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Free the Nipple–Fort Collins and the Enduring Fight for Gender Equality

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FREE THE NIPPLE–FORT COLLINS AND THE ENDURING FIGHT FOR GENDER EQUALITY

Abstract: On February 15, 2019, the United States Court of Appeals for the Tenth Circuit in *Free the Nipple–Fort Collins v. City of Fort Collins* held that a public nudity ordinance that banned the exposure of female breasts violated the Equal Protection Clause. In doing so, the court split from the Fourth, Seventh, and Eighth Circuits and established that ordinances that restrict women, but not men, from being topless in public are unconstitutional. This Comment argues that the Tenth Circuit was correct in holding that the prohibition on public exposure of female breasts violated the Equal Protection Clause, as the ban did not substantially serve any important governmental interest. It further argues that female-only toplessness bans should be wholly struck down because they are based on archaic stereotypes about women's bodies and have significant adverse effects on women.

INTRODUCTION

Public female toplessness is at the center of a growing gender equality movement in the United States.[1] Since the 1990s, advocacy groups have brought legal actions to challenge public nudity ordinances that criminalize only female toplessness.[2] These challenges found minimal success until February 2019, when the United States Court of Appeals for the Tenth Circuit decided *Free the Nipple–Fort Collins v. City of Fort Collins* (*Free the Nipple II*).[3]

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[1] *See* Deborah Acosta, *Free the Nipple?*, N.Y. TIMES (Jan. 26, 2016), https://www.nytimes.com/video/fashion/100000004162595/free-the-nipple.html [https://perma.cc/Z22Z-DZYN] (explaining the growing popularity of the Free the Nipple movement and its mission to fight for gender equality).

[2] *See, e.g.*, People v. Santorelli, 600 N.E.2d 232, 233–34 (N.Y. 1992) (holding that a statute created to discourage restaurants from having topless female waiters could not be used to prohibit female toplessness in public because the state failed to demonstrate how the law served any important government interest). The defendant in *Santorelli*, a member of a group known as the "Topfree Seven," was arrested while conducting a demonstration in a public park and bearing her uncovered breasts. *See id.* at 233; Luke A. Boso, *A (Trans)Gender-Inclusive Equal Protection Analysis of Public Female Toplessness*, 18 LAW & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 143, 158–61 (2009) (explaining the history of the movement to take down female-only toplessness bans through protest).

[3] *See* Free the Nipple–Fort Collins v. City of Fort Collins (*Free the Nipple II*), 916 F.3d 792, 805 (10th Cir. 2019) (striking down the city's public nudity statute that permitted men to be topless in public, but not women); *Santorelli*, 600 N.E.2d at 234 (dismissing charges against defendants for allegedly violating a state law banning public exposure of female breasts); *see also* U.S. CONST. amend. XIV, § 1; Tagami v. City of Chicago, 875 F.3d 375, 379–80 (7th Cir. 2017) (holding that an ordinance prohibiting women from being topless in public survived constitutional scrutiny because its

The Tenth Circuit evaluated the constitutionality of an ordinance that banned female-only toplessness in public.[4] It considered whether the ordinance substantially served the purported interests asserted by Fort Collins, which included maintaining public order and protecting children from public nudity, as well as whether the alleged physical differences between male and female breasts warranted this ordinance.[5] Ultimately, the court found that the ordinance violated the Equal Protection Clause.[6]

This Comment argues that the Tenth Circuit was correct in holding that a public nudity ordinance restricting female-only toplessness could not survive intermediate scrutiny, rendering it unconstitutional under the Equal Protection Clause.[7] Part I of this Comment gives an overview of Supreme Court jurisprudence on laws that distinguish on the basis of gender, the history of the Free the Nipple movement, and the factual and procedural history of *Free the Nipple II*.[8] Part II examines and discusses the circuit split and the different positions courts have taken in analyzing the constitutionality of female-only toplessness ordinances.[9] Lastly, Part III argues that the Tenth Circuit was correct in holding that the ordinance violated the Equal Protection Clause and discusses the implications of female-only toplessness bans and the rationale for eliminating laws of this type.[10]

I. Equal Protection, Gender- Based Classifications, and Female Toplessness

Section A of this Part discusses the Equal Protection Clause and the Supreme Court's development of intermediate scrutiny as the standard of review for gender-based classifications.[11] Section B discusses the history and impact of the Free the Nipple movement in the United States.[12] Section C provides the

purpose was preserving norms and maintaining order); Ways v. City of Lincoln, 331 F.3d 596, 600 (8th Cir. 2003) (upholding a female-only toplessness ban because the defendant town's interests in preventing the negative effects of public nudity were important and the ordinance was "substantially related to these objectives"); United States v. Biocic, 928 F.2d 112, 115–16 (4th Cir. 1991) (holding that a public nudity ordinance banning female toplessness was constitutional because the ordinance substantially served the government's interest in "protecting the moral sensibilities").

[4] *Free the Nipple II*, 916 F.3d at 800–804.

[5] *Id.* at 804–05.

[6] *Id.* (concluding the "overbroad" ban on female toplessness violated the Equal Protection Clause).

[7] *See infra* notes 54–77 and accompanying text.

[8] *See infra* notes 14–39 and accompanying text.

[9] *See infra* notes 40–53 and accompanying text.

[10] *See infra* notes 54–77 and accompanying text.

[11] *See infra* notes 14–23 and accompanying text.

[12] *See infra* notes 24–30 and accompanying text.

procedural history and facts of *Free the Nipple–Fort Collins v. City of Fort Collins*.[13]

A. Equal Protection and Intermediate Scrutiny for Gender-Based Classifications

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires states to treat all persons "similarly situated" equally under the law.[14] The Supreme Court has expanded this principle by allowing differential treatment for groups of individuals so long as the treatment can survive judicial review.[15] Laws that differentiate between men and women are subject to a heightened standard of review, known as intermediate scrutiny.[16] To survive this standard, a law must "serve important governmental

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[13] *See infra* notes 31–39 and accompanying text.

[14] U.S. CONST. amend. XIV, § 1; *see* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439–41 (1985) (holding that the existence of "immutable" traits does not justify laws that treat individuals differently absent some rational relation to a governmental objective); s*ee also* Reed v. Reed, 404 U.S. 71, 75 (1971) (concluding that the statute at issue violated the Equal Protection Clause by arbitrarily treating men and women differently who were "similarly situated").

[15] *See City of Cleburne*, 473 U.S. at 439–40 (holding that courts should presume that legislation that draws a classification among persons is valid as long as the classification is "rationally related to a legitimate state interest"); Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (holding that the Constitution allows for differential treatment as long the distinction drawn by a statute is not irrational). The Supreme Court first articulated the deferential "rational basis" standard of review and applied it to most state action that created a classification among persons. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533–34 (1973) (holding that a statutory classification must "rationally further" a legitimate state interest to be constitutional); Dandridge v. Williams, 397 U.S. 471, 487 (1970) (concluding that laws that create distinctions are constitutional as long as the state's action is "rationally based" and does not arbitrarily discriminate against any group); *see also* GEORGE BLUM ET AL., 16B AM. JUR. 2D CONSTITUTIONAL LAW § 859 (2d ed. 2019) (explaining that courts review most laws containing classifications for constitutionality using a rational basis standard of review).

