PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1530

CHELSEA C. ELINE; MEGAN A. BRYANT; ROSE R. MACGREGOR; CHRISTINE E. COLEMAN; ANGELA A. URBAN,

Plaintiffs - Appellants,

v.

TOWN OF OCEAN CITY, MARYLAND,

Defendant - Appellee,

and

RICHARD W. MEEHAN; JOSEPH J. THEOBALD; ROSS C. BUZZURO,

Defendants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. James K. Bredar, Chief District Judge. (1:18-cv-00145-JKB)

Argued: May 5, 2021 Decided: August 4, 2021

Before GREGORY, Chief Judge, KEENAN, and QUATTLEBAUM, Circuit Judges.

Affirmed by published opinion. Judge Quattlebaum wrote the opinion, in which Judge Keenan joined. Chief Judge Gregory wrote a separate opinion concurring in the judgment.

Devon M. Jacob, JACOB LITIGATION, INC., Mechanicsburg, Pennsylvania, for Appellants. Bruce Frederick Bright, AYRES, JENKINS, GORDY & ALMAND, P.A., Ocean City, Maryland, for Appellee.

QUATTLEBAUM, Circuit Judge:

In response to inquiries about topless sunbathing on its beaches, the Town of Ocean City, Maryland, passed an ordinance prohibiting public nudity. While the ordinance restricts both men and women from showing certain body parts in public, it prohibits only women from publicly showing their bare breasts. Plaintiffs, five women who seek "to be bare-chested in public in the same locations where it is lawful for men to be bare-chested," sued Ocean City to enjoin the ordinance, claiming it unconstitutionally discriminated against women. *See* J.A. 91a–95a. The gist of Plaintiffs' argument was that the gender classification in the ordinance could not withstand the heightened scrutiny required by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The district court disagreed and granted Ocean City's Motion for Summary Judgment. We agree with the district court that Ocean City has established that prohibiting females from publicly showing their bare

breasts is substantially related to an important government interest—protecting public sensibilities—and satisfies the heightened scrutiny of the Equal Protection Clause. For those reasons, and as explained below, we affirm.

I.

Ocean City is a beach town "located on a barrier island 8.4 miles long in Worcester County, Maryland and was originally founded as a fishing village in 1875." J.A. 358a. Ocean City currently has over 7,000 residents, with a median age around 54 years old. Despite its small population, Ocean City is a frequent tourist location, with over 300,000 vacationers per weekend during the busy summer months and 200,000 vacationers per weekend during the off-season months. "Ocean City has long been identified and considered by its visitors and residents, and has identified itself, as a family-friendly resort catering to visitors of all ages and providing a family-friendly environment." J.A. 609a.

On August 17, 2016, Plaintiff Chelsea Eline contacted the Ocean City Police Department and the Worcester County State's Attorney "regarding her stated intention to go 'topless' in Ocean City[,] including on its beaches." J.A. 607a. "Eline took the position . . . that she had a constitutionally-protected right to be topless (i.e., expose her breasts) in public, including in Ocean City and on its beaches." J.A. 608a. As a result of her inquiry, the possibility of Ocean City becoming a

topless beach "became a matter of great public attention and concern. . . ." J.A. 608a. Mayor Richard W. Meehan and members of the Ocean City Council "received many emails and phone calls from Ocean City residents and vacationers expressing great concern about the possibility that Ocean City beaches would become topless beaches." J.A. 608a (internal quotation marks omitted). Due to the large number of inquiries government officials received on the issue, Ocean City posted an announcement on its website titled "Ocean City Is Not a Topless Beach & Will Not Become A Topless Beach." J.A. 612a.

The Ocean City Council then held a special meeting to consider the first reading of a proposed ordinance to regulate public nudity—Ordinance 2017-10 ("the Ordinance"). The Ordinance defines nudity as follows:

> (a) Nude, or a State of Nudity means the showing of the human male or female genitals, pubic area, vulva, anus, or anal cleft with less than a full opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

J.A. 46a. The Ordinance also recognizes that "[p]rotecting the public sensibilities is an important governmental interest" and contains a legislative finding that "a prohibition against females baring their breasts in public, although not offensive to everyone, is still seen by society as unpalatable." J.A. 45a.

At the meeting, the Ordinance was read, and the floor was opened to the public. Only one member in the audience—a 70-year-old Ocean City resident—spoke. She expressed support for the Ordinance. City Council then passed the Ordinance on first reading unanimously. Following that vote, a Council member moved to immediately enact the Ordinance on an emergency basis. That motion passed unanimously as well. After that, Mayor Meehan approved the passage of the Ordinance as an emergency ordinance.

Plaintiffs[1] sued Mayor Meehan and several other city officials[2] in the United States District Court for the District of Maryland, alleging a 42 U.S.C. § 1983 claim for violation of their equal protection rights.[3] Plaintiffs

---

[1] None of the Plaintiffs are residents of Ocean City nor even the county in which it resides. Three are Maryland residents who live in other counties, and two reside out of state. All claim they frequent Ocean City beaches and state they desire to do so topless.

[2] The other officials were Emergency Services Director Joseph J. Theobald and Chief of Police Ross C. Buzzuro. Plaintiffs subsequently dismissed Meehan, Theobald and Buzzuro. Therefore, the case proceeded only against Ocean City.

[3] Plaintiffs also alleged a *Monell* claim against Ocean City for violation of Plaintiffs' equal protection rights. *See Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658, 690 (1978) (holding that municipalities "can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers"). Additionally, Plaintiffs alleged a claim for violation of Article 46 of the Declaration of Rights to the Maryland Constitution. *See* Md. Const. Dec. of Rights, Art. 46 ("Equality of rights under the law shall not be abridged or denied because of sex.").

sought a declaration that the Ordinance violates the Equal Protection Clause and a preliminary and permanent injunction precluding Ocean City from enforcing the Ordinance.

Later, after Plaintiffs moved for a preliminary injunction, the parties presented evidence at a hearing on the motion. None of the Plaintiffs testified. Instead, they presented their proposed expert witness, Dr. Debby Herbenick, who had produced two expert reports. Dr. Herbenick's initial report acknowledges that the Ordinance contains language indicating that it was enacted for the protection of the public sensibilities. Despite that, she offered four opinions that conflict with the Ocean City Council's legislative findings:

(1) the ordinance fails to acknowledge important similarities between female and male breasts,

(2) the ordinance overstates differences between female and male breasts.

(3) the notion that females baring their breasts in public "is still seen by society as unpalatable," is not supported by peer-reviewed scientific research.

(4) peer-reviewed scientific research supports the conclusion that by not treating females and males equally in regard to their ability to appear barechested may contribute to harmful secondary effects, such as discouraging breastfeeding and promoting a culture that over-sexualizes

> girls and women; thus harming and not protecting the public.

J.A. 1260a. Dr. Herbenick's supplemental expert report indicated that she "systematically reviewed more than one thousand historical and contemporary photographs from Ocean City, Maryland." J.A. 1268a. Based upon this review, Dr. Herbenick opined "that public sensibilities have evolved rapidly over the decades regarding what males and females wear on or near the Ocean City beaches. From the 1930s to 1960s and 1970s, there were considerable changes that resulted in men going from covering their chests to baring their chests, and from women wearing dresses and even stockings to wearing bikinis." J.A. 1268a. Additionally, the supplemental expert report stated that "Ocean City has seen the establishment of two Hooters locations, with quite a few photos of 'Hooters girls' posing with young boys." J.A. 1268. Moreover, she indicated "recent decades have seen women in Ocean City wearing thong or g-string bikini bottoms, and even 'pasties' that cover just the nipples during 'Best Body' competitions." J.A. 1268a. At the hearing, Dr. Herbenick testified largely consistent with her reports.

Ocean City presented Mayor Richard Meehan, Council Member Mary P. Knight, and Melanie Pursel—the President and CEO of the Ocean City Chamber of Commerce. These witnesses all testified about communications they had received in support of the Ordinance.

