IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-02192-RBJ

DONNA WALTER, et al.,

Plaintiffs,

v.

JARED POLIS, GOVERNOR OF THE STATE OF COLORADO, in his official capacity, et al.,

Defendants.

GOVERNOR JARED POLIS'S
MOTION TO DISMISS AMENDED COMPLAINT

As Colorado seeks to mitigate the public health effects of the COVID-19 virus, few—if any—measures have had as significant an effect as Colorado's statewide mask mandate. The mandate, which includes reasonable exceptions, substantially stemmed the tide of Colorado's early COVID-19 cases, and continues to be a key tool in Colorado's efforts to keep our residents safe.

Under both federal and state law, the Governor has broad authority to take all steps necessary to respond to the COVID-19 crisis—including asking all Coloradans to wear a cloth face-covering to protect their neighbors. Plaintiffs' Amended Complaint fails to state a plausible claim upon which relief may be granted, and the Court should dismiss their effort to undermine the Governor's ongoing response.

BACKGROUND

I. Executive Order D 2020 138

Since March 5, 2020, when Colorado confirmed the State's first presumptive positive COVID-19 test result, Governor Jared Polis, the Colorado Department of Health and Environment ("CDPHE"), and county and local health officials have worked together to mitigate

the effects of the virus. In July, these efforts included promulgating Executive Order D 2020 138, which ordered all individuals over ten years old to wear a "face covering over their nose and mouth" in public indoor spaces. Ex. A, EO D 2020 138.[1] Since July, the Executive Order has been extended on multiple occasions. The currently operative order is Executive Order D 2020 219, which is virtually identical to EO D 2020 138.[2] Ex. B, EO D 2020 219. For purposes of this Motion, the Governor uses the term "the Executive Order" to refer to these orders interchangeably.

From March 5 to July 16, Colorado encountered over 37,000 cases of COVID-19, and more than 1,700 fatalities. Ex. A at 1. As the State began to "take steps to return Coloradans to work," it looked for additional measures to "facilitate reopening the economy while protecting public health." *Id.* Working alongside public health officials at CDPHE, the Governor concluded that "widespread mask use is a low cost and highly effective way to reduce the spread of COVID-19 infections." *Id.* In particular, the Governor determined that "[b]road adoption of mask wearing" would permit the State to "prevent re-closures of businesses and schools." *Id.*

In pursuit of this goal, the Executive Order requires all individuals over ten years old to wear a face covering while in a "Public Indoor Space." *Id.* at 2. The Executive Order includes

---

[1] In addition to the well-pleaded factual allegations in the Complaint, the Court may consider documents, like the Executive Order, which are (1) "referred to in the complaint," and (2) "central to the plaintiff's claim[s]," and (3) the authenticity of which the parties do not dispute. *Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 521 (10th Cir. 2013) (quotation omitted). In doing so, the Court should examine "the document itself, rather than the complainant's description of it." *Id.* (citing *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941–42 (10th Cir. 2002)).

[2] The only substantive amendment in the latter Order permits CDPHE, in consultation with Local Public Health Administrators, to grant waivers for activities that "take place for a limited time period if such activities cannot practically or safely be performed while wearing a mask." Ex. B at 2.

several reasonable exemptions, including for individuals who "cannot medically tolerate a face covering." *Id.* at 3.

II. Procedural History

On July 25, 2020, Plaintiffs Donna Walter and Mark Milliman, both candidates for the Colorado State House of Representatives, initiated this lawsuit against the Governor and other local officials. Compl. (Doc. 1). The Amended Complaint (Doc. 14) seeks to enjoin the Governor from enforcing the Executive Order.

STANDARD OF REVIEW

Dismissal under Rule 12(b)(6) is appropriate where the complaint fails to contain "enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To be plausible, a claim must provide sufficient detail to supply a "reasonable inference that the defendant is liable for the alleged misconduct." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "While courts must accept well-pleaded factual allegations as true, purely conclusory statements are not entitled to this presumption." *WildEarth Guardians v. Extraction Oil & Gas, Inc.*, 457 F. Supp. 3d 936, 945 (D. Colo. 2020).

ARGUMENT

The Amended Complaint asserts three claims against the Governor, each of which fails to state a claim on its face. Furthermore, under the standard set out in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Executive Order may only be set aside if it lacks "a real or substantial relation to the protection of the public health," or "beyond all question" amounts to "a plain,

palpable invasion" of rights secured by the Constitution. *Id.* at 27, 31. Plaintiffs cannot clear this high bar, and their claims should be dismissed.

