on children and, in fact, has positive effects on childhood development, including later engagement in sexual activity, when more positive sexual experience later in life, decreased instances of petty theft and shoplifting, and lower rates of drug use. Aplt. Appx., Vol. III, p. 197; *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). Section 17-142 inhibits a child's capacity to understand the human body. *See* Aplt. Appx., Vol. III, p. 198.

Additionally, Section 17-142 enshrines gender discrimination, which has a negative effect on children. *See* Aplt. Appx., Vol. III, pp. 197-98, 204-05 Enshrined gender discrimination has a particularly negative effect on young girls, who are astute in recognizing discrimination and feel its effects more dramatically. *See* Aplt. Appx., Vol. III, pp. 207-09; *see also* 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.

Even if there were evidence in the record showing that Section 17-142 protects children, Section 17-142's under-inclusiveness makes it constitutionally infirm. Section 17-142 does not prohibit men from appearing topless. If Section 17-142 were truly concerned with protecting children from public nudity, it would prevent all persons from appearing with their breasts exposed below the areola in public, not just women. The under-inclusiveness of Section 17-142 undermines Defendant-Appellant's argument that it, in fact, serves the interest it is purported to serve. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (noting that statute at issue was "so woefully underinclusive" that the state's asserted interest in the statute was "a challenge to the credulous"); *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) ("The facial underinclusiveness" of a regulation of speech "raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which appellee invokes in support of affirmance.").

The District Court did not abuse its discretion when it found that there is no evidence in the record that the protection of children is substantially advanced by Section 17-142's discriminatory treatment of women.

6.6 The other justifications advanced by Defendant-Appellant, which were not supported by any testimony at the preliminary injunction hearing and

therefore were not considered by the District Court, do not save Section 17-142.

6.6(a) ***Morality, which is couched by Defendant-Appellant as an interest in "decency" and "family-friendliness," cannot justify sex discrimination.***

Supreme Court jurisprudence has rejected morality, or a "sense of decency and family," as an important or substantial governmental interest. In *Lawrence*, the Court confronted the question of whether even "profound and deep convictions accepted as ethical and moral principles" could justify a constitutionally suspect law. 539 U.S. at 571, 577-78. It held, unequivocally, that the answer was no. *Id*. (stating that "considerations [of morality] do not answer the question before us . . . . The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. Our obligation is to define the liberty of all, not to mandate our own moral code. . . . the 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[.]" (internal quotation marks omitted); *id.* at 582 (O'Connor, J., concurring) ("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.").[14]

[14] S*ee also Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (further stating that "neither history nor tradition could save a law prohibiting

Post-*Lawrence*, the Supreme Court has recognized that a purported government interest in "decency" (or "morality" or "family-friendliness") is insufficient to justify gender discrimination. *See Obergefell*, 135 S. Ct. at 2584; *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (holding that law justified by moral disapprobation was unconstitutional where Congress's "principal purpose [wa]s to impose inequality" by imposing burdens on same-sex couples who had lawfully married); *see also McDonald v. City of Chi.*, 561 U.S. 742, 895 (2010) (holding that a city's "own moral code" was insufficient to justify the restriction of Second Amendment rights); *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 745 (5th Cir. 2008) (striking down ban on sale of "obscene devices" and commenting that "interests in 'public morality' cannot constitutionally sustain the statute after *Lawrence*"). "Morality," however articulated, is a governmental interest that can

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miscegenation from constitutional attack"); *Craig v. Boren*, 429 U.S. 190, 210 n.23 (1976) (disapproving of *Goesaert v. Cleary*, 335 U.S. 464 (1948), which had upheld a law barring women from bartending justified on the grounds that the sight of female bartenders caused "moral and social problems"); *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); *Barnes v. Glen Theatre*, 501 U.S. 560, 581 (1991) (Souter, J., concurring) (stating that "simple references to the State's general interest in promoting societal order and morality are not sufficient justification for a statute which concededly reaches a significant amount of protected expressive activity") (Justice Souter's concurrence was the narrowest majority opinion and can, therefore, be read as controlling precedent in *Barnes*).

no longer, in the post-*Lawrence* landscape, undergird a law that discriminates based on sex and perpetuates sex stereotypes.

6.6(b) ***Section 17-142 does not promote respect for women or prevent assaults.***

It is unclear how Section 17-142 promotes respect for women, as it makes them second-class citizens under the law. And the only testimony from female residents of Fort Collins at the preliminary injunction hearing demonstrates that women in Fort Collins feel denigrated by Section 17-142, not respected. Aplt. Appx., Vol. III, p. 172, 222. Further, expert testimony from Dr. Roberts demonstrates the negative effects that laws, like Section 17-142, have on women. Aplt. Appx., Vol. III, pp. 193-96 (finding that laws like Section 17-142, that perpetuate the objectification of women, have a negative impact on women's mental health and academic performance). Promoting women is a laudable governmental interest and it is an objective that Plaintiffs-Appellees wish to advance with this lawsuit. Section 17-142 does not advance this interest.