The district court denied Plaintiffs' motion. Noting the majority of cases that have upheld similar public nudity laws, the court found that it was bound by our decision in *United States v. Biocic*, 928 F.2d 112, 115–116 (4th Cir. 1991), which recognized that protecting the portion of society that disfavored public display of female breasts furthers an important governmental interest.[4] The district court described the testimony from Ocean City's witnesses—Mayor Meehan, Council Member Knight and Ms. Pursel—which indicated that many Ocean City residents and vacationers had voiced strong opposition to allowing public nudity in Ocean City. It then noted that "Plaintiffs did not testify, choosing instead to rely upon an expert witness, [Dr.] Herbenick. . . ." J.A. 431a. The district court did not find Dr. Herbenick's opinion persuasive and, more importantly, concluded that it was "not strictly relevant to the issue at hand" because "[i]nstead of her testifying as to what Ocean City's citizens' public sensibilities *are*, she testified as to what she thought they *should be.*" J.A. 432a. Accordingly, the district court concluded that "Plaintiffs did not muster any evidence to show that Ocean City's citizens shared their view that women should be able to be bare-chested in public places as men are." J.A. 432a. It determined that "assessment of public sensibilities does not require precise scientific sampling," and found that Ocean City's witnesses were able to articulate the public

[4] Ocean City and the district court referred to this governmental interest as protection of "public sensibilities." *See* J.A. 45a, 432a–33a. For ease of reference, we adopt this shorthand description.

sensibilities of the Ocean City community because—as elected officials—they are "accredited as accurate barometers of public sensibilities" and "can, and do, speak for the public." J.A. 432a. The court also relied on the information that Ocean City's witnesses provided about the support they received from the public about the ordinance. It concluded, therefore, that "Ocean City has shown its ordinance is substantially related to an important government objective, the protection of public sensibilities." J.A. 433a.

After a year of litigation, the parties each moved for summary judgment.[5] Through discovery, the record had been developed somewhat since the Order denying Plaintiffs' Motion for Preliminary Injunction. For example, the parties deposed several witnesses and produced emails from concerned residents and vacationers, which were largely in support of the Ordinance. Nevertheless, the arguments offered at summary judgment were not materially different from

[5] Additionally, Plaintiffs moved to exclude Mayor Meehan and Council Member Knight as expert witnesses, arguing that neither were qualified to offer expert opinions, that their opinions would not be reliable and that Ocean City did not comply with the disclosure requirements of Federal Rule of Civil Procedure 26(a)(2). In response, Ocean City clarified that it was not offering these witnesses as experts but, instead, was offering them as fact witnesses who may offer lay opinions. The district court agreed that Ocean City was not seeking to offer expert testimony, concluding that Mayor Meehan and Council Member Knight were entitled to "testify as to what they have observed and experienced in the course of their personal community interactions," as such testimony was "relevant to determining the purpose of the Ordinance. . . ." J.A. 1300a–02a. Accordingly, the district court denied Plaintiffs' Motion to Exclude as moot.

those offered in connection with the Motion for Preliminary Injunction.

The district court granted summary judgment for Ocean City on all of Plaintiffs' claims. Initially, in evaluating Ocean City's adoption of the Ordinance, it " 'assume[d], without deciding' that a classification based on 'anatomical differences between male and female' qualifies as a gender-based distinction in the context of the equal protection analysis." J.A. 1306a (quoting *Biocic*, 928 F.2d at 115). The district court then found that Dr. Herbenick's opinions were irrelevant and declined to consider them in evaluating Plaintiffs' constitutional challenges to the Ordinance. In its Order, the district court found that "Dr. Herbenick's opinion that the ordinance overstates differences between females and males in terms of breasts/chests, focusing heavily on sexualization does not help the Court to understand whether Ocean City's public sensibilities support a ban on public female toplessness." J.A. 1303a (internal quotation marks omitted). Nor, the district court concluded, did Dr. Herbenick's opinion that female toplessness is not generally seen as unpalatable in contemporary American society help resolve whether female toplessness is considered unpalatable in Ocean City.

Then, relying on this Court's decision in *Biocic*, as well as most courts from around the country that have considered this issue, the district court held that the purpose of the restriction—protecting the public sensibilities—was an important governmental interest. Finally, echoing its analysis of the evidence presented by

Ocean City in response to Plaintiffs' Motion for Preliminary Injunction, the court held that the record established that the restriction was substantially related to that interest.[6] Accordingly, the district court granted Ocean City's Motion for Summary Judgment and denied Plaintiffs' Motion for Summary Judgment.

Plaintiffs filed a timely Notice of Appeal from the district court's Order. They ask us to reverse the district court's grant of summary judgment in favor of Ocean City and find that the Ordinance is unconstitutional under the Equal Protection Clause of the United States Constitution. In assessing this argument, we review that decision de novo, "applying the same legal standards as the district court and viewing all facts and reasonable inferences in the light most favorable to the nonmoving party." *Ballengee v. CBS Broad., Inc.*, 968 F.3d 344, 349 (4th Cir. 2020).

II.

The Equal Protection Clause of the United States Constitution provides that: "No State shall . . . deny to any person within its jurisdiction the equal protection

---

[6] Because the district court found no constitutional violation, it also granted summary judgment for Ocean City on Plaintiffs' *Monell* claim. Additionally, the district court—applying Maryland law—found "substantial justification" for the Ordinance and granted summary judgment for Ocean City on Plaintiffs' claim under Article 46 of the Maryland Declaration of Rights. *See Giffin v. Crane*, 716 A.2d 1029, 1037 (Md. 1998) (noting that Article 46 "flatly prohibits genderbased classifications, absent substantial justification").

of the laws." U.S. Const. amend. XIV, § 1. When a law containing a gender-based classification is challenged under the Equal Protection Clause, "[t]he burden of justification is demanding and it rests entirely on the State." *United States v. Virginia*, 518 U.S. 515, 533 (1996). When examining the "differential treatment[,] . . . the reviewing court must determine whether the proffered justification is exceedingly persuasive." *Id.* at 532–33 (internal quotation marks omitted).

"The defender of legislation that differentiates on the basis of gender must show 'at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (quoting *Virginia*, 518 U.S. at 533). Moreover, the classification must meet that heightened standard by today's assessment, for the Supreme Court "has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." *Obergefell v. Hodges*, 576 U.S. 644, 673 (2015). "The justification must [also] be genuine, not hypothesized or invented *post hoc* in response to litigation." *Virginia*, 518 U.S. at 533. "And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.*

However, "[t]he heightened review standard [the Supreme Court's] precedent establishe[d] does not make sex a proscribed classification." *Id.* That is so

because "the two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *Ballard v. United States*, 329 U.S. 187, 193 (1946). "Inherent differences between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." *Virginia*, 518 U.S. at 533 (internal quotation marks omitted). Laws may, for that reason, acknowledge the physical differences between men and women so long as they are not "used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women." *Id*. at 534 (internal citation omitted).

Whether laws that prohibit public nudity by referencing anatomical differences between women and men—as the Ordinance does—qualify as gender-based classifications that are subject to heightened scrutiny for purposes of the Equal Protection Clause has not been squarely addressed by this Court or the Supreme Court. However, we decline to delve into that issue because, even assuming that the classification in the Ordinance is subject to heightened scrutiny, the gender-based classification in the Ordinance "serves important governmental objectives and . . . the discriminatory means employed are substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 533 (internal quotation marks omitted).

First, our *Biocic* decision teaches that the classification in the Ordinance serves an important government objective. There, an adult female "removed the

top of her two-piece bathing suit, fully exposing her breasts" while walking on the beach in a Natural Wildlife Refuge. *Biocic*, 928 F.2d at 113. An officer of the federal Fish and Wildlife Service charged her with violating a federal regulation, which provided that "[a]ny act of indecency or disorderly conduct as defined by State or local laws is prohibited on any national wildlife refuge." *Id.* (alteration in original) (citing 50 C.F.R. § 27.83). The applicable local ordinance made it "unlawful for any person to knowingly, voluntarily, and intentionally appear . . . in a place open to the public or open to public view, in a state of nudity" and defined "state of nudity" to include the showing of female breasts. *Id.* (alteration in original). She appealed her conviction under this regulation, claiming that it violated the Equal Protection Clause. *Id.* at 114. We disagreed, concluding that:

> The important government interest is the widely recognized one of protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous zones. These still include (whether justifiably or not in the eyes of all) the female, but not the male, breast.

