No. _____

In The
Supreme Court of the United States

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

Petitioners,

v.

TOWN OF OCEAN CITY, MARYLAND;
RICHARD W. MEEHAN; JOSEPH J. THEOBALD;
and ROSS C. BUZZURO,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is protecting traditional moral sensibilities an important governmental interest on which the government may lawfully base a discriminatory gender-based classification as the Fourth and Seventh Circuits held, or not an important governmental interest as the Tenth Circuit (and this Court) held?

Is the all-encompassing sex and gender classification of "female," provided in Ocean City's ordinance, sufficiently tailored to achieve an important governmental interest?

PARTIES TO PROCEEDINGS

Petitioners Chelsea C. Eline, Megan A. Bryant, Rose R. MacGregor, Christine E. Coleman, and Angela A. Urban, were the plaintiffs in the district court proceedings and appellants in the court of appeals proceedings. Respondent, Town of Ocean City, Maryland, along with additional defendants, Richard W. Meehan, Joseph J. Theobald, and Ross C. Buzzuro, were the defendants in the district court proceedings. Town of Ocean City, Maryland was the appellee in the court of appeals proceedings.

RELATED CASES

- *Chelsea C. Eline, et al. v. Richard W. Meehan, et al.,* No. 1:18-CV-00145, U.S. District Court for the District of Maryland. Judgment entered April 7, 2020.
- *Chelsea C. Eline, et al. v. Town of Ocean City, Maryland,* No. 20-1530, U.S. Court of Appeals for the Fourth Circuit. Judgment entered August 4, 2021. Motion for Rehearing and Rehearing *en banc* denied September 2, 2021.

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The published opinion from the Court of Appeals for the Fourth Circuit affirming the decision of the United States District Court for the District of Maryland is reported at *Chelsea C. Eline, et al. v. Town of Ocean City, Maryland*, 20-1530 (4th Cir. 2021).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The published opinion from the Court of Appeals for the Fourth Circuit was issued on August 4, 2021, and is reported at *Chelsea C. Eline, et al. v. Town of Ocean City, Maryland*, 20-1530 (4th Cir. 2021). On September 2, 2021, the Fourth Circuit denied plaintiffs' petition for rehearing and for rehearing *en banc*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 United States Code, Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or

other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Constitution of the United States, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This lawsuit seeks a declaration from this Court that the Town of Ocean City, Maryland's Emergency Ordinance 2017-10, intended to protect traditional moral sensibilities, violates the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, because the discriminatory gender classification contained in the ordinance does not further

an important governmental interest, and is not narrowly tailored to achieve its objective. Rather, the ordinance codifies longstanding discriminatory and sexist ideology in which women are viewed as inherently sexual objects without the agency to decide when they are sexual and when they are not. This Court is asked to resolve a split in the circuits between the Fourth and Seventh Circuits, and the Tenth Circuit (and this Court), regarding whether protecting traditional moral sensibilities is an important governmental interest on which the government may lawfully base a discriminatory gender-based classification.

Ocean City admits that it adopted Emergency Ordinance 2017-10 in reliance on *United States v. Biocic*, 928 F.2d 112 (4th Cir. 1991) "to protect and advance the public and moral sensibilities of Ocean City residents and visitors." In recognizing protecting traditional moral sensibilities as an important governmental interest, however, *Biocic* permits sexist ideology to be cloaked in legitimacy in the same way that "nationalism" legitimizes racism.

On June 10, 2017, Ocean City adopted Emergency Ordinance 2017-10, which provides, in relevant part, the following:

ORDINANCE 2017-10

AN ORDINANCE TO AMEND
CHAPTER 58, ENTITLED OFFENSES
AND MISCELLANEOUS PROVISIONS,
OF THE CODE OF THE
TOWN OF OCEAN CITY, MARYLAND

NOW, THEREFORE, BE IT ENACTED AND ORDAINED BY THE MAYOR AND CITY COUNCIL OF OCEAN CITY THAT CHAPTER 58, ENTITLED OFFENSES AND MISCELLANEOUS PROVISIONS, OF THE CODE OF THE TOWN OF OCEAN CITY, MARYLAND BE, AND IT IS HEREBY AMENDED BY ADDING ARTICLE V, AS FOLLOWS:

ARTICLE V. OFFENSES INVOLVING PUBLIC NUDITY OR STATE OF NUDITY

Division 1. Generally.

