IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **1:20-cv-2192**

DONNA WALTER, and
MARK MILLIMAN,

Plaintiff(s),

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,

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

Defendant(s).

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(6)

Plaintiffs, Donna Walter and Mark Milliman ("Plaintiffs") respectfully file this response in opposition to the Motions by Colorado Governor Jared Polis ("Colorado"), Boulder County Public Health Executive Director Jeffrey Zayach ("Boulder"), and Fort Collins City Manager Darin Atteberry ("Fort Collins") to dismiss the Amended Complaint, pursuant to Fed. R. Civ. P. 12(b)(6) ("Colorado MTD," ECF 23; "Boulder MTD", ECF 25; "Fort Collins MTD", ECF 24).[1]

[1] Colorado's Motion to Dismiss is cited herein as "Colorado MTD at _". Boulder's Motion to Dismiss is cited herein as "Boulder MTD at _". Fort Collins' Motion to Dismiss is cited herein as "Fort Collins MTD at _".

PRELIMINARY STATEMENT

The defendant's motions to dismiss are deeply flawed because they rely on a deferential interpretation of *Jacobson v. Massachusetts* that has been superseded by *Roman Catholic Diocese of Brooklyn v. Cuomo*. *Cuomo* instructs courts to protect constitutional liberties. Defendants likewise misconstrue the rules regarding dismissal under 12(b)(6) and seek to curtail the plaintiffs' rights to adjudication of their claims.

ARGUMENT

I. STANDARD OF REVIEW

A motion to dismiss brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the sufficiency of the complaint against the legal standard set forth in Rule 8: "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Rule 12(b)(6) motion tests the sufficiency of the allegations within the complaint after taking those allegations as true. *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994). The Court may consider the complaint, as well as: (i) documents that the complaint incorporates by reference, see *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 322 (2007); (ii) "documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity," *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002); and (iii) "matters of which a court may take judicial notice," *Tellabs* at 322. For purposes of resolving a Rule 12(b)(6) motion, the court must view allegations of the complaint in the light most favorable to the plaintiff. *Smith v. U.S.*, 561 F.3d 1090, 1098 (10th Cir. 2009).

A complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations. *Bell Atlantic Corp v. Twombly*, 550 US 544, 555 (2007). Rule 8(a)(2) requires only

"a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema N.A.*, 122 S. Ct. 992, 998 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). The Court should not dismiss a case on the pleadings alone "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." *Conley at* 45 (emphasis added); *Hishon v. King Spalding*, 467 U.S. 69, 73 (1984) ("[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.").

To survive a 12(b)(6) motion, the complaint must simply "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting, *Twombly* at 570). All that is required is that plaintiff present "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" to support the claim and provide "plausible" grounds for recovery. *Twombly*, 550 U.S. at 556. Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. *Twombly* at 563. In order to survive a motion to dismiss, a plaintiff need only "nudge his claims across the line from conceivable to plausible"'. *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir.2007) (quoting *Twombly*, 550 U.S.. at 544).

Dismissal is highly disfavored and only appropriate "where it is certain that no relief could be granted under any set of facts that could be proved." *H.J. Inc. v. Northwestern Bell Tel. Co*., 492 U.S. 229, 249–50 (1989) (emphasis added). A well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely". *Scheuer v. Rhodes*, 416 U.S.

232, 236 (1974). Rule 8(a)(2) is a simplified notice pleading standard that "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims". *Conley*, at 47–48.

As set forth below, Plaintiffs state cognizable claims and have met this standard of review, thus warranting denial of defendants' motions in their entirety.