[16] *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1700–01 (2017) (explaining that all laws that distinguish between men and women are subject to heightened scrutiny); United States v. Virginia, 518 U.S. 515, 533 (1996) (holding that courts shall review sex-based classifications under a standard of intermediate scrutiny); *City of Cleburne*, 473 U.S. at 440 (holding that classifications based upon gender are subject to a more stringent standard of review). *See generally* Jillian Friedmann, Note, *A Girl's Right to Bare Arms: An Equal Protection Analysis of Public-School Dress Codes*, 60 B.C. L. REV. 2547, 2567 (2019) (explaining that policies that intentionally affect one gender more than the other are generally unconstitutional). The Supreme Court initially applied rational basis review to sex-based distinctions. *See Goesaert*, 335 U.S. at 466–67 (upholding a law banning women from owning bars because it did not irrationally discriminate against women). After concluding that rational basis review was inappropriate for sex and gender-based classifications, however, the Supreme Court held that these classifications warranted strict judicial scrutiny. *See* Frontiero v. Richardson, 411 U.S. 677, 688 (1972) (holding that sex-based classifications are "inherently suspect" and courts must review them with "strict judicial scrutiny"). The Supreme Court finally reached the consensus that a middle tier of scrutiny was appropriate for gender classifications and held that intermediate scrutiny is required for these distinctions. *See United States v. Virginia*, 518 U.S. at 532–33 (establishing the standard for evaluating gender-based classifications); s*ee also* Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that sex-based classifications are subject to a heightened scrutiny under the Equal Protection Clause).

objectives and must be substantially related to achieving these objectives."[17] Physical differences between males and females may occasionally justify differential treatment under the law, but laws based upon generalizations about each gender cannot pass constitutional muster.[18] States must assert a genuine interest served by distinguishing between males and females beyond archaic and baseless stereotypes about women or their physical characteristics.[19] The classification must actually further this interest, and the state cannot simply declare the interest in response to a legal challenge to the classification.[20]

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[17] *See Craig*, 429 U.S. at 197–99 (holding that laws that distinguish between men and women must be substantially related to "important governmental objectives" to pass intermediate scrutiny); *see also* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725–26 (1982) (holding that there must be a "direct, substantial relationship between objective and means" in order for a state's gender classification to pass constitutional scrutiny). The Court has recognized that protecting public safety and health are legitimate government interests, but it has also emphasized that state actions must actually accomplish these objectives to satisfy intermediate scrutiny. *See Craig*, 429 U.S. at 199–200. The Supreme Court made it clear that "discrimination that 'is merely the accidental byproduct of a traditional way of thinking about females' is unacceptable." Miller v. Albright, 523 U.S. 420, 442 (1998) (Stevens, J., concurring) (quoting Califano v. Goldfarb, 430 U.S. 199, 223 (1977)).

[18] *See Morales-Santana*, 137 S. Ct. at 1700–01 (2017) (explaining that laws based on generalizations about gender roles and capabilities will be more closely scrutinized); Tuan Anh Nguyen v. INS., 533 U.S. 53, 68 (2001) (upholding a law that made it easier for an undocumented immigrant to gain citizenship if he entered the country with his mother, rather than his father, because the classification was based on the physical difference in the relationships between newborn children and their mothers compared to those with their fathers); *United States v. Virginia*, 518 U.S. at 533 (holding that, although some laws may differentiate based upon physical differences between men and women, they must not be premised on gendered generalizations); Michael M. v. Sup. Ct. of Sonoma Cty., 450 U.S. 464, 470–71 (1981) (concluding that a California law that defined statutory rape as unlawful sexual intercourse with a *female* was not unconstitutional because the sex classification was based on physical differences between males and females and the interest in preventing unwanted pregnancy). The Supreme Court has held that classifications based upon "inherent differences" between males and females, though potentially constitutional, may not be used to further the notion that women are inferior. *United States v. Virginia*, 518 U.S. at 533–34.

[19] *See Miss. Univ. for Women*, 458 U.S. at 725 (explaining that courts must ensure that statutes' purposes are not to perpetuate "archaic and stereotypic notions"); *United States v. Virginia*, 518 U.S. at 533 (holding that the justification for a sex-based classification must be genuine); Weinberger v. Wiesenfeld, 420 U.S. 636, 638, 642–43 (1975) (holding that a provision of the Social Security Act that differentiated, on the basis of sex, the amount of earnings a surviving family member could collect was unconstitutional because it was based on the stereotype that men financially supported their families more than women). The Court acknowledged that "societal understandings" change over time, and therefore laws that were constitutional at their enactment may devolve into constitutional violations if the interests they once served are no longer legitimate. *See Morales-Santana*, 137 S. Ct. at 1684 (holding that a federal immigration law was unconstitutional because it was based on an outdated stereotype about the roles and capabilities of husbands and wives, though these stereotypes permissibly existed in many laws and judicial opinions when the law was created); Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015) (explaining that courts may invalidate current laws that are based on inequitable principles that were once permissible).

[20] *See United States v. Virginia*, 518 U.S. at 533 ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."); *Craig*, 429 U.S. at 199–200 (concluding that the state's different minimum age for purchasing liquor for males and females did not closely serve its asserted interest in protecting public safety and therefore the legislation was unconstitutional). In order for a sex-based distinction to survive intermediate scrutiny, the interest asserted by the state must be

The Supreme Court requires an "exceedingly persuasive justification" for laws that discriminate based upon gender, and the government bears the burden of proving this justification.[21] Though the Supreme Court has never addressed the constitutionality of statutes prohibiting female-only toplessness, several federal courts of appeals have heard Equal Protection challenges against this type of ordinance.[22] These lower courts consistently rejected the argument that female-only toplessness bans violate the Equal Protection Clause, and instead have held that these restrictive laws are substantially related to the important government interests of protecting public morality and safety.[23]

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the actual rationale behind enacting the legislation. *See Morales-Santana*, 137 S. Ct. at 1684–85 (observing that the state's asserted interests in ensuring a connection between child and citizen parent and preventing statelessness were likely not the true reason for the sex-based classification at issue); *see also Craig*, 429 U.S. at 201–04 (holding that the state did not present sufficient evidence to prove that its purpose in enacting the sex-based classification was reducing traffic accidents); *Weinberger*, 420 U.S. at 648 (explaining that the state may not simply offer an interest to support its action if that interest was not the actual motivation behind the action). The Supreme Court explained that courts reviewing sex-based classifications must find that there is a sufficient means-ends connection between the legislation and the asserted interest to ensure the classification is genuine and not motivated by an intent to discriminate or disadvantage any group. *See* Romer v. Evans, 517 U.S. 620, 633 (1996) (explaining that courts must guarantee that the purpose of a classification is not to disadvantage the group subject to different treatment); *see also Michael M*, 450 U.S. at 470 (quoting *Weinberger*, 420 U.S. at 648 n.16) (affirming that a court may reject a state's asserted interest "if 'it could not have been a goal of the legislation'").

[21] *See United States v. Virginia*, 518 U.S. at 524 (explaining that in order for a court to uphold a law that classifies based on gender, a party must show an "'exceedingly persuasive justification' for the classification"); s*ee also Miss. Univ. for Women*, 458 U.S. at 724 (holding that the state was required to provide an "exceedingly persuasive justification" for a law that prohibited men from taking university courses for credit) (citing *id.*). An "exceedingly persuasive justification" exists if the distinction between males and females is "substantially related to the achievement of important government interests." *United States v. Virginia*, 518 U.S. at 524. The Court has recognized that the protection of public health and safety, along with "public sensibilities" and morality are important interests that may justify discriminatory ordinances so long as the classification "closely serves" to accomplish these goals. *See Craig*, 429 U.S. at 199–200 (holding that "public health and safety" are significant interests of state and local governments).

[22] *See*, *e.g.*, *Free the Nipple II*, 916 F.3d at 795 (involving a challenge to a city ordinance banning females over age ten from exposing their breasts in public); *Tagami*, 875 F.3d at 377 (involving the member of a topless advocacy group challenging the constitutionality of a Chicago ordinance restricting female-only toplessness in public); *Ways*, 331 F.3d at 599 (involving a challenge to a city ordinance banning females from exposing their breasts without fully opaque coverings); *Biocic*, 928 F.2d at 113 (resolving a challenge to a United States Fish and Wildlife regulation prohibiting female toplessness in wildlife refuges). In *Barnes v. Glen Theatre*, the Supreme Court held that a public nudity ordinance prohibiting completely nude dancing did not violate the First Amendment, but did not reach the question of whether the ordinance violated the Equal Protection Clause. 501 U.S. 560, 565 (1991).

[23] *See Tagami*, 875 F.3d at 380 (affirming that an ordinance prohibiting women from being topless in public survived constitutional scrutiny because it protected norms and public order); *Ways*, 331 F.3d at 600 (upholding a public nudity ordinance prohibiting the exposure of female breasts intended to protect the public from nudity); *Biocic*, 928 F.2d at 115–16 (concluding that a public nudity ordinance banning female toplessness was constitutional because the ordinance was substantially related to the important government interest of preserving "moral sensibilities").

