IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-02192-RBJ

DONNA WALTER, and
MARK MILLIMAN,

Plaintiffs,

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, and
DARIN ATTEBERRY, in his official capacity as City Manager, City of Fort Collins,

Defendants.

MOTION TO DISMISS FROM DEFENDANT DARIN ATTEBERRY

Defendant Darin Atteberry, by and through his counsel, Andrew D. Ringel, Esq., of Hall & Evans, L.L.C. and John R. Duval, Esq., Deputy City Attorney, Fort Collins City Attorney's Office, pursuant to Fed. R. Civ. P. 12(b)(6), hereby respectfully submits this Motion to Dismiss, as follows:[1]

INTRODUCTION

Plaintiffs Donna Walters and Mark Milliman bring this 42 U.S.C. § 1983 action for declaratory and injunctive relief against Jared Polis, Governor of the State of Colorado, Jeffrey J. Zayach, Executive Director of Boulder County Public Health, and Darin

[1] Counsel for Mr. Atteberry conferred with counsel for the Plaintiffs prior to filing this Motion and submitted the letter required by this Court's Practice Standards on September 18, 2020. [ECF 18]. This Court authorized the filing of this Motion by Minute Order dated October 15, 2020. [ECF 21].

Atteberry, City Manager, City of Fort Collins (all in their official capacity), challenging the emergency public health regulations issued by the State of Colorado, Boulder County, and the City of Fort Collins (the "City") requiring wearing face coverings due to the COVID-19 pandemic violates their First, Fifth and Fourteenth Amendment constitutional rights. Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief raises the following claims against Mr. Atteberry: (1) Claim Three—alleging Fort Collins' Emergency Regulation 2020-18 (the "Emergency Regulation") 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 is entitled to dismissal of Plaintiffs' claims against him for multiple reasons. The Emergency Regulation challenged by the Plaintiffs represents a reasonable and appropriate exercise of the City's police power to prevent the spread of COVID-19 within its community. More than a century ago, the Supreme Court of the United States recognized the legitimacy and necessity of responses to public health emergencies. Under the applicable law, Plaintiffs' second-guessing of the validity and legitimacy of the public health policy choices made by the City, and their political, social, or medical disagreement with the public health measures put in place by the City, do not and cannot create any legitimate claim. This Court is required to defer to the reasonable judgments of the City's policymakers about the appropriate response to the COVID-19 pandemic. Evaluated against the applicable law, all Plaintiff's claims prove wanting.

FACTUAL BACKGROUND

1. The City is a home-rule City under Colorado law.

2. The Fort Collins City Code creates an Emergency Management system. [*See* Fort Collins City Code Chapter 2, Article IX, attached as Exh. A].

3. An Office of Emergency Management exists within the City organization. The City Manager is the Director of the Office of Emergency Management. [*See* City Code § 2-670, Exh. A].

4. Darin Atteberry is the City Manager of the City of Fort Collins and therefore also the Director of the Office of Emergency Management.

5. The City Manager, as the Director of the Office of Emergency Management, is authorized to declare a local emergency. [*See* City Code § 2-671(a)(1), Exh. A].

6. Any declaration of a local emergency by the City Manager as the Director of the Office of Emergency Management only lasts for seven (7) days at which time it must be consent to by the City Council in order to continue in effect. [*See* Art. IX, § 2-671(a)(1), Exh. A].

7. On March 20, 2020, the Fort Collins City Council (the "City Council") adopted Resolution 2020-030 consenting to the City Manager's March 13, 2020 declaration of local emergency due to life, health, safety and property risks from the COVID-19 pandemic, which declaration remains in effect as of the date of this Motion.

8. Pursuant to the City's declaration of a local emergency, the City Manager, as Director of the Office of Emergency Management and pursuant to City Code, promulgated various emergency rules and regulations reasonably related to the

protection of life, health, safety and property affected by the COVID-19 pandemic. Plaintiffs challenge one such emergency rule and regulation related to the requirement of face coverings, Fort Collins Emergency Regulation 2020-18, signed by the City Manager on May 28, 2020. [*See* ECF 14].

