

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:20-cv-2192

DONNA WALTER, and
MARK MILLIMAN,

Plaintiff(s),

v.

GOVERNOR JARED POLIS, in his official capacity as Governor of Colorado,
JEFFREY J. ZAYACH, in his official capacity as Executive Director, Boulder County Public
Health,
TOM GONZALEZ, in his official capacity as Director, Larimer County Dept. of Health &
Environment,
DARIN ATTEBERRY in his official capacity as City Manager, City of Fort Collins.

Defendant(s).

COMPLAINT

Plaintiffs Donna Walter and Mark Milliman, by and through the undersigned counsel, file this Complaint for Declaratory and Injunctive Relief against Defendants Governor Jared Polis, Boulder County Public Health Executive Director Jeffrey J. Zayach, Larimer County Public Health Director Tom Gonzalez, and Fort Collins City Manager Darin Atteberry, in their official capacities, and allege as follows:

GOVERNOR JARED POLIS

1. Plaintiff Donna Walter is a natural person and a resident of the city of Fort Collins in Larimer County, Colorado.
2. Plaintiff Mark Milliman is a natural person and a resident of Boulder County, Colorado.
3. The plaintiffs seek declaratory and injunctive relief to enjoin the governor’s executive orders D 2020-138 and D 2020-092.
4. Executive order D 2020-138 (hereafter “EO-138”) is a statewide face covering order that requires healthy people to wear face coverings to prevent them from spreading the COVID-19 virus. Plaintiffs allege that requiring healthy individuals to wear symbolic face coverings is compelled speech in violation of the First and Fourteenth Amendments and impermissibly violates plaintiffs’ federal constitutional and statutory rights.
5. Executive order D 2020-092 (“EO-092”) authorizes “operators of places of public accommodations ... [to] deny admittance or service and require the removal of any individual who fails to wear a medical or non-medical face covering”. Plaintiffs allege

47 this is private enforcement of compelled speech under color of state law, in violation of
48 the First and Fourteenth Amendments of the U.S. Constitution, that exposes businesses to
49 liability under 42 U.S.C § 1983 and impermissibly violates plaintiffs’ federal
50 constitutional and statutory rights.

51 BOULDER COUNTY PUBLIC HEALTH EXECUTIVE DIRECTOR JEFFREY J. ZAYACH

- 52
- 53 6. Plaintiff Mark Milliman seeks declaratory and injunctive relief to enjoin Boulder County
 - 54 Public Health Order 2020-04 (hereafter “BCPHE-2020-04”).
 - 55 7. BCPHE-2020-04 requires healthy individuals entering commercial businesses to wear
 - 56 face coverings. Plaintiffs allege that requiring healthy individuals to wear symbolic face
 - 57 coverings is compelled speech in violation of the First and Fourteenth Amendments and
 - 58 impermissibly violates plaintiff’s federal constitutional and statutory rights.

59 FORT COLLINS CITY MANAGER DARIN ATTEBERRY

- 60
- 61 8. Plaintiff Donna Walter seeks declaratory and injunctive relief to enjoin Fort Collins
 - 62 Emergency Regulation 2020-18.
 - 63 9. FC-2020-18 requires healthy individuals entering commercial businesses to wear face
 - 64 coverings and makes it a criminal misdemeanor to refuse to wear a face mask but
 - 65 continue to remain in the area. Plaintiffs allege that requiring healthy individuals to wear
 - 66 symbolic face covering is compelled speech in violation of the First and Fourteenth
 - 67 Amendments and impermissibly violates plaintiff’s federal constitutional and statutory
 - 68 rights.

69 LARIMER COUNTY PUBLIC HEALTH DIRECTOR TOM GONZALEZ

- 70
- 71 10. Plaintiff Donna Walter seeks declaratory and injunctive relief to enjoin Larimer County
 - 72 Seventh Public Health Order (hereafter “LPH-07”).
 - 73 11. LPH-07 requires that healthy individuals wear face coverings when entering businesses.
 - 74 Plaintiffs allege that requiring healthy individuals to wear symbolic face coverings is
 - 75 compelled speech in violation of the First and Fourteenth Amendments and
 - 76 impermissibly violates plaintiff’s federal constitutional and statutory rights.

