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.	)	

REPLY 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.

ORAL ARGUMENT IS REQUESTED
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October 10, 2017

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ARGUMENT

I. 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

The parties are in agreement regarding the factors applicable to motions for preliminary injunction. However, missing from Plaintiffs' Answer Brief is any discussion of the heightened burden applicable where, as here, the party seeking a preliminary injunction seeks to disturb the status quo. ***Kikumura v. Hurley***, 242 F.3d 950, 955 (10th Cir. 2001). Here, Plaintiffs must not only meet the four requirements for a preliminary injunction, but must demonstrate that they weigh "heavily and compellingly" in Plaintiffs' favor. ***Id.*** For all the reasons discussed below and in the Opening Brief, Plaintiffs are unable to do so.

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

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

Plaintiffs ask this Court to disregard the City's citation to a Wikipedia page relating to female breasts, claiming such source is "neither scientific nor reliable." [Answer Brief at p.12 n.5]. However, this Court has itself cited Wikipedia in its opinions. *See, e.g.*, ***Paros Props. LLC v. Colo. Cas. Ins. Co.***, 835 F.3d 1264, 1276

(10th Cir. 2016); ***United States v. Nance***, 767 F.3d 1037, 1044 (10th Cir. 2014). Further, the article the City relies on does not consist of an undocumented narrative, but instead contains citations to specific reference materials, including a multitude of scientific and medical sources, none of which Plaintiffs claim are inaccurate or unsupported. [ECF 47-1]. In particular, the article's notation that sensation from female nipples travels to the same part of the brain as sensations from the vagina, clitoris, and cervix, producing "a sensation in the genital area of the brain," is supported by citations to *Human Sexuality, Second Edition* and *The Journal of Sexual Medicine*, peer reviewed scholarly works in the field. [*Id.* at p.8 and p.11 n.57-58].

Plaintiffs also ignore the other sources referenced by the City, including research demonstrating the sensitivity of female breasts is "significantly greater" than a man's after puberty, and a seminal study of human sexual interactions discussing the prevalence of manual and oral stimulation of the female breast during intercourse. [Opening Brief at pp.13-14]. Plaintiffs also disregard the testimony of a CSU graduate student who testified at the City Council hearing on the Ordinance regarding the sexual function of female nipples, as compared to male nipples that are "as important to the body as an appendix." [ECF 47-4 at 11:21-12:6, 12:45-13:3, 12:7-9]. *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 in rejecting an equal protection challenge to a state law defining nudity to include only the female breast).

Further, even if the City had provided ***no*** evidence on this issue, it should not require expert testimony, documentary evidence, or peer reviewed scientific studies to establish the proposition that female breasts have a unique sexual function, a reality that would seem to be apparent to anyone who has engaged in or read about human sexual relations. *See* ***Hang On, Inc. v. City of Arlington***, 65 F.3d 1248, 1256 (5th Cir. 1995) (finding physician's testimony distinguishing between male and female breasts was "certainly consistent with what we know medically about human sexual response," 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.")

ii. The Ordinance Does Not Perpetuate Any Sex Stereotype

The City's Opening Brief explained why the District Court incorrectly relied on the Supreme Court's rejection of sex-role stereotyping in laws differentiating between men and women, because the Ordinance at issue here does nothing to impede a woman's ability to pursue any job or other economic opportunity.

[Opening Brief at p.33]. Plaintiffs now proclaim the Ordinance does in fact perpetuate sex-role stereotyping in the form of the notion that the exposure of a woman's breast is inherently sexual. [Answer Brief at pp.10-11]. Plaintiffs' argument, and the District Court's ruling it relies on, demonstrate a fundamental misunderstanding of the Ordinance.