Sec. 58-191. Legislative Findings.

(a) There is no constitutional right for an individual to appear in public nude or in a state of nudity. It does not implicate either the First Amendment to the United States Constitution, the right to privacy, or a protected liberty interest. It lacks any communicated *value* that might call for First Amendment protection. Nor does it implicate the right of privacy or the right to be alone: one does not have right (sic) to impose one's lifestyle on others who have an equal right to be left alone.

(b) Whatever personal right one has to be nude or in a state of nudity, that right becomes subject to government interest and regulation when one seeks to exercise it in public.

(c) A gender-based distinction challenged under the equal protection clause of

the United States Constitution is gauged by an important governmental interest that is substantially accomplished by the challenged discriminatory means.

(d) 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.

(e) The equal protection clause does not demand that things that are different in fact be treated the same in law, nor that a government pretend there are no physiological differences between men and women.

Sec. 58-192. Definitions.

(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.

(b) Specified Anatomical Areas means:

(1) the human male genitals in a discernibly turgid state, even if completely and opaquely covered; or

(2) less than completely and opaquely covered human genitals, pubic region, anal

> cleft, or a female breast below a point immediately above the top of the areola.
>
> Sec. 58-193. Violations.
>
> 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.
>
> Sec. 58-194. Penalties.
>
> Any person who is found to be in any violation of this Article shall be deemed to be guilty of a municipal infraction and be subject to a fine of up to $1,000.00.
>
> INTRODUCED at a meeting of the City Council of Ocean City, Maryland held on June 10, 2017.
>
> ADOPTED AND PASSED, as an Emergency Ordinance, by the required vote of the elected membership of the City Council and approved by the Mayor at its meeting held on June 10, 2017.

Prior to enacting the ordinance, Ocean City did not conduct any investigation, hold public hearings, consult peer reviewed articles, conduct public surveys, consult with experts, or consult with other jurisdictions, regarding female bare-chestedness or the effect that the ordinance might have on Ocean City. Ocean City did not conduct a survey to determine what impact, if any, female bare-chestedness would have on its tourism industry. Ocean City has no evidence that any hotel reservations were canceled before the ordinance

was enacted. Ocean City was not aware of any business that intended to leave if the ordinance was not adopted.

Ocean City was not targeting any special issue or problem particular to women that needed to be addressed. Ocean City was not targeting any potential "deleterious effects" or "secondary adverse effects" that purportedly might result from female barechestedness. Ocean City did not conduct research regarding what impact, if any, banning female barechestedness would have on public health. Ocean City did not conduct an investigation or consult with experts regarding whether an ordinance of this nature could harm children, promote a rape culture, negatively impact female body image, or negatively impact breastfeeding rates. Ocean City admits that complainants were not concerned about sexual health, and Ocean City did not consider the issue. Other than a few poorly tracked or documented complaints, Ocean City does not have empirical, quantitative, or qualitative, evidence to support the conclusion that precluding females only from publicly displaying their breasts barechested furthers a governmental interest; let alone an important one.

Prior to enacting the ordinance, only approximately 150 of the 8,007,800 residents and visitors complained by email or telephone about the prospect of females being permitted to be bare-chested in public. Emails that may have been sent to a council member only that were against the ordinance were not preserved by Ocean City. Although not documented,

Ocean City claims that an estimated 300 to 500 people complained to Mayor Richard Meehan in person. Ocean City claims that people also complained in person to members of counsel but cannot estimate how many.