77 **JURISDICTION AND VENUE**

- 78
- 79 12. This Court has original jurisdiction over the subject matter of this action pursuant to 28
 - 80 U.S.C. §§ 1331 and 1343 because the matters in controversy arise under the Constitution
 - 81 and laws of the United States.
 - 82 13. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because Defendants
 - 83 reside in this district and because a substantial part of the events and omissions giving
 - 84 rise to the claims herein occurred in this district.
 - 85 14. This Court has the authority to enter a declaratory judgment and to provide injunctive
 - 86 relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure and 28 U.S.C.
 - 87 §§ 2201 and 2202.

88 **PARTIES**

- 89
- 90 15. Plaintiff Mark Milliman is a resident of Boulder County, Colorado.
- 91 16. Plaintiff Donna Walter is a resident of the City of Fort Collins in Larimer County,
- 92 Colorado.
- 93 17. Defendant Jared Polis is the Governor of Colorado. As Governor, he is vested with the
- 94 executive power of the state. CO. CONST., art. IV, § 2.
- 95 18. Defendant Jeffrey J. Zayach is Executive Director of Boulder County Public Health.
- 96 19. Defendant Tom Gonzalez is Larimer County Public Health Director.
- 97 20. Defendant Darin Atteberry is Fort Collins City Manager.
- 98 21. Defendants Polis, Zayach, Gonzalez, and Atteberry are sued in their official capacities
- 99 only.

100 **STATEMENT OF FACTS**

- 101
- 102 22. Plaintiffs bring this action under 42 U.S.C. §§ 1983 and 1988 to remedy deprivations of
- 103 rights, privileges, or immunities secured by the Constitution and laws of the United
- 104 States.
- 105 23. On March 11, 2020, the World Health Organization (WHO) declared the COVID-19
- 106 outbreak a pandemic. D. Cucinotta D, M. Vanelli, *WHO Declares COVID-19 a*
- 107 *Pandemic*, (2020), available at <https://pubmed.ncbi.nlm.nih.gov/32191675/>.
- 108 24. On March 16, UK Imperial College published a COVID-19 research report. Imperial
- 109 College COVID-19 Response Team, *Report 9: Impact of non-pharmaceutical*
- 110 *interventions (NPIs) to reduce COVID-19 mortality and healthcare demand* (2020),
- 111 available at [https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-](https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf)
- 112 [fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf](https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf),
- 113 25. The imperial College report warned that 2.2 million Americans would die of COVID-19
- 114 if government didn't close schools and businesses. *Id.* at 7.
- 115 26. The lead author, Prof. Neil Ferguson, later resigned in disgrace from a British scientific
- 116 advisory committee after he broke self-quarantine to have sex with a married woman he
- 117 met online. Anna Mikhailova, *Exclusive: Government scientist Neil Ferguson resigns*
- 118 *after breaking lockdown rules to meet his married lover*, THE TELEGRAPH, May 25,
- 119 2020, available at [https://www.telegraph.co.uk/news/2020/05/05/exclusive-government-](https://www.telegraph.co.uk/news/2020/05/05/exclusive-government-scientist-neil-ferguson-resigns-breaking)
- 120 [scientist-neil-ferguson-resigns-breaking](https://www.telegraph.co.uk/news/2020/05/05/exclusive-government-scientist-neil-ferguson-resigns-breaking).
- 121 27. Prof. Ferguson's Imperial College computer model was "totally unreliable", according to
- 122 experts who studied it. Peter Aitken, *Imperial College model Britain used to justify*
- 123 *lockdown a 'buggy mess', 'totally unreliable', experts claim*, FOX NEWS, May 16, 2020,
- 124 available at [https://www.foxnews.com/world/imperial-college-britain-coronavirus-](https://www.foxnews.com/world/imperial-college-britain-coronavirus-lockdown-buggy-mess-unreliable)
- 125 [lockdown-buggy-mess-unreliable](https://www.foxnews.com/world/imperial-college-britain-coronavirus-lockdown-buggy-mess-unreliable).
- 126 28. It is impossible to use the model to reproduce the same results from the same data,
- 127 according to University of Edinburgh experts who tested Prof. Ferguson's model. *Id.*
- 128 29. Dr. Tony Fauci and Dr. Deborah Birx used the Imperial College model to argue for
- 129 unprecedented US economic lock downs. Sheri Fink, *White House Takes New Line After*

130 *Dire Report on Death Toll*, NEW YORK TIMES, March 16, 2020, available at
131 <https://www.nytimes.com/2020/03/16/us/coronavirus-fatality-rate-white-house.html>.