It is also unclear how Section 17-142 prevents assault on women, as it does not criminalize, or create more substantial penalties for, assault on women. Section 17-142, instead, engages in victim-blaming; Defendant-Appellant is essentially stating that women who would appear in public with their breast exposed below the areola bring assault upon themselves. Further, the unrebutted testimony of Dr. Roberts at the preliminary injunction hearing shows that laws like Section 17-142,

which perpetuate the objectification of women, lead to greater instances of assault and sexual violence. Aplt. Appx., Vol. III, pp. 194-95. If Defendant-Appellant truly cared about respecting women it would not engage in the slut-shaming and victim-blaming inherent in Section 17-142.

6.6(c) ***Criminalizing Plaintiff-Appellees' sartorial choices has no impact on the quiet enjoyment of private property.***

Defendant-Appellant's argument at the hearing regarding the supposed 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*, 388 U.S. at 1; *Romer*, 517 U.S. at 629; *Windsor*, 133 S.Ct. at 2675; *Obergefell*, 135 S.Ct. at 2584.

> It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause . . . and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic.

City of Cleburne, Tex. v Cleburne Living Ctr., 473 U.S. 432, 448 (1985) (internal citation omitted)).

And 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

(1971) (finding the burden falls on the viewer to "avoid further bombardment of their sensibilities simply by averting their eyes"); *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).

Moreover, every 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 supremacists 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).

Finally, there was no evidence presented at the preliminary injunction hearing that Section 17-142 effects, in any way, the quiet enjoyment of private property. In fact, Section 17-142 burdens Plaintiffs-Appellees quiet enjoyment of their own property by *criminalizing them* for choosing to wear, or not wear, certain clothing while on their own property or in their own homes. *See* FORT COLLINS, CO MUN. CODE 17-142(a)(2) (stating that female exposure of the breast below the

areola is criminal "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[.]"). Not only is there no evidence in the record that Section 17-142 protects the quiet enjoyment of private property, but there *is* evidence that it hampers this interest with regards to women who wish to appear topless on their own private property in Fort Collins.

6.6(d) ***There is no evidence in the record demonstrating that Section 17-142 has an impact on businesses in Fort Collins.***

Defendant-Appellant has presented no evidence, and there is no evidence in the record, that Section 17-142 has any impact on businesses in Fort Collins. Further, there is just as much anecdotal evidence in the record that the implementation of Section 17-142 has harmed businesses in Fort Collins. One of the Plaintiffs-Appellees testified at the preliminary injunction hearing testified that she moved from Fort Collins because of the re-authorization of Section 17-142, which certainly harmed businesses in Fort Collins that she previously patronized. Aplt. Appx., Vol. III, p. 169.

If plausible assumptions are accepted by this Court as evidence, which is the only evidence in the record supporting Defendant-Appellant's assertion that Section 17-142 would harm businesses in Fort Collins, there is certainly an equally plausible assumption that Section 17-142 has a negative impact on Fort Collins' businesses. A recent example shows how those who support equality vote with their wallet, and will happily boycott those institutions that are seen as promoting

inequality. After Uber broke a cab driver strike at LaGuardia airport (that was engaged in by the drivers in solidarity with those protesting President Trump's Travel Ban), a campaign was launched to #DeleteUber.[15] In the wake of Uber's perceived stand against equality and American constitutional ideals, their rival, Lyft, saw a thirty percent increase in ridership.[16] It is certainly an equally plausible that those who see equality between the sexes as an important societal goal would refrain from traveling, or moving, to Fort Collins, and frequenting Fort Collins businesses, because of Section 17-142.

Simply put, there is nothing in the record indicating that Section 17-142 substantially positively effects business in Fort Collins, or that the invalidation of Section 17-142 would have a negative impact on business there.

6.6(e) ***Fort Collins has no legitimate interest in regulating the personal dress of its female citizens at large.***

Former Supreme Court Justice John Paul Stevens, while sitting as a circuit judge on the Seventh Circuit, noted that blanket restrictions on personal dress and grooming would 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

[15] *See* #deleteuber, Twitter, https://twitter.com/hashtag/deleteuber?lang=en
[16] *See* Abha Bhattari, *The numbers are in, and #DeleteUber worked – in Lyft's favor*, The Washington Post (March 14, 2017), https://www.washingtonpost.com/news/business/wp/2017/03/14/the-numbers-are-in-and-deleteuber-worked-in-lyfts-favor/?utm_term=.396196c5894b

> 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. . . 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)).