B. The "Free the Nipple" Movement

The "Free the Nipple" movement began its fight for gender equality in 2012.[24] The idea behind the movement is simple: men and women should be equal, and this certainly includes the right to be topless in public.[25] To achieve this goal, members of the movement engage in public protests and bring litigation against cities with discriminatory public nudity ordinances.[26] In recent years, the Free the Nipple campaign has spread significantly on social media sites, where it has amassed an impressive global following.[27] The movement drew inspiration from the Topfree Seven, a collection of women responsible in

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[24] Lina Esco, *"Free the Nipple" Is Not About Seeing Breasts*, TIME (Sept. 11, 2015), https://time.com/4029632/lina-esco-should-we-freethenipple/ [https://perma.cc/H2L7-6T49]; Sophie Roberts, *The Breast Exception: What Is Free the Nipple, What Celebrities Are Involved, Is It Illegal to Go Naked in Public, and What Counts as Graphic Content on Facebook?*, THE SUN (Mar. 26, 2019), https://www.thesun.co.uk/fabulous/2778411/free-the-nipple-campaign-celebrity-supporters-laws-illegal-facebook-instagram/ [https://perma.cc/R4ST-CF4P]. A film entitled "Free the Nipple" was released in 2012 and brought attention to the growing social movement. Roberts, *supra*. The film featured the movement's founder, Lina Esco, and highlighted efforts taken by members to raise awareness on gender inequality and discriminatory public nudity ordinances. *Id.* The current movement may trace its pre-history back to a group of outspoken women in the 1990s in New York. *See* Helen Pundurs, *Public Exposure of the Female Breast: Obscene and Immoral or Free and Equal?*, 14 IN PUB. INT. 1, 1–2 (1994–1995) (discussing prior social demonstrations conducted by the plaintiff in *Santorelli* and their effect of strengthening the growing gender equality movement). As one member, Miley Cyrus, explained: "It's not about getting your titties out. It's about equality." Gregory Babcock, *A Beginner's Guide to the "Free the Nipple" Movement*, COMPLEX (Jan. 23, 2015), https://www.complex.com/life/2015/01/guide-to-the-free-the-nipple-movement/ [https://perma.cc/2NY9-GX37].

[25] *See* Ashley Terrill, *Meet the Women Behind the #FreeTheNipple Movement*, ELLE (Jun. 23, 2014), https://www.elle.com/culture/career-politics/news/a15444/meet-the-women-behind-freethenipple-movement/ [https://perma.cc/Z3K2-M7J6] (featuring the Free the Nipple founder explaining that legalizing female toplessness is one of the first battles to win in the enduring fight for gender equality). Thirty-five states have laws banning female toplessness, but none have laws regulating male toplessness. *Id.*

[26] *See* Free the Nipple–City of Fort Collins v. City of Fort Collins (*Free the Nipple I*), 237 F. Supp. 3d 1126, 1128 (2017) (explaining that the plaintiffs in this case initially protested Fort Collins' public nudity ordinance by exposing their breasts on a street corner); Boso, *supra* note 2, at 147 (explaining the history of the movement to take down female-only toplessness bans through protest). In addition to fighting to allow women to be topless in public, Free the Nipple also seeks to rid society of the outdated notion that female breasts are inherently sexual. *See* Babcock, *supra* note 24 (featuring explanation by Free the Nipple founders that female toplessness will become less politically charged once members of society, especially men, are able to view female breasts as not inherently sexual objects). Members, including many celebrities, have taken to social media sites to protest discriminatory nudity policies that allow men to post photos of their nipples but not females. *See id.* (listing celebrities who have shared posts referencing the movement, such as Miley Cyrus and Cara Delevingne).

[27] *See* Babcock, *supra* note 24. The movement gained significant momentum on Twitter and Instagram due to its popular hashtag, #FreeTheNipple, and has over 450,000 combined followers on these sites. Free the Nipple (@freethenipple), TWITTER, https://twitter.com/freethenipple?lang=en [https://perma.cc/2NAQ-LVAN]; Free the Nipple (@freethenipple), INSTAGRAM, https://www.instagram.com/freethenipple/ [https://perma.cc/Y8AD-V9UK]. A number of celebrities have participated in the movement by posting photos to social media with "#freethenipple" included in the caption. Roberts, *supra* note 24.

part for the legalization of female toplessness in New York State.[28] Since then, a growing number of city legislatures have followed suit and repealed public nudity ordinances, partially because of zealous advocacy by Free the Nipple members.[29] The most successful and noteworthy legal action Free the Nipple commenced is the case discussed in this Comment: *Free the Nipple–Fort Collins v. City of Fort Collins*.[30]

C. History of Free the Nipple–Fort Collins v. City of Fort Collins

In 2017, Free the Nipple–Fort Collins, Brittany Hoagland, and Samantha Six filed an action in the United States District Court for the District of Colorado against the City of Fort Collins.[31] The plaintiffs challenged the constitutionality of the defendant's public nudity ordinance, which prohibited women from revealing their breasts in public, arguing that the ordinance was a violation of the Equal Protection Clause of the Fourteenth Amendment.[32] In decid-

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[28] *See Santorelli*, 600 N.E.2d at 234 (overturning the ban on female-only toplessness and ordering dismissal of the charges against the defendant); Babcock, *supra* note 24 (discussing the efforts taken by the defendant in *Santorelli* during her fight to free the nipple). The defendant in *People v. Santorelli*, who was arrested for violating the city's ban on exposure of female breasts, was a member of the Topfree Seven. 600 N.E.2d at 233; *see* Boso, *supra* note 2, at 147 (explaining that Ramona Santorelli was arrested during a public demonstration for exposing her breasts). Santorelli challenged her arrest in court and the court ultimately decided the discriminatory ordinance could not stand. *Santorelli*, 600 N.E.2d at 234.

[29] *See* Sarah Begley, *Here's Where It's Legal for Women to Go Topless in the U.S.*, TIME (Apr. 24, 2015) (showing a map of states that allow both men and women to be topless in public). Free the Nipple has also impacted the everyday lives of women by leading to an increase in female empowerment and even a newfound trend of displaying nipples in fashion. *See The Impact of the Free the Nipple Movement*, VELVET'S EDGE BLOG (May 13, 2019), https://velvetsedge.com/lifestyle/the-impact-the-of-the-free-the-nipple-movement/ [https://perma.cc/MG3F-YC69] (discussing fashion trends featuring nipples and the recent popularity of nipple augmentations).

[30] *See Free the Nipple II*, 916 F.3d at 807 (holding a public nudity ordinance forbidding female toplessness violated the Equal Protection Clause). There has recently been significant media coverage about the case and increasing legality of female toplessness, which has sparked a revived interest in the Free the Nipple movement. *See, e.g.*, Ben Feurherd, *Free the Nipple: Going Topless Effectively Legalized in Six States*, N.Y. POST (Sept. 19, 2019), https://nypost.com/2019/09/19/free-the-nipple-going-topless-effectively-legalized-in-six-states/ [https://perma.cc/7HD7-LSC2] (explaining the consequences of the Tenth Circuit's decision); Dillon Thompson, *"Free the Nipple" Movement: Women Can Now Legally Go Topless in 6 States*, AOL (Sept. 20, 2019), https://www.aol.com/article/news/2019/09/20/free-the-nipple-movement-women-legally-topless-fort-collins-colorado-oklahoma-utah/23817022/ [https://perma.cc/K37J-5RLR] (reporting the impact of the Tenth Circuit's decision on women and the evolving conversation about female toplessness); Pete Williams, *Topless Women Win Big as Colorado City Drops Ban*, NBC NEWS (Sept. 19, 2019), https://www.nbcnews.com/politics/politics-news/topless-women-win-big-colorado-city-drops-ban-n1056701 [https://perma.cc/HWN9-YAAK] (reporting on the Free the Nipple victory in Colorado and its implications for the Tenth Circuit).

[31] Free the Nipple–Fort Collins v. City of Fort Collins (*Free the Nipple I*), 237 F. Supp. 3d 1126, 1135 (D. Colo. 2017).