Id. at 115–16. *Biocic* is clear. And we are not permitted to discard it merely due to the passage of time.

Importantly, the overwhelming majority of courts that have addressed laws banning public female

toplessness have upheld their constitutionality. *See*, *e.g.*, *Free the Nipple – Springfield Residents Promoting Equal. v. City of Springfield, Mo.*, 923 F.3d 508, 512 (8th Cir. 2019) (noting "important governmental interests in promoting public decency and proscribing public nudity to protect morals, public order, health, and safety" and collecting cases upholding similar laws); *see also* Kimberly J. Winbush, *Regulation of exposure of female, but not male, breasts*, 67 A.L.R.5th 431, § 2[a] (1999) ("As a general rule, the courts have concluded that the equal protection clause of the Fourteenth Amendment does not prohibit such ordinances. . . .").[7]

Plaintiffs acknowledge *Biocic* and the other courts that have expressed the same view. They ask us to overrule *Biocic*, however, largely suggesting it represents a viewpoint that is outdated at best and misguided at worst. As far as being outdated, Plaintiffs argue that "[t]his nation has evolved significantly" during the thirty years since this Court issued its decision in *Biocic*. Appellants' Br. at 41. Therefore, in light of what they characterized as the changing public

---

[7] The outlier on this issue is *Free the Nipple-Fort Collins v. City of Fort Collins, Co.*, 916 F.3d 792 (10th Cir. 2019). There, the Tenth Circuit, in a divided decision, held a similar ordinance failed to withstand heightened scrutiny when justified on three reasons other than public sensibilities. *See id.* at 802–05. The issues presented to the Tenth Circuit, however, were in a different procedural context. The Tenth Circuit was reviewing a district court's issuance of a preliminary injunction; therefore, its finding on the constitutionality of the ordinance was limited to concluding that the plaintiffs "made a strong showing of their likelihood of success on the merits. . . ." *Id.* at 805. Even so, it acknowledged that its decision represented "the minority viewpoint." *Id.*

sentiment towards females as well as the Supreme Court's recent equal protection jurisprudence, Plaintiffs ask the Court to overrule *Biocic* and conclude that protecting the public sensibilities is no longer an important government interest.

To be sure, public attitudes about gender and sexuality are constantly changing and evolving. But our precedent has not changed. As a three-judge panel, we may not overrule *Biocic*, and it has not been overruled by the Supreme Court. In any event, Plaintiffs arguments do not persuade us that the important government interest we recognized then is no longer important.

As far as being misguided, Plaintiffs point out that perceived public moral sensibilities have been used to justify government action that we now recognize to be unconstitutional if not outright immoral. On this issue, they have a point. The judicial legacy of justifying laws on the basis of the perceived moral sensibilities of the public is far from spotless. Some government action that we now rightly view as unconstitutional, if not immoral, has been justified on that basis. Even so, in this situation, protecting public sensibilities serves an important basis for government action. Thus, following *Biocic* and the majority of courts that have addressed the issue, we find no error in the district court's determination that the provision in the Ordinance prohibiting the public showing of female breasts furthers the

important governmental interest of protecting the public sensibilities.[8]

Last, Plaintiffs alternatively argue that, even if *Biocic* controls, Ocean City has not established that the Ordinance is substantially related to protecting the public sensibilities of Ocean City residents and vacationers. That position, however, is belied by the record.

Ocean City presented testimonial and documentary evidence that demonstrated Ocean City residents and vacationers overwhelmingly supported the Ordinance. The vast majority of the emails in the record favor the Ordinance. And Meehan, Knight and Pursel all testified that they had received communications from residents and vacationers supporting it as well.

Undeterred, Plaintiffs offer several counter-arguments. First, they criticize Ocean City's evidence. They argue it is not illustrative of the views of Ocean City because its population is transient due to tourism. But the emails sent to Mayor Meehan undermine this argument. Alongside the view of residents, many of the emails came from tourists who indicated that they would not vacation in Ocean City if public female toplessness was allowed.

---

[8] Of course, the Ordinance could serve other important governmental interests, such as "promoting public decency and proscribing public nudity to protect morals, public order, health, and safety." *See City of Springfield, Mo.*, 923 F.3d at 512. But those are not before us, and *Biocic* controls on the important governmental interest advanced by Ocean City.

Additionally, Plaintiffs argue the testimony of Ocean City's leaders who expressed their opinions on the public sensibilities concerning female toplessness lacks sufficient scientific basis. For example, they suggest that Ocean City officials did not save all emails related to the Ordinance and point out that the "names of the people who complained by telephone or in person were not recorded. . . ." Appellants' Br. at 23. But nothing in our precedent requires that a municipality empirically prove the public sensibilities of a community. The district court rightly held that Ocean City's leaders could offer testimony as fact witnesses giving lay opinions about the moral sensibilities of the Ocean City community based on their personal community interactions, including those interactions as elected officials. That is sufficient to show that the Ordinance is substantially related to this important governmental interest.

Finally, Plaintiffs contend the district court erred by excluding Dr. Herbenick's expert reports and testimony. They claim that this evidence reveals that public female toplessness does not violate the public sensibilities of Ocean City residents and vacationers. Even so, much of their briefing focuses on explaining Dr. Herbenick's qualifications and the methodology that she used to reach her opinions. Those arguments, however, miss the point. To be sure, Dr. Herbenick has experience and expertise in human sexuality, including American societal attitudes concerning female breasts. But that does not make her testimony or opinions relevant to the discrete issue in this case—the public

sensibilities of Ocean City residents and vacationers on the issue of public female toplessness. As the district court properly noted, while Dr. Herbenick's supplemental expert report does show a substantial transformation in male and female swimwear in Ocean City over the last century, "[t]he issue facing the Court is not whether society's ideas around appropriate beachwear have evolved over time, as they undeniably have. . . ." J.A. 1304a. The issue is the current public sensibilities on the issue of public female toplessness, and Dr. Herbenick offered no evidence that the public sensibilities of Ocean City residents or vacationers have evolved on that discrete issue.

The Federal Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993). "In reviewing a trial court's ruling on experts, we are mindful of the Supreme Court's admonition against 'applying an overly stringent review . . . [that] fail[s] to give the trial court the deference that is the hallmark of abuse-of-discretion review.'" *United States v. Ancient Coin Collectors Guild*, 899 F.3d 295, 318 (4th Cir. 2018) (alterations in original) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997)). Accordingly, and in light of our deferential standard of review, we cannot conclude that the district court erred in concluding that Dr. Herbenick's testimony would not be helpful "to understand the

evidence or to determine a fact in issue."[9] *See* Fed. R. Evid. 702(a).

In sum, Ocean City has met its burden of showing the Ordinance is substantially related to an important government interest. The burden of proving the Ordinance's constitutionality rests with Ocean City, and it offered the only admissible evidence on the public sensibilities of Ocean City residents and vacationers. Accordingly, we find that Ocean City has met its burden of providing an exceedingly persuasive justification for treating the public showing of bare breasts by females and males differently in the Ordinance. We further hold that the prohibition on public female toplessness is substantially related to the important governmental interest in protecting the public sensibilities of Ocean City. *See Virginia* at 518 U.S. at 533. Therefore, we affirm the district court's grant of Ocean City's Motion

---

[9] Similarly, we conclude that the district court did not err in denying Plaintiff's Motion to Exclude the testimony of Mayor Meehan and Council Member Knight. These witnesses were offered as lay witnesses. They provided opinion testimony that was based on their perceptions dealing with Ocean City residents and vacationers, was helpful in determining Ocean City's purpose in adopting the Ordinance and was not based on scientific, technical or other specialized knowledge. This is a quintessential example of the type of opinion testimony from lay witnesses that is permitted by Federal Rule of Evidence 701, and the district court did not abuse its discretion in finding it admissible. *See United States v. Hassan*, 742 F.3d 104, 130, 135–36 (4th Cir. 2014) (outlining the requirements for lay opinion testimony and noting that we will only overturn an evidentiary ruling "that is arbitrary and irrational" (internal quotation marks omitted)).

for Summary Judgment on Plaintiffs' equal protection claim.[10]

III.

For the reasons stated above, the district court's Order granting Ocean City's Motion for Summary Judgment, denying Plaintiffs' Motion for Summary Judgment and denying Plaintiffs' Motion to Exclude is

AFFIRMED.