In *De Weese*, the Eleventh Circuit struck down as not rationally related to a legitimate government interest an ordinance that forbid men from appearing topless in public. 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 these interests were "a mere circumlocution for enforcing the town fathers' view of the proper fashion for personal dress" and that "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 Fort Collins' City Council underpin the criminalization of female toplessness. Such predilections cannot form the basis for an important government interest.

6.7 Defendant-Appellant's contention that the District Court misinterpreted *Virginia* is a red herring.

6.7(a) ***This Court lacks jurisdiction to consider Defendant-Appellant's arguments and authority regarding the District Court's denial of Defendant-Appellant's Motion to Dismiss.***

Defendant-Appellant has undertaken an interlocutory appeal of the District Court's Order on Plaintiffs-Appellees' Motion for Preliminary Injunction, which enjoined the enforcement of Section 17-142. However, in its Opening Brief, Defendant-Appellant directly challenges the District Court's denial of their Motion to Dismiss and spends nine pages of its briefing addressing an alleged error that the District Court made. The District Court's ruling on Defendant-Appellant's Motion to Dismiss is irrelevant to this interlocutory appeal, which turns on the District Court's Order on Plaintiffs-Appellees Motion for Preliminary Injunction, and these

nine pages of Defendant-Appellant's Opening Brief should be disregarded by this Court. *See* Aplt. Op. Br., pp. 24-33.

Even if Defendant-Appellant had raised the issue of whether the District Court committed reversible error in denying Defendant-Appellant's Motion to Dismiss, which it has not, this Court would not have jurisdiction to make such a determination. Under 28 U.S.C. § 1291, courts of appeal only have jurisdiction over "final decisions of the district courts." 28 U.S.C. § 1291. "Usually, this means litigants must await a final judgment terminating their case before pursuing an appeal." *United States v. Wampler*, 624 F.3d 1330, 1333 (10th Cir. 2010) (citing *Mohawk Indus. v. Carpenter*, 130 S. Ct. 599, 605 (2009)). A non-final or interlocutory order denying a motion to dismiss, such as the District Court's Order on Defendant-Appellant's Motion to Dismiss in this case, does not grant this Court jurisdiction. *See United States v. Wampler*, 624 F.3d 1330, 1338 (10th Cir. 2010); *see also John E. Burns Drilling Co. v. Cent. Bank of Denver*, 739 F.2d 1489, 1491 (10th Cir. 1984) (per curiam). This Court lacks jurisdiction to consider these arguments and authority, and, therefore, they are not properly before this Court.

6.7(b) ***The District Court did not misinterpret Virginia in its Order granting Plaintiffs-Appellees' Motion for Preliminary Injunction.***

The District Court's application of *Virginia* in its Order granting Plaintiffs-Appellees Preliminary Injunction was correct and well-reasoned. Nowhere in its

briefing does Defendant-Appellant argue, or cite authority that, the District Court misinterpreted *Virginia* in its Order granting Plaintiffs-Appellees Preliminary Injunction. And, in fact, the District Court correctly applied *Virginia*.

The District Court appropriately followed *Virginia*'s holding that heightened scrutiny "bars governments from discriminating on the basis of supposed 'differences' between the sexes when doing so is a means of 'creat[ing] or perptetuat[ing] the legal, social, and economic inferiority of women.'" Aplt. Appx., p. 144 (quoting *Virginia*, 518 U.S. at 534). In other words, when a law utilizes sex stereotypes to define "real" differences between the sexes, it violates Equal Protection.

And, post-*Virginia*, Supreme Court precedent has reaffirmed this principle of equal protection jurisprudence. *See* Section 6.4, *supra*. Contrary to Defendant-Appellant's strained logic, it is clear from the face of Section 17-142 that it "creates or perpetuates that *legal, social*, and economic inferiority of women." *Virginia*, 518 U.S. at 534 (emphasis added). Section 17-142 criminalizes women for choices that men can make with impunity. The District Court did not misinterpret *Virginia* in its Order on Plaintiffs-Appellees Preliminary Injunction.

6.8 The District Court did not abuse its discretion in finding that Plaintiffs-Appellees will suffer irreparable injury absent an injunction.

The District Court was correct when it concluded that "any infringement of one's constitutional rights inflicts an irreparable injury." Aplt. Appx., Vol. III, p.