Ocean City cannot establish that the people who complained were a representative sample of the 8,007,800 people who live in or visit Ocean City. When asked how Ocean City measured whether the ordinance was an accurate representation of the public's moral sensibilities, a council woman testified, "I can't answer that." While the Mayor believes that Ocean City's elected officials' position on female bare-chestedness caused, at least in part, their reelection, this conclusion is pure speculation.

The Mayor testified that Ocean City surveys visitors to determine their sensibilities but did not know if "toplessness" was even one of the survey questions. Ocean City understood the complaints to be that providing females with the same right as men would change the family image of Ocean City, that it would no longer be the Ocean City that the complainants' parents brought them to when they were children, and that the complainants would not bring their children to Ocean City. When asked what was unsafe about female bare-chestedness, Ocean City stated that while Ocean City did not ask, the town believed, "They were concerned about how it would affect their family. They had some insecurities about that being part of what possibly could be allowed on the beach, where does it go from there."

When asked why "the female nipple as opposed to the male nipple needed to be covered," the Mayor explained that "what the outrage was, what the concern was, that in this day and age, still at this time, there was a public sensibility that there was a difference. And this morally is something that is objectionable to a majority of the people, a vast majority of the people that live, own property, and visit Ocean City." When asked what was not decent about female bare-chestedness, Ocean City could not answer other than to state, "the moral sensibilities of our residents and visitors find that to be objectionable, find that to be contrary to what they want to see and what they want to take place when they're in Ocean City." When asked how female bare-chestedness threatens the public order, Ocean City stated, "we just believed that it upsets – people were passionate about this and were concerned, and they were concerned about how this affected their individual families and their morals. And we were concerned as they were concerned how this would play out. Wasn't something we wanted to see play out because of some of those things."

Ocean City admits that when talking about the "public sensibilities and moral sensibilities," "the sexualization of the female body" "might be part of the issue that that sensibility revolves around." Ocean City understood that "the sexualization of the female body" could have been one of the reasons as to why female bare-chestedness offended the complainants' moral sensibilities. Yet, Ocean City did not try to determine whether there was a lawful basis for the

complainants' objections to female bare-chestedness. For example, Ocean City testified that it did not ask the complainants to define their "family values," i.e., whether women should be barefoot and pregnant in the kitchen, whether women should be required to serve men, whether women should be permitted to drive, or whether women should need to wear a bourka in public.

The defendants did not present expert evidence. However, plaintiffs' expert, Dr. Debby Herbenick, concluded that the ordinance does not accurately reflect the public's present moral sensibilities. Dr. Herbenick did not find *any* data that indicated that there was any public health benefit to the government restricting female bare-chestedness. To the contrary, Dr. Herbenick found data that indicated that there was a negative impact on public health when the government restricted female bare-chestedness. Dr. Herbenick explained that the ordinance's use of the word "exposed" has a sexual connotation, and the ordinance's use of the word "unpalatable" to describe a part of the body designed to be palatable to most human beings is an odd word choice. Dr. Herbenick explained that her opinion based on existing research on the sexualization of girls is that treating female breasts differently than male breasts creates a situation where women of all ages, but in particular girls and young women, feel sexualized, objectified, and different. Dr. Herbenick explained that the least family friendly thing we could do is raise girls in a culture of sexism. Dr. Herbenick explained that the research and the professional reports,

including the American Psychological Association (APA) task force report, suggest that for the health of all, whether it's infant health through supporting cultures of breastfeeding, or child and adolescent health through not objectifying and sexualizing girls, we should be treating girls like people and not a special, different, sexualized group of human beings.

REASONS FOR ALLOWANCE OF THE WRIT

Review is needed to decide a split in the circuits between the Fourth and Seventh Circuits, and the Tenth Circuit (and this Court), regarding whether protecting traditional moral sensibilities is an important governmental interest on which the government may lawfully base a discriminatory gender-based classification.