GREGORY, Chief Judge, concurring:

I agree that we must affirm the district court's grant of summary judgment to Ocean City under *United States v. Biocic*, 928 F.2d 112, 115–16 (4th Cir. 1991). However, I write separately, concerned that *Biocic*'s reasoning is inconsistent with equal protection principles. In *Biocic*, this Court upheld gender-based distinctions in nudity laws, believing them to substantially relate to an important governmental interest: "protecting the [community's] moral sensibilities." *Id.* at 115. Though we are bound by *Biocic*, the majority properly recognizes that "[s]ome government action that we now rightly view as unconstitutional, if not immoral,"

---

[10] Because we find that the district court properly concluded there was no constitutional violation, we also affirm the district court's grant of summary judgment on Plaintiffs' *Monell* claim. And we find, for the reasons expressed by the district court, that the Ordinance does not violate Article 46 of the Maryland Constitution.

has been justified by invoking "the perceived moral sensibilities of the public." Maj. Op. at 15. This case raises the question, then, of how we distinguish between the types of disparate treatment justified by a community's public sensibilities and those that are not.

Ordinarily, we answer this question by determining whether the law's discriminatory classifications "create or perpetuate the legal, social, and economic inferiority of women." *United States v. Virginia*, 518 U.S. 515, 533 (1996). A law discriminating this way would not be permissible on the grounds that it reflected the views of a particular community. *See Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring) ("Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.").

But *Biocic* contradicts this rule by permitting gender discrimination so long as the law doing so is supported by "public sensibilities." Because local legislative bodes represent the communities that elected them, their legislative acts presumably reflect the public sensibilities of those communities. *See Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("As long as ours is a representative form of government, [ ] our legislatures are those instruments of government elected directly by and directly representative of the people."). Upholding discrimination because it reflects public sensibilities therefore defers to the legislative body that passed

it, effectively applying a kind of rational-basis review contrary to the heightened scrutiny required under the Equal Protection Clause. *See Virginia*, 518 U.S. at 555.

Moreover, the Court's heightened scrutiny is incomplete if we assume without deciding that this ordinance enacts a form of gender-discrimination. *See Biocic*, 928 F.2d at 115. Heightened scrutiny serves the purpose of "smok[ing] out" any impropriety underlying a form of discrimination. *See Johnson v. California*, 543 U.S. 499, 506 (2005) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83, 146 (2010). Because of that, each step in the intermediate scrutiny analysis is interconnected. *See* Franklin, *The Anti-Stereotyping Principle*, *supra*, at 138 n.296 ("The anti-stereotyping principle pervades both stages of [intermediate scrutiny], shaping what constitutes an important interest and what means qualify as sufficiently narrowly tailored to serve this interest."). Thus, we must grapple with the nature of the alleged discrimination to establish whether the government's ends justify its means. Rather than assuming that this ordinance presents a cognizable form of gender-based discrimination, this Court must ask whether it perpetuates the legal, social, or economic inferiority of women.

Many of the Supreme Court's gender-discrimination cases have involved laws erecting economic, educational, or employment barriers between men and women. *See*, *e.g.*, *Califano v. Westcott*, 443 U.S. 76, 84, 88–89 (1979) (holding unconstitutional provision that

gave unemployed-parent benefits exclusively to fathers); *Califano v. Goldfarb*, 430 U.S. 199, 206–207 (1977) (plurality opinion) (holding unconstitutional a Social Security classification that denied widowers survivors' benefits available to widows); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648–653 (1975) (holding unconstitutional a Social Security classification that excluded fathers from receipt of child-in-care benefits available to mothers); *Frontiero v. Richardson*, 411 U.S. 677, 688–691 (1973) (plurality opinion) (holding unconstitutional exclusion of married female officers in the military from benefits automatically accorded married male officers); *Reed v. Reed*, 404 U.S. 71, 74, 76–77 (1971) (holding unconstitutional a probate-code preference for a father over a mother as administrator of a deceased child's estate); *Virginia*, 518 U.S. at 555–58 (holding unconstitutional the Virginia Military Institute's male-only admissions policy).

But the Court's gender-discrimination cases extend beyond economic or educational opportunities. In *Craig v. Boren*, the Supreme Court struck down a sex-based restriction on the purchase and sale of certain alcoholic beverages. 429 U.S. 190, 204 (1976). Though the law imposed a relatively insignificant burden, the Court nevertheless recognized it to fall within a run of statutes that impermissibly rested upon "'archaic and overbroad' generalizations" about gender. *Id.* at 198 (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)).

Across all of these cases, the Court has consistently struck down gender-based restrictions, even ones

supposedly based upon "reasonable considerations," because those laws were premised upon noxious gender stereotypes. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994). Laws premised upon noxious gender stereotypes stand as yet another plank propping up the structure of gender inequality. While many of those laws were enacted out of a paternalistic attempt to "protect" members of a certain gender, they proved unconstitutional because they relied upon stereotypical understandings of where men and women belong both in the public and at home. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 & n.10 (1982); *Weinberger*, 420 U.S. at 648–653. And the Constitution requires us to remain wary of those paternalistic laws in search of victims to protect. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692 (2017); Melissa Murray, *Inequality's Frontiers*, 122 Yale L. J. Online 235, 236–37, 239–40 (2013).

At first glance, Ocean City's ordinance seems innocuous enough. It forbids public nudity and defines nudity in a way commonly understood across western societies. But we must take care not to let our analysis be confined by the limits of our social lens. *See Obergefell v. Hodges*, 576 U.S. 644, 673 (2015). Suppose the ordinance defined nudity to include public exposure of a woman's hair, neck, shoulders, or ankles. Would that law not run afoul of the Equal Protection Clause?[1]

---

[1] This is not to suggest that there is anything wrong, for example, with women choosing to cover their hair due to personal or religious beliefs about modesty. Where such a rule is imposed

While the ordinance here imposes a much narrower restriction on women, this is only a difference in degree, and not in kind.

Viewed in this light, laws that discriminate between male and female toplessness embody problematic stereotypes through the control imposed upon the bodies of women and not men. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 915 (1992) (Stevens, J., concurring in part, dissenting in part) ("'Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.' . . . The same holds true for the power to control women's bodies."). By requiring women to cover up, such laws heighten the "feminine mystique" and all the baggage that it forces women to carry. *See generally* Betty Friedan, Feminine Mystique (1963); bell hooks, Feminist Theory: From Margin to Center (1984). By treating women's breasts (but not those of men) as forbidden in public sight, these laws may reduce women's bodies to objects of public gaze, reproduce the Victorian-era belief that women should be seen but not heard, and reinforce stereotypes that sexually objectify women rather than treating them as people in their own right.

In *Free the Nipple-Fort Collins v. City of Fort Collins, Co.*, the Tenth Circuit came to that very conclusion. 916 F.3d 792, 802–05 (10th Cir. 2019). It determined that laws prohibiting female toplessness

---

broadly by law, however, such a restriction takes on different meaning.

perpetuate negative sex-object stereotypes about women and their bodies. *Id.* To be sure, the Tenth Circuit's case differs from our case procedurally, and it contains a different factual record as well. Even considering the evidence excluded by the district court, Plaintiffs present little evidence connecting female toplessness to gender stereotypes.[2] Nevertheless, this Court should reconsider *Biocic* and apply greater scrutiny to fulfill the full promise of equal protection.

[2] For example, Plaintiffs offer journal articles that reference the sexual objectification of women, but these sources do not mention nudity laws at all, let alone explain how such laws are related. Plaintiffs' expert, Dr. Herbenick, states in her report that disparate treatment of male and female breasts "may contribute to harmful secondary effects, such as . . . promoting a culture that oversexualizes girls and women." J.A. 1260. But she does not actually explain why or how. The corresponding section of her report instead discusses whether the public thinks female toplessness should be banned.

FILED: August 4, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1530
(1:18-cv-00145-JKB)

CHELSEA C. ELINE; MEGAN A. BRYANT;
ROSE R. MACGREGOR; CHRISTINE E. COLEMAN;
ANGELA A. URBAN

Plaintiffs - Appellants

v.