132 GOV. JARED POLIS EXECUTIVE ORDER D 2020 017
133

- 134 30. On March 25, Gov. Jared Polis issued Executive Order D 2020 017 (EO-017), a “stay at
135 home” lock down order that closed non-essential businesses. Executive Order D 2020
136 017, available at
137 [https://drive.google.com/file/d/1ppYkzwOR7wAo5Aw9PhS7PiMU4vGVcPLN/view?usp](https://drive.google.com/file/d/1ppYkzwOR7wAo5Aw9PhS7PiMU4vGVcPLN/view?usp=sharing)
138 [=sharing](https://drive.google.com/file/d/1ppYkzwOR7wAo5Aw9PhS7PiMU4vGVcPLN/view?usp=sharing).
139 31. EO-017 stated, “The virus that causes COVID-19 is spread primarily by close contact
140 between people and through respiratory droplets *when an infected person* coughs or
141 sneezes” (emphasis added). *Id.* at 1.

142 BOULDER COUNTY PUBLIC HEALTH ORDER 2020-04
143

- 144 32. On May 2, Boulder County Public Health Executive Director Jeffrey J. Zayach issued
145 Boulder County Public Health Order 2020-04 (“BPH-2020-04”). Boulder County Public
146 Health Order 2020-04, available at [https://assets.bouldercounty.org/wp-](https://assets.bouldercounty.org/wp-content/uploads/2020/06/2020-04-extension-of-masking-order-0629.pdf)
147 [content/uploads/2020/06/2020-04-extension-of-masking-order-0629.pdf](https://assets.bouldercounty.org/wp-content/uploads/2020/06/2020-04-extension-of-masking-order-0629.pdf).
148 33. BPH-2020-04 requires people in Boulder County to wear face coverings. *Id.*
149 34. BPH-2020-04 requires healthy people to wear face coverings. *Id.*
150 35. BPH-2020-04 defines “Face Covering” to mean “a covering made of cloth, fabric, or
151 other soft or permeable material”. *Id.*
152 36. BPH-2020-04 threatens violators with fines and imprisonment. *Id.*
153 37. BPH-2020-04 is of indefinite duration. *Id.*
154 38. BPH-2020-04 is predicated on a finding that “people can be infected with the COVID-19
155 virus and be asymptomatic yet still be contagious”. *Id.*
156 39. BPH-2020-04 finds that “Many people with COVID-19 have mild symptoms and do not
157 recognize that they are infected and contagious and that they can unintentionally infect
158 others”. *Id.*

159 LARIMER COUNTY SEVENTH PUBLIC HEALTH ORDER
160

- 161 40. On May 30, Larimer County Public Health Director Tom Gonzalez issued a Seventh
162 Public Health Order (“LPH-07”). Larimer County Seventh Public Health Order,
163 available at [https://www.larimer.org/sites/default/files/uploads/2020/public-health-face-](https://www.larimer.org/sites/default/files/uploads/2020/public-health-face-covering-order.pdf)
164 [covering-order.pdf](https://www.larimer.org/sites/default/files/uploads/2020/public-health-face-covering-order.pdf).
165 41. LPH-07 requires that “Individuals must wear face coverings at all times except when a
166 face covering inhibits the individual’s ability to participate in certain activities or to eat or
167 drink ... [or] participate in a physical fitness activity”.
168 42. LPH-07 requires healthy people to wear face coverings. *Id.*
169 43. LPH-07 states that “One proven way to slow the transmission is for individuals to wear a
170 mask or other facial covering”. *Id.*

- 171 44. LPH-07 states that, “The primary transmission of COVID-19 is now known to be droplet-
 172 based, and the transmission largely occurs in the first seven days after infection, when
 173 people are *largely asymptomatic*.” (emphasis added). *Id.*
 174 45. LPH-07 requires businesses to enforce the face covering order unless they implement
 175 Alternative to Face Covering requirements. *Id.*
 176 46. LPH-07 threatens violators with fines or imprisonment. *Id.*
 177 47. LPH-07 is of indefinite duration. *Id.*