I. *Jacobson* Bars Plaintiffs' Claims Against the Governor

In 1905, in the context of a smallpox outbreak in Cambridge, Massachusetts, the United States Supreme Court established a framework for courts to use in evaluating challenges to the exercise of executive authority during a public health emergency. *Jacobson*, 197 U.S. at 11. In *Jacobson*, the Court rejected a claim that a state compulsory vaccination law imposed to control the epidemic violated federal constitutional rights, stating "the liberty secured by the constitution . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Id.* at 26. Instead, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. Ultimately, the Court concluded that the judiciary will only overturn public health laws 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." *Id.* at 27, 31. In arriving at this holding, the Supreme Court noted that "[s]mallpox being prevalent and increasing in Cambridge, the court would usurp the functions of another branch of government if it adjudged, as a matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case." *Id.* at 28.

Throughout the COVID-19 pandemic, courts have looked to *Jacobson* to evaluate challenges to the government's response. In *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), the Supreme Court denied a church's application for injunctive relief against California's public health orders. Concurring in the denial, Chief Justice Roberts

affirmed *Jacobson*'s holding that courts are ill-equipped to second-guess a state's response to public health emergencies:

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U.S. 11, 38, 25 S. Ct. 358, 49 L. Ed. 643 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427, 94 S. Ct. 700, 38 L. Ed.2d 618 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545, 105 S. Ct. 1005, 83 L.Ed.2d 1016 (1985).

Id. at 1613–14.

And in this district, multiple courts have relied on *Jacobson* and *South Bay* to reject challenges to the State's COVID-19 response. *See Lawrence v. Colorado*, 455 F. Supp. 3d 1063, 1070 (D. Colo. 2020) (declining to enjoin COVID-19 public health orders and holding *Jacobson* is "both binding and illustrative" (citing *Jacobson*, 197 U.S. at 31, 35)); *High Plains Harvest Church v. Polis*, No. 20-cv-01480-RM-MEH, 2020 WL 3263902, at *2 (D. Colo. June 16, 2020) (relying on *South Bay* to deny a house of worship's TRO request); *Andrew Wommack Ministries, Inc. v. Polis*, No. 20-cv-02922-CMA-KMT, 2020 WL 5810525, at *2 (D. Colo. Sept. 29, 2020) (denying motion for TRO), *motion for injunction pending appeal denied sub nom* No. 20-1336, 2020 WL 5983978, at *1 (10th Cir. Oct. 5, 2020) ("We conclude that plaintiff-appellant has not made a sufficient showing that it is likely to succeed on appeal as to merit the requested relief.").

Here, not only does the Executive Order not implicate fundamental rights—at least as applied to Plaintiffs—it is a rational, tailored response to the COVID-19 public health crisis. As

the Governor detailed in the Order, "widespread mask use is a low cost and highly effective way to reduce the spread of COVID-19 infections by as much as 65%." Ex. A at 1. The Order also cites a study from Goldman Sachs concluding that a nationwide mask mandate "could save the U.S. economy from taking a 5% hit to the Gross Domestic Product." *Id.* The Centers for Disease Control has concluded that "cloth face coverings are one of the most powerful weapons we have to slow and stop the spread of the virus."[3]

In Colorado, the General Assembly recognized that the Executive Branch is best positioned to evaluate responses to pandemics and impose restrictions to protect Coloradans. This is evident in its decision to vest the Executive Branch with the authority to make complex and fraught public health decisions. *See* §§ 25-1.5-102(1)(a)(I), (1)(b)(I)–(II), (1)(c), C.R.S. (2020) (setting forth CDPHE's powers and duties with respect to epidemic and communicable diseases). And through enactment of the Colorado Disaster Emergency Act, § 24-33.5-701, *et seq.*, C.R.S. (2020), the General Assembly expressly provided that "[t]he governor is responsible for meeting the dangers to the state and people presented by disasters," including an "epidemic" like COVID-19. §§ 24-33.5-704(1) & -703(3), C.R.S. (2020).

While those impacted by the Executive Branch's decisions may second-guess or attempt to substitute their own judgment because, in their opinion, the decisions are "perhaps, or possibly[,] not the best[,]" the Supreme Court held that it is not appropriate for courts to overrule

[3] Centers for Disease Control, Press Release, *CDC calls on Americans to wear masks to prevent COVID-19 spread*, July 14, 2020, available at https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html (hereinafter, "CDC Mask Release"). *See also Garling v. United States Environmental Protection Agency*, 849 F.3d 1289, 1297 n.4 (10th Cir. 2017) (recognizing that courts may take judicial notice of information from government websites).

a state's public health decisions on that basis. *Jacobson*, 197 U.S. at 30–35. This Court must therefore decline Plaintiffs' invitation to "usurp the functions of another branch of government," *id.* at 28, and instead join the myriad courts across our nation in deferring to the Executive Branch on issues of public health. *South Bay*, 140 S.Ct. at 1613–14; *Jacobson*, 197 U.S. at 30; *Lawrence*, 2020 WL 2737811 at *9.