TOWN OF OCEAN CITY, MARYLAND

Defendant - Appellee

and

RICHARD W. MEEHAN; JOSEPH J. THEOBALD;
ROSS C. BUZZURO

Defendants

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

CHELSEA C. ELINE, *et al.*,	*	
Plaintiffs	*	
	*	
v.	*	**CIVIL NO. JKB-18-0145**
TOWN OF OCEAN CITY, MD.,	*	
	*	
	*	
Defendant	*	

* * * * * * * * * * * * * * * * *

MEMORANDUM

(Filed Apr. 7, 2020)

Plaintiffs Chelsea C. Eline, Megan A. Bryant, Rose R. MacGregor, Christine E. Coleman, and Angela A. Urban filed suit against Defendant Town of Ocean City, Maryland ("Ocean City")[1] alleging that Emergency Ordinance 2017-10—which bans females, but not males, from publicly displaying their breasts—is a violation of the Constitution's Equal Protection Clause and Article 46 of the Maryland Declaration of Rights. Plaintiffs seek a declaratory judgment, attorneys' fees and costs, discretionary damages, and a permanent injunction to prevent Ocean City from continuing to

[1] Plaintiffs originally filed suit against several individual defendants in addition to Ocean City. (*See* Compl., ECF No. 1.) The Court ordered the Clerk to terminate the individual defendants pursuant to the Plaintiffs' Stipulation of Dismissal (ECF No. 16). (Order, ECF No. 17.) Accordingly, Ocean City is the only remaining defendant.

enforce Emergency Ordinance 2017-10. Now pending before the Court are Defendant's Motion for Summary Judgment (ECF No. 60), Plaintiffs' Cross-Motion for Summary Judgment (ECF No. 61), and Plaintiffs' Motion to Exclude Richard Meehan and Mary P. Knight as Expert Witnesses (ECF No. 63). No hearing is required. *See* Local Rule 105.6 (D. Md. 2018). For the reasons set forth below, the Defendant's Motion for Summary Judgment will be granted, Plaintiffs' Cross-Motion for Summary Judgment will be denied, and Plaintiffs' Motion to Exclude Richard Meehan and Mary P. Knight as Expert Witnesses will be denied as moot.

I. Background

Ocean City is a town located along Maryland's Atlantic coastline which receives millions of visitors each year. (Meehan Decl., Def. M.S.J Ex. A, Attach. 5 at 56, ECF No. 60-2.) Around August 17, 2016, Plaintiff Chelsea Eline submitted written inquiries to both the Ocean City Police Department and the Worcester County State's Attorney "regarding her stated intention to go 'topless' in Ocean City[,] including on its beaches." (Meehan Decl., Def. M.S.J Ex. A ¶¶ 4–5.) In response to her inquiries, the Worcester County State's Attorney requested legal guidance from the Maryland Attorney General's Office on the issue. (*Id.* ¶ 5.)

As the debate over female toplessness in Ocean City became public, the Ocean City Council began receiving comments regarding Ocean City's position on

female toplessness. (*Id.* ¶ 7; Chavis Decl., Def. M.S.J Ex. B ¶¶ 3–4, ECF No. 60-3; Comments, Def. M.S.J. Ex. D, ECF No. 60-5.) The overwhelming majority of these commenters expressed disapproval of public female toplessness in Ocean City, with many saying they would not return to Ocean City if it permitted female toplessness. (*See* Comments, Def. M.S.J. Ex. D.)

On June 9, 2017, the Mayor of Ocean City, Richard Meehan, publicly stated that both he and the Ocean City Council "are unanimously opposed to women being topless on our beach or in any public area in Ocean City." (Meehan Decl., Def. M.S.J Ex. A, Attach. 1.) He further elaborated: "While we respect [Eline's] desire to express what rights she believes she may have, Ocean City is a family resort and we intend to do whatever is within our ability to also protect the rights of those families that visit us each year." (*Id.*)

On June 10, 2017, "to preserve and protect the family-oriented character and quality of Ocean City and its beaches, and to protect the sensibilities of Ocean City's residents and visitors," Ocean City adopted Emergency Ordinance 2017-10 (hereinafter, "Ordinance"). (Meehan Decl., Def. M.S.J Ex. A ¶ 8.) The Ordinance states: "It shall be unlawful for any person to be on the beach, boardwalk, public parks, parking lots, streets, avenues, alleys or any other public place with the person's specified anatomical areas nude or in a state of nudity." (Ord. No. 2017-10, Sec. 58-193, Pl. M.S.J. Ex. 5, ECF No. 61-7.) Included within the definition of "specified anatomical areas" is "a female breast below a point immediately above the top of the

areola." (*Id.* Sec. 58-192.) Male breasts are not included within this definition. The Ordinance further defines "Nude, or a State of Nudity" to "mean[] the showing of the human male or female genitals, pubic area, vulva, anus, or anal cleft with less than a full opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state."[2] (*Id.*) Those who violate the Ordinance will "be guilty of a municipal infraction and be subject to a fine of up to $1,000.00." (*Id.* Sec. 58-194.)

The Ordinance also memorializes the City Council's reasons for passing the ban on female toplessness, explaining: "Protecting the public sensibilities is an important governmental interest based on an indisputable difference between the sexes. Further, a prohibition against females baring their breasts in public, although not offensive to everyone, is still seen by society as unpalatable." (*Id.* Sec. 58-191.)

On June 14, 2017, the Maryland Attorney General's Office issued its legal guidance on the issue, concluding, "[i]t is our view that Maryland courts would hold that prohibiting women from exposing their breasts in public while allowing men to do so under the same circumstances does not violate the federal or

---

[2] For ease of reference, the Court will refer to the restrictions in the Ordinance as a ban on female toplessness, though the Court acknowledges that the restrictions as defined in the Ordinance are more complicated than that phrase may suggest.

State Constitution." (Meehan Decl., Def. M.S.J Ex. A, Attach. 3 at 11.)

On January 16, 2018, Plaintiffs filed suit against Ocean City. (Compl.) In 2018, Mayor Meehan and Council Members Lloyd Martin and Matthew James were re-elected. (Def. Interrogatory Ans., Def M.S.J. Ex. G at 2, ECF No. 60-8.) On December 7, 2018, the Court held a hearing on Plaintiffs' Motion for Preliminary Injunction (ECF No. 21). (Motion Hearing, ECF No. 42.) The Court subsequently denied Plaintiffs' request for a preliminary injunction, finding that Ocean City had demonstrated that the Ordinance is "substantially related to an important governmental objective," namely, "the protection of public sensibilities," and that Plaintiffs did not show they were likely to succeed on the merits. *Eline v. Town of Ocean City*, 382 F. Supp. 3d 386, 393 (D. Md. 2018). Accordingly, the Court denied Plaintiffs' request for a preliminary injunction. *Id*.

II. Evidentiary Issues

Before the Court considers the merits of the parties' cross-motions for summary judgment, the Court first considers the parties' challenges to the proffered evidence.

a. Plaintiffs' Motion to Exclude Expert Witnesses

Plaintiffs filed a motion to exclude Mayor Richard Meehan and Counsel Member Mary P. Knight as

expert witnesses. (ECF No. 63.) In response, Ocean City argues that it does not seek to offer Mayor Meehan and Counsel Member Knight as expert witnesses, but rather as fact witnesses. (Opp'n Mot. Exclude at 2, ECF No. 68-1.) Plaintiffs reply that their motion to exclude should be granted on that basis. (Reply Mot. Exclude at 1, ECF No. 72.) However, because Mayor Meehan and Counsel Member Knight are not being offered as expert witnesses, Plaintiffs' motion to exclude their testimony as expert witnesses is moot. Accordingly, the Court will deny Plaintiffs' motion to exclude as moot.

