

THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-2192-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;  
TOM GONZALEZ, in his official capacity as Director, Larimer County Dept. of Health &  
Environment; and  
DARIN ATTEBERRY, in his official capacity as City Manager, City of Fort Collins,

Defendants.

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**DEFENDANT JEFFREY J. ZAYACH'S MOTION TO DISMISS**

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Defendant Executive Director of Boulder County Public Health Jeffrey J. Zayach in his official capacity ("BCPH") respectfully requests that this Court dismiss Plaintiff's First Amended Complaint [ECF 14] ("Am. Compl."). In support, BCPH states as follows:

**CONFERRAL**

Counsel for BCPH conferred with Plaintiffs' counsel as required by this Court's practice standards. Plaintiffs oppose the Motion, and the Court has granted leave for BCPH to file.

**BACKGROUND**

The world is in the midst of a global health emergency occasioned by a novel coronavirus that causes a disease known as COVID-19. *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). More than 213,000 Americans have died from the disease.<sup>1</sup> “[N]early every jurisdiction around the country and world has recognized [COVID-19] as a significant danger if left to spread unchecked . . .” *Lawrence*, 2020 U.S. Dist. LEXIS 92910, at \*20.

On March 10, 2020, Governor Polis declared a state of emergency in response to COVID-19, the illness caused by the SARS-CoV-2 virus. (Am. Compl. ¶ 11.) Governor Polis and BCPH implemented face covering orders to reduce the spread of the virus. Specifically, pursuant to Executive Order D 2020 138, individuals in Colorado over ten years old are required to wear a face covering when entering or moving within any public indoor space. (See Am. Compl. ¶ 19.) Likewise, BCPH Order 2020-05<sup>2</sup> requires each person over the age of ten in Boulder County to wear a face covering outside of their home if they are not able to maintain social distancing. (*Id.* ¶ 20.) Plaintiff Mark Milliman is a Boulder County resident who claims to have suffered an unspecified injury through enforcement of the BCPH order. (*Id.* ¶ 1 and 18 ¶ 3).<sup>3</sup> Plaintiffs ask the Court to invalidate the State and BCPH face covering orders.

## ARGUMENT

- I. *The BCPH Order is constitutional under the Jacobson standard for evaluating government actions taken in response to a public health emergency.*

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<sup>1</sup> <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm>

<sup>2</sup> The Am. Compl. refers to the BCPH Order as Order 2020-04 rather than 2020-05.

<sup>3</sup> The Am. Compl. contains no allegation that BCPH injured Plaintiff Donna Walker and therefore Walker lacks standing with respect to BCPH. See *Valley Forge Christian Coll. v. Ams. United for the Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

BCPH has a statutory duty to investigate and control the causes of epidemic or communicable diseases. Colo. Rev. Stat. §§ 25-1-506(3)(b)(V); 25-1-506(3)(b)(VII); 25-1-514. The face covering order falls within BCPH's wide-ranging legal authority to address the current public health crisis.

States have general police powers to protect public health through quarantines and other measures. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). In rejecting a claim that a compulsory vaccination law violated the defendant's rights under the Fourteenth Amendment, the Supreme Court emphasized that "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. *Jacobson* established a framework under which public health orders are reviewed. The narrow rule permits judicial review only "if a statute purporting to have been enacted to protect the public health . . . has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 31.

For the past few months, courts around the country have applied the *Jacobson* framework to COVID-19 related restrictions to reject similar constitutional challenges. 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); see also *Andrew Wommack Ministries, Inc. v. Polis*, Civil Action No. 20-cv-02922-CMA-KMT, 2020 U.S. Dist. LEXIS 182503 (D. Colo. Sept. 29, 2020) *aff'd* No. 20-1336, 2020 U.S. App. LEXIS 32237 (10th Cir. Oct. 5, 2020).

Under this framework, courts may review whether a challenged emergency measure implemented by a state or local authority is arbitrary or unreasonable, and whether the measure lacks basic exceptions for extreme cases. *Lawrence*, 2020 U.S. Dist. LEXIS 92910, at \*11; *see also Jacobson*, 197 U.S. at 28, 38-39. But courts should take care not to “second-guess the wisdom or efficacy of the measures.” *In re Abbott*, 954 F.3d 772, 785 (5th Cir. 2020) (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 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”).

The BCPH Order meets the constitutional standard in *Jacobson* 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. *See Tigges v. Northam*, Civil Action No. 3:20-cv-410, 2020 U.S. Dist. LEXIS 131592, at \*18 (E.D. Va. July 21, 2020) (requirements to wear face coverings are valid because they relate to an effort to slow rate of infection of COVID-19 and meet the *Jacobson* test). While Plaintiffs’ Am. Compl. 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. Thus, the Court should dismiss Milliman's claims as provided under *Jacobson*.