II. NORMAL CONSTITUTIONAL STANDARDS APPLY IN JUDICIAL REVIEW OF PUBLIC HEALTH ORDERS EVEN IN A PANDEMIC

Even in a pandemic, the Constitution cannot be put away and forgotten. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 2020 WL 6948354, at 3 (U.S. 2020). In *Cuomo*, the court held that a New York public health order infringed on First Amendment free exercise and could not survive strict scrutiny because it was not narrowly tailored. *Id.* at 2-4. Government is not free to disregard the First Amendment in times of crisis. *Id.*, at 4 (Gorsuch, J. concurring). The *Jacobson* decision "hardly supports cutting the Constitution loose during a pandemic". *See, Jacobson v. Massachusetts*, 197 U.S. 11 (1905). *Jacobson* is no precedent for departing from normal legal rules. *Jacobson* applies normal legal scrutiny for the right at issue. While *Jacobson* predates modern tiers of scrutiny, the court essentially applied rational basis review. *Cuomo*, at 5 (Gorsuch, J. concurring). *Jacobson* does not purport "to address, let alone approve … serious and long-lasting intrusions into settled constitutional rights." *Id.* at 6 (same).

The Governor is mistaken that *Jacobson* bars plaintiffs' claims against the Governor. *See*, Colorado MTD at 4. The Governor mistakenly relies on *South Bay United Pentecostal Church v. Newsom* and related cases for the proposition that *Jacobson* restricts judicial review of public health orders. *Id.* at 4-5; *See*, *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). The Governor erroneously contends that *South Bay* mandates that courts to look to *Jacobson* for the standard of review for public health orders. Colorado MTD at 4. The

Governor insists, "This Court must therefore decline Plaintiffs' invitation to 'usurp the functions of another branch of government'". *Id.* at 8. However, *Cuomo* makes clear that normal constitutional standards apply to judicial review of public health orders. *Jacobson* is "no towering authority that overshadows the Constitution during a pandemic". The court "may not shelter in place when the Constitution is under attack". *Cuomo*, at 6 (Gorsuch, J. concurring). *Jacobson* stands as no bar to claims against the Governor.

Boulder mistakenly relies on *Jacobson* to apply the deferential rational basis test as the required standard of review for public health orders. Boulder MTD at 3-4. Boulder cites *Lawrence v. Colorado* and related cases for the proposition that *Jacobson* restricts judicial review of public health orders. *Id.*: *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)). Boulder insists that, "The Court is obligated under *Jacobson* to give the elected branches deference on public health matters". Boulder MTD at 4. However, *Cuomo* makes clear that normal constitutional standards apply in judicial review of public health orders. Thus, Boulder's reliance on *Lawrence* and *Jacobson* for the standard of review of public health orders is misplaced.

Fort Collins mistakenly relies on *Jacobson* and related cases as requiring over deferential review of public health orders. Fort Collins MTD at 6-7. Fort Collins cites to *Lawrence v. Colorado* and related cases to maintain that *Jacobson* requires deference to the legislature and limits judicial review of public health orders. *Id.* Fort Collins demands that, "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." *Id.* at 10. The plaintiffs invite the court to follow *Cuomo*

and apply normal constitutional standards of judicial review to public health orders in the instant case.

The court should reject Fort Collins invitation to abdicate its duty to protect constitutional liberties.[2] Fort Collins relies on *Jacobson* to insist, "This Court cannot appropriately second-guess the basis of the City's decision requiring face coverings is both necessary and appropriate". Fort Collins MTD at 10. However, while *Cuomo* acknowledges "this Court are not public health experts, and … should respect the judgment of those with special expertise and responsibility in this area", it instructs that "even in a pandemic, the Constitution cannot be put away and forgotten". *Cuomo*, at 3 (per curiam). Judicial deference "to executive orders in the pandemic's early stages based on the newness of the emergency and how little was known then about the disease … has expired". *Cuomo*, at 5 (Gorsuch, J. concurring).

The usual constitutional standards apply during the pandemic. The *Cuomo* framework instructs the court to: (i) consider the right asserted, (ii) determine the legal standard of review, (iii) consider the nature of the restriction, and (iv) apply the standard of review. *Cuomo*, at 5-6 (Gorsuch, J. concurring). In *Jacobson*, Mr. Jacobson asserted a substantive due process right to bodily integrity against a state vaccination law. A substantive due process right not involving suspect classifications or fundamental rights is subject to rational basis review.[3] The restriction at issue provided opt-outs and exemptions. The *Jacobson* court applied rational basis review and the statute "easily survived rational basis review, and might even have survived strict scrutiny, given the opt-outs available to certain objectors." *Id.* The *Cuomo* decision instructs courts to apply the usual constitutional standards to public health orders.