178 FORT COLLINS CITY EMERGENCY REGULATION 2020-18

- 179
 180 1. On May 1, Fort Collins City Manager Darin Atteberry issued Emergency Regulation,
 181 2020-18 (“FC-2020-18”). Emergency Regulation 2020-18, available at
 182 [https://www.fcgov.com/eps/files/2020-18-extending-and-amending-the-face-coverings-
 183 requirement.docx.pdf?1594996287](https://www.fcgov.com/eps/files/2020-18-extending-and-amending-the-face-coverings-requirement.docx.pdf?1594996287).
 184 2. FC-2020-18 requires all persons entering commercial businesses to wear face coverings.
 185 *Id.*
 186 3. FC-2020-18 requires healthy people to wear face coverings. *Id.*
 187 4. FC-2020-18 discourages medical face coverings. *Id.*
 188 5. FC-2020-18 recommends cloth face coverings. *Id.*
 189 6. FC-2020-18 makes it a criminal misdemeanor to refuse to wear a face mask and continue
 190 to remain in the area or property. *Id.*
 191 7. Fort Collins City Manager’s Office spokesperson Honore Depew said the burden falls on
 192 the business owners of Fort Collins to make sure their customers and visitors are
 193 following the law. Dillon Thomas, *Fort Collins Issues Face Covering Order Amid*
 194 *Coronavirus Pandemic*, CBS 4 DENVER, May 1, 2020, available at
 195 <https://denver.cbslocal.com/2020/05/02/fort-collins-coronavirus-face-coverings>.
 196 8. Honore Depew said, “They have the responsibility to ensure, if a patron comes in their
 197 store, that patron is complying with the face covering order. And, it is their responsibility
 198 not to serve that person if they refuse to wear a face covering.” *Id.*
 199 9. FC-2020-18 is of indefinite duration. *Id.*

200 GOVERNOR’S EXECUTIVE ORDER D 2020-092

- 201
 202 10. On June 4, Gov. Polis issued Executive Order D 2020-092 (“EO-092”). Executive Order
 203 D 2020 092, available at
 204 <https://drive.google.com/file/d/1ETYSBaJPl2wvv0RRnjIHpr38UnZ8pski/view>.
 205 11. EO-092 authorizes “operators of places of public accommodations ... the discretion to
 206 deny admittance or service and require the removal of any individual who fails to wear a
 207 medical or non-medical face covering”. *Id.*
 208 12. EO-092 makes no exception for healthy individuals. *Id.*

209 TRI-COUNTY PUBLIC HEALTH ORDER 0708

- 210
 211 13. On July 8, Tri-County Health Department issued a public health order (hereafter “TCH-
 212 0708”). Public Health Order Requiring Facial Coverings, available at

213 <https://www.tchd.org/DocumentCenter/View/7407/Tri-County-Health-Department->
 214 [Public-Health-Order-Requiring-Facial-Coverings.](https://www.tchd.org/DocumentCenter/View/7407/Tri-County-Health-Department-)

- 215 14. TCH-0708 requires face coverings to be worn in public where social distancing cannot be
 216 maintained. *Id.*
- 217 15. TCH-0708 requires healthy people to wear face coverings. *Id.*
- 218 16. TCH-0708 provides that, “Face coverings may be factory-made, sewn by hand, or be
 219 improvised from household items, including but not limited to, scarfs, bandanas...” *Id.*
- 220 17. TCH-0708 makes an exception for individuals “when exercising in a gym or fitness
 221 center”. *Id.*
- 222 18. TCH-0708 requires private enforcement by businesses, providing that “Any business
 223 open to the public that permits an individual to enter or remain in the business or on its
 224 premises without a required face covering may be subject to the suspension or revocation
 225 of its license...” *Id.*
- 226 19. TCH-0708 makes a finding that “Persons can be infected with COVID-19 and be
 227 *asymptomatic* yet still contagious” (emphasis added). *Id.*
- 228 20. TCH-0708 applied to Adams County, Arapahoe County, and Douglas County. *Id.*
- 229 21. Tri-County Health Executive Director Dr. John M. Douglas had recommended a mask
 230 order only for Adams County. Blair Miller, *Douglas County commissioners move to*
 231 *leave Tri-County Health Department over mask mandate*, July 9, 2020.

232 GOVERNOR’S EXECUTIVE ORDER D 2020-138

- 233
- 234 22. On July 16, Gov. Polis issued Executive Order D 2020-138 (“EO-138”). Executive
 235 Order D 2020-138, available at
 236 [https://drive.google.com/file/d/13S9bLuKZbMvmHPucQnekVyOY2k6gYRa9/view?usp=](https://drive.google.com/file/d/13S9bLuKZbMvmHPucQnekVyOY2k6gYRa9/view?usp=sharing)
 237 [sharing.](https://drive.google.com/file/d/13S9bLuKZbMvmHPucQnekVyOY2k6gYRa9/view?usp=sharing)
- 238 23. EO-138 is a statewide mask order requiring non-medical face coverings. *Id.*
- 239 24. EO-138 states that “widespread mask use is a low cost and highly effective way to reduce
 240 the spread of COVID-19 infections by as much as 65%”. *Id.*
- 241 25. EO-138 requires that healthy individuals wear face coverings. *Id.*
- 242 26. EO-138 threatens violators with civil or criminal penalties. *Id.*
- 243 27. EO-138 amends and extends the governor’s June 4 “public accommodations” order, EO-
 244 092. *Id.*
- 245 28. EO-138 expands on EO-092 private enforcement of mask orders under color of state law,
 246 adding criminal trespass charges against individuals who refuse to wear face coverings in
 247 a business. *Id.*