II. Plaintiffs' Individual Claims Are Equally Flawed

Even absent the deferential bar set by *Jacobson*, Plaintiffs still fail to state a plausible constitutional claim against the Governor.

A. Wearing a Mask is Not Expressive Activity that Can Support a Compelled Speech Claim

First, Plaintiffs allege that the Executive Order is "compelled speech," Am. Compl. (Doc. 14) at 16 (Count I), but fail to plausibly allege that the Order compels any expression, let alone expression with which they disagree. To state a compelled speech claim, a plaintiff must establish "(1) speech; (2) to which the speaker objects; that is (3) compelled by some governmental action." *Semple v. Griswold*, 934 F.3d 1134, 1143 (10th Cir. 2019). The Amended Complaint fails the first prong of this simple test.

The First Amendment only protects conduct that is "inherently expressive." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). Unlike "pure speech" like 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) (*Cressman II*) (internal quotations omitted). To state a compelled speech claim with regard to 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 fails on both accounts. A reasonable viewer observing someone wearing 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. (Doc. 14) ¶ 65. Nor does wearing a mask imply that the user agrees masks are "necessary or effective." *Id.*

Instead, wearing a mask is another of the many requirements imposed by state, local, and federal officials to keep us and our communities safe and healthy. It 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 transmission of COVID-19 or the effectiveness of mask wearing. *See also Antietam Battlefield KOA v. Hogan*, -- F. Supp. 3d --, No. CCB-20-1130, 2020 WL 2556496, at *12 (D. Md. May 20, 2020) (rejecting First Amendment challenge to mask order, and observing that "especially in the context of COVID-19, wearing a face covering would be viewed as a means of preventing the spread of COVID-19, not as expressing any message").

At most, a reasonable viewer would think that a mask wearer, like a seatbelt wearer, is a law-abiding citizen who wishes to avoid the trouble of a penalty. Nothing more. The Amended Complaint does not plausibly allege that Plaintiffs object to this type of uncontroversial message, again assuming *any* message can be gleaned at all from wearing a mask.

Cressman is instructive. There, a plaintiff invoked the compelled speech doctrine to challenge the design of Oklahoma's license plate, specifically its image of a Native American shooting an arrow towards the sky. *Cressman v. Thompson*, 719 F.3d 1139, 1141 (10th Cir. 2013) (*Cressman I*). The District Court dismissed the complaint, but the Tenth Circuit reversed, concluding that the Complaint had plausibly alleged that the image "conveys a particularized message that others would likely understand." *Id.* at 1156.

But here, there is no image of which to complain. The Executive Order requires only a "face covering over [an individual's] nose and mouth." Ex. A at 2. There are no requirements for images or messages that must be included on the mask. In fact, there are nearly limitless messages an individual could *choose* to convey using their mask, from support for the Broncos or a chosen political candidate, to even—presumably—a message that masks are "ineffective at reducing the spread of COVID-19." *See* Am. Compl. (Doc. 14) ¶ 40. Far from requiring a specific image on a required piece of equipment, as in *Cressman*, the Executive Order allows individuals to use the required masks to convey whatever message they choose.

Because Plaintiffs cannot identify an objectively discernible inference that can be drawn from wearing a mask, Count I fails as a matter of law.

B. Because It Applies to All Conduct or Content, the Executive Order is Not a Content-Based Restriction

Plaintiffs next allege that the Executive Order is a "content-based restriction," and cannot survive strict scrutiny. Am. Compl. (Doc. 14) at 17 (Count IV). This, too, is mistaken.

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). This claim, like Count I,

fails because wearing a mask is not expressive activity subject to First Amendment scrutiny. *See* Part II.A.

And even if it were, Plaintiffs have failed to plausibly allege that enforcement of the Executive Order depends upon the "content" of the expressive activity. A content-based restriction is one that "require[s] 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) (internal quotations omitted). Because Plaintiffs allege that the restriction is "facially content-based," Am. Compl. ¶ 62, the issue is whether the Executive Order "on its face draws distinctions based on the message a speaker conveys." *Reed*, 576 U.S. at 163 (internal quotations omitted).