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[2] *See*, *Cuomo*, at 6 ("Many lower courts quite understandably read [*South Bay* and *Jacobson*] as inviting them to slacken their enforcement of constitutional liberties") (Gorsuch, J. concurring).
[3] *Jacobson* predates modern substantive due process, including an individual's right to refuse medical treatment. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

II. DEFENDANTS' MASK ORDERS CANNOT SURVIVE STRICT SCRUTINY

Laws subject to strict scrutiny must be narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, supra, at 766-767. If a less restrictive alternative would serve the government's purpose, the government must use that alternative. *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). Laws that are overinclusive and regulate more than is necessary are not narrowly tailored. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 121 (1991). Laws that are underinclusive and regulate less than is necessary are not narrowly tailored. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). Underinclusiveness raises doubts about whether the government is in fact pursuing the interest it invokes. *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 448 (2015). Underinclusiveness can reveal that a law does not actually advance a compelling interest. Id. at 449.

The defendants' mask orders are ineffective against the spread of COVID-19. Common sense and reason tell us that forcing healthy uninfected individuals to wear face coverings is ineffective at reducing the spread of COVID-19 because these individuals are not infected and pose no risk of spreading the virus. Forcing healthy asymptomatic individuals to wear face coverings is ineffective at reducing the spread of COVID-19 because a) they pose negligible risk since the risk of asymptomatic spread is negligible[4] and b) the required face coverings are ineffective against asymptomatic spread because they poorly filter the aerosols and nanoparticles

[4] Asymptomatic people rarely spread COVID-19, according to WHO epidemiologist Maria Van Kerkhove. *Jacqueline Howard, Coronavirus spread by asymptomatic people 'appears to be rare,' WHO official says*, CNN, June 9, 2020, available at https://cnn.it/3jA2VN6. Ms. Van Kerkhove is the WHO's technical lead for coronavirus response. Id. Real-world data demonstrates that asymptomatic spread is very rare, she maintained, after her comments triggered a backlash. *Sarah Boseley, WHO expert backtracks after saying asymptomatic transmission 'very rare'*, The Guardian, June 9, 2020, available at https://bit.ly/3lIWf0Q.

associated with asymptomatic spread theory.[5] Requiring symptomatic individuals to wear face coverings may be effective at reducing the spread of COVID-19 because a) they pose greater risk since they suffer symptoms of a respiratory virus and b) the masks better filter the respiratory droplets associated with symptomatic spread.

The defendants' mask orders cannot survive strict scrutiny because they are not necessary to a compelling government interest and there are less restrictive means available. Further, these orders are not narrowly tailored because they are both overinclusive and underinclusive.

The defendants' mask orders are not necessary to a compelling government interest because they do not actually advance a compelling interest and there are less restrictive means available. The state's interest in stemming the epidemic is not advanced by forcing widespread use of ineffective masks to address negligible risks. A less restrictive and more effective means might require masks only for symptomatic individuals.

The defendants' mask orders are overinclusive because they sweep in more than required by sweeping in both healthy and symptomatic individuals without regard for risk and effectiveness. The vast majority are healthy or asymptomatic and pose a negligible risk that face coverings are ineffective against. These orders are overinclusive because forcing healthy individuals to wear ineffective masks is not required for the interest invoked.

The defendants' mask orders are underinclusive because they sweep in less than required. These orders force healthy individuals to wear face coverings to reduce asymptomatic spread but require a solution that is ineffective for the interest invoked and does not advance the interest of

[5] 31. Cloth masks are ineffective for asymptomatic spread because they poorly filter aerosolized nanoparticles. They may be more effective for symptomatic individuals because they better filter larger respiratory droplets. *Rapid Expert Consultation on the Effectiveness of