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The Honorable R. Brooke Jackson
United States District Court Judge
Alfred A. Arraj United States Courthouse A938
Denver, Colorado 80294

Re: ***Donna Walter and Mark Milliman v. Governor Jared Polis, Jeffrey J. Zayach, and Darin Atteberry,*** United States District Court for the District of Colorado, Civil Action No. 20-cv-02192-RBJ

Dear Judge Jackson:

Pursuant to your Practice Standards, on behalf of Defendant Darin Atteberry, in his official capacity as City Manager of the City of Fort Collins, I respectfully submit this letter outlining the arguments to be raised in a Motion to Dismiss filed by Mr. Atteberry.

The undersigned counsel participated in two telephone conferences to discuss the potential Motion to Dismiss with counsel for the Plaintiffs and with counsel for all the other Defendants. The first telephone conference occurred on August 26, 2020, related to the initial Complaint, and a second telephone conference occurred on September 16, 2020, related to the First Amended Complaint. During the telephone conferences, counsel for the parties were unable to reach agreement and counsel all agreed the legal issues to be raised by the Defendants in their Motions to Dismiss needed to be litigated before this Court.

Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief raises the following claims against Mr. Atteberry pursuant to 42 U.S.C. § 1983: (1) Claim Three—alleging Fort Collins' Emergency Regulation 2020-18 violates the First Amendment free speech protections against compelled speech; (2) Claim Six—alleging the Emergency Regulation violates the First Amendment as a content-based restriction; and (3) Claim Nine—alleging the Emergency Regulation violates the Due Process Clauses of the Fifth and Fourteenth Amendments and the fundamental right to refuse healthcare.

Mr. Atteberry intends to raise the following arguments related to the Plaintiffs' claims against him. First, the start of any analysis is the Supreme Court of the United States' decision in ***Jacobson v. Massachusetts,*** 197 U.S. 11 (1904), providing it was within the police power for government to enact a mandatory vaccination law to address the spread of smallpox. ***Jacobson*** has been applied to support public health measures to fight COVID-19. *See, e.g.,* ***Lawrence v. Colorado,*** 20-cv-00862-DDD-SKC, 2020 U.S. Dist. LEXIS 92910 (D. Colo. Apr. 19, 2020).

Second, the Emergency Regulation does not compel speech. Plaintiffs' position that a requirement for individuals to wear masks in public to protect themselves and others from a global pandemic spread by droplets of saliva and nasal discharge represents compelled speech is not supported by applicable compelled speech precedent. It simply does not meet the definition of compelled speech as a matter of law. *See, e.g.,* ***Janus v. AFSCME, Council 31,*** 138 S.Ct. 2448 (2018); ***Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,*** 547 U.S. 47 (2005); ***Johanns v. Livestock Mktg. Ass'n,*** 544 U.S. 550 (2005).

Third, the Emergency Regulation is not content-based but rather is content-neutral. Its restrictions and requirements are applicable to individuals in Fort Collins. Specifically, Plaintiffs' argument the mask requirement in the Emergency Regulation constitutes a content-based regulation is erroneous. Nothing in the Emergency Regulation distinguishes between any type of speech at all. It simply requires individuals to take the action of wearing masks under the specifically defined circumstances of the Emergency Regulation. Fort Collins has not engaged in any content-based regulation with the Emergency Regulation at all. Moreover, the mask requirement advances the legitimate public health interests of the City in stopping the spread of a deadly pandemic and does not burden any free speech of Plaintiffs or otherwise. ***Turner Broad. Sys. v. FCC,*** 520 U.S. 622 (1994); ***Doe v. Shurtleff,*** 628 F.3d 1217 (10th Cir. 2010); ***Golan v. Holder,*** 609 F.3d 1076 (10th Cir. 2010).

Fourth, the Due Process Clause of the Fifth Amendment applies only to the federal government and not a municipality like Fort Collins. *See, e.g.,* ***Koessel v. Sublette County Sheriff's Dept.,*** 717 F.3d 736, 738 n. 2 (10th Cir. 2013); ***Carrier v. Lundstedt,*** 13-cv-02933-PAB-CBS, 2014 U.S. Dist. LEXIS 182569 at *12 (Dec. 22, 2014).

Fifth, the fundamental right to refuse healthcare is not implicated by a requirement to wear a mask. The right to refuse healthcare announced in ***Cruzan v. Dir., Missouri Dep't of Health,*** 497 U.S. 261 (1990), is grounded in the liberty interest individuals have in their bodily integrity. However, this substantive due process right to bodily integrity has only been recognized by the Supreme Court in narrow circumstances such as birth control, abortion, end-of-life decisions, and instances where individuals are subjected to dangerous or invasive medical procedures. *See, e.g.,* ***Moore v. Guthrie,*** 438 F.3d 1036, 1040 (10th Cir. 2006). Plaintiffs' complaint about mandatory mask wearing requirements to thwart the spread of infectious disease simply does not fall within the parameters of this liberty interest. *Compare* ***Casey v. Parker,*** 3:20-CV-00525, 2020 U.S. Dist. LEXIS 165665 at *7-8 (M.D. Tenn. Sept. 10, 2020) (rejecting challenge by inmate to mandatory temperature check for COVID-19 in prison based on ***Cruzan***).

Mr. Atteberry's current deadline for his response to the Plaintiffs' First Amended Complaint is September 21, 2020. Mr. Atteberry respectfully requests the opportunity to file a Motion to Dismiss based on the above arguments as more fulsomely advanced and articulated in the Motion.

Thank you for your attention.

Very truly yours,

/s/ Andrew D. Ringel

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