248 MASK EFFECTIVENESS

- 249
- 250 29. The *New England Journal of Medicine* reported that “We know that wearing a mask
 251 outside health care facilities offers little, if any, protection from infection.” Michael
 252 Klompas, M.D., M.P.H., *Universal Masking in Hospitals in the Covid-19 Era*, NEW
 253 ENGLAND JOURNAL OF MEDICINE, May 21, 2020, available at
 254 <https://www.nejm.org/doi/full/10.1056/NEJMp2006372>.

- 255 30. The chance of catching Covid-19 from a passing interaction in a public space is minimal.
 256 *Id.*
- 257 31. According to OSHA, cloth face coverings are not considered personal protective
 258 equipment (PPE). <https://www.osha.gov/SLTC/covid-19/covid-19-faq.html>
- 259 32. Cloth face masks will not protect the wearer against airborne transmissible infectious
 260 agents due to loose fit and lack of seal or inadequate filtration. *Id.*

261 ASYMPTOMATIC SPREAD

- 262
- 263 33. On June 8, WHO epidemiologist Maria Van Kerkhove called asymptomatic spread “very
 264 rare”, based on data from countries who tracked asymptomatic cases. Jacqueline
 265 Howard, *Coronavirus spread by asymptomatic people 'appears to be rare,' WHO official*
 266 *says*, CNN, June 9, 2020, available at
 267 <https://www.cnn.com/2020/06/08/health/coronavirus-asymptomatic-spread-who->
 268 [bn/index.html](https://www.cnn.com/2020/06/08/health/coronavirus-asymptomatic-spread-who-)
- 269 34. Ms. Van Kerkhove is the World Health Organization's technical lead for coronavirus
 270 response and head of the emerging diseases and zoonoses unit. *Id.*
- 271 35. Ms. Van Kerkhove faced a backlash for her comments. Sarah Boseley, *WHO expert*
 272 *backtracks after saying asymptomatic transmission 'very rare'*, THE GUARDIAN, June
 273 9, 2020, available at [https://www.theguardian.com/world/2020/jun/09/who-expert-](https://www.theguardian.com/world/2020/jun/09/who-expert-backtracks-after-saying-asymptomatic-transmission-very-rare)
 274 [backtracks-after-saying-asymptomatic-transmission-very-rare.](https://www.theguardian.com/world/2020/jun/09/who-expert-backtracks-after-saying-asymptomatic-transmission-very-rare)
- 275 36. Ms. Van Kerkhove maintained that real-world data suggested that asymptomatic spread
 276 of COVID-19 is very rare. *Id.*
- 277 37. Ms. Van Kerkhove said she didn’t mention estimates of up to 40% asymptomatic spread
 278 because “those are from models”. *Id.*

279 COUNT I

280 *(Executive Order D 2020-092 Violates First Amendment Free Speech Protections and 42 U.S.C.*
 281 *§ 1983)*

- 282
- 283 38. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.
- 284 39. The First Amendment protects freedom of thought against state action, including the right
 285 to speak and the right to refrain from speaking. *Board of Education v. Barnette*, 319 U.S.
 286 624, 645 (Murphy, J., concurring) (1943). The right to speak and the right to refrain
 287 from speaking are components of “individual freedom of mind.” *Id.*, at 637 (Jackson, J).
 288 Both good and evil men have waged struggles to coerce uniformity of support for some
 289 idea thought essential in that time and place. Governmental pressure for unity causes
 290 bitter strife as to whose unity it shall be. *Id.*, at 641. Compulsory unification of opinion
 291 achieves only the unanimity of the graveyard. The First Amendment was designed to
 292 avoid that end by avoiding those beginnings. *Id.*, at 640.
- 293 40. The State’s interest in disseminating beliefs, however widely held, cannot outweigh an
 294 individual’s First Amendment right to avoid becoming messenger. *See, e.g., Wooley v.*
 295 *Maynard*, 430 U.S. 705, 706 (Burger, J.) (1977). The First Amendment protects the right
 296 of individuals to hold a point of view different from the majority and refuse to foster. *Id.*,