[32] *Id.*; *see* U.S. CONST. amend. XIV, § 1; Fort Collins, CO. MUN. CODE § 17-142 (2017). The city's ordinance prohibited females over the age of ten from showing their breasts in public. *Id.*; *Free*

ing whether to grant the plaintiffs' motion, the district court considered four main factors: whether the plaintiffs would likely succeed on their Equal Protection claim, whether the ordinance would cause the plaintiffs irreversible harm, the balance of injustices that would result from granting or denying the injunction, and the public interest.[33] The court ultimately found that the plaintiffs demonstrated credibility that they would succeed on their Equal Protection challenge and enjoined the defendant from enacting the revised ordinance.[34]

The City of Fort Collins appealed to the United States Court of Appeals for the Tenth Circuit, which ultimately affirmed the district court's decision in February of 2019.[35] The court focused its inquiry on whether the defendant's ordinance violated the Equal Protection Clause by creating an unconstitutional

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the Nipple I, 237 F. Supp. 3d at 1129. Violators of this ordinance could be subject to a fine, imprisonment, or both. § 17-142; *Free the Nipple I*, 237 F. Supp. 3d at 1129. Two years prior to filing the lawsuit, the plaintiffs, among other women, held a protest in opposition to Fort Collins' restrictive ordinance and revealed their breasts with only opaque coverings over their nipples. *Free the Nipple I*, 237 F. Supp. 3d at 1128–29. The plaintiffs and other protestors argued that they were complying with the ordinance because they had solid-colored coverings over their nipples. *Id.* The plaintiffs intended to express their view that the ordinance was the result of "tired stereotypes" and the "hypersexualization of women's breasts." *Id.* In response, the Fort Collins City Council enacted a modified ordinance, which again prohibited females over the age of ten from appearing in public topless. § 17-142(b). This revised ordinance was substantially similar to the original ordinance, but it contained an exception for breastfeeding mothers. *Id.*; *Free the Nipple I*, 237 F. Supp. 3d at 1129.

[33] *Free the Nipple I*, 237 F. Supp. 3d at 1130–35; *see* Kikuma v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001) (explaining that in order to succeed on a motion for a preliminary injunction, a movant must demonstrate "(1) a likelihood of success on the merits (2) irreparable injury will result if the injunction is denied, (3) the threatened injury to the movant outweighs the injury to the other party, and (4) the injunction is not adverse to the public interest"). The district court found that the plaintiffs would likely succeed in establishing that the defendants unconstitutionally enacted an impermissibly gender-based, discriminatory statute. *Free the Nipple I*, 237 F. Supp. 3d at 1133. In regards to the second factor, the court found the plaintiffs would suffer harm caused by a deprivation of their constitutional right to equal protection under the laws if the ordinance was permitted. *Id.* at 1134. In balancing the injustices that both sides would experience if the injunction were granted, the court found that the plaintiffs would be harmed more by governmental denial of their rights than the city would be harmed. *Id.* Finally, the court found it would be contrary to the public interest to allow the defendants to violate the plaintiffs' constitutional rights. *Id.* at 1134–35.

[34] *Free the Nipple I*, 237 F. Supp. 3d at 1135. First, the court rejected that the defendant's asserted interest in promoting traffic safety was an important interest, because the defendant failed to offer a legitimate explanation as to how topless women could create a risk of accidents. *Id.* at 1131. Similarly, the court rejected the alleged interest in protecting children from the dangers of public nudity as an important government interest. *Id.* In conducting its inquiry into the legitimacy of the city's asserted interests, the court found no connection between the interests and the means chosen to promote them, as there was insufficient evidence to support claims of any adverse effects of female toplessness on public safety. *Id.* at 1131–34.

[35] *Id.* at 1126, *appeal docketed*, No. 17-01103 (10th Cir. March 21, 2017); *see Free the Nipple II*, 916 F.3d at 804 (holding that the district court did not err in concluding that the plaintiffs would likely succeed on their Equal Protection claim). The defendant contended that its ordinance did not violate the Equal Protection Clause and that the court erred in granting the plaintiffs' motion, because the plaintiffs failed to demonstrate that the ordinance unfairly discriminated against women. *Free the Nipple II*, 916 F.3d at 800.

gender-based classification.[36] Ultimately, the court concluded that the ban on female toplessness did not survive intermediate scrutiny, because it did not substantially further any legitimate government interest.[37] In reaching this conclusion, the court first explained that the defendant's purported interests in protecting children and promoting public safety were impermissibly based on stereotypes about female breasts.[38] The court also held that the City of Fort Collins failed to demonstrate sufficient evidence that the ordinance substantially served these interests.[39]

II. The Tenth Circuit's Split in Determining the Constitutionality of Bans on Public Female Toplessness

In holding that public nudity ordinances prohibiting female toplessness are unconstitutional and violate the Equal Protection Clause, the Tenth Circuit distinguished itself from several other circuits, which held that these ordinances survive heightened judicial scrutiny.[40] For example, in 2017, in *Tagami v. City of Chicago*, the United States Court of Appeals for the Seventh Circuit held that Chicago's ordinance allowing only males to show their breasts in public did not violate the Equal Protection Clause.[41] The court concluded that banning the exposure of female breasts substantially served the essential gov-

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[36] *Free the Nipple II*, 916 F.3d at 800.

[37] *Id.* at 801–05. The court considered whether the inherent differences between male and female breasts gave sufficient grounds for different treatment for males and females and concluded that it did not. *Id.* at 801. The court also concluded that the defendant's ordinance was premised upon generalizations about female nudity, as opposed to legitimate differences between male and female breasts. *Id.*

[38] *Id.* at 803–04 (holding that interests based on stereotypes about women, including protecting children from the dangers of female breasts, may not be constitutionally furthered by sex-based classifications). The court rejected the defendant's argument that the ordinance was meant to prevent children from exposure to nudity, as well as the argument that its purpose was to uphold public order and prevent traffic accidents caused by distracted drivers, agreeing with the district court that the motivation behind the ordinance was a "sex-object stereotype" about women's breasts. *Id.*

[39] *Id.* at 804–05 (holding that the ordinance failed to satisfy the "tight means-ends fit" that is required under intermediate scrutiny because it was unconstitutionally overbroad). The court further agreed with the district court's finding that the plaintiffs would suffer harm if the city were to enact the ordinance, that the balance of injury weighed toward the plaintiffs, and that the injunction was not against the public interest. *Id.* at 805–07.

[40] *See* Free the Nipple–Fort Collins v. City of Fort Collins (*Free the Nipple II*), 916 F.3d 792, 805 (10th Cir. 2019); Tagami v. City of Chicago, 875 F.3d 375, 380 (7th Cir. 2017) (holding that an ordinance prohibiting the exposure of female breasts in public withstood constitutional review under the Equal Protection Clause); Ways v. City of Lincoln, 331 F.3d 596, 600 (8th Cir. 2003) (stating that a similar public nudity ordinance survived intermediate scrutiny because the law was "substantially related" to the city's goal of eliminating the negative consequences of public nudity); United States v. Biocic, 928 F.2d 112, 116 (4th Cir. 1991) (affirming that the city's nudity ordinance passed intermediate scrutiny because it was substantially related to the city's interest in preserving "moral sensibilities").

[41] *See Tagami*, 875 F.3d at 377, 380 (affirming the dismissal of a member of the nonprofit organization, GoTopless, Inc.'s suit against the city of Chicago for its ordinance that restricted female-only toplessness after being cited for violating the ordinance).

ernmental purpose of protecting "traditional norms and public order."[42] The court based its conclusion, in part, on the inherent physical differences between male and female breasts, noting that only female breasts are considered "erogenous" and therefore should not be openly exposed.[43] The Eighth Circuit, in *Ways v. City of Lincoln*, affirmed the constitutionality of a similar public nudity ordinance banning open exposure of female breasts, because the city's goal was to protect the public from the negative consequences of public nudity, and the ordinance substantially served this public interest.[44] In *United States v. Biocic*, the Fourth Circuit held that a comparable public nudity ordinance survived intermediate scrutiny because it substantially served the defendant's important interest of "protecting moral sensibilities."[45]

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[42] *See id.* at 379 (concluding that protecting "norms and public order" were important government interests because members of the public should not unwillingly encounter nudity in public). Beyond acknowledging the defendant city's alleged interest in protecting the public from inadvertent exposure to nudity, the court did not explain how the ordinance protects traditional morality, opting instead to declare the interest "self-evident." *See id.* at 379 (concluding that the interest of promoting traditional norms survived intermediate scrutiny).

[43] *Id.*at 380.