The instant matter challenges Emergency Ordinance 2017-10 on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

The District Court's decision to grant the defendants' motion for summary judgment and to deny plaintiffs' motion for summary judgment and request for an injunction to preclude Ocean City from enforcing its ordinance, rests solely on *United States v. Biocic*, 928 F.2d 112 (4th Cir. 1991) and its morality exception to the Equal Protection Clause. The District Court stated, "this Court must respect *Biocic* as stating the law in the Fourth Circuit." The Fourth Circuit affirmed the

District Court's decision. *See Chelsea C. Eline, et al. v. Town of Ocean City, Maryland*, 20-1530 (4th Cir. 2021) ("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.") *but see* (*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.").

A. Protecting traditional moral sensibilities is not an important governmental interest on which a government may lawfully base a discriminatory gender-based classification.

Ocean City's ordinance prescribes one rule for females – requiring them to cover a portion of their breasts and their nipples in public when not breastfeeding, and a different rule for males – allowing them to be bare-chested in public, at any time, for any reason. Notably, the ordinance contains *no* findings of fact. Rather, the ordinance provides:

> 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.

See Ordinance, at Sec. 58-191(d).

The Equal Protection Clause of the Fourteenth Amendment directs "that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "At a minimum," it requires that any statutory classification be "rationally related to a legitimate governmental purpose." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). But more stringent judicial scrutiny attaches to classifications based on certain "suspect" characteristics because these (often immutable) characteristics seldom provide a "sensible ground for differential treatment." *See City of Cleburne*, 473 U.S. at 440.

Gender "frequently bears no relation to ability to perform or contribute to society," and statutes that differentiate between men and women "very likely reflect outmoded notions" about their "relative capabilities." *Id.* at 440–41 (*quoting Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)). As a result, gender-based classifications call for a heightened standard of review – "intermediate scrutiny." *Clark*, 486 U.S. at 461.

To survive intermediate scrutiny, a gender-based classification needs "an exceedingly persuasive justification." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994). The classification must serve "important governmental objectives" through means "substantially related to" achieving those objectives. *United States v.*

Virginia, 518 U.S. 515, 533 (1996) (*quoting Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

This Court noted that "Physical differences between men and women . . . are enduring," *Virginia*, 518 U.S. at 533, and has found in certain instances that such differences justify differential treatment. *See, e.g.*, *Nguyen v. INS*, 533 U.S. 53, 58–59, 68 (2001) (upholding a paternal-acknowledgment requirement in a citizenship statute that treated unwed mothers differently than unwed fathers, in part because the statute addressed "an undeniable difference" between women and men: "at the moment of birth . . . the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father"). However, this Court has also held that any law premised on "generalizations about 'the way women are'" will fail constitutional scrutiny because it serves no important governmental objective. *Virginia*, 518 U.S. at 550; *see also Sessions v. Morales-Santana*, 137 S. Ct. 1687, 1692 (2017) (rejecting "the obsolescing view that 'unwed fathers [are] invariably less qualified and entitled than mothers' to take responsibility for nonmarital children").

This Court has explained that generalizations regarding genders "have a constraining impact, descriptive though they may be of the way many people still order their lives." *Morales-Santana*, 137 S. Ct. at 1692–93. They "may 'creat[e] a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver,'" or in the instant matter, as a sexual object first and foremost.

See id. at 1693 (alteration in original) (*quoting Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003)). It is for this reason that this Court has instructed that while examining the objective of the discriminatory gender-based classification, courts must consider longstanding stereotypes about women and their potential to instigate or perpetuate sexism and inequality. "Even if stereotypes frozen into legislation have 'statistical support,'" this Court has cautioned that courts must "reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn." *Morales-Santana*, 137 S. Ct. at 1693 n.13 (*citing J.E.B.*, 511 U.S. at 139 n.11).