The Executive Order draws no such distinctions. The Executive Order requires "all individuals over ten (10) years old" to wear a face covering in public indoor spaces. Ex. A at 2. It does not ask enforcement authorities to examine the content of any expressive activity before enforcing the Executive Order, and it does not distinguish between any form of expressive conduct. Even Plaintiffs allege that the Executive Order "muzzle[s] speech" and "stifle[s] nonverbal expression," without regard to the speech or expression allegedly expressed. Thus, it is not a content-based restriction subject to strict scrutiny review under the First Amendment.[4]

[4] Even if it were, the Executive Order would easily satisfy any form of constitutional scrutiny based on the government's compelling interest in slowing the COVID-19 pandemic. *See, e.g.*, *Lawrence v. Colorado*, 455 F. Supp. 3d 1063, 1075 (D. Colo. 2020) (recognizing the State's "compelling interest in maintaining the health and safety of [its] residents" in the context of COVID-19).

And while the Executive Order contains many exemptions, including for "individuals who cannot medically tolerate a face covering," or "individuals who are hearing impaired or otherwise disabled," Ex. A at 3, none of those exemptions varies depending on the content of the expression. The Order exempts, for example, "individuals who are giving a speech for broadcast or an audience." *Id.* But critically, the content of that speech is irrelevant. It is the act of speaking for an audience, not the message spoken or delivered, that triggers the exemption. *Contra Reed*, 576 U.S. at 164 (declaring a town "sign code" content-based because "[t]he restrictions . . . that apply to any given sign . . . depend entirely on the communicative content of the sign").

Because enforcement of the Executive Order is not dependent on any form of expression or communicative content, Count IV fails to state a claim.

C. Wearing a Cloth Face-Covering Does Not Implicate Liberty Concerns Sufficient to Trigger the Fundamental Right to Refuse Healthcare Treatment

Finally, in Count VII, Plaintiffs allege that the Executive Order violates the right to refuse medical treatment. But the Executive Order imposes no medical treatment, and even if it did, it would be clearly permissible under *Jacobson*.

The Supreme Court has recognized a constitutional right to refuse medical treatment in certain, limited situations—specifically as to "the forced administration of life-sustaining medical treatment," *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990), and in the context of physician-assisted suicide, *Washington v. Glucksberg*, 521 U.S. 702, 706 (1997). But those cases are easily distinguishable from this one—mostly because wearing a mask is not medical treatment. As the CDC and others have made clear, the primary benefit of a mask is in the protection of others in the community, not oneself. CDC Mask Release ("There is increasing

evidence that cloth face coverings help prevent people who have COVID-19 from spreading the virus to others.").[5]

Even if it could be construed as medical treatment—and to be clear, it cannot—an individual's interest in not wearing a mask does not rise to the liberty interests recognized in *Cruzan*, *Glucksberg*, and cases recognizing this fundamental right. *Cf. Washington v. Harper*, 494 U.S. 210, 229 (1990) (holding that the "forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty"). And a slight burden on those individual interests is, in any event, more than justified by the State's compelling interest in public health and safety. In fact, *Jacobson* stands for the principle that during a pandemic, the government's compelling interest permits mandatory vaccination—let alone the minor imposition of a cloth face covering. 197 U.S. at 27–28.

For these reasons, Count VII should also be dismissed.

CONCLUSION

Governor Jared Polis respectfully requests that the Court dismiss counts I, IV, and VII of the Amended Complaint with prejudice.

[5] *See also* Colorado Department of Public Health, *Guidance for Wearing Masks*, *Science of Universal Mask-Wearing, What is the most recent science behind universal mask wearing?*, available at: https://covid19.colorado.gov/mask-guidance#science ("Masks appear to help keep the person wearing the mask from spreading COVID-19 to others by reducing the amount and distance infectious particles can spread through partial filtering of said particles.").

RESPECTFULLY SUBMITTED this 29th day of October, 2020.

PHILIP J. WEISER
Attorney General

s/ Peter G. Baumann

GRANT T. SULLIVAN*
Assistant Solicitor General
PETER G. BAUMANN*
Campaign Finance Enforcement Fellow
1300 Broadway, 10th Floor
Denver, CO 80203
Telephone: (720) 508-6349 / 6152
Email: grant.sullivan@coag.gov
peter.baumann@coag.gov
Attorneys for Governor Jared Polis
*Counsel of Record

CERTIFICATE OF SERVICE

I certify that I served the foregoing Motion to Dismiss upon all parties herein by e-filing with the CM/ECF system maintained by the court, this 29th day of October 2020, addressed as follows:

Mark Christopher Patlan
Patlan Law
3735 Dorshire Ln
Timnath, CO 80547

Catherine R. Ruhland
David Evan Hughes
Boulder County Attorney's Office
P.O. Box 471
Boulder County Courthouse
1325 Pearl Street
Boulder, CO 80306

Andrew David Ringel
Hall & Evans LLC-Denver
1001 Seventeenth St.
Suite 300
Denver, CO 80202

s/ Xan Serocki