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September 21, 2020

The Honorable R. Brooke Jackson
Alfred A. Arraj United States Courthouse A938
901 19th Street, Denver, Colorado 80294

RE: Motion to Dismiss in *Walter v. Polis*, et al. – No. 1:20-cv-2192-RBJ

Dear Judge Jackson:

In accordance with the Court's 12/1/19 Practice Standards on Motions to Dismiss, Defendant Jared Polis, in his official capacity, submits this letter outlining the grounds for dismissal that he intends to raise in his Motion to Dismiss Claims I, IV, and VII based on Fed. R. Civ. P. 12(b)(6), and his efforts to confer with Plaintiffs' counsel concerning the same.

The Amended Complaint [ECF No. 14] raises three claims against the Governor. Each fails to state a claim upon which relief can be granted.

1. Claim I asserts that Executive Order D 2020 138 violates First Amendment protections against compelled speech. That claim fails because wearing a mask, or not wearing a mask, is not expressive activity protected by the First Amendment. The First Amendment only protects conduct that is "inherently expressive." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). And unlike "pure speech," such as the spoken or written word, "symbolic speech or conduct must be sufficiently imbued with elements of communication" to be protected, and "is subject to a relaxed constitutional standard." *Cressman v. Thompson*, 798 F.3d 938, 951–52 (10th Cir. 2015). To state a compelled speech claim with regards to a claim for symbolic speech, a plaintiff must a) "articulate some inference drawn from the [symbol] that a viewer would perceive," *id.* at 958, and b) allege his objection to this objectively identifiable message, *id.* at 961.

   The Amended Complaint here fails on both accounts. A reasonable viewer observing someone wear a mask would not perceive any articulable inference or identifiable message. The Amended Complaint offers no justification for why wearing a mask "may" express that the wearer "care[s]," is "not 'stupid,'" or is not a "selfish bastard." Am. Compl. ¶ 65. Nor does wearing a mask imply that the user agrees masks are "necessary or effective." *Id.*

Wearing a mask is akin to wearing a seatbelt—both are public safety requirements that convey no symbolic message. And even if some identifiable message could be discerned, it would not convey any suggestion that the wearer agrees with the State of Colorado's views regarding the transmission of COVID-19 or the effectiveness of mask wearing. At most, a reasonable viewer would think that a mask wearer, like a seatbelt wearer, is a law-abiding citizen who merely wishes to avoid the trouble of a fine. Nothing more. Plaintiffs' Amended Complaint does not allege that they object to this type of uncontroversial message, again assuming *any* message can be gleaned at all from wearing a mask.

2. Claim IV alleges that the Executive Order D 2020 138 is a content-based restriction on speech, and therefore violates the First Amendment. Content based regulations are "those that target speech based on its communicative content," and apply "to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Even accepting the allegations contained in the Amended Complaint, the Executive Order is not a content-based restriction because it "stifle[s]" all "nonverbal expression." Am. Compl. ¶ 62. It does not discriminate between topics or viewpoints, and does not "require[] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014). Instead, it imposes a reasonable, generally applicable restriction that applies equally to all Coloradans. To the extent the Executive Order imposes restrictions on an individual's expression—and to be clear, it does not—those restrictions are applied across-the-board, without consideration of viewpoint or content.

3. Finally, Claim VII of the Amended Complaint alleges that Executive Order D 2020 138 violates the fundamental right to refuse healthcare treatment. First, Executive Order D 2020 138 does not require any individual to seek healthcare treatment. Wearing a cloth face covering does not implicate the same liberty concerns as do the treatments identified in the cases Plaintiffs cite. *See, e.g.*, *Cruzan v. Dir., Missouri Dep't. of Health*, 497 U.S. 261, 279 (1990) (addressing "the forced administration of life-sustaining medical treatment, and even artificially delivered food and water essential to life"); *Washington v. Glucksberg*, 521 U.S. 702, 706 (1997) (addressing physician-assisted suicide).

   Second, Executive Order D 2020 138 is directed at containing the spread of the coronavirus, and is a valid exercise of the State's general police powers to protect public health during a public health emergency. The Supreme Court has held that the traditional tiers of constitutional scrutiny do not apply during a public health emergency, and a court may overturn public health laws only if they lack a "real or substantial relation to [the public health]," or

> "beyond all question" amount to "a plain, palpable invasion" of rights secured by the Constitution. *Jacobson v. Massachusetts*, 197 U.S. 11, 27, 31 (1905); *see also South Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring) (applying *Jacobson* to address restrictions imposed to stem the spread of COVID-19).
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> The allegations contained in the Complaint are insufficient to clear either of these high bars. Indeed, other judges on this Court on at least two recent occasions have cited *Jacobson* and/or *South Bay* to deny relief to plaintiffs challenging the Governor's COVID-19-related executive and public health orders. *See High Plains Harvest Church v. Polis*, No. 20-cv-01480-RM-MEH, 2020 WL 4582720, at *1–2 (D. Colo. Aug. 10, 2020); *Lawrence v. Colorado*, No. 20-cv-00862-DDD-SKC, 2020 WL 2737811, at *5, 7–11 (D. Colo. Apr. 19, 2020).

Conferral

Undersigned counsel conferred with counsel for the Plaintiffs by telephone on three separate occasions. First, following submission of Plaintiffs' original Complaint, the parties conferred regarding the Governor's intent to move to dismiss the lawsuit on the grounds 1) that wearing a mask or not wearing a mask is not expressive activity within the ambit of the First Amendment, and 2) that the Governor's Executive Orders are a valid exercise of the State's police power in responding to a public health emergency. The parties agreed during this conferral that the issues to be raised in the Governor's Motion to Dismiss were questions of law and not factual issues that could be resolved through an amended complaint.

Less than a week later, the parties spoke again. This time Plaintiffs' counsel indicated that Plaintiffs would be amending their Complaint to add additional claims. After the Amended Complaint was filed, counsel for the parties conferred a third time. Once more, undersigned counsel expressed the Governor's intent to move to dismiss on the legal grounds listed above, and the parties agreed that the issues the Governor intends to raise in his Motion to Dismiss are not factual issues that could be resolved through an amended complaint.

Plaintiffs object to the relief sought by the Governor's proposed Motion to Dismiss.

Sincerely,

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cc: All counsel of record