[44] *See Ways*, 331 F.3d at 598–600 (providing the factual background of the case involving the owner of a gentlemen's club suing the City of Lincoln for its allegedly overbroad and unconstitutional public nudity ordinance). The plaintiff was arrested and convicted of violating the ordinance because he operated a gentlemen's club with partially nude female dancers and, in turn, sued the city, seeking a declaration that the ordinance was unconstitutional. *Id.* at 596–98. On May 6, 2019, approximately two months after the Tenth Circuit decided *Free the Nipple II*, the Eighth Circuit affirmed that a city ordinance banning female-only toplessness was constitutional because the ordinance was substantially related to preventing the negative effects of public nudity and maintaining public order. Free the Nipple–Springfield Residents Promoting Equality v. City of Springfield, 923 F.3d 508, 510–12 (8th Cir. 2019) (holding that the ordinance was constitutional because it did not rely on obsolete stereotypes about gender norms and was substantially related to "promoting public decency and proscribing public nudity to protect morals, public order, health, and safety"). This case was decided after *Free the Nipple II*, so this Comment does not discuss it further, though it is worth noting that the case could increase the likelihood that more appellate courts will uphold ordinances banning female-only toplessness as constitutional. *See id.* at 510–12 (upholding a statute prohibiting female toplessness); *Free the Nipple II*, 916 F.3d at 803 (striking down a ban on female toplessness as a violation of the Equal Protection Clause).

[45] *See Biocic*, 928 F.2d at 113, 115–16 (evaluating the defendant's claim that a federal public nudity ordinance, which she was convicted of violating, was unconstitutionally vague and in violation of the Equal Protection Clause). The court, like in *Tagami*, went further to explain that many view female breasts as erogenous, but that the same is not true for male breasts. *Id.* at 115–16; *see Tagami*, 875 F.3d at 379. The Second Circuit, in *Buzzetti v. City of New York*, affirmed that exposure of female breasts may have adverse consequences when it upheld a zoning ordinance that restricted adult-entertainment businesses from operating in certain parts of the city. *See* 140 F.3d 134, 141–42 (2d Cir. 1998) (holding that the city may restrict areas where adult entertainers conduct business because of their adverse effects, which include lower property values and higher crime rates). Though *Buzzetti* is part of the federal circuit split, this Comment does not further discuss it because the facts are distinguishable and the Second Circuit did not address public health, safety, or morals in its decision. *Compare id.* at 144 (holding the restrictive zoning ordinance did not violate the Equal Protection Clause because it was substantially related to the important interest of limiting the harmful effects of adult entertainment), *with Free the Nipple II*, 916 F.3d at 803–05 (affirming that the defendant failed to put forth any important government interest that could be served by the public nudity ordinance).

The common thread between the Fourth, Seventh, and Eighth Circuits' decisions is the notion that banning public exposure of female breasts substantially serves the government's significant interest in protecting public morality, sensibilities, and norms.[46] The Seventh Circuit affirmed the female-only toplessness ban without requiring that the defendant present evidence of how the ban prevented harmful effects of public nudity, and instead relied on general societal disapproval as a sufficient justification.[47] The Fourth Circuit concluded that because female breasts are typically perceived as "erogenous zones," laws forbidding their exposure substantially serve the important interest of preserving moral sensibilities.[48] The Tenth Circuit, on the other hand, explicitly rejected the deferential rationale of these circuits, and instead concluded that the defendant had failed to demonstrate evidence of any harmful effects of female breast exposure that the public would need to be protected from.[49] In rejecting this argument, the Tenth Circuit determined that the motivations behind the nudity ordinance were actually stereotypes about female breasts and their fabricated "danger" to the public.[50]

The existence of the inherent physical differences between male and female breasts, and their effect on the constitutionality of public nudity laws, is another source of contention among the circuits.[51] The Fourth and Seventh Circuits shared the rationale that male and female breasts are fundamentally different

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[46] *See Tagami*, 875 F.3d at 379 (holding that the public nudity ordinance protected "traditional moral norms and public order"); *Ways*, 331 F.3d at 600 (reasoning that the ordinance was intended to eliminate the negative consequences of public nudity and promote public health and safety); *Biocic*, 928 F.2d at 115 (holding that the government could enact the ordinance at issue to protect members of society who do not want to see female breasts in public).

[47] *See Tagami*, 875 F.3d at 379 (concluding that the prohibition on female toplessness could stand because of the historical criminalization of public nudity and general societal disapproval). The Eighth Circuit adopted an even more deferential approach and simply concluded that the important government interest of shielding the public from the negative effects of nudity was substantially served by the ordinance, without any further discussion. *Ways*, 331 F.3d at 600. The court relied heavily on precedential cases involving public nudity ordinances in reaching its decision. *See id.* at 598–99 (explaining Eighth Circuit cases upholding public nudity ordinances substantially similar to the statute at issue in *Ways*).

[48] *Biocic*, 928 F.2d at 115–16.

[49] *Free the Nipple II*, 916 F.3d at 803. The Tenth Circuit adopted the reasoning of the district court, which found that there was no evidence that alleged adverse effects—including endangerment of children, distracted driving, and harm to public order—would result from females exposing their breasts in public. *Id.*; *see Free the Nipple I*, 237 F. Supp. 3d at 1131 (rejecting the defendant's argument that female breasts threaten traffic safety by distracting drivers). In turn, the court concluded that the defendants failed to satisfy the means-ends fit test required to survive heightened scrutiny. *Free the Nipple II*, 916 F.3d at 805.

[50] *Free the Nipple II*, 916 F.3d at 803–04.

[51] *Compare id.* at 801 (holding that there is no meaningful difference between male and female breasts as to warrant differential treatment by nudity ordinances), *with Tagami*, 875 F.3d at 379–80 (explaining that, because of physical differences, female breasts are "intimate body part[s]," whereas male breasts are not), *and Biocic*, 928 F.2d at 115 (acknowledging the physical differences between male and female breasts referenced in the public nudity ordinance).

because society only recognizes female breasts as sexual and erogenous.[52] The Tenth Circuit, in contrast, acknowledged the physical differences between men and women, namely the ability to breastfeed, however, it concluded that the justification for the defendant's ordinance did not lie with these dissimilarities.[53]

III. THE TENTH CIRCUIT IS CORRECT THAT PUBLIC NUDITY ORDINANCES THAT PROHIBIT EXPOSURE OF FEMALE-ONLY BREASTS CANNOT SATISFY INTERMEDIATE SCRUTINY

The Tenth Circuit correctly held in *Free the Nipple–Fort Collins v. City of Fort Collins* that a public nudity ordinance banning only the exposure of female breasts violated the Equal Protection Clause of the United States Constitution.[54] Though the Fourth, Seventh, and Eighth Circuits have determined that this type of ordinance is constitutional, foundational cases from the Supreme Court provide ample support for the Tenth Circuit's holding.[55]

As the Supreme Court has required for all laws distinguishing between males and females, there must be an "exceedingly persuasive justification" for public nudity laws banning the exposure of only female breasts.[56] The Fourth,

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[52] *See Tagami*, 875 F.3d at 380 (explaining that the fact that female breasts are "intimate" body parts and different from male breasts justifies the nudity ordinance's distinction); *Biocic*, 928 F.2d at 115–16 (explaining that the physical differences between male and female breasts serve as a constitutional justification for the female-only public toplessness ban).

[53] *See Free the Nipple II*, 916 F.3d at 801–02 (recognizing that physical differences may warrant differential treatment under the law, but not if the rationale for the treatment is actually rooted in stereotypes and generalizations). The court concluded that the physical differences between breasts did not warrant singling out female breasts for different treatment because the Equal Protection Clause requires more. *See id.* at 805 (explaining that Equal Protection jurisprudence reveals the need for more physical differences to warrant different treatment).

[54] *See* U.S. CONST. amend. XIV, § 1; Free the Nipple–Fort Collins v. City of Fort Collins (*Free the Nipple II*), 916 F.3d 792, 805–06 (10th Cir. 2019).

