



## Office of the County Attorney

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September 18, 2020

The Honorable R. Brooke Jackson  
United States District Court of Colorado  
Alfred A. Arraj United State Courthouse, A938  
901 19<sup>th</sup> St.  
Denver, Colorado 80294

Re: *Walter v. Polis*, 1:20-cv-2192-RBJ

Dear Judge Jackson:

As required under the Court's 12/1/19 Practice Standards on Motions to Dismiss, Defendant Jeffrey J. Zayach, in his official capacity as Executive Director of Boulder County Public Health ("the Director"), submits this letter outlining the grounds for dismissal that he intends to raise in a motion to dismiss under Fed. R. Civ. P. 12(b)(6) and the Director's efforts to confer with Plaintiff regarding the motion.

Plaintiffs' Amended Complaint challenges the constitutionality of a Boulder County Public Health ("BCPH") Order that requires healthy people over the age of ten in Boulder County, Colorado to wear a face covering when social distance cannot be maintained. BCPH enacted the order to slow the spread of a novel coronavirus that causes a disease known as COVID-19. "COVID-19 has been widely recognized throughout the country and around the world as a threat that must be taken seriously." *Lawrence v. Colorado*, Civil Action No. 1:20-cv-00862-DDD-SKC, 2020 U.S. Dist. LEXIS 92910, at \*19 (D. Colo. Apr. 19, 2020); *S. Bay United Pentecostal Church v. Newsom*, \_\_\_ U.S. \_\_\_, 140 S. Ct. 1613, 1613 (2020) ("COVID-19 . . . has killed . . . more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine.") "[N]early every jurisdiction around the country and world has recognized [COVID-19] as a significant danger if left to spread unchecked . . ." *Lawrence* at \*20.

The face covering order falls within the Director's wide-ranging legal authority to address the current public health crisis. The Order meets the constitutional standard set forth in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) because it has a real and substantial relation to the protection of public health and does not constitute a palpable invasion of rights secured by fundamental law. Courts around the country have rejected constitutional challenges similar to Plaintiffs'. See *Open Our Or. v. Brown*, Civ. No. 6:20-cv-773-MC, 2020 U.S. Dist. LEXIS 87942, at \*6 (D. Or. May 19, 2020) (collecting cases). While Plaintiffs' Amended Complaint indicates that Plaintiffs and others disagree about the effectiveness of masks to stem the spread of the virus, the Court is obligated under *Jacobson* to give the elected branches deference on public health matters, especially given the extreme consequences of failing to contain the virus. *S. Bay United Pentecostal Church*, 140 S. Ct. at \*1613-14; *Lawrence*, U.S. Dist. LEXIS 92910, at \*21.

One alleged basis for Plaintiffs' constitutional claims is the Fourteenth Amendment right to refuse medical treatment. However, the BCPH Order, on its face, does not provide or purport to provide treatment for COVID-19 or any other medical condition. Instead, the object of the Order is to prevent the spread of a disease to others. Thus, the right to refuse medical treatment is inapplicable

under the undisputed facts of this case. Even if wearing a face covering could be considered an involuntary medical treatment, such treatment is constitutionally permissible when it is administered for the purpose of preventing the spread of contagious disease. *Reynolds v. McNichols*, 488 F.2d 1378, 1382-83 (10th Cir. 1973).

Further, the requirement to wear a face covering does not present sufficient communicative elements to establish a First Amendment claim based on freedom of speech. *See Antietam Battlefield KOA v. Hogan*, Civil Action No. CCB-20-1130, 2020 U.S. Dist. LEXIS 88883, at \*31 (D. Md. May 20, 2020). Even assuming the applicability of the First Amendment to these circumstances, the face covering order does not violate Plaintiffs' right to free speech because it was adopted to serve compelling state interests, unrelated to the suppression of ideas. Specifically, slowing the spread of COVID-19 is a compelling governmental interest. *Id.* at \*33.

### **Conferral**

The undersigned counsel for the Director, along with counsel for the Governor and the City of Fort Collins, spoke with Mark Patlan, the attorney for Plaintiffs, on August 26, 2020 and again on September 16, 2020. Defendants' counsel advised Mr. Patlan of their plans to file motions to dismiss and the grounds for those motions. The parties generally agreed that the issues could not be resolved through alternative processes or further amendment of the complaint.

The Director requests that the Court grant him leave to file a motion to dismiss in this case.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. Hughes", is written over a faint rectangular stamp.

David Hughes  
Deputy County Attorney