

No. 19-

In The

Supreme Court of the United States

CITY OF FORT COLLINS, COLORADO,

Petitioner,

v.

FREE THE NIPPLE-FORT COLLINS, an incorporated association; BRITTANY HOAGLAND;
and SAMANTHA SIX,

Respondents,

APPLICATION DIRECTED TO THE HONORABLE SONIA SOTOMAYOR FOR AN
EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Andrew D. Ringel
Counsel of Record
Hall & Evans, LLC
1001 17th Street, Suite 300
Denver, Colorado 80202
(303) 628-3300
ringela@hallevans.com

Counsel for Applicant

May 1, 2019

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To the Honorable Sonia Sotomayor, Associate Justice of the United States and Circuit Justice for the Tenth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, Applicant City of Fort Collins, Colorado, respectfully requests a 30-day extension of time, to and including June 16, 2019, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case. The Tenth Circuit issued its opinion on February 15, 2019. (A copy of the Tenth Circuit's decision, *Free the Nipple—Fort Collins et. al. v. City of Fort Collins*, 916 F.3d 792 (10th Cir. 2019), is attached as Attachment 1.) Currently, any petition would be due on May 16, 2019. This application has been filed more than 10 days before the date a petition would be due. *See* Sup. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the judgment in this case. The Tenth Circuit's decision raises complex and important issues related to the proper interpretation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution concerning public nudity municipal ordinances and state statutes throughout the United States that prohibit female toplessness. The Tenth Circuit's decision conflicts with several other Circuit Courts of Appeal decisions and the decisions of the highest courts of several states.

On April 23, 2019, a new City Council for the City of Fort Collins was sworn into office with three re-elected incumbents and two new members of the seven-person City Council. The new City Council needs to be consulted to determine whether it wants the City to file a petition in this case. Additional time is necessary for the consultation process and to prepare an appropriate petition for review by this Court in the event the City Council decides to proceed to authorize the filing of a petition with this Court.

BACKGROUND

The City Council of the City of Fort Collins has in its municipal code the following ordinance prohibiting female toplessness in public:

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

Fort Collins, Colo., Mun. Code § 17-142(b). The ordinance includes certain exceptions to this prohibition, including breastfeeding in public and persons undergoing emergency medical treatment in public. Fort Collins, Colo., Mun. Code § 17-142(c), (d).

Respondents filed suit in the United States District Court for the District of Colorado. The District Court granted in part the City's Motion to Dismiss, dismissing the Respondents' First Amendment challenge to the ordinance, but denied the Motion to Dismiss regarding the Respondents' Equal Protection claim. *See Free the Nipple—Fort Collins v. City of Fort Collins*, 216 F.Supp.3d 1258 (D. Colo. 2016).

Subsequently, following a hearing, the District Court granted the Respondents' Motion for a Preliminary Injunction after concluding the ordinance likely violated the Equal Protection Clause of the Fourteenth Amendment. *See Free the Nipple—Fort Collins v. City of Fort Collins*, 237 F.Supp.3d 1126 (D. Colo. 2017).

The City appealed the District Court's grant of the preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1). On February 15, 2019, the Tenth Circuit issued its decision affirming the

District Court's grant of the preliminary injunction. *Free the Nipple—Fort Collins*, 916 F.3d at 795.

Judge Harris Hartz dissented. *Id.* at 807.

REASONS FOR GRANTING THE APPLICATION

1. The Tenth Circuit's decision in this case represents the first time any appellate court in the United States has determined any municipal public nudity ordinance prohibiting female toplessness was unconstitutional. In contrast to the Tenth Circuit's decision, earlier decisions from the Fourth, Fifth and Seventh Circuit Courts of Appeal held public-nudity ordinances prohibiting female toplessness did not violate the Equal Protection Clause. *See United States v. Biocic*, 928 F.2d 112, 115-16 (4th Cir. 1991); *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1256 (5th Cir. 1995); *Tagami v. City of Chicago*, 875 F.3d 375, 377 (7th Cir. 2017), *cert. denied*, 138 S.Ct. 1577 (2018). Similarly, earlier decisions from the highest courts of the States of Mississippi, Washington and New Hampshire also concluded similar public-nudity ordinances passed constitutional muster under the Equal Protection Clause. *See City of Jackson v. Lakeland Lounge*, 688 So.2d 742, 751 (Miss. 1996); *City of Seattle v. Buchanan*, 584 P.2d 918, 920 (Wash. 1978); *State v. Lille*, 2019 N.H. LEXIS 29 (N.H. Feb. 8, 2019).¹ Based on this conflict of authority, this is the type of case warranting this Court's review and clarification of the appropriate standard applicable for Equal Protection review of public-nudity ordinances generally and how that standard applies to the City's public-nudity ordinance specifically. Many different municipalities and some States throughout the United States have similar public-nudity laws and all of them need to know from this Court whether they are

¹ Indeed, the dearth of authority supporting the District Court's and the Tenth Circuit's decisions was recognized by the District Court who noted, “[a]fter much thought, I have concluded that going out on this lonely limb is the right thing to do.” *Free the Nipple—Fort Collins*, 237 F.Supp.3d at 1133.

unconstitutional.

2. A brief extension of time is warranted in this matter, so the undersigned counsel may consult with the newly constituted City Council of the City of Fort Collins to determine if the City Council wants to authorize the filing of a petition for certiorari in this case and to prepare an appropriate petition for filing with this Court if the City Council chooses to proceed. Following the Tenth Circuit's decision, the undersigned counsel consulted with the past City Council about filing a petition for certiorari in this case. Because a municipal election was occurring on April 2, 2019, with final certification of the election results to occur after April 10, the City Council deferred its decision on the issue until the new City Council could be elected and sworn into office because of the importance of this issue to the Fort Collins electorate. The Fort Collins municipal election occurred on April 2, 2019, the election was certified on April 12, 2019, and the new City Council was sworn in on April 23, 2019. The City Council consists of seven members, a Mayor and one representative from each of six districts. Five seats of the seven Council seats were up for election. Three of those elected in April were returning incumbents, and two are newly-elected members who have not yet participated in any discussions regarding this case.

An executive session with the new City Council is being planned for later this month to allow the undersigned counsel and the City Attorney to discuss this case and the prospect of filing a petition for certiorari with this Court. It is expected the City Council will decide then whether to file a petition for certiorari. To allow the new City Council the time to make its decision and for the undersigned counsel to prepare and file a petition for certiorari with this Court, a brief extension of time of the deadline to do so is warranted. Accordingly, counsel respectfully requests a 30-day extension of time to prepare and file a petition that will best assist this Court's review.

CONCLUSION

For the foregoing reasons, the time for filing Applicant City of Fort Collins, Colorado's petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit in this case should be extended to and including June 16, 2019.

May 1, 2019

Respectfully submitted,

Andrew D. Ringel
Counsel of Record
Hall & Evans, L.L.C.
1001 17th Street, Suite 300
Denver, Colorado 80202
(303) 628-3300
ringela@hallevans.com

*Counsel for Applicant City of Fort
Collins, Colorado*

CERTIFICATE OF SERVICE

I HEREBY certify a true and correct copy of the foregoing was served on counsel for the Respondents by electronic mail and by United States Mail, first-class postage prepaid and addressed to the following:

David A. Lane, Esq.
Andrew McNulty, Esq.
Killmer, Lane & Newman, LLP
1543 Champa Street, #400
Denver, Colorado 80202
dlane@kln-law.com
amcnulty@kln-law.com