Plaintiffs also argue that "lay persons, and specifically Mayor Meehan and Council Member Knight, are not qualified to identify a designated population's public sensibilities." (*Id.*) Pursuant to Federal Rule of Evidence 701, witnesses who are not testifying as experts may provide "testimony in the form of an opinion" so long as it is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

Mayor Meehan testified, "I and members of the Ocean City Council received many emails and phone calls from Ocean City residents and vacationers expressing great concern about the possibility that Ocean City beaches would 'become topless beaches.'" (Meehan Decl., Def. M.S.J Ex. A ¶ 7.) These email messages are attached to Mayor Meehan's Declaration. (Comments, Def. M.S.J. Ex. D.) He also testified that

Ocean City identifies itself as a "family-friendly resort." (Meehan Decl., Def. M.S.J Ex. A ¶ 11.) This is also supported by attached documentation promoting Ocean City as a family-friendly destination. (*See* Meehan Decl., Def. M.S.J Ex. A, Attach. 4 at 20–21.) Such testimony reflects Mayor Meehan's personal observations, is helpful to determine the purpose of the Ordinance, and is not based on specialized or technical knowledge.

Similarly, Council Member Mary Knight's testimony reflects her personal perceptions based on interactions with members of the community. At the preliminary injunction hearing, she testified that she heard from "constituents, tourists, people that live in Ocean City, nonresidents, [and] taxpayers" that they did not support public female toplessness in Ocean City. (Hearing Transcript at 74, ECF No. 51.) Council Member Knight said she did not receive any phone calls or have any "face-to-face communications" with individuals who supported public female toplessness. (*Id.* at 77.) Based on these interactions, she stated that she believed the Ordinance reflected public sensibilities in Ocean City. (*Id.*)

The Court finds that, like Mayor Meehan's testimony, Council Member Knight's testimony is not "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. While lay witnesses may not be able to define precisely what the public sensibilities of one particular area are from a scientific or statistical standpoint, they certainly may testify as to what they have observed

and experienced in the course of their personal community interactions. Such information is relevant to determining the purpose of the Ordinance at issue here. Therefore, the Court will consider the testimony of Mayor Meehan and Council Member Knight as fact witnesses pursuant to Rule 701.

b. Defendant's Motion to Exclude Testimony of Dr. Debby Herbenick

Plaintiffs provided an expert report from Dr. Debby Herbenick in support of their motion for summary judgment. (Herbenick Rep., Pl. M.S.J. Ex. 13, ECF No. 61-15.) Dr. Herbenick is a professor at the Indiana University School of Public Health in the Department of Applied Health Science, where she also serves as the Director of the Center for Sexual Health Promotion. (*Id.* at 1.) In its summary judgment motion, Ocean City argues that the testimony of Dr. Herbenick is not admissible under Rule 702 of the Federal Rules of Evidence because her opinions are not "credible," "reliable," "relevant," or "probative." (Def. M.S.J. Mem. at 28, ECF No. 60-1.) Because of this, Ocean City argues, Dr. Herbenick's testimony "should not bear in any way on Defendant's summary judgment motion or in the case generally." (*Id.*)

Rule 702 of the Federal Rules of Evidence provides that a witness "qualified as an expert by knowledge, skill, experience, training, or education" may offer testimony if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

In other words, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993).

At the hearing for a preliminary injunction, the Court permitted Dr. Herbenick to testify. However, in its memorandum denying Plaintiffs' request for a preliminary injunction, the Court noted it did "not find Dr. Herbenick's opinion persuasive." *Eline*, 382 F. Supp. 3d at 392. The Court found that Dr. Herbenick's opinion was "not strictly relevant to the issue at hand," because "[i]nstead of her testifying as to what Ocean City's citizens' public sensibilities *are*, she testified as to what she thought they *should be*." *Id.* at 392–93.

The Court finds that the same flaws with Dr. Herbenick's testimony at the preliminary injunction hearing are present in her expert report. Dr. Herbenick's opinion that "the ordinance overstates differences between females and males in terms of breasts/chests, focusing heavily on sexualization" does not help the Court to understand whether Ocean City's public sensibilities support a ban on public female toplessness.

(Herbenick Rep. at 3.) Nor does her opinion that female toplessness "is not generally seen as 'unpalpable' in contemporary America" shed light on whether female toplessness is seen as unpalpable in Ocean City specifically. (*Id.* at 4.) Dr. Herbenick also testified that she was "not able to identify U.S. population-level data on the topic [of female toplessness] from a reputable, scientific source." (*Id.* at 6.) Such testimony raises questions about whether Dr. Herbenick's testimony would even be reliable in determining nationwide views on public female toplessness.

The Court finds that Dr. Herbenick's supplemental expert report is also irrelevant to the questions at issue in this case. Dr. Herbenick's supplemental expert report includes a series of photographs taken in Ocean City from 1906 to the present day. (Herbenick Supp. Rep., Pl. M.S.J. Ex. 14, ECF No. 61-16.) These photographs demonstrate the massive transformation in swimwear over the course of the last century, from long skirts to the modern bikini. (*Id.*) But while these photographs show that community norms have changed regarding appropriate beachwear, they do not demonstrate that community norms in Ocean City have evolved to embrace public female toplessness.[3]

Accordingly, the Court does not find Dr. Herbenick's supplemental expert report to be helpful to

---

[3] Even an undated video still from what is titled, "Best Body on the Beach Contest," which shows a woman wearing large pasties covering her nipples, does not provide any evidence suggesting that the public sensibilities of Ocean City as a whole support female toplessness. (Herbenick Supp. Rep. at 13.)

"understand the evidence or to determine a fact in issue" in this case. Fed. R. Evid. 702. The issue facing the Court is not whether society's ideas around appropriate beachwear have evolved over time, as they undeniably have, or whether society should differentiate between male and female breasts—rather, the issue is whether banning public female toplessness to protect the public sensibilities is constitutional. Because neither Dr. Herbenick's expert report not her supplemental expert report help the Court evaluate the issues in this case, the Court finds them irrelevant and will not consider either report in making its decision.

III. Analysis

a. Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (citing predecessor to current Rule 56(a)). The burden is on the moving party to demonstrate the absence of any genuine dispute of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). If sufficient evidence exists for a reasonable jury to render a verdict in favor of the party opposing the motion, then a genuine dispute of material fact is presented and summary judgment should be denied. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The facts themselves, and the

inferences to be drawn from the underlying facts, must be viewed in the light most favorable to the opposing party. *Scott v. Harris*, 550 U.S. 372, 378 (2007); *Iko v. Shreve*, 535 F.3d 225, 230 (4th Cir. 2008). Still, the opposing party must present those facts and cannot rest on denials. The opposing party must set forth specific facts, either by affidavit or other evidentiary showing, demonstrating a genuine dispute for trial. Fed. R. Civ. P. 56(c)(1). Furthermore, the opposing party must set forth more than a "mere . . . scintilla of evidence in support of [its] position." *Anderson*, 477 U.S. at 252.

b. Equal Protection

Classifications based on gender are subject to "heightened review under the Constitution's equal protection guarantee." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017). Such classifications require an "'exceedingly persuasive justification.'" *United States v. Virginia*, 518 U.S. 515, 531 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). As the Supreme Court explained, this heightened scrutiny "responds to volumes of history" of sex discrimination in this county. *Id*. The party defending a gender-based classification must show "'at least'" that the "'classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Sessions*, 137 S. Ct. at 1690 (quoting *Virginia*, 518 U.S. at 533.). Furthermore, "the classification must substantially serve an

important governmental interest *today*," and not merely reflect " 'unjustified inequality' " that was previously " 'unnoticed and unchallenged.' " *Sessions*, 137 S. Ct. at 1690 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)). "The burden of justification is demanding and it rests entirely on the State." *Virginia*, 518 U.S. at 533.

This "heightened review standard" does not mandate that all gender-based classifications must fail; rather, it recognizes that "[p]hysical differences between men and women . . . are enduring." *Id*. Accordingly, laws may acknowledge the physical differences between men and women, so long as such gender-based classifications do not "create or perpetuate the legal, social, and economic inferiority of women." *Id.* at 534. *See*, *e.g.*, *Nguyen v. INS*, 533 U.S. 53 (2001) (upholding law requiring unmarried citizen fathers, but not unmarried citizen mothers, to officially acknowledge relationship to foreign-born child in order to pass U.S. citizenship to such child because of biological differences between the sexes related to childbirth).