If the City actually believed the exposure of a woman's breast is inherently sexual, it would not have made any exception for breastfeeding. Further, the Ordinance does not single female breasts out for public cover-up, and instead includes female breasts within a category of private parts the City's citizens have demonstrated they do not want themselves or their children to be exposed to in public. Both male and female genitals and buttocks are included among those parts, and Plaintiffs do not and cannot argue that exposure of those body parts by either sex is inherently sexual.[1] Instead, the plain and common sense intent of the Ordinance is to require body parts with an eliminative or procreative function be kept clothed, regardless of the individual's intent in attempting to expose them, and

[1] An individual urinating in public, or mooning their friends as a prank, would be in violation of the Ordinance just the same as someone exposing their genitals or buttocks for purposes of sexual gratification. Nor does Plaintiffs' expert explain why, if the point of covering up women's breasts was to "keep[] women in their place," [Hearing Transcript at 40:11], then men are also required to cover their buttocks and genitals.

both common sense and the evidence cited by the City demonstrate that female breasts do, in fact, have a procreative function unmatched by male breasts.[2]

Plaintiffs next argue the Ordinance reflects sex-role stereotyping in the form of dictating how a woman should dress. [Answer Brief at pp.14-17]. Initially, this issue was not raised in the District Court below, and should not be considered by this Court on appeal. ***United States v. Hernandez***, 847 F.3d 1257, 1269 (10th Cir. 2017). In any event, the cases cited by Plaintiffs discuss how comments that a woman's dress at work was not sufficiently feminine could provide evidence of gender discrimination in the employment context. This case does not involve employment, and to the contrary the individual Plaintiffs each specifically testified their access to economic opportunities was not affected by the Ordinance. [*See* Reporter's Transcript, Motion for Preliminary Injunction, 12/19/2016, Appendix Volume 3, p.153 ("Hearing Transcript"), at 32:5-34:4; 73:10-74:16]. Nor is the City telling women to dress femininely, and whether breasts are covered with a lace dress

[2] Plaintiffs assert that City Councilmember Ray Martinez equated the public exposure of female breasts to pornography, but in the quoted testimony it is one of the City's Attorneys who refers to pornography, in the context of a state law prohibiting sales of nude magazines to minors. [Answer Brief at p.13 and n.6]. Plaintiffs also here proclaim the irony of Mr. Martinez not wanting Fort Collins to become a "strip club" given that the City allows strip clubs, [*see id.*], but the obvious distinction is that an adult can choose whether or not they want to attend a strip club, and the Plaintiffs wish to decide for themselves who will be exposed to their breasts, including children.

or a flannel shirt makes no difference under the Ordinance. This line of cases therefore has no bearing on the issue at hand.

Plaintiffs then offer an extensive discussion of the Supreme Court's cases relating to sex-role stereotyping, including cases based on stereotypes that women earn less than men, marry earlier than men, vote certain ways on a jury, have different capacities than men, and are more involved in child-rearing than men. [Answer Brief at pp.17-23]. The Ordinance at issue here is based on biology, not stereotypes, but in any event, preventing women from obtaining jobs, serving on juries, and attending schools, cannot legitimately be compared to preventing women from taking their tops off in public. *See* ***Craft v. Hodel***, 683 F. Supp. 289, 299-300 (D. Mass. 1988) (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").

Plaintiffs do not persuasively point to any sex role stereotype perpetuated by the Ordinance, and as a result their effort to fit this case within the holding of ***United States v. Virginia***, 518 U.S. 515 (1996) ("***VMI***"), fails as a matter of law.

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

Plaintiffs assert the Ordinance is not substantially related to the important government interest of maintaining public order and protecting children, claiming these are the same concerns expressed by citizens in supporting discrimination based on race, gender, and sexual orientation. [Answer Brief at pp.23-24]. Contrary to Plaintiffs' inflammatory rhetoric, however, the desire of the City's citizens to determine for themselves and their own children whether they should be exposed to the nude bodies of strangers, has no conceivable relationship to baseless prejudice against people of different colors, genders, and sexual orientations.

Plaintiffs complain the City presented no evidence, "empirical or otherwise," that the Ordinance furthers these interests. [Answer Brief at p.25]. In reality, the City presented evidence in the form of the testimony of its citizens at the public hearing, [ECF 19-2 at 7:20-9:3, 10:9-11:5, 12:12-13:9, 13:18-15:14, 17:8-18:20, 18:24-19:20, 19:23-21:5, 21:20-22:23, 23:3-24:13, 25:4-26:11, 27:1-20, 33:16-35:2, 35:6-36:10; 38:6-39:1, 39:17-40:8, 40:21-41:13, 46:10-17, 47:22-48:5, 48:14-49:24, 50:19-51:5, 56:11-19, 57:4-58:7, 59:3-20, 60:12-61:9, 65:6-13], the testimony of City officials at the preliminary injunction hearing, [Hearing Transcript at 94:19-102:14; 136:19-139:25; 150:13-153:6], and the dozens of cases cited by the City upholding topless bans applicable only to females. [*See* Opening Brief at pp.18-22].