II. *The BCPH Order does not unconstitutionally infringe on Milliman's right to free speech.*

Because the BCPH Order meets the *Jacobson* test, the Court need not delve into the specific constitutional issues raised in the Am. Compl. Moreover, the Am. Compl. fails to state a claim under any constitutional theory, including free speech. Milliman alleges the BCPH Order violates his free speech right as either a content-based restriction on speech or unconstitutionally compelled speech. However, a face covering requirement does not present communicative elements sufficient to establish a First Amendment claim based on freedom of speech. The First Amendment protects only inherently expressive conduct. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). Unlike spoken or written words, symbolic conduct is only protected if it is sufficiently imbued with elements of communication. *Cressman v. Thompson*, 798 F.3d 938, 951-52 (10th Cir. 2015).

Should Milliman wear a mask where the BCPH Order requires it, such compliance with the law conveys no particular message. Similarly, patrons who wear a shirt and shoes in a restaurant are not conveying a message by following public health laws for eating establishments. Likewise, those who go topless in public are not necessarily conveying a message. *See, e.g. Free the Nipple v. City of Fort Collins*, 216 F. Supp. 3d 1258, 1263 (D. Colo. 2016) *aff'd*. 916 F.3d 792 (10th Cir. 2019) (“[A] persuasive amount of case law suggests that public nudity itself is not inherently expressive of any particular message.”). Thus, Milliman's professed desire to expose his face in public places fails to plead facts supporting any speech-based claim. *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) (rejecting a similar claim because “wearing a face covering would be viewed as a means of preventing the spread of COVID-19, not as expressing any message”).

Even assuming the BCPH Order regulates speech, the facts alleged in the Am. Compl. show that the BCPH Order is not a content-based restriction. Plaintiffs allege that facial coverings limit facial expressions that constitute speech, but the Am. Compl. fails to identify any portion of the BCPH Order that differentiates between the content of those expressions. See *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). In other words, the BCPH Order, with certain content-neutral exceptions, requires that *everyone* wear facial covering, which means everyone’s speech, if limited at all, is limited regardless of content. Thus, no fact alleged in the Am. Compl. shows a basis for a facial challenge to the BCPH Order as content based.

Finally, even assuming the applicability of the First Amendment’s strict scrutiny test to these circumstances,<sup>4</sup> the BCPH order does not violate Milliman’s right to free speech because it serves compelling state interests, unrelated to the suppression of ideas. Specifically, slowing the spread of COVID-19 is a compelling governmental interest. *Antietam Battlefield KOA*, 2020 U.S. Dist. LEXIS 88883, at \*33; *Lawrence*, 2020 U.S. Dist. LEXIS 92910, at \*23 (face covering requirement valid because the “State and City have a compelling interest in maintaining the health and safety of their

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<sup>4</sup> Plaintiffs do not claim that the BCPH Order would be invalid under a rational basis analysis.

residents”). Thus, the Court should dismiss Milliman’s free speech claims against BCPH.

*III. The BCPH Order does not infringe on Milliman’s constitutional right to refuse medical treatment.*

The BCPH Order does not provide or purport to provide treatment for COVID-19 or any other medical condition. Instead, the stated goal of the BCPH Order is “to control and reduce the spread of COVID-19, so as to maintain consistent health care capacity in Boulder County to adequately treat patients suffering from the disease . . .” (BCPH Order at 1 <https://assets.bouldercounty.org/wp-content/uploads/2020/07/2020-05-amended-mask-order-0724.pdf>). Further, BCPH does not leave Milliman without a choice regarding whether to accept “treatment” (wear a face covering). He need not wear a face covering if he remains in his residence or socially distanced outdoors. (*Id.* at 4). Thus, the right to refuse medical treatment is inapplicable because the facts as alleged do not involve medical treatment, and, even if they do, such treatment is not involuntary.

Even assuming wearing a face covering is involuntary medical treatment, it is not the type of invasive, life-altering treatment that raises the type of liberty concerns at issue in *Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261 (1990). Moreover, courts have upheld far more invasive treatment when it is administered for the purpose of preventing the spread of contagious disease. *Jacobson*, 197 U.S. at 24-30 (upholding compulsory vaccination law but recognizing a liberty interest in personal medical decisions); *Reynolds v. McNichols*, 488 F.2d 1378, 1382-83 (10th Cir. 1973). The facts alleged in the Am. Compl. show that BCPH implemented the minimally invasive face

covering requirement to prevent the spread of COVID-19. Thus, Milliman failed to state a claim based on involuntary medical treatment.

### **CONCLUSION**

For the foregoing reasons, the Court should dismiss all claims against BCPH with prejudice.

Dated this 29th day of October 2020.

Respectfully submitted,

BOULDER COUNTY ATTORNEY

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