- 297 at 715. The State cannot compel speech without a countervailing interest sufficiently
298 compelling to justify that compelled speech. *Id.*, at 716.
- 299 41. Private enforcement of unconstitutional measures exposes private businesses to financial
300 liability for violating civil rights under color of state law. 42 U.S.C. § 1983. Private
301 entities and individuals may be subject to liability under 42 USC § 1983 if plaintiffs can
302 show that they (1) acted pursuant to the coercive power of the State or are controlled by
303 the State; (2) willfully participated in joint activity with the State or their functions are
304 entwined with state policies; or (3) have been delegated a public function by the State. 42
305 U.S.C. § 1983, *Jones v. Nickens*, 961 F. Supp. 2d 475 (E.D. N.Y. 2013). Under the
306 “public function test,” a private party can be characterized as a state actor, for § 1983
307 purposes, if the plaintiff establishes that, in engaging in the challenged conduct, the
308 private party performed a public function that has been traditionally the exclusive
309 prerogative of the State. 42 U.S.C. § 1983. *Aldrich v. Ruano*, 952 F. Supp. 2d 295 (D.
310 Mass. 2013).
- 311 42. EO-092 authorizes businesses to deny service to healthy people who refuse to wear face
312 coverings.
- 313 43. EO-092 impermissibly violates the plaintiffs’ First and Fourteenth Amendment and
314 statutory rights because forcing healthy people to wear symbolic face coverings violates
315 First Amendment protections against compelled speech. Forcing people to wear non-
316 medical and cloth face coverings is compelled symbolic speech because these face
317 coverings are not PPE and are not effective at preventing the spread of COVID-19.
318 Forcing healthy people to wear face coverings is compelled speech because healthy
319 people do not spread COVID-19 except in very rare circumstances. The Defendant’s
320 compelled speech mandate can be justified by no countervailing interest because healthy
321 people are unlikely to spread COVID-19 and the prescribed masks are ineffective.
- 322 44. EO-092 private enforcement exposes private businesses to financial liability for violating
323 First Amendment free speech rights under color of state law. Because this face covering
324 mandate is unconstitutional compelled speech, private businesses who enforce it do so
325 acting pursuant to the coercive power of the state. Private entities and individuals may be
326 subject to liability under 42 USC § 1983 for enforcing unconstitutional face covering
327 mandates.
- 328 45. Defendants have acted and, unless enjoined, will act under color of state law to violate
329 plaintiffs’ rights to free speech protections under the First Amendment. In doing so,
330 Defendant exposes private businesses to financial liability under 42 U.S.C. § 1983.
- 331 46. Plaintiffs have standing to challenge EO-092 because they suffer injury-in-fact from its
332 enforcement. Plaintiffs are permitted to challenge laws infringing on free expression
333 whether their own rights of free expression are violated, because those laws very
334 existence may cause others not before the court to refrain from constitutionally protected
335 speech or expression. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).
- 336 47. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to
337 their constitutional rights unless Defendant is enjoined from enforcing EO-092.

- 338 48. The injury to plaintiffs’ First Amendment rights by EO-092 enforcement outweighs any
339 injury sustained by Defendant as a result of injunctive relief because enforcement of
340 unprecedented face covering mandates on the healthy has no public health benefit.
341 49. Injunctive relief would not adversely affect public policy or the public interest because
342 enforcement of unprecedented face covering mandates on the healthy has no public
343 health benefit.

344 **COUNT II**

345 *(Executive Order D 2020-138 Violates First Amendment Free Speech Protections and 42 U.S.C.*
346 *§ 1983)*
347

- 348 50. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.
349 51. EO-138 is a statewide order mandating that healthy people wear non-medical face
350 coverings. EO-138 relies on EO-092 private enforcement by expanding enforcement
351 powers to include criminal trespass charges against individuals who refuse to wear face
352 coverings in a business.
353 52. EO-138 impermissibly violates the plaintiffs’ First and Fourteenth Amendment and
354 statutory rights because forcing healthy people to wear symbolic face coverings violates
355 First Amendment protections against compelled speech that cannot be justified by any
356 countervailing interest.
357 53. EO-138 private enforcement exposes private businesses to financial liability for enforcing
358 unconstitutional face covering mandates under color of state law. 42 USC § 1983.
359 54. Plaintiffs have standing to challenge EO-138 because they suffer injury-in-fact from its
360 enforcement and because EO-138’s very existence may cause others not before the court
361 to refrain from constitutionally protected speech or expression. *Broadrick v. Oklahoma,*
362 *413 U.S. 601, 612 (1973).*
363 55. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to
364 their constitutional rights unless Defendant is enjoined from enforcing EO-138.
365 56. The injury to plaintiffs’ First Amendment rights by EO-138 enforcement outweighs any
366 injury sustained by Defendant as a result of injunctive relief because enforcement of
367 unprecedented face covering mandates on the healthy has no public health benefit.
368 57. Injunctive relief would not adversely affect public policy or the public interest because
369 enforcement of unprecedented face covering mandates on the healthy has no public
370 health benefit.