151. "[W]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012). Further, "[a] plaintiff suffers irreparable injury when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain." *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1156 (10th Cir. 2001). It is clear that in this case "[d]amages would be inadequate or difficult to ascertain," *id.* at 1156, as Plaintiff-Appellant's injuries stem from their subjugation under the law. "Dignitary wounds cannot always be healed with the stroke of a pen." *Obergefell*, 135 S. Ct. at 2606.

Further, absent an injunction, Plaintiffs-Appellees would face citation, arrest, and prosecution under Section 17-142 every day for simply making the same choice to appear topless in public that men are legally allowed to make. *See Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm."). Section 17-142's violation of Plaintiffs-Appellees Fourteenth Amendment rights alone constitutes irreparable harm. *See e.g.*, *Adams By & Through Adams v. Baker*, 919 F. Supp. 1496, 1505 (D. Kan. 1996).

Section 17-142 also significantly harms Plaintiffs-Appellees, and all other women in Fort Collins, by perpetuating the objectification of women. As Dr. Roberts testified at the preliminary injunction hearing,

> 25 years of research [demonstrates] that when one is treated as a sexual object, one begins to view oneself with a self-objectified perspective; one views oneself as an object that's available only for the scrutiny of others; one beings to feel shame if one doesn't meet the standards of scrutiny of others; one begins to feel disgust or anxiety about potential scrutiny.

Aplt. Appx., pp. 193-94. Research demonstrates that increased objectification of women results in greater instances of sexual violence towards women by men, Aplt. Appx., Vol. III, p. 194-95, increased mental health disorders among objectified women, Aplt. Appx., Vol. III, p. 195, and decreased academic performance among objectified women. Aplt. Appx., Vol. III, pp. 195-96.

The weight of scientific consensus also evinces that increased societal objectification of women has negative effects on men as well; men are more likely to carry sexist beliefs about women and to view sexual assault as acceptable. Aplt. Appx., Vol. III, p. 196. The only evidence in the record from the Preliminary Injunction hearing shows that in so doing, Fort Collins' sex-based classification causes harm to women and girls, as well as to men and boys. Aplt. Appx., Vol. III, pp. 193-97. Laws like Section 17-142 cause irreparable harm to women by perpetuating the objectification and sexualization of their bodies.

6.9 The District Court did not abuse its discretion in finding that the balance of harms weighs in favor of protecting constitutional rights.

"[W]hen plaintiff is claiming the loss of a constitutional right, courts commonly rule that even a temporary loss outweighs any harm to defendant and that a preliminary injunction should issue[.]" 11A Charles Alan Wright et al., Federal Practice and Procedure § 2948.2; *see also Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds by Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012) ("The balance of equities . . . generally favors the constitutionally-protected freedom of expression."). An injunction of Section 17-142 does little harm to Defendant-Appellant because Defendant-Appellant has no significant interest in enforcing Section 17-142 because it is unconstitutional. *See Awad*, 670 F.3d at 1131-32; *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999).

The District Court correctly recognized that the harm caused by the violation of Plaintiffs-Appellees' constitutional rights outweighs the personal moral qualms of other Fort Collins residents. *See Obergefell*, 135 S. Ct. at 2605-06 ("An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials

and to establish them as legal principles to be applied by the courts.'") (quoting *West Virginia Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 638 (1943)).

6.10 The District Court did not abuse its discretion in determining that the public interest is served by enjoining Section 17-142.

"[I]t is always in the public interest to prevent a violation of a party's constitutional rights." *Awad*, 670 F.3d at 1132**;** *see also Phelps-Roper*, 545 F.3d at 689. While it is in the public interest to enforce democratically enacted laws when they are enforced in a manner that complies with the constitution, even the public's interest in such enforcement must give way to the "more profound and long-term interest in upholding an individual's constitutional rights." *Awad*, 670 F.3d at 1132. The District Court did not abuse its discretion when it relied on this well-established legal principle.

7. **Conclusion**

History "has shown us the inequities that arise when the government organizes society by outdated constructs like biological sex and gender. Fortunately, the law eventually catches up to the lived facts of people[.]" *G.G. v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729, 730-31 (4th Cir. 2017) (David, J., concurring). Plaintiffs-Appellees ask that this Court to hold that the District Court did not abuse its discretion in issuing a preliminary injunction. Section 17-142 criminalizes women based on sex stereotypes and outdated social mores. It violates the most basic of Constitutional guarantees.

8. Statement Regarding Oral Argument

Plaintiffs-Appellees believe oral argument would assist the Court in resolving the issue on appeal.

DATED this 11th day of September 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,988 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Local Rule 32.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this **PLAINTIFFS-APPELLEES' RESPONSE BRIEF** was served on September 11, 2017, via CM/ECF to the following:

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