By contrast, Plaintiffs fail to cite a single case finding no substantial government interest in prohibiting female toplessness, and instead attempt to deflect the City's cases by proclaiming they are not binding on this Court and do not reflect the purported "current state of equal protection jurisprudence." [Answer Brief at pp.25-26].[3]

While Plaintiffs are correct that the cases cited by the City are not binding on this Court, the sheer volume of cases finding an important governmental interest supporting similar bans is at the very least persuasive, particularly given the glaring lack of any contrary authority. Plaintiffs' additional assertion that the cases cited by the City are not current is simply false. To the contrary, the City discussed multiple cases finding no equal protection violation in female-only topless bans since the ***VMI*** case relied on by the District Court. [*See* Opening Brief at pp.27-33]. In fact, the most recent case cited by the City for its rejection of an equal protection challenge was decided just two years ago, *see* ***Tagami v. City of Chicago***, 2015 U.S. Dist. LEXIS 90149, *9 (N.D. Ill. July 10, 2015), long after the vast majority of the tangentially-related precedent cited by Plaintiffs. [*See* Answer Brief at pp.17-23].

Plaintiffs also argue this Court should disregard all of the government interests

[3] Indeed, contrary to the Plaintiffs' assertion, the District Court recognized the weight of authority against its position by noting it was "going out on [a] lonely limb" in issuing its decision. [ECF 53 at p. 10].

cited in support of its nudity ban, because it raised certain interests in briefing on the preliminary injunction motion, addressed two of those interests at the preliminary injunction hearing, and now allegedly asserts new interests on appeal. [Answer Brief at pp.27-29]. In fact, the government interests cited by the City in the briefing below and in this Court are merely different articulations of the same core principles, and the City made the choice to highlight two main categories at the hearing due to limited time and the significance of those that were emphasized.[4] Further, while Plaintiffs mock the City's suggestion that the Court review the entirety of the records of the City Council hearings and preliminary injunction hearing, it is only by reviewing those materials in their entirety that the Court can obtain a true understanding of the widely varying concerns presented to the City Council, and how the ban relates to those concerns.

Plaintiffs next continue their foray into entirely unrelated legal issues, claiming the Ordinance relies on "private biases" and attempting to liken the ban at issue here to a law stripping a white mother of the custody of her children after she married an African-American man, the use of peremptory challenges to jurors based on gender, and laws prohibiting interracial marriage. [Answer Brief at pp.30-34].

[4] Counsel for the City stated specifically that the City was addressing the "principal governmental interests" at the hearing, and that there were additional "subsets" of those interests. [Hearing Transcript at 9:10-15].

Plaintiffs continue to invoke inflammatory examples with no bearing on the issues at hand, apparently due to the lack of any precedent adopting their viewpoint in this context. However, Plaintiffs fail to show how the Ordinance reflects private biases and, to the contrary, the evidence in the record demonstrates the distinction between male and female breasts is based on biology and a common sense understanding of human sexual relations, and not any private or public bias against women on the basis of gender.

Plaintiffs next assert the City should have been able to provide evidence of the disruption to public order caused by topless women to support this asserted government interest. In fact, the City received testimony from a resident who had lived in places like Las Vegas, Bangkok, China, Thailand, and Serifos, Greece, where topless and nudity were common place, and had witnessed the detrimental effects on those societies, including increases in sex trade, abuse, and sexual assault. [ECF 19-2 at 39:20-40:8]. With respect to the Colorado cities listed by Plaintiffs as permitting women to go topless in public, Plaintiffs never offered any evidence women in those cities go topless on a regular basis, such that data relating to public

order would likely be available.[5] Further, Plaintiffs appear to concede there is an important government interest in prohibiting public nudity in other forms, such as the male penis and the female vagina, despite the lack of any empirical data demonstrating its effect on public order. In fact, Plaintiffs' own expert testified that a woman "might want to think seriously about whether it's smart to go topless next to the construction site," [Hearing Transcript at 63:15-64:1], apparently recognizing the potential disruption to public order from toplessness in certain situations.