371 **COUNT III**

372 *(Boulder County Public Health Order 2020-04 Violates First Amendment Free Speech*
373 *Protections and 42 U.S.C. § 1983)*
374

- 375 58. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.
376 59. BPH-2020-04 is a Boulder County order mandating that healthy people wear non-
377 medical face coverings. BPH-2020-04 plainly doesn’t require effective face coverings
378 because its definition of “face covering” includes “a covering made of cloth, fabric, or
379 other soft or permeable material” that offer little or no protection against viral spread.

- 380 60. BPH-2020-04 impermissibly violates the plaintiffs' First and Fourteenth Amendment and
381 statutory rights because forcing healthy people to wear symbolic face coverings violates
382 First Amendment protections against compelled speech that cannot be justified by any
383 countervailing interest.
- 384 61. Plaintiff Mark Milliman has standing to challenge BPH-2020-04 because he suffers
385 injury-in-fact from its enforcement and because BPH-2020-04's very existence may
386 cause others not before the court to refrain from constitutionally protected speech or
387 expression. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).
- 388 62. Plaintiff Mark Milliman has no adequate remedy at law and will suffer serious and
389 irreparable harm to his constitutional rights unless Defendant is enjoined from enforcing
390 BPH-2020-04.
- 391 63. The injury to plaintiff Mark Milliman's First Amendment rights by BPH-2020-04
392 enforcement outweighs any injury sustained by Defendant as a result of injunctive relief
393 because enforcement of unprecedented face covering mandates on the healthy has no
394 public health benefit.
- 395 64. Injunctive relief would not adversely affect public policy or the public interest because
396 enforcement of unprecedented face covering mandates on the healthy has no public
397 health benefit.

398 **COUNT IV**

399 *(Fort Collins Emergency Regulation 2020-18 Violates First Amendment Free Speech Protections*
400 *and 42 U.S.C. § 1983)*
401

- 402 65. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.
- 403 66. FC-2020-08 is a Fort Collins emergency regulation mandating that healthy people wear
404 face coverings. FC-2020-08 plainly doesn't require effective face coverings because it
405 discourages medical face coverings and recommends cloth face coverings.
- 406 67. FC-2020-08 impermissibly violates the plaintiffs' First and Fourteenth Amendment and
407 statutory rights because forcing healthy people to wear symbolic face coverings violates
408 First Amendment protections against compelled speech that cannot be justified by any
409 countervailing interest.
- 410 68. City of Fort Collins expressly place the burden of FC-2020-18 enforcement of FC-2020-
411 18 on Fort Collins business owners, exposing them to financial liability for enforcing
412 unconstitutional face covering mandates under color of state law. 42 USC § 1983.
- 413 69. Plaintiff Donna Walter has standing to challenge FC-2020-08 because she suffers injury-
414 in-fact from its enforcement and because FC-2020-08's very existence may cause others
415 not before the court to refrain from constitutionally protected speech or expression.
416 *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).
- 417 70. Plaintiff Donna Walter has no adequate remedy at law and will suffer serious and
418 irreparable harm to her constitutional rights unless Defendant is enjoined from enforcing
419 FC-2020-08.
- 420 71. The injury to plaintiff Donna Walter's First Amendment rights by FC-2020-18
421 enforcement outweighs any injury sustained by Defendant as a result of injunctive relief

422 because enforcement of unprecedented face covering mandates on the healthy has no
423 public health benefit.

424 72. Injunctive relief would not adversely affect public policy or the public interest because
425 enforcement of unprecedented face covering mandates on the healthy has no public
426 health benefit.

427 **COUNT V**

428 *(Larimer County Seventh Public Health Order Violates First Amendment Free Speech*
429 *Protections and 42 U.S.C. § 1983)*

430
431 73. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

432 74. LPH-07 is a Larimer County Public Health Order mandating that healthy people wear
433 face coverings. LPH-07 evinces little seriousness attempt to limit plainly doesn't require
434 effective face coverings because it makes exceptions for participation in physical fitness
435 activities where an individual is more likely to spread infection.