This Court, following the guidance of the United States Court of Appeals for the Fourth Circuit, will "assume, without deciding" that a classification based on "anatomical differences between male and female" qualifies as a gender-based distinction in the context of the equal protection analysis. *United States v. Biocic*, 928 F.2d 112, 115 (4th Cir. 1991). *But see Ways v. City of Lincoln*, 331 F.3d 596, 600 n.3 (8th Cir. 2003) ("Arguably, the higher standard would not apply because the 'discrimination' was based on a real physical

difference between men and women's breasts, thus men and women were not similarly situated for equal protection purposes."); *State v. Lilley*, 204 A.3d 198, 208 (N.H. 2019), *cert. denied*, 140 S. Ct. 858 (2020) (finding that challenge to ban on exposure of female but not male breasts was not a gender-based classification and applying rational basis review).[4]

The Court will now determine: 1) whether the " 'classification serves important governmental objectives,' " and 2) whether " 'the discriminatory means employed are substantially related to the achievement of those objectives.' " *Sessions*, 137 S. Ct. at 1690 (quoting *Virginia*, 518 U.S. at 533.)

i. Important Governmental Objective

Ocean City's stated purpose for enacting the Ordinance is that "[p]rotecting the public sensibilities is an important governmental interest." (Ord. No. 17-2020, Sec. 58-191.) The parties do not dispute that this is Ocean City's purpose for enacting the Ordinance. The Court of Appeals for the Fourth Circuit has held that "protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in

---

[4] Because the Court finds that the Ordinance survives the heightened scrutiny applied to gender-based classifications under an equal protection challenge, the Court also finds that the Ordinance would survive rational basis review if this Ordinance was not a gender-based distinction.

this society have been regarded as erogenous zones" is an "important government interest" under the equal protection analysis. *Biocic*, 928 F.2d at 115–16. The Fourth Circuit further found that "(whether justifiably or not in the eyes of all) the female, but not the male, breast" qualifies as such an "erogenous zone[ ]." *Id.* at 116. Based on this finding, the Fourth Circuit upheld a United States Fish and Wildlife regulation which, based on a local county ordinance, prohibited women, but not men, from showing their breast "with less than a fully opaque covering on any portion thereof below the top of the nipple." *Id.* at 113 (internal quotations omitted).

As this Court noted in its decision denying Plaintiffs' motion for a preliminary injunction, "this Court must respect *Biocic* as stating the law in the Fourth Circuit." *Eline*, 382 F. Supp. 3d at 390. Plaintiffs argue that the Supreme Court's decisions in *Virginia*, 518 U.S. 515, *Sessions*, 137 S. Ct. 1678, and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) are intervening decisions which mean this Court is no longer bound to follow *Biocic*. (Pl. M. S.J. Mem. at 6–7.) The Court does not agree. While these decisions have clarified the proper analysis required when evaluating gender-based classifications under the equal protection framework, they have not changed that analysis such that *Biocic* is no longer applicable. The Court in *Biocic* found that the ban on female toplessness did not violate the equal protection clause because it was "substantially related to an important governmental interest." *Biocic*, 928 F. 2d at 115. This standard was

reaffirmed in each of the cases Plaintiffs cite to as intervening precedent: *Sessions*, 137 S. Ct. at 1690; *Virginia*, 518 U.S. at 533; and *J.E.B.*, 511 U.S. at 137 n.6. Accordingly, the Court finds that *Biocic* is still binding precedent.

The fact that the vast majority of courts around the country that have faced challenges similar to the one at issue here have upheld ordinances banning females, but not males, from being topless in public further supports this Court's finding that *Biocic* remains good law. *See*, *e.g.*, *Free the Nipple – Springfield Residents Promoting Equal. v. City of Springfield*, 923 F.3d 508, 512 (8th Cir. 2019) (ordinance banning female toplessness did not violate the equal protection clause because it was "substantially related to [city's] important governmental interests in promoting public decency and proscribing public nudity to protect morals, public order, health, and safety"); *Tagami v. City of Chicago*, 875 F.3d 375, 380 (7th Cir. 2017), *as amended* (Dec. 11, 2017) (Chicago ordinance banning female but not male toplessness did not violate the equal protection clause); *Buzzetti v. City of New York*, 140 F.3d 134, 142 (2d Cir. 1998) (zoning ordinance regulating female topless entertainment but not male topless entertainment did not violate the equal protection clause because "preventing crime, maintaining property values, and preserving the quality of urban life" are important government objectives substantially related to the ordinance); *J & B Soc. Club No. 1, Inc. v. City of Mobile*, 966 F. Supp. 1131, 1139 (S.D. Ala. 1996) (assuming distinction between male and female breasts is gender-based

and finding "the distinction is substantially related to an important governmental interest"); *Craft v. Hodel*, 683 F. Supp. 289, 300 (D. Mass. 1988) (ban on female toplessness at Cape Cod National Seashore did not violate equal protection clause because ordinance was "substantially related to the achievement of the government's important governmental objective of protecting the public from invasions of its sensibilities") (internal quotations omitted); *see also State v. Lilley*, 204 A.3d at 208 (ordinance banning female but not male toplessness passed rational basis review where purpose was to "uphold and support public health, public safety, morals and public order") (internal quotations omitted).

In response to this weight of authority, Plaintiffs highlight the recent decision of the United States Court of Appeals for the Tenth Circuit which upheld a preliminary injunction barring implementation of Fort Collins, Colorado's ban on public female, but not male, toplessness. *See Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792 (10th Cir. 2019). In support of its ban on public female toplessness, Fort Collins argued that the ban served three important governmental objectives: 1) protecting children from public nudity; 2) promoting traffic safety; and 3) maintaining public order. *Id.* at 802. The Tenth Circuit upheld the district court's decision that the plaintiffs "made a strong showing of their likelihood of success on the merits" because these were not important government interests substantially related to an ordinance banning public female toplessness. *Id.* at

804–05. In doing so, the Tenth Circuit acknowledged that its opinion reflected the "minority viewpoint." *Id.* at 805.

Though the Tenth Circuit focused its analysis on the three proffered governmental interests at issue in *Free the Nipple-Fort Collins*—none of which are at issue in this case—it also noted that similar ordinances premised on a government interest in public morality, such as the one at issue in *Biocic*, were vulnerable to being found unconstitutional:

> [A]lthough the City itself never asserted public morality as a justification for banning female toplessness, notions of morality may well underlie its assertions that conflicts will break out, and distracted drivers will crash, if it allows women to be topless in public. But such notions, like the fear that topless women will endanger children, originate from the sex-object stereotype of women's breasts . . . [T]hat stereotype doesn't stand up to scrutiny.

Id. at 804. The Tenth Circuit found that banning female toplessness perpetuates the stereotype that women's breasts are predominantly sex objects, which contributes to broader discrimination against women and therefore fails to further any important governmental interest. *Id.* at 803–04.

The Court acknowledges that the Fourth Circuit issued its decision in *Biocic* almost thirty years ago. During that time, the Supreme Court's treatment of sex and gender has evolved substantially. In the last thirty years, state laws criminalizing sexual conduct

between members of the same sex have been ruled unconstitutional, *Lawrence v. Texas*, 539 U.S. 558 (2003), as have laws prohibiting same-sex marriage, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). As Judge Murnaghan stated almost thirty years ago in his concurring opinion in *Biocic*:

> The time may well soon come, as it has already with the French and others, when the perceived public sense of outrage will wane. [Female toplessness] will then be classified as non-criminal, not because it was a bold blow for 'liberty,' but because it was too trifling—perhaps even childish—a matter for a community to spend time and energy addressing.

Biocic, 928 F.2d at 118 (Murnaghan, J., concurring). *See also Lawrence*, 539 U.S. at 579 ("[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.") This Court questions whether laws which distinguish between men and women based on "public sensibilities" can survive indefinitely. Such amorphous concepts are vulnerable to prejudice and stereotypes grounded more in fear than in reality.

Yet though the Court acknowledges the changes in society and the evolution of the Supreme Court's jurisprudence on gender and sexuality over the last thirty years, the Court remains equally cognizant of its duty to follow precedent and "not to mandate [its] own moral code." *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992). As the Supreme Court has explained, "*[s]tare decisis* . . . promotes the evenhanded,

predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). *See*, *e.g.*, *Condon v. Haley*, 21 F. Supp. 3d 572, 587 (D.S.C. 2014) ("Coherent and consistent adjudication requires respect for the principle of stare decisis and the basic rule that the decision of a federal circuit court of appeals left undisturbed by United States Supreme Court review is controlling on the lower courts within the circuit."); *Jones v. Tyson Foods, Inc.*, 378 F. Supp. 2d 705, 709 (E.D. Va. 2004), *aff'd sub nom. Jones v. Tyson Foods*, 126 F. App'x 106 (4th Cir. 2005) ("a district court in a circuit owes obedience to a decision of the court of appeals in that circuit and must follow it until the court of appeals overrules it") (citing Moore's Federal Practice, 134.02(2), 3rd Ed., 2000).