9. Emergency Regulation 2020-18 provides the following requirements for face coverings:

> 3. Definitions.
>
> a. Face Covering shall mean a uniform piece of material that securely covers a person's nose and mouth and remains affixed in place without the use of one's hands. Face Coverings include, but are not limited to, bandanas, medical masks, cloth masks and gaiters.
>
> 4. Face Coverings required. All persons shall wear Face Coverings when entering and while inside:
>
> a. Any enclosed area, including retail and commercial businesses or on-site service providers, to which the public is invited or in which workers, including volunteers, from more than one household are present;
>
> b. Any City of Fort Collins building or indoor City facility;
>
> c. Any public transportation, including City Tranfort buses and bus shelters;
>
> d. Any other public indoor place where persons are unable to maintain safe social distancing (six feet or more feet separation) from others not of their own household;
>
> e. Any outdoor seating or patio area of a place that falls within Section 4(a), unless the person is seated for dining or drinking as set forth in Section 6(g); or
>
> f. Where otherwise required by State or County order.

These requirements shall be in effect within the City regardless of any less restrictive County or State orders or guidance concerning face coverings, including the May 19, 2020, Amended Seventh Public Health Order from Larimer County.

5. Face Coverings for workers. All employers shall require, and make reasonable efforts to provide, Face Coverings to employees, volunteers and other workers in their places of employment that fall within the scope of Section 4 of this Regulation.

6. Exceptions. Nothing herein shall require the wearing of face coverings by the following persons or on the following properties:

a) Persons under the age of ten years or children within a childcare facility, however, childcare facilities must follow any applicable State or County guidance on face coverings;

b) Persons for whom a face covering would cause impairment due to an existing health condition and who present a doctor's note to that effect;

c) Persons working in a professional office or other workspace who do not have any face-to-face interactions with or share workspace with other persons;

d) If the person is undergoing a medical or dental procedure, or any other personal service, that requires access to the person's mouth or nose; and

e) Property owned or operated by the federal, state or county governments.

f) Persons who are customers of banks, financial institutions, and pawn shops, however, employees of these places must still wear face coverings;

g) Persons who are eating or drinking at a restaurant when seated for dining or drinking, however, facial coverings must be worn when not seated for eating or drinking, such as waiting for or picking up food or drinks, walking past other tables or going to restroom facilities; or

> h) Individuals participating in indoor gyms, indoor training services or other indoor recreational activities that are complying with applicable State Orders, Larimer County directives and a businesses' policy on when to wear a face covering within the business.

[*See* Emergency Regulation No. 2020-18, Exh. B].

10. On June 2, 2020, the City Council approved and adopted Emergency Regulation No. 2020-18 as an Ordinance of the City Council. [*See* Emergency Ordinance No. 08, 2020 of the Council of the City of Fort Collins Approving Emergency Rules and Regulations Enacted by the City Manager Pursuant to the Local COVID-19 Emergency, attached as Exh. C].

ARGUMENT

I. THE CITY OF FORT COLLINS' BROAD POLICE POWER ALLOWS IT TO ISSUE EMERGENCY REGULATIONS TO ADDRESS THE COVID-19 PANDEMNIC

Initially, the starting place for any analysis of Plaintiffs' claims is the Supreme Court of the United States' decision in ***Jacobson v. Massachusetts,*** 197 U.S. 11 (1905), providing it was within the police power for government to enact a mandatory vacation law to address the spread of smallpox. ***Id.*** at 24-39. ***Jacobson*** has been applied by the federal courts to support public health measures to fight COVID-19. In ***Lawrence v. Colorado,*** 20-cv-008622-DDD-SKC, 2020 U.S. Dist. LEXIS 92910 (D. Colo. Apr. 19, 2020), another judge of this Court described the applicable framework for evaluating the propriety of emergency restrictions enacted in response to COVID-19 under ***Jacobson***, as follows:

> States have broad powers to act during an emergency to secure public health and safety. ***Jacobson v. Massachusetts,*** 197 U.S. 11, 29, 25 S.Ct. 358, 49 L.Ed. 643 (1905). "[T]he rights of the individual in respect