[55] *See* Tagami v. City of Chicago, 875 F.3d 375, 379 (7th Cir. 2017) (holding that the public nudity ordinance banning only female toplessness was constitutional); Ways v. City of Lincoln, 331 F.3d 596, 600 (8th Cir. 2003) (holding that the public nudity ordinance was constitutional because it intended to eliminate negative consequences of public nudity and promote public health and safety); United States v. Biocic, 928 F.2d 112, 115 (4th Cir. 1991) (upholding the constitutionality of a public nudity ordinance prohibiting female-only toplessness); *see also* United States v. Virginia, 518 U.S. 515, 534 (1996) (holding that the state failed to present an "exceedingly persuasive justification" for refusing to admit females to the Virginia Military Institute and, therefore, violated the Equal Protection Clause); Craig v. Boren, 429 U.S. 190, 199–200 (1976) (holding that a law allowing women to buy higher proof alcohol at a lower age violated the Equal Protection Clause because it did not substantially serve the important government interest of promoting traffic safety); Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973) (holding that distinguishing between genders in the administration process for military service benefits for spouses solely for "administrative efficiency" was unconstitutional); Reed v. Reed, 404 U.S. 71, 76–77 (1971) (explaining that, although distinguishing between males and females for the administrator application process produced efficiency in probate courts, it violated the Equal Protection Clause by arbitrarily discriminating against women).

[56] *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982) (holding that the government bears the burden of presenting an "exceedingly persuasive justification" for its creation of a classifica-

Seventh, and Eighth Circuits concluded that the alleged dangerous adverse consequences that flowed from females exposing their breasts in public warranted restrictive public nudity ordinances to maintain public morals, sensibilities, order, and safety, but they did so without going into detail as to what those dangers are.[57] Though these are important government interests, banning female toplessness does not further them in any way.[58] Intermediate scrutiny commands a substantial connection between the asserted interest and means chosen to further that interest, yet the Fourth, Seventh, and Eighth Circuits appear to be satisfied by a hypothetical rational relationship between the two.[59]

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tion-based statute); *see also United States v. Virginia*, 518 U.S. at 524 (concluding that the state must provide an "exceedingly persuasive justification" for drawing a distinction between men and women in law).

[57] *See Tagami*, 875 F.3d at 379–80 (holding that the ordinance was substantially related to the government interest in shielding the public from the harmful effects of seeing female breasts); *Ways*, 331 F.3d at 600 (upholding the district court's finding that a female toplessness ban was substantially related to protecting the public's well-being); *Biocic*, 928 F.2d at 116 (recognizing that the ordinance served the important government interest of "protecting the moral sensibilities"). The closest that these courts came to explaining an adverse effect of seeing female breasts is simply concluding that unwillingly seeing female breasts *is* an adverse effect. *See Tagami*, 875 F.3d at 379 (recognizing that the defendant city had an important interest in protecting the public from unwanted exposure); *Biocic*, 928 F.2d at 115–16 (concluding that the public nudity ordinance was permissible because it protected the public from unwillingly encountering female breasts).

[58] *See United States v. Virginia*, 518 U.S. at 533 (holding that different military academies for male and female students did not substantially serve the state's purported interest in providing a distinct educational experience for male students); *Craig*, 429 U.S. at 199–200 (concluding that protecting public safety and health are legitimate government interests); *Free the Nipple II*, 916 F.3d at 804 (concluding that the public nudity law was overbroad and did not substantially further the city's interest in promoting public order and preventing traffic accidents).

[59] *See United States v. Virginia*, 518 U.S. at 536 (holding that the state must articulate a close connection between the aim of the sex-based classification and underlying motivation of the legislation (quoting *Miss. Univ. for Women*, 458 U.S. at 727, 730)); *Craig*, 429 U.S. at 199–200 (concluding that a sex-based classification must closely serve a state's asserted interests in order to survive judicial review); *Free the Nipple II*, 916 F.3d at 805 (concluding that the defendant city failed to satisfy the means-ends fit test required by intermediate scrutiny); *Tagami*, 875 F.3d at 379 (concluding that the ordinance substantially served the interest of protecting members of the public from the harmful effects of seeing female breasts without requiring evidence of those effects); *Ways*, 331 F.3d at 600 (concluding that the government interest in protecting the public from the consequences of public nudity was substantially furthered by the ban on female toplessness); *Biocic*, 928 F.2d at 116 (holding that prohibiting females from exposing their breasts substantially serves the important interest of protecting "moral sensibilities"). The Supreme Court has held that the state has the burden of proving a "close resemblance between the 'alleged objective' and 'the actual purpose underlying the discriminatory classification.'" *United States v. Virginia*, 518 U.S. at 536 (quoting *Miss. Univ. for Women*, 458 U.S. at 727, 730). This means that a state cannot provide an unfounded justification for a gender classification without demonstrating how the classification actually relates to an important government objective. *See id.* at 535–36 (concluding that the policy rationale for a gender classification must be "genuine, not hypothesized or invented *post hoc* in response to litigation"). The Supreme Court in *Lawrence v. Texas* explicitly restricted states from relying purely on public "morality" as an important government interest to justify classifications in statutes. *See* 539 U.S. 558, 571 (2003) (explaining that states could not criminalize homosexual sodomy solely because it had been historically viewed as

The Tenth Circuit correctly applied intermediate scrutiny and rejected the defendant's claims that the ordinance was designed to protect the public because the defendant failed to provide *any* evidence of how the toplessness ban would further any of the asserted interests.[60]

The Fourth, Seventh, and Eighth Circuits accepted inadequate and unpersuasive explanations from the governmental defendants when evaluating the relationship between restricting the public from seeing female breasts and promoting public morals and safety, and thus they failed to appropriately apply intermediate scrutiny.[61] Unjustified acceptance of female toplessness bans by courts perpetuates gender discrimination, which can have severe adverse consequences.[62] Forbidding the exposure of female breasts in public also perpetuates the false notion that the primary purpose of female breasts is sexual pleasure.[63] The Seventh Circuit had based its holding on the "fact" that physiologi-

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"immoral"); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992) (explaining that the Court's "obligation is to define the liberty of all, and not to mandate [its] own moral code").

[60] *See Free the Nipple II*, 916 F.3d at 803–04 (concluding that the public nudity ordinance did not substantially further the city's asserted interests of protecting children and promoting traffic safety because it was overbroad and drew an unnecessary distinction); *see also Lawrence*, 539 U.S. at 583 (O'Connor, J. concurring) (rejecting "moral disapproval" as an important policy interest). The defendant's ordinance was likely motivated by an illegitimate "public morality" concern based upon outdated stereotypes about women's breasts and their unwavering sexuality. *See Free the Nipple II*, 916 F.3d at 804–05 (concluding that the city's concerns about threats to public morality, child endangerment, and traffic accidents stemmed from stereotypes about female breasts being sex objects). The court concluded that the City of Fort Collins could not enact its female toplessness ban because it failed to satisfy the means-ends fit test required by intermediate scrutiny. *See id.* at 805.

[61] *See Tagami*, 875 F.3d at 379 (holding that a ban on female toplessness substantially furthered the government's asserted interests); *Ways*, 331 F.3d at 600 (same); *Biocic*, 928 F.2d at 115 (same). The court in *Tagami* held that the defendant city was justified in its female-only toplessness ban because female breasts are "intimate, erogenous, and private," and therefore should be hidden to protect the public. *Tagami*, 875 F.3d at 380. The court failed to explain, however, why female breasts bear this description and how banning their exposure actually protects the public. *See id.* The court in *Ways* simply held that the defendant city had an interest in protecting the public from the harmful effects of female toplessness, but did not explain what these harmful effects are. *See Ways*, 331 F.3d at 600. Additionally, the court failed to adequately explain the nexus between prohibiting public nudity and the important governmental interest of protecting the public, which would appear to go against the Supreme Court's requirements. *See id.*; *see also United States v. Virginia*, 518 U.S. at 524 (requiring an "exceedingly persuasive justification" for sex-based distinctions); People v. Santorelli, 600 N.E.2d 232, 237 (N.Y. 1992) (Titone, J., concurring) (rejecting the state's argument that banning female-only toplessness substantially furthered important government interests because the state failed to provide evidence as to how exposure to a female breast harms members of the public).

[62] *See Tagami*, 875 F.3d at 382–83 (Rovner, J., dissenting) (explaining that a potential consequence of these ordinances is that women will be treated unequally at work, in part because they are expected to dress differently than men); s*ee also Santorelli*, 600 N.E.2d at 236 (Titone, J., concurring) (asserting that using "public sensibilities" as a justification may simply be a "reflection of commonly held preconceptions and biases" against women). *See generally Morales-Santana*, 137 S. Ct. at 1693 (explaining that laws based on gendered generalizations perpetuate stereotypes about women and their domestic roles).