Ultimately, *Free the Nipple-Fort Collins*, 916 F.3d 792, is not the law in the Fourth Circuit. Nor does this Court find that any of the Supreme Court decisions cited by Plaintiffs require this Court to invalidate an ordinance which distinguishes between men and women based on physical differences. Even under the heightened scrutiny required for gender-based classifications, the Supreme Court has consistently maintained that physical differences between men and women—as opposed to stereotypes about men or women—provide a constitutionally sound basis for laws which treat men and women differently. *See*, *e.g.*, *Nguyen*, 533 U.S. 53; *Virginia*, 518 U.S. at 533.

Whether or not society *should* differentiate between male and female breasts is a separate inquiry from whether it is constitutional to do so. Following the precedent set in *Biocic*, the Court finds that protecting the public sensibilities from the public display of areas of the body traditionally viewed as erogenous zones—including female, but not male, breasts—is an important government objective. Therefore, Ocean City's stated purpose of the Ordinance to protect the public sensibilities passes the first stage of the heightened scrutiny analysis.

ii. Substantially Related

Having determined that protecting the public sensibilities is an important governmental objective, the Court next turns to the question of whether Ocean City's ban on female toplessness is substantially related to protecting the public sensibilities.

First, Plaintiffs argue that a ban on female toplessness does not reflect the public sensibilities of the residents and visitors of Ocean City. (Pl. M. S.J. Mem. at 8–9, 15.) Ocean City argues that the comments received by elected officials and the re-election of the Mayor and members of the City Council—all of whom publicly supported a ban on female toplessness—demonstrates that Ocean City's public sensibilities support a ban on female toplessness. (Def. M.S.J. Mem. at 9–12.) Plaintiffs, however, argue that Mayor Meehan's 2018 re-election should hold no weight in determining the public sensibilities because, considering

the number of people who did not cast a ballot, only 28% of eligible voters voted for the Mayor in the last election, and he faced opposition for re-election for only the second time in twelve years. (Pl. M.S.J. Mem. at 8.) Plaintiffs further argue that this data does not include the more than eight million visitors Ocean City receives each year. (*Id.*) Nor does election data reveal any information as to why voters voted as they did or what issues voters considered (or did not) when they made their decision to go to the polls or stay home. (*Id.*) Last, Plaintiffs argue that there is no evidence that comments from the public opposing toplessness as heard by the Mayor and City Council were at all representative of the broader views of the community. (*Id.* at 9.)

Though Plaintiffs argue Ocean City's data does not accurately reflect public sensibilities, Plaintiffs have failed to provide any reliable data of their own suggesting that the public sensibilities of Ocean City in particular approve of public female toplessness. As this Court stated in its decision denying Plaintiffs' preliminary injunction, "[i]t is a part of our democratic culture that elected representatives can, and do, speak for the public." *Eline*, 382 F. Supp. 3d at 393. Elected representatives best speak for and represent the views of their constituent communities because, as the testimony of Mayor Meehan and Council Member Knight demonstrates, community members go to their elected representatives with their fears and hopes for their community. The elected representatives then take action to reflect those concerns, as occurred here with the passing of the Ordinance. If the constituents believe

their elected representatives are no longer listening to their concerns or accurately speaking for them, then the community may vote those representatives out of office. Incumbents lose elections with some regularity in our robust American democratic process, precisely because their views are thought to no longer represent those of the community. This process holds elected officials accountable to their constituents and best ensures that the views of the community are reflected in the acts of their elected representatives. It provides confidence that the action taken by City officials truly does reflect public sensibilities.

Second, Plaintiffs argue that Ocean City has presented no evidence that banning female toplessness is substantially related to protecting the public sensibilities. However, this argument misinterprets the governmental interest served by Ocean City's Ordinance. Where, as here, the important government interest being served by an ordinance is "societal disapproval of nudity in public places and among strangers," "[t]he statutory prohibition is not a means to some greater end, but an end in itself." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571–72 (1991) (holding that public indecency law prohibiting nude dancing did not violate First Amendment). Accordingly, the Court need not determine whether protecting the public sensibilities by banning female toplessness promotes some separate good; rather, the ban itself accomplishes the government's stated purpose of protecting the public sensibilities from public nudity.

Because the Court finds that there is no genuine dispute of material fact that Ocean City's Ordinance is substantially related to the important governmental objective of protecting the public sensibilities, the Court will grant Ocean City summary judgment on Plaintiffs' equal protection claim.[5]

IV. Maryland Declaration of Rights

Article 46 of the Maryland Declaration of Rights states that "[e]quality of rights under the law shall not be abridged or denied because of sex." This provision "flatly prohibits genderbased classifications, absent substantial justification." *Giffin v. Crane*, 716 A.2d 1029, 1037 (Md. 1998). Because the Court has found "'exceedingly persuasive justification,'" *Sessions*, 137 S.Ct. at 1690 (quoting *Virginia*, 518 U.S. at 531), for Ocean City's Ordinance in the course of its equal protection analysis, the Court also finds "substantial justification," *Giffin*, 716 A.2d at 1037, for the Ordinance. Accordingly, for the same reasons the Court will grant Ocean City's motion for summary judgment on Plaintiffs' equal protection claim, it will also grant Ocean City's motion for summary judgment on Plaintiffs'

---

[5] Because the Court finds that no constitutional violation occurred, the Court will also grant summary judgment to Ocean City on Plaintiffs' claim for municipal liability. *See Owens v. Baltimore City State's Att'ys Office*, 767 F.3d 379, 402 (4th Cir. 2014) ("[A] municipality is liable under § 1983 if it follows a custom, policy, or practice by which local officials violate a plaintiff's constitutional rights.") (citing *Monell v. N.Y. City Dep't of Social Services*, 436 U.S. 658, 694 (1978)).

claim under Article 46 of the Maryland Declaration of Rights.

V. Conclusion

For the foregoing reasons, an Order shall enter granting Defendants' Motion for Summary Judgment; denying Plaintiffs' Motion for Summary Judgment; and denying Plaintiffs' Motion to Exclude as moot.

DATED this 7th day of April, 2020.

BY THE COURT:

/s/

James K. Bredar
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

CHELSEA C. ELINE, *et al.*,	*	
Plaintiffs	*	
	*	
v.	*	**CIVIL NO. JKB-18-0145**
TOWN OF OCEAN CITY, MD.,	*	
	*	
	*	
Defendant	*	

* * * * * * * * * * * * * * * * *

ORDER

(Filed Apr. 7, 2020)

For the reasons set forth in the foregoing memorandum, it is hereby ORDERED:

1. Defendants' Motion for Summary Judgment (ECF No. 60) is GRANTED;
2. Plaintiffs' Motion for Summary Judgment (ECF No. 61) is DENIED;
3. Plaintiffs' Motion to Exclude (ECF No. 63) is DENIED as MOOT; and
4. The Clerk SHALL CLOSE this case.

DATED this 7th day of April, 2020.

BY THE COURT:

/s/

James K. Bredar
Chief Judge

FILED: September 2, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1530
(1:18-cv-00145-JKB)

CHELSEA C. ELINE; MEGAN A. BRYANT;
ROSE R. MACGREGOR; CHRISTINE E. COLEMAN;
ANGELA A. URBAN

Plaintiffs - Appellants

v.

TOWN OF OCEAN CITY, MARYLAND

Defendant - Appellee

and

RICHARD W. MEEHAN; JOSEPH J. THEOBALD;
ROSS C. BUZZURO

Defendants

HEIDI C. LILLEY; KIA SINCLAIR;
GINGER M. PIERRO

Amici Supporting Rehearing Petition

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge Quattlebaum, and Senior Judge Keenan.

For the Court

/s/ Patricia S. Connor, Clerk