> to his liberty may at times, under pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." ***Id.*** Those powers are not unfettered, however. A state may implement measures that curtail constitutional rights during an emergency only "so long as the measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" ***In re Abbott,*** 954 F.3d 772, 2020 WL 1685929, at *7 (5th Cir. 2020) (quoting ***Jacobson***, 197 U.S. at 31).
>
> Under this framework, courts may review whether a challenged emergency measure implemented by a state is arbitrary or unreasonable, and whether the measure "lack[s] basic exceptions for extreme cases.'" ***Id.***; *see also* ***Jacobson,*** 197 U.S. at 28, 38-39. But courts must take care not to "second-guess the wisdom or efficacy of the measures." ***Abbott,*** 954 F.3d 772, 2020 WL 1685929, at *7 (citing ***Jacobson,*** 197 U.S. at 28, 30). "It is no part of the function of a court . . . to determine [what is] likely to be the most effective for the protection of the public against disease." ***Jacobson***, 197 U.S. at 30., It is, rather, the role of the people's elected representatives to determine, in light of the available information, the best course to combat a public health threat, and courts must be careful not to usurp that role. ***Id.*** at 28, 30; *see also* ***Phillips v. City of N.Y.,*** 775 F.3d 538, 542 (2d Cir. 2015) (weighing scientific evidence as to societal costs and benefits of public health measures "is a determination for the legislature, not . . . individual objectors"); ***Hickox v. Christie,*** 205 F.Supp.3d 579, 592 (D.N.Y. 2016) (a public health official's "better-safe-than-sorry determination" is "entitled to deference, absent a 'reliable showing of error'").

Id. at * 11-12. This Court's analysis of the Plaintiffs' claims must be undertaken in the context of these basic legal principles.

II. FORT COLLINS' EMERGENCY REGULATION DOES NOT COMPEL SPEECH IN VIOLATION OF THE FIRST AMENDMENT

Plaintiffs' Third Claim for Relief alleges Emergency Regulation 2020-18 violates the First Amendment free speech protections against compelled speech. [ECF 14, at 17]. The Supreme Court has determined the First Amendment protects against compelled speech. "Compelling individuals to mouth support for views they find objectionable

violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned." ***Janus v. AFSCME, Council 31,*** 138 S.Ct. 2448, 2463 (2018). "We have sustained First Amendment challenges to allegedly compelled expression in two categories of cases: true 'compelled speech' cases, in which an individual is obligated personally to express a message he disagrees with, imposed by the government; and 'compelled-subsidy' cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity." ***Johnson v. Livestock Mktg., Ass'n,*** 544 U.S. 550, 557 (2005).

In the compelled speech context, the Supreme Court distinguishes between government action compelling speech and proscribing conduct concluding the former is protected by the First Amendment while the latter is not. In ***Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,*** 547 U.S. 47 (2006), the Court addressed the propriety of the Solomon Amendment which prohibited law schools, whose colleges and universities received federal funds, from differentiating in their recruiting access to the United States Military from any other campus recruiter. The law schools wanted to do so because they disputed the Military's policies concerning the service of homosexuals. ***Id.*** at 51. Initially, the Court rejected the notion the requirement to provide equal access and limited affirmative assistance to all recruiters including the Military was not compelled speech. The Court reasoned the "Solomon Amendment neither limits what law schools may say nor requires them to say anything." ***Id.*** at 60. Further, the Court concluded the required conduct was not "inherently expressive" and therefore was not protected by the

First Amendment. ***Id.*** at 65-55 (applying ***United States v. O'Brien,*** 391 U.S. 367 (1968), and ***Texas v. Johnson,*** 491 U.S. 397, 406 (1989)).

Here, the City's face covering requirement cannot be considered compelled-speech as a matter of law. Requiring citizens and residents of Fort Collins to wear masks under the specific circumstances required by the Emergency Regulation is conduct not speech. Moreover, characterizing a face covering requirement as "inherently expressive" and therefore akin to flag burning is inappropriate. No particular political viewpoint is created based on the fact of wearing face coverings publicly. Instead, "explanatory speech is necessary" to evaluate any mask wearer's political perspective. ***Rumsfeld,*** 547 U.S. at 66; *compare* ***Lighthouse Fellowship Church v. Northam,*** 2020 U.S. Dist. LEXIS 80289 at *32-33 (E.D. Va. May 1, 2020) (no expressive element in conduct of wanting to gather in groups larger than ten precluded by Virginia COVID-19 Order). In reality, a face covering is nothing more than a public health requirement for individuals to protect themselves and others from the global COVID-19 pandemic by decreasing the spread of droplets of saliva and nasal discharge. Extrinsic information concerning the reason why someone is wearing a mask is needed to give it any expressive or symbolic content.