In *Biocic*, the Fourth Circuit identified the following as an important governmental interest: "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." *Biocic*, 928 F.2d at 115–16. After the Fourth Circuit decided *Biocic*, however, this Court decided *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

In *Lawrence*, this Court held that Texas' sodomy law violated the Due Process Clause because it "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence*, 539 U.S. at 578 (2003). After

Lawrence, Ocean City's interest in protecting traditional "moral sensibilities" is no longer a sufficient reason to uphold a discriminatory gender-based classification. *See id.* at 577 (*quoting Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.")); *id.* at 583 ("Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause") (O'Connor, J., concurring).

Despite this Court's holding in *Lawrence*, Ocean City relied on *Biocic* to enact the ordinance in question. Ocean City relied on the traditional moral sensibilities of a minority group of people to justify a gender-based classification that denies the equal protection of the law to all females. *See Biocic*, 928 F.2d at 115–16; *accord Tagami v. City of Chicago*, 875 F.3d 375, 379 (7th Cir. 2017) ("promoting traditional moral norms" is not an important governmental interest); *Ways v. City of Lincoln*, 331 F.3d 596, 600 (8th Cir. 2003).

Ocean City's ordinance that is intended to protect traditional moral sensibilities "perpetuates a stereotype engrained in our society that female breasts are primarily objects of sexual desire whereas male breasts are not." *See Free the Nipple–Fort Collins v. City of Fort Collins*, 237 F. Supp. 3d 1126, 1132 (D. Colo. 2017); *accord, Free the Nipple–Fort Collins*, No. 17-1103 (10th Cir. 2019); *see, e.g.*, *People v. Santorelli*, 600 N.E.2d 232, 237 (N.Y. 1992) (Titone, J., concurring)

(acknowledging this perception and remarking that it is "a suspect cultural artifact rooted in centuries of prejudice and bias toward women"); *see also Williams v. City of Fort Worth*, 782 S.W.2d 290, 297 (Tex. App. – Fort Worth 1989) (noting "the concept that the breasts of female[s] . . . unlike their male counterparts, are commonly associated with sexual arousal" but explaining that, in reality, this is "a viewpoint . . . subject to reasonable dispute, depending on the sex and sexual orientation of the viewer").

> At bottom this ordinance is based upon *ipse dixit* – the female breast is a sex object because we say so. That is, the naked female breast is *seen* as disorderly or dangerous because society, from Renaissance paintings to Victoria's Secret commercials, has conflated female breasts with genitalia and stereotyped them as such. The irony is that by forcing women to cover up their bodies, society has made naked women's breasts something to see.

Free the Nipple–Fort Collins v. City of Fort Collins, 237 F. Supp. 3d at 1133.

The Fourth Circuit's decision, reaffirming its holding in *Biocic*, conflicts with this Court's ruling in *Lawrence*, and the Tenth Circuit's decision in *Free the Nipple–Fort Collins*, No. 17-1103 (10th Cir. 2019) ("But such notions, like the fear that topless women will endanger children, originate from the sex-object stereotype of women's breasts. And as we've explained, that stereotype doesn't stand up to scrutiny."); *Cf. People*

v. Santorelli, 600 N.E.2d 232, 236 (N.Y. 1992) (Titone, J., concurring) ("One of the most important purposes to be served by the Equal Protection Clause is to ensure that 'public sensibilities' grounded in prejudice and unexamined stereotypes do not become enshrined as part of the official policy of government."); *accord Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015); *Lawrence, supra*; *see also Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 850 (1992) ("Our obligation is to define the liberty of all, not to mandate our own moral code.").

Plaintiffs ask this Court to resolve the split in the Circuits and reaffirm the rule espoused by this Court in *Lawrence*, and by the Tenth Circuit, i.e., that protecting traditional moral sensibilities is not an important governmental interest that a government may lawfully use to justify a discriminatory gender-based classification. As the Tenth Circuit recently noted while striking down a similar law:

> As we interpret the arc of the Court's equal-protection jurisprudence, ours is the constitutionally sound result. At least since *Virginia*, that arc bends toward requiring more – not less – judicial scrutiny when asserted physical differences are raised to justify gender-based discrimination, while casting doubt on public morality as a constitutional reason for gender-based classifications.