[63] *See Breast Anatomy*, HEALTH ENGINE, https://healthengine.com.au/info/breast [https://perma.cc/G5MR-Y3VH] (explaining that the main purpose of female breasts is breastfeeding).

cal differences between male and female breasts cause only female breasts to be considered "erogenous," and therefore protecting the public from unwilling exposure is an important government interest.[64] In doing so, the Seventh Circuit blatantly perpetuated the exhausted stereotype that the Tenth Circuit correctly rejected.[65] This is a perfect example of the sort of "overbroad generalization" that is forbidden as justification for laws that differentiate based on gender.[66] The conversation surrounding female breasts has been changing in recent times, as more individuals recognize the lack of meaningful physical difference between female and male breasts.[67] Courts have the unique ability to

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[64] *See Tagami*, 875 F.3d at 379–80 (holding that the fact that female breasts are deemed erogenous is sufficient justification for banning their exposure).

[65] *See Free the Nipple II*, 916 F.3d at 804 (holding that the defendant's ordinance was based on stereotypes about female breasts, and that this sex-object stereotype could not stand up to judicial scrutiny); *Tagami*, 875 F.3d at 380. The Seventh Circuit's reasoning was simply wrong. *See* Reena N. Glazer, *Women's Body Image and the Law*, 43 DUKE L. J. 113, 134 (1993) (acknowledging scientific evidence that male and female breasts are substantially similar); *see also Tagami*, 875 F.3d at 382–83 (Rovner, J., dissenting) (arguing that the plaintiff's Equal Protection claim should not have been dismissed because it was possible that the defendant's sex-based classification was based on archaic stereotypes).

[66] *See, e.g.*, *Miss. Univ. for Women*, 458 U.S. at 730 n.16 (explaining that a "statement that relies on the very sort of archaic and overbroad generalizations about women that [the Court] has found insufficient to justify a gender-based classification" will not withstand constitutional scrutiny); *United States v. Virginia*, 518 U.S. at 533–34 (holding that classifications based upon inherent physical differences between men and women may not be used to further the notion that women are inferior). The dissenting opinion in *Tagami* argued that the city's true motive was reinforcing the stereotype that female breasts are "objects of desire," even though the real function of female breasts is to nourish children. *See Tagami*, 875 F.3d at 382 (Rovner, J. dissenting) (rejecting the argument that the city's ordinance could survive intermediate scrutiny). The dissent also argued that courts should not uphold discriminatory ordinances simply because they coincide with "traditional moral norms" and perceptions. *Id.*

[67] *See* Acosta, *supra* note 1 (featuring interviews from women in New York exercising their right to be topless in public and the general public's positive reaction to it); Melissa Conrad Stöppler, *Breast Anatomy*, MEDICINENET, (Oct. 12, 2018), https://www.medicinenet.com/breast_anatomy/article.htm [https://perma.cc/Y94F-T8S4] (explaining that male and female breasts are essentially the same, except for the fact that male breast tissue lacks the "specialized lobules" that produce milk). Female breasts have lobes that contain the glands and ducts involved in milk production. Ströppler, *supra*. This supports the argument that the main difference between male and female breasts is functional, rather than physical. *See id. But see* Thomas H. Kunz & David J. Hosken, *Male Lactation: Why, Why Not, and Is It Care?*, 24 TRENDS IN ECOLOGY & EVOLUTION 80 (2009) (explaining that males are technically capable of lactation if exposed to the right combination of hormones). In regards to nipples, the purported sworn enemy of public morality, there are essentially no differences between male and female nipples, except for, often, size differences. *See* Michelle Moscova, *Why Do Men Have Nipples?*, PHYS.ORG (Sept. 20, 2019), https://phys.org/news/2019-09-men-nipples.html [https://perma.cc/9E52-KRZ7] (explaining that the development of male and female nipples is identical until female hormones eventually lead to female nipples typically being larger). As previously mentioned, the core difference between male and female nipples is a *functional* one: the evolutionary need to produce milk has led to female nipples generally being larger in size, though there are no clear physical differences apart from that. *See id*. The Supreme Court has allowed for differential treatment for males and females when there are clear physical differences, but has not extended this exception to

compel cities to update their outdated public nudity ordinances to reflect this shift by rejecting justifications based on gender stereotypes.[68]

The logic of the Seventh and Eighth Circuits is further undermined by the breastfeeding exceptions in the ordinances at issue, which create a substantial possibility that members of the public will still see female breasts.[69] The Tenth Circuit addressed a similar exception and concluded that it was further evidence that the governmental defendant's true motive in enacting the ordinance was to preserve outdated traditions.[70]

The inclusion of the language "female breasts" in public nudity ordinances creates confusing and concerning consequences for the approximately 1.4 million transgender, nonbinary, and intersex adults living in the United States.[71] The

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functional differences. *See United States v. Virginia*, 518 U.S. at 533 (acknowledging that physical differences between men and women may warrant differential treatment).

[68] *See, e.g.*, *Free the Nipple II*, 916 F.3d at 805 (holding that the defendant's public nudity ordinance violated the Equal Protection Clause). The Tenth Circuit's creation of a federal circuit split almost opened the door for a lower court case challenging a similar ordinance to potentially reach the Supreme Court, however, the Supreme Court declined to hear the case. *See* State v. Lilley, 204 A.3d 198, 208–09 (N.H. 2019), *cert. denied*, 140 S. Ct. 858 (2020) (holding that the defendant city's nudity ordinance did not violate the New Hampshire or federal Equal Protection clauses because it substantially served the city's interest in supporting "public health, public safety, morals, and public order"); Ben Feuerherd, *Right to Bare Boobs: Topless Advocates Take Battle to Supreme Court*, N.Y. POST (Aug. 20, 2019), https://nypost.com/2019/08/20/right-to-bare-boobs-topless-advocates-take-battle-to-supreme-court/ [https://perma.cc/G5DR-G8AJ] (reporting on the petition to the Supreme Court); *U.S. Supreme Court Asks New Hampshire to Respond in 'Free the Nipple' Case*, PRESS HERALD (Sept. 17, 2019), https://www.pressherald.com/2019/09/17/u-s-supreme-court-asks-new-hampshire-to-respond-in-free-the-nipple-case/ [https://perma.cc/Y7W5-4XQ5] (explaining that the United States Supreme Court requested New Hampshire to respond to an appeal that the *State v. Lilley* defendants filed after being arrested for violating a public nudity ordinance). The Supreme Court in *Lawrence* reasoned that it should use the country's developing laws and traditions when analyzing the constitutionality of a law that is justified by public morality. 539 U.S. at 571–72. If the Supreme Court ever addresses female-only toplessness bans, it should follow in the *Lawrence* Court's footsteps and look to the modern trend of increased individual liberty in public places to determine that these bans are archaic and unconstitutional. *See id.*; Begley, *supra* note 29 (showing a map of the states that allow women to expose their breasts in public).

[69] *See Tagami*, 875 F.3d at 383 (Rovner, J., dissenting) (explaining that Chicago's ordinance had an exception for women breastfeeding in public); *Ways*, 331 F.3d at 599–600 (providing an excerpt from the city's ordinance that explicitly laid out an exception for breastfeeding women). If the defendants in these cases truly wanted to protect the public from the dangers of seeing breasts in public, they would have enacted a complete ban on public exposure, rather than including a substantial exception. *See Tagami*, 875 F.3d at 383 (Rovner, J., dissenting) (calling attention to the breastfeeding exception); *Ways*, 331 F.3d at 599–600 (same). The presence of a significant exception connotes the likelihood of there being an ulterior motive in enacting restrictive public nudity ordinances, most likely archaic and stereotypical views on female breasts. *See generally Free the Nipple II*, 916 F.3d at 802–03 (explaining that the breastfeeding exception in the defendant's ordinance called into question whether their actual interest was protecting children).

[70] *See Free the Nipple II*, 916 F.3d at 802–03 (explaining that there was still a likelihood that children would be exposed to female breasts).