Indeed, the City's face covering requirement does not proscribe any particular message on the face covering itself, and Plaintiffs are free to include any message at all on their masks including their political view the efficacy of Face Coverings to prevent the spread of COVID-19 has not been scientifically established. A face covering emblazoned with "Masks are Bogus" would be perfectly acceptable under the Emergency Regulation.

Further, the face covering requirement is justified by the City's substantial public health interest in stopping the spread of COVID-19 and therefore is constitutional even if it has some impact on Plaintiffs' freedom of expression. ***Johnson,*** 491 U.S. at 403; ***O'Brien,*** 391 U.S. at 376. Under the Supreme Court's analysis, "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." ***Id.*** at 376-77. Under ***Jacobson,*** the City possesses the authority to issue emergency regulations to address the COVID-19 pandemic and this Court cannot appropriately second-guess the basis of the City's decision requiring face coverings is both necessary and appropriate to thwart increased COVID-19 transmission. This Court must reject Plaintiffs' invitation to become a super-public health authority evaluating the merits of each and every public health decision to determine if governmental officials could have done something differently or even better.

III. FORT COLLINS' EMERGENCY REGULATION IS NOT CONTENT-BASED BUT RATHER CONTENT-NEUTRAL

Plaintiffs' Sixth Claim for Relief alleges the Emergency Regulation is a content-based restriction violative of the First Amendment. [ECF 14, at 18]. Applicable precedent holds otherwise. "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based." ***Turner Broad. Sys. v. FCC,*** 512 U.S. 622, 643 (1994). "By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed

are in most instances content-neutral." ***Id.*** Nothing about the face covering requirement in the Emergency Regulation is content-based. It requires everyone falling into the parameters of the Emergency Regulation to wear a face covering, does not specify any content at all, and requires conduct not speech. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." ***Ward v. Rock Against Racism,*** 491 U.S. 781, 791 (1989).

Federal courts addressing face covering requirements have concluded they are content-neutral. In ***Robinson v. Murphy,*** 2020 U.S. Dist. LEXIS 185070 (D.N.Y. Oct. 2, 2020, the District Court analyzed the State of New Jersey's mask requirement as a content-neutral regulation as follows:

> Plaintiffs' Freedom of Speech and Freedom of Assembly claims must be reviewed under intermediate scrutiny because the challenged regulations are content-neutral. *See* ***Nat'l Assoc. of Theatre Owners, et. al.,*** No. 20-8298, slip op. at 20. The Court finds that the challenged orders are content-neutral because they do not "distinguish favored speech from disfavored speech on the basis of ideas or views expressed." *See* ***Turner Broad. Sys., Inc. v. F.C.C.,*** 512 U.S. 622, 643 (1994). The indoor gatherings restrictions and mask requirements satisfy intermediate scrutiny review as they are narrowly tailored, serve a significant governmental interest, and allow ample alternative means of communication. *See* ***Startzell v. City of Phila.,*** 533 F.3d 183, 201 (3d. Cir. 2008).

Id. at *22-23. Similarly, other COVID-19 era restrictions have been found to be content-neutral. *Compare* ***McCarthy v. Cuomo,*** 2020 U.S. Dist. LEXIS 107195 at *11-12 (E.D.N.Y. June 18, 2020) (restriction on large public gatherings content-neutral in face of challenge by businesses involving alternative lifestyles or adult dancing); ***Talleywhacker, Inc. v. Cooper,*** 2020 U.S. Dist. LEXIS 99905 at *35-36 (E.D.N.C. June 8, 2020) (same

for adult dancing); ***Nat'l Ass'n of Theatre Owners v. Murphy,*** 2020 U.S. Dist. 148902 at *27-30 (D.N.J. Aug. 18, 2020) (closing indoor movie theater operations content-neutral); ***Givens v. Newsom,*** 2020 U.S. Dist. LEXIS 81760 at *12-19 (E.D. Cal. May 8, 2020) (stay-at-home order and elimination of protest permits at the California State Capitol content-neutral).

Because the City's face-covering requirement is content-neutral, it must be narrowly tailored to serve a significant government interest. The COVID-19 pandemic, the associated requirement to protect public health, and the scientific and medical basis for requiring face coverings easily meet this requirement. Plaintiffs' political argument concerning the efficacy of face masks is not sufficient to raise any actual issue to the contrary. The Centers for Disease Control's current public health guidance is to wear masks.[2] Under ***Lawrence,*** this fact alone ends the inquiry. *See* ***Lawrence,*** 2020 U.S. Dist. LEXIS 92910 at * 11-12.