Returning to the issue of protection of children, Plaintiffs once again attempt to liken the City's arguments to those promoting discrimination against homosexuals. [Answer Brief at pp.36-37]. However, in both cases cited by Plaintiffs, the actual argument was for the maintenance of the traditional family unit, meaning a mother and father raising children together. ***Evans v. Romer***, 1993 Colo. Dist. LEXIS 1, *20 (D. Denver Cty. Dec. 14, 1993); ***Obergefell v. Wymyslo***, 962 F. Supp.2d 968, 994 (S.D. Ohio 2013). This case has nothing to do with traditional family units, and protecting children from viewing nude strangers is obviously different than protecting children from perceived evils of being raised by same-sex

[5] While the City of Denver permits women to go topless in public, counsel for the City, Mr. Ringel and Ms. Dale, have lived a combined 56 years in Denver and have never seen a single topless woman in public in the streets of Denver. Indeed, the general societal more of women covering their breasts in public likely explains the lack of significant data one way or the other.

parents. Further, Plaintiffs again do not object to the entirety of the statute, and thereby apparently concede the state's interest in protecting children from at least some form of stranger nudity.[6] The fact that the Ordinance draws the line differently than the Plaintiffs does not equate to the imposition of private bias against women.

Plaintiffs next argue that even if the Ordinance did protect children, it is unconstitutional because it does not include males and is therefore under-inclusive. [Answer Brief at p.38]. However, as previously discussed, males are not actually biologically similarly situated to females in terms of their breast development and function, and as a result the failure to bar male toplessness does not render it unconstitutional.

Plaintiffs next assert the Supreme Court has rejected morality or decency as

[6] Plaintiffs cite to Dr. Roberts's testimony regarding a long-term study of the effect of exposure to parental nudity on children, [Answer Brief at p.37], but she cited no studies evaluating the effect of stranger nudity on children. By contrast, multiple citizens, including a family therapist, testified at the City Council hearing regarding the detrimental effects of early exposure to nudity on children. [*See, e.g.*, ECF 19-2 at 48:14-49:29]. While the City agrees parents should be able to make their own decisions regarding their children's exposure to parental nudity in their own home, it does not agree that Plaintiffs, who do not have children themselves, should be able to decide on behalf of all parents in the City limits when their children will be exposed to the nudity of strangers at the swimming pool, the public park, or on the street corner.

an important or substantial governmental interest. [Answer Brief at p.39].[7] In reality, while the Supreme Court has rejected morality as an important government interest supporting certain laws, it has never asserted that morality can never be a basis for upholding a law.[8] Moreover, the cases relied on relate to the actions of consenting adults in the privacy of their own homes, and Plaintiffs neglect to discuss more relevant cases permitting municipalities to limit the exposure of minors to nudity. *See, e.g.*, ***Ginsberg v. New York***, 390 U.S. 629 (1968) (upholding conviction of store owner for selling magazine containing pictures of female breasts to a 16-year-old).

Plaintiffs question how the Ordinance promotes respect for women and prevents assaults. [Answer Brief at pp.41-42]. While Plaintiffs themselves purport to feel "denigrated" by the law, [*id.* at p.41], the testimony at the City Council hearing was abundant that the City's citizens feel the exact opposite, and believe

[7] Of course, Plaintiffs' suggestion that the Ordinance is based on the City's morality ignores the actual decision being based on biology not morality. By pejoratively labeling the Ordinance as an exercise of morality, Plaintiffs attempt to mischaracterize the underlying bases of the Ordinance without considering them in their totality based on the entire record before the City Council and the District Court.

[8] Plaintiffs here continue to quote Justice Souter's "controlling precedent" concurrence, [Answer Brief at p.40 n.14], even after the City pointed out the language came from Justice White's dissent, and the actual concurrence expressly declined to weigh in on the plurality's determination that morality is a sufficient governmental interest to support a nudity ban. [ECF 35 at pp.7-8].

prohibiting public female toplessness shows respect for the unique attributes of female breasts. If anything, it is men who are rendered "second-class citizens under the law," [*id.*], as their chests include no appendage worthy of protection from the view of strangers. Further, keeping organs covered that unquestionably have a sexual function does not constitute "slut-shaming" or "victim-blaming" any more than requiring both males and females to keep their genitals covered in public suggests that individuals who expose their genitals are asking to be assaulted. [*Id.* at p.42].