[71] *See* Kristin Lam, *More Than 7,000 Americans Have Gender X IDs, a Victory for Transgender Rights. Is It a Safety Risk, Too?*, USA TODAY (Aug. 8, 2019), https://www.usatoday.com/story/news/nation/2019/08/08/nonbinary-gender-ids-momentum-intersex-state-driver-licenses/1802059001/ [https://

resulting exemption of individuals whose legally-designated sex is not female, due to the limiting language of the term "female," from public toplessness ordinances further demonstrates the need to update these laws because, transgender women may be topless in public so long as their legally-designated sex is male.[72] This apparent loophole provides further evidence that the underlying purpose in enacting this type of ordinance is not to protect public safety and morality, but rather to discriminate against females and to perpetuate the antiquated stereotype that female breasts function primarily for objectification and sex.[73]

Though the government defendants in *Tagami*, *Ways*, and *Biocic* may cite to protecting the public as justification for ordinances banning the public exposure of female breasts, the more likely motivation is grounded in gender discrimination, overused stereotypes, and the historic hyper-sexualization of female nipples and breasts.[74] There is an inherent risk that courts will allow governments to use the "public morality" rationale as justification for discriminatory ordinances, as many have done in the past.[75] Gender discrimination,

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perma.cc/75CF-EFEK]. Given that an increasing percentage of the population no longer identifying as male or female, this raises questions of how public nudity ordinances restricting only "female" toplessness will be enforced, who they are intended to apply to, as well as why they are still so prevalent in the first place. *See generally* Boso, *supra* note 2, at 161 (explaining the need for courts to take a fluid approach on reviewing discriminatory laws because many no longer believe that only "true" men and women exist, rather there is overlap between the genders).

[72] *See* Boso, *supra* note 2, at 160–61 (explaining how traditional sex-based classifications affect transgender individuals).

[73] *See id.*; Virginia Milstead, *Forbidding Female Toplessness: Why "Real Difference" Jurisprudence Lacks "Support" and What Can Be Done About It*, 36 U. TOL. L. REV. 273, 280–83 (2004) (criticizing how courts have historically treated female-only toplessness bans and discussing the lack of essential differences between male and female breasts).

[74] *See Free the Nipple II*, 916 F.3d at 804 (explaining the court's suspicion that the public nudity ordinance had less to do with the city's professed objectives and more to do with the stereotype that women are predominantly "sex objects" subject to the male gaze). *See generally* Sara Sheridan, *Toplessness—The One Victorian Taboo That Won't Go Away*, BBC NEWS (Nov. 15, 2014), https://www.bbc.com/news/magazine-30052071 [https://perma.cc/W3QK-F6CC] (explaining that although taboos such as women wearing pants or exposing their ankles have lost their force, women's toplessness in public remains a taboo). Female breasts have consistently been labeled "erogenous zones" because of the heterosexual male ideology that their primary purpose is for arousal prior to sex. *See* Nassim Alisobhani, *Female Toplessness: Gender Equality's Next Frontier*, 8 U.C. IRVINE L. REV. 299, 318–19 (2019) (explaining constitutional challenges to female-only toplessness bans and the false rationales given as justifications for these discriminatory public nudity ordinances). This justification appears to be the type banned by the Supreme Court, as it is based on a "traditional way of thinking" about female breasts. *See* Miller v. Albright, 523 U.S. 420, 442 (1998) (quoting Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J., concurring)) (holding that sex-based classifications may not rely on traditional notions about women for constitutional support).

[75] *See Free the Nipple II*, 916 F.3d at 804 (expressing concern that public morality may be used to justify sex-based classifications that are actually founded in archaic stereotypes about female breasts, even when the government does not explicitly assert it as an important interest); *see also* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (holding that a state law criminalizing homosexual sodomy was constitutional, because the government had an important interest in protecting traditional norms and values and the criminalization of homosexual sodomy substantially served this interest), *overruled by*

which in this case takes the form of female-only toplessness bans, can have severe negative consequences for women.[76] Women have faced a history of stereotyping and discrimination that will endure as long as appellate courts continue to uphold laws that arbitrarily distinguish between men and women.[77]

CONCLUSION

In *Free the Nipple–Fort Collins*, the Tenth Circuit correctly held that a public nudity ordinance prohibiting female-only toplessness violated the Equal Protection Clause and was thus unconstitutional. The Fourth, Seventh, and

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Lawrence v. Texas, 539 U.S. 558; *Biocic*, 928 F.2d at 115 (articulating that "protecting moral sensibilities" is the important governmental interest that the ban on female toplessness served). Though *Bowers v. Hardwick* was explicitly overruled in *Lawrence v. Texas*, it demonstrates a clear example of the Supreme Court allowing the government to use the alleged interest of preserving public morals and sensibilities as an excuse to discriminate against a group of individuals and prohibit an activity that society allegedly disagrees with. *See Lawrence*, 539 U.S. at 578 (holding that *Bowers* was incorrectly decided); *Bowers*, 478 U.S. at 196 (upholding a Georgia law criminalizing sodomy because of a wide-ranging consensus that it was immoral). Reena Glazer has articulated that the concept of "protecting public sensibilities" and morality may be nothing more than a reflection of archaic stereotypes about female breasts. Glazer, supra note 65, at 128. The "public sensibilities" justification is a slippery slope and essentially affords state governments a blank check to discriminate, so long as they can identify a traditionally held moral norm that is conceivably protected by the classification. *See generally Bowers*, 478 U.S. at 196 (upholding a Georgia law criminalizing homosexual sodomy on the grounds that the conduct is considered "immoral and unacceptable" by a large population of the state).

[76] *See* Georgina M. Hosang & Kamaldeep Bhui, *Gender Discrimination, Victimisation, and Women's Mental Health*, 213 BRITISH J. PSYCHIATRY 682, 682–84 (2018) (explaining the negative effects gender discrimination has on women's mental health). Although women not being allowed to bare their breasts in public may seem like a minor inconvenience, it is still plainly gender discrimination and signals to women that they are unequal to their male counterparts. *See id.* at 682 (explaining the negative psychological effects of gender discrimination and its tendency to exacerbate psychiatric disorders, such as depression).

[77] *See Califano*, 430 U.S. at 320 (acknowledging the history of sex discrimination in the United States); *Frontiero*, 411 U.S. at 684–85 (explaining that the United States has a history of discriminating against women that was supported by "romantic paternalism" and codified stereotypical distinctions). Though women face less discrimination than they did in the past, they are still subject to subtle discrimination in their education and careers. *See Frontiero*, 411 U.S. at 685–86 (explaining that women have greatly improved their position in society over time, though they still face instances of discrimination). The Free the Nipple founders explained that ridding the country of female-only toplessness bans is merely one step in the ongoing fight for gender equality. Roberts, *supra* note 24. To truly understand the impact of female-only toplessness bans, one needs to look at the bigger picture of gender equality and realize that women will never be truly equal to men if laws like this continue to exist. *See generally* Maria Nardone, *The Powerful and Covert Role of Culture in Gender Discrimination and Inequality*, 54 CONTEMP PSYCHOANALYSIS, 747, 751–52 (2018) (explaining that women face disadvantages resulting from differential treatment and these disadvantages lead to even more inequality). Arguably, women have seldom challenged female-only toplessness bans because the culture of the United States has conditioned women to believe that these laws are necessary to preserve societal traditions and norms. *See id.* (discussing the impact that culture and ingrained values have on the acceptance of gender discrimination). Women who accept discriminatory laws are theoretically more likely to accept discriminatory treatment in the workplace and in educational institutions. *See id.* at 754, 757 (explaining that emotions and beliefs stemming from culture contribute to women maintaining complicity and passivity when being discriminated against).

Eighth Circuits have held that nearly identical ordinances were constitutional, reasoning that these laws substantially further the governmental interests of protecting public safety, morals, and welfare. In holding female toplessness bans were constitutional, these circuits were satisfied with a minimal connection between the asserted interests and governmental means adopted to further those interests. The Tenth Circuit correctly rejected the City of Fort Collins' justification for its ban on female toplessness and held that there was insufficient evidence demonstrating a connection between protecting the public and banning females from exposing their breasts. The court concluded that the ordinance was likely founded on outdated stereotypes about female breasts being primarily sex objects.

The Tenth Circuit was absolutely correct that laws that restrict only females from being topless fail to satisfy intermediate scrutiny, as they are premised on overbroad generalizations and outdated stereotypes about female breasts. The Supreme Court should resolve the current circuit split using its Equal Protection jurisprudence and affirm that this sort discriminatory classification cannot withstand heightened judicial review. Until then, advocacy groups like Free the Nipple, in their enduring fight for gender equality, will continue to challenge these constricting ordinances based on antiquated and wholly unfounded stereotypes surrounding female breasts and their purported innate sexuality.

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