IV. THE FUNDAMENTAL RIGHT TO REFUSE HEALTH CARE IS NOT IMPLICATED BY FORT COLLINS' EMERGENCY REGULATION

Plaintiffs' Ninth Claim for Relief contends the Emergency Regulation violates Plaintiffs' substantive due process fundamental right to refuse healthcare. [ECF 14, at 19].[3] The fundamental right to refuse healthcare announced in ***Cruzan v. Dir., Missouri***

[2] *See https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html* (last visited October 21, 2020) ("CDC recommends that people wear masks in public settings, like on public and mass transportation, at events and gatherings, and anywhere they will be around other people.").

[3] Plaintiffs ground their due process claim in both the Fifth and Fourteenth Amendments. However, the Due Process Clause of the Fifth Amendment applies only to the federal government and not a municipality like the City. ***Koessel v. Sublette County***

Dep't of Health, 497 U.S. 261 (1990), is grounded in the liberty interest individuals have in their bodily integrity. However, the Supreme Court has only recognized this substantive due process right to bodily integrity in narrow circumstances such as birth control, abortion, end-of-life decisions, and instances where individuals are subjected to dangerous or invasive medical procedures. ***Moore v. Guthrie,*** 438 U.S. 1036, 1040 (10th Cir. 2006).

Here, Plaintiffs' characterization of a face covering as a medical device is a misnomer. Simply because the face covering requirement stems from a public health rationale does not make it a medical device or a medical treatment. Indeed, masks requirements are not simply to protect the wearer, but also for the benefit of others like the vaccine in ***Jacobson***. Moreover, even assuming *arguendo* Plaintiffs' characterization is appropriate, federal courts who have addressed analogous issues have concluded basic public health requirements seeking to prevent the spread of infectious disease simply do not fall within the parameters of the liberty interest of refusing healthcare. *Compare* ***Casey v. Parker,*** 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***); ***Vincent v. Bysiewicz,*** 2020 U.S. Dist. LEXIS 191941 at *28-30 (D. Conn. Oct. 16, 2020) (rejecting right to privacy challenge to COVID-19 order requiring medical documentation for exemption from face coverings requirement). Finally, if Plaintiffs' interpretation of ***Cruzan*** applies, the entire rationale underlying

---

Sheriff's Dept., 717 F.3d 736, 738 n. 2 (10th Cir. 2013); ***Carrier v. Lundstedt,*** 2014 U.S. Dist. LEXIS 182569 at *12 (Dec. 22, 2014).

Jacobson evaporates. No court has narrowed or limited ***Jacobson*** based on the right to refuse healthcare. This Court should decline Plaintiffs' invitation to do so in this case.

V. INCORPORATION OF ARGUMENTS

To avoid as much duplication as possible and to meet this Court's admonition to make this Motion as short as possible [ECF 21], Mr. Atteberry, pursuant to Fed. R. Civ. P. 10(c), hereby incorporates by reference all applicable arguments and authorities raised in the motions to dismiss to be filed by the other Defendants.

CONCLUSION

In conclusion, for all the foregoing reasons, Defendant Darin Atteberry respectfully requests this Court dismiss all Plaintiffs' claims against him in their entirety with prejudice, and for all other and further relief as this Court deems just and appropriate.

Dated this 29th day of October, 2020.

Respectfully submitted,

s/ Andrew D. Ringel .
Andrew D. Ringel, Esq.
of Hall & Evans, L.L.C.
1001 17th Street, Suite 300
Denver, CO 80202
Phone: 303-628-3453
Fax: 303-628-3368
ringela@hallevans.com

and

John R. Duval, Esq.
Deputy City Attorney
Fort Collins City Attorney's Office
P.O. Box 580
Fort Collins, CO 80522
Phone: (970) 221-6520
jduval@fcgov.com

ATTORNEY FOR DEFENDANT DARIN ATTEBERRY

CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on the 29th day of October, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Mark C. Patlan, Esq.
mpatlan@patlanlw.com

Grant T. Sullivan, Esq.
grant.sullivan@coag.gov

Peter G. Baumann, Esq.
peter.baumann@coag.gov

David E. Hughes, Esq.
dhughes@bouldercounty.org

Catherine R. Ruhland, Esq.
cruhland@bouldercounty.org

s/Nicole Marion, Legal Assistant of
Hall & Evans, L.L.C.