Plaintiffs then question the City's reliance on the quiet enjoyment of property, once again returning to their inflammatory and wholly inapposite analogies to cases involving interracial marriage, and now adding equally inapposite cases relating to equal housing opportunities, discrimination by private associations, and access to contraceptives. [Answer Brief at pp.42-43]. Plaintiffs include case law relating to First Amendment, [*id.*], despite the dismissal of their First Amendment claim in the District Court below. [ECF 37]. And, contrary to Plaintiffs' assertion, the City did in fact present evidence that the Ordinance effects the quiet enjoyment of property by the citizens of Fort Collins. [Hearing Transcript at 102:15-21; ECF 19-2 at 20:5-11, 25:17-21, 34:23-35:2].

Plaintiffs also falsely assert there is no record evidence demonstrating that striking down the Ordinance's topless ban would impact businesses in Fort Collins.

[Answer Brief at p.44]. To the contrary, multiple citizens testified at the hearing that they would no longer go downtown to shop or to eat if the City Council decided to permit female toplessness in public. [Hearing Transcript at 102:22-104:2; ECF 19-2 at 9:14-17, 11:8-14, 20:18-21:1, 33:17-20, 37:13-17, 58:11-24].

Plaintiffs next argue the City "has no legitimate interest in regulating the personal dress of its female citizens at large." [Answer Brief at p.45]. As discussed above, the City is not trying to regulate anyone's dress, it is trying to restrict public nudity. Plaintiffs cite to a footnote from a Seventh Circuit opinion authored by later Supreme Court Justice John Paul Stevens, but ignore the body of the opinion, which rejected a teacher's constitutional challenge to his termination by a school board based on his dress, noting:

> From the earliest days of organized society, no absolute right to an unfettered choice of appearance has ever been recognized; matters of appearance and dress have always been subjected to control and regulation, sometimes by custom and social pressure, sometimes by legal rules. A variety of reasons justify limitations on this interest. They include a concern for public health or safety, a desire to avoid specific forms of antisocial conduct, and an interest in protecting the beholder from unsightly displays. Nothing more than a desire to encourage respect for tradition, or for those who are moved by traditional ceremonies, may be sufficient in some situations. Indeed, even an interest in teaching respect for (though not necessarily agreement with) traditional manners, may lend support to some public grooming requirements. Therefore, just as the individual has an interest in a choice among different styles of appearance and behavior, and a democratic society has an interest in fostering diverse choices, so also does society have a legitimate interest in placing limits on the exercise

of that choice.

Miller v. School Dist., 495 F.2d 658, 664 (7th Cir. 1974). Therefore, even if this case involved mode of dress rather than nudity, ***Miller*** does not support Plaintiffs' assertion that blanket restrictions on dress "would readily be condemned as unconstitutional." [Answer Brief at p.45].

Plaintiffs also cite to ***De Weese v. Palm Beach***, 812 F.2d 1365, 1369 (11th Cir. 1987), which struck down a town ordinance barring men from jogging without shirts in public. While that case does actually deal with the absence of clothes, instead of the type of clothing, it does not address female toplessness. In fact, the court in ***DeWeese*** considered whether other jurisdictions had enacted similar laws in assessing the rationality of the law, and concluded: "The virtual absence of statutes or ordinances similar to the instant one, although not controlling, is a strong suggestion that the ordinance is arbitrary and irrational." ***Id.*** at 1369. By contrast, there are myriad laws prohibiting female toplessness from across the country, along with myriad cases upholding constitutional challenges to such laws identical to Plaintiffs' challenge here, as discussed in detail in the Opening Brief. [*See* Opening Brief at pp.14-23, 28-33].

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

Plaintiffs assert the City cannot here raise the District Court's

misinterpretation of ***VMI*** and its progeny because it is not appealing the denial of the Motion to Dismiss. [Answer Brief at pp.47-48]. However, the District Court's interpretation of ***VMI*** forms the basis for its decision granting the preliminary injunction, [*see* ECF 53 at p.4], and as a result the proper interpretation of ***VMI*** is appropriately raised on appeal.