436 75. LPH-07 impermissibly violates the plaintiffs' First and Fourteenth Amendment and
437 statutory rights because forcing healthy people to wear symbolic face coverings violates
438 First Amendment protections against compelled speech that cannot be justified by any
439 countervailing interest.

440 76. LPH-07 requires businesses to enforce the face covering order, exposing them to
441 financial liability for enforcing unconstitutional face covering mandates under color of
442 state law. 42 USC § 1983. LPH-07 frees businesses from enforcing an illegal mandate by
443 paying only by implementing other countermeasures.

444 77. Plaintiff Donna Walter has standing to challenge LPH-07 because she suffers injury-in-
445 fact from its enforcement and because LPH-07's very existence may cause others not
446 before the court to refrain from constitutionally protected speech or expression.
447 *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

448 78. Plaintiff Donna Walter has no adequate remedy at law and will suffer serious and
449 irreparable harm to her constitutional rights unless Defendant is enjoined from enforcing
450 LPH-07.

451 79. The injury to plaintiff Donna Walter's First Amendment rights by LPH-07 enforcement
452 outweighs any injury sustained by Defendant as a result of injunctive relief because
453 enforcement of unprecedented face covering mandates on the healthy has no public
454 health benefit.

455 80. Injunctive relief would not adversely affect public policy or the public interest because
456 enforcement of unprecedented face covering mandates on the healthy has no public
457 health benefit.

458 **PRAYER FOR RELIEF**

459
460 WHEREFORE, Plaintiffs ask this Court to enter a judgement in their favor and provide the
461 following relief:

- 462 a. A declaratory judgment declaring that Executive Order EO-092 violates First
463 Amendment free speech protections, U.S. CONST. amend I.

- 464 b. A declaratory judgment declaring that Executive Order EO-138 violates First
465 Amendment free speech protections, U.S. CONST. amend I.
- 466 c. A declaratory judgment declaring that Boulder County Public Health Order BPH-
467 2020-04 violates First Amendment free speech protections, U.S. CONST. amend
468 I.
- 469 d. A declaratory judgment declaring that Fort Collins Emergency Regulation FC-
470 2020-08 violates First Amendment free speech protections, U.S. CONST. amend
471 I.
- 472 e. A declaratory judgment declaring that Larimer County Public Health Order LPH-
473 07 violates First Amendment free speech protections, U.S. CONST. amend I.
- 474 f. A permanent injunction prohibiting the Governor from implementing,
475 administering, and enforcing Executive Order EO-092.
- 476 g. A permanent injunction prohibiting the Governor from implementing,
477 administering, and enforcing Executive Order EO-138.
- 478 h. A permanent injunction prohibiting Boulder County Public Health Executive
479 Director Jeffrey J. Zayach and Boulder County Public Health from implementing,
480 administering, and enforcing Executive Order BPH-2020-04.
- 481 i. A permanent injunction prohibiting Fort Collins City Manager Darin Atteberry
482 and the City of Fort Collins from implementing, administering, and enforcing
483 Emergency Regulation FC-2020-18.
- 484 j. A permanent injunction prohibiting Larimer County Public Health Director Tom
485 Gonzalez and Larimer County Public Health from implementing, administering,
486 and Larimer County Public Health Order LPH-07.
- 487 k. An order requiring Defendants to pay Plaintiffs' reasonable attorney's fees,
488 including litigation expenses and costs; and
- 489 l. Awarding Plaintiffs such other and further relief as this court deems just and
490 proper.

491 **CERTIFICATION AND CLOSING**

492
493 Under Federal Rule of Civil Procedure 11, by signing below, I certify to the best of my
494 knowledge, information, and belief that this complaint: (1) is not being presented for an improper
495 purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
496 (2) is supported by existing law or by a nonfrivolous argument for extending, modifying, or
497 reversing existing law; (3) the factual contentions have evidentiary support or, if specifically so
498 identified, will likely have evidentiary support after a reasonable opportunity for further
499 investigation or discovery; and (4) the complaint otherwise complies with the requirements of
500 Rule 11.

501
502 s/Mark C. Patlan

503 **Mark C. Patlan, Esq.**
504 1001-A E. Harmony Rd, #330
505 Fort Collins, CO 80525
506 Telephone: (970) 981-3344

507 Fax: (949) 266-8730
508 Email: mpatlan@patlanlaw.com
509 Attorney for Plaintiffs