BRIAN E. FROSH
Attorney General

ELIZABETH HARRIS
Chief Deputy Attorney General

CAROLYN QUATTROCKI
Deputy Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

FACSIMILE NO.
(410) 576-7036

WRITER'S DIRECT DIAL NO.
(410) 576-6327
asnyder@oag.state.md.us

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Via First Class Mail & Electronic Mail

The Honorable Beau H. Oglesby
State's Attorney, Worcester County
The William G. Kerbin, Jr. Bldg.
106 Franklin Street
Snow Hill, Maryland 21863

Dear Mr. Oglesby:

You asked whether State or local indecent exposure laws may constitutionally be interpreted to allow men to appear bare-chested in public while simultaneously forbidding women to do the same. It 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 State Constitution.[1]

Gender classifications are subject to intermediate scrutiny under the Fourteenth Amendment, *Craig v. Boren*, 429 U.S. 190, 197 (1976), and strict scrutiny under Maryland's Equal Rights Amendment. *See* Maryland Declaration of Rights, art. 46; *Giffin v. Crane*, 351 Md. 133, 148 (1998). But equal protection principles do not require "things which are different in fact . . . to be treated in law as though they were the same." *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981) (internal quotation marks omitted). Accordingly, several courts in other jurisdictions have applied this principle to uphold the constitutionality of indecency statutes applied to topless women, but not men, on the grounds that there are "real physical differences" between men and women in this regard. *See, e.g.*, *State v. Vogt*, 341 N.J. Super. 407, 418-20 (App. Div. 2001); *Craft v. Hodel*, 683 F. Supp. 289, 300 (D. Mass. 1988); *see generally* Kimberly J. Winbush, *Regulation of exposure of female, but not male, breasts*, 67 A.L.R.

[1] This advice letter should not be read to call into question a mother's right to breast-feed her child in public as the General Assembly has specifically recognized a woman's right to do so. *See* Md. Code Ann., Health-General § 20-801.

5th 431, § 12(a) (listing cases upholding public exposure or lewdness statutes that regulate the exposure of female, but not male, breasts).

For example, in *United States v. Biocic*, the Fourth Circuit held that a federal law prohibiting indecent exposure in national parks could be applied to topless women sunbathing, and not men, without violating equal protection:

> 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.

928 F.2d 112, 115-16 (4th Cir. 1991).

Although no Maryland appellate court has addressed the issue of toplessness, the Court of Appeals, in *Burning Tree Club v. Bainum*, recognized the same principle on which *Biocic* was based, namely, that "[d]isparate treatment on account of physical characteristics unique to one sex is generally regarded as beyond the reach of equal rights amendments." 305 Md. 53, 64 n.3 (1985). And, in 1994, Attorney General Curran, citing *Burning Tree* and *Biocic*, concluded that the provision of a bill prohibiting a female entertainer from exhibiting "her breasts below the top of the areola" did not violate Maryland's Equal Rights Amendment. *See* Bill Review Letter to Governor William Donald Schaefer from Attorney General J. Joseph Curran, Jr. (May 19, 1994).

In the more than 20 years since *Biocic* was decided and Attorney General Curran expressed his view, a majority of cases have upheld the constitutionality—under both the Equal Protection Clause and state equal rights amendments—of ordinances that treat the female breast differently than the male breast. *See* 67 A.L.R. 5th 431, § 2(a). Although a minority of cases reach the opposite conclusion, *see, e.g., People v. Santorelli*, 80 N.Y.2d 875 (1992) (Titone, J. concurring), *People v. David*, 585 N.Y.S.2d 149 (N.Y. Co. Ct. 1991), the most recent of them acknowledged that the majority of courts have upheld the constitutionality of such ordinances. *See FTN-Fort Collins v. City of Fort Collins*, 2017 WL 713918, *5 (D. Colo. Feb. 22, 2017).

Ultimately, our job here is to predict how the Maryland Court of Appeals would resolve this issue if presented to it. 95 *Opinions of the Attorney General* 3, 4 n.1 (2010). Although the Court has consistently declared unconstitutional laws that perpetuate State-mandated gender roles, *see*, *e.g.*, *Giffin*, 351 Md. at 152-53, none of the cases involved the principle that lies at the heart of this issue, namely, that the Equal Protection Clause and state equal rights amendments generally do not prohibit disparate treatment of men and women on the basis of physical characteristics unique to one sex. The Court recognized the validity of that principle in *Burning Tree*, and our Office applied that principle in the precise context we address here: to confirm the constitutionality of legislation regulating women's breasts differently from men's. And, the clear majority of cases from other jurisdictions—including the Fourth Circuit—have applied that principle to uphold the constitutionality of ordinances prohibiting women, but not men, from appearing topless in public. Based on all of this, we see little reason to believe that the Court of Appeals would join the handful of courts in reaching the opposite conclusion.

While we conclude that the Court of Appeals would uphold the application of Maryland's indecency laws against female toplessness, we also know that "public morals are not static in this realm." *Biocic*, 928 F.2d at 116 n.4. And when public sensibilities begin to change, they can change quickly. We also recognize that what is seen as "indecent" can depend on context. Law enforcement officials may consider that context when exercising their enforcement discretion and thus are best positioned to ensure that Maryland's indecency laws are applied no more broadly than public sensibilities require. *See Id.* at 117 (Murnaghan, J. concurring).

Sincerely,

Sandra Benson Brantley (by ADS)

Sandra Benson Brantley
Counsel to the General Assembly

Adam D. Snyder
Chief Counsel, Opinions & Advice

ADVICE OF COUNSEL
NOT AN OPINION OF THE ATTORNEY GENERAL