Free the Nipple–Fort Collins, et al. v. City of Fort Collins, Colorado, No. 17-1103 (10th Cir. 2019).

B. The all-encompassing sex and gender classification of "female" in the ordinance is not sufficiently tailored to achieve an important governmental interest.

Since 1991, our society and courts have evolved in their perception and understanding of "gender" and "sex." We now understand that "'Sex' is defined as the anatomical and physiological processes that lead to or denote male or female." *Doe v. Boyertown Area School District, et al.*, No. 17-3113 (3d Cir., July 26, 2018) (quotation marks removed). "Typically, sex is determined at birth based on the appearance of external genitalia." *Id.* (quotation marks removed). We now understand that "'Gender' is a broader societal construct that encompasses how a society defines what male or female is within a certain cultural context." *Id.* (quotation marks removed). "A person's gender identity is their subjective, deep-core sense of self as being a particular gender." *Id.*

The notion that a child could be harmed by viewing a naked female breast is undermined by the fact that one of the very first things a child sees when s/he is born is their mother's naked breasts. Similarly, the ordinance specifically permits females to breastfeed in public, so everyone, including children, could conceivably encounter a woman breastfeeding in public and view her naked breasts. Notably, Ocean City has not claimed that that experience is harmful to children. Rather, "[i]t seems, then, that children do not need to be protected from the naked female breast itself but from the negative societal norms, expectations, and

stereotypes associated with it." *Free the Nipple–Fort Collins v. City of Fort Collins*, 237 F. Supp. 3d 1126, 1131 (D. Colo. 2017).

As such, "We're left . . . to suspect that [Ocean City's] professed interest in protecting children derives not from any morphological differences between men's and women's breasts but from negative stereotypes depicting women's breasts, but not men's breasts, as sex objects." *Free the Nipple–Fort Collins*, No. 17-1103 (10th Cir.); *cf. Tagami v. City of Chicago*, 875 F.3d 375, 382 (7th Cir. 2017) (Rovner, J., dissenting) ("The City's claim therefore boils down to a desire to perpetuate a stereotype that female breasts are primarily the objects of desire, and male breasts are not."), *cert. denied*, 138 S. Ct. 1577 (2018).

Ocean City has not produced *any* evidence establishing that targeting all "females," of all ages, both as a "sex" and as a "gender," is substantially related to protecting the "moral sensibilities" of a transient population of 8,007,800. Yet, pursuant to the ordinance, a transgender person who has been determined to be of the male sex at birth but whose gender identity is female would be precluded from being bare-chested in places where a cismale is permitted to be bare-chested. Likewise, Ocean City's gender-classification is overly broad in that it encompasses all ages of the female gender class. Ocean City has not produced any evidence establishing, for example, that the bare chest of a two-year-old female but not the bare chest of a two-year-old male is a threat to the moral sensibilities of this population of 8,007,800. Simply put, Ocean City

has not produced any evidence establishing that the all-encompassing sex and gender classification of "female" is necessary and narrowly tailored to achieve its purported important governmental interest.

While striking down Ocean City Emergency Ordinance 2017-10 may upset a minority of the population in question (significantly less than 1%) possibly causing them to leave or not return to Ocean City, it might just as well attract new members to join the population. Regardless, "our history is littered with many forms of discrimination, including discrimination against women. As the barriers have come down, one by one, some people were made uncomfortable. In our system, however, the Constitution prevails over popular sentiment." *See Lawrence*, 539 U.S. at 577 (2003); *see also Craig v. Boren*, 429 U.S. 190, 210 n.23 (1976) (disapproving of the holding in *Goesaert v. Cleary*, 335 U.S. 464 (1948), in which the Supreme Court earlier upheld a Michigan law that barred women from bartending that was justified on the grounds that the sight of female bartenders caused "moral and social problems"); *Free the Nipple–Fort Collins*, No. 17-1103 (10th Cir.).

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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