Plaintiffs also argue in the alternative that the District Court properly applied ***VMI***, with the bald proclamation "it is clear from the face of Section 17-142 that it 'creates [sic] or perpetuates [sic] that [sic] *legal*, *social*, and economic inferiority of women." [Answer Brief at p.49 (quoting ***VMI***, 518 U.S. at 534) (emphasis Plaintiffs')]. However, Plaintiffs neglect to explain how the Ordinance creates or perpetuates the legal, social, or economic inferiority of women, nor do they cite to any evidence from the record demonstrating any such effect. A common sense reading of the Ordinance demonstrates that it is directed at women because their breasts have biological attributes and functions absent from men's breasts. Therefore, if anything the Ordinance acknowledges the superiority of women in terms of the unique nutritive and sexual functions of their breasts.

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

Plaintiffs do not dispute their claim of irreparable injury relies on their assumption that the Ordinance violates their constitutional rights, and do not cite a

single case holding the inability to go topless in public while a case is decided on the merits constitutes an irreparable injury. The vague and conclusory testimony of Dr. Roberts does not establish an injury that is great, actual, and not theoretical, ***Heideman v. S. Salt Lake City***, 348 F.3d 1182, 1189 (10th Cir. 2003), particularly given her admissions that she had seen no data on the effect of allowing female toplessness on the self-objectification concerns that formed the basis for her testimony, [Hearing Transcript at 60:6-23], and was aware of no studies on the psychological effect on women who choose to go topless in public. [*Id.* at 64:2-7]. One of the Plaintiffs does not even live in the City anymore, and they themselves acknowledge they are free to go topless in other cities in Colorado. [Answer Brief at pp.32, 44]. Because Plaintiffs do not have a substantial likelihood of demonstrating an equal protection violation, they will suffer no irreparable injury from being required to wear tops when they are in Fort Collins while this case is pending.

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

Plaintiffs continue to incorrectly apply First Amendment cases and again cite no cases finding the balance of harms weighs in favor of female toplessness when a nudity ordinance is being challenged on equal protection grounds. [Answer Brief at p.52]. Plaintiffs also proclaim the City has no significant interest in enforcing the Ordinance "because it is unconstitutional," [*id.*], but if the District Court erred in

finding a substantial likelihood on the merits, then Plaintiffs' own argument for this prong fails. Plaintiffs' reliance on ***Obergefell*** is once again inapposite, as the case did not involve a preliminary injunction, and instead discussed whether a plaintiff should be required to wait for legislative action before challenging the denial of a fundamental right. [Answer Brief at pp.52-53].

E. THE INJUNCTION IS ADVERSE TO THE PUBLIC INTEREST

Plaintiffs here continue to rely on their assumption of a constitutional violation to support their assertion that the public interest is served by the injunction, [Answer Brief at p.53], and a finding they are unlikely to prevail on the merits therefore undermines their argument on this prong as well. Plaintiffs also continue to rely solely on First Amendment cases, [*see id.*], and cannot cite a single case holding it is in the public interest to permit women to go topless in public while a legal challenge to a municipal ordinance is decided on the merits.

CONCLUSION

In conclusion, it is not accidental Plaintiffs invoke such provocative topics as interracial marriage, race discrimination, and sexual orientation discrimination to advance their position on female nudity. Because Plaintiffs lack any persuasive authority adopting their position, they are instead left with trying to liken their cause to governmental limitations previously accepted by the public, but rejected by the

federal courts on the basis of constitutional protections. The obvious problem with this effort is the cases they rely on were seeking to address biases that had no justification other than discrimination against minorities. No such issue exists here, and no matter how inflammatory their characterizations, Plaintiffs cannot change the fundamental biology underlying the distinction at issue here.

Plaintiffs do not dispute that municipalities have the right to prohibit public exposure of genitals and buttocks, and the City's determination that the exposure of female breasts constitutes nudity in a way that male breasts do not has a foundation in science and in common sense. The District Court's "lonely" contrary conclusion is not supported by the overwhelming applicable precedent from other federal and state courts who have addressed this precise issue previously, and should be overturned by this Court.

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 4896 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 Reply 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 10th day of October, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of October, 2017, I electronically filed the foregoing **REPLY BRIEF** using the CM/ECF system which will send notification of such filing to the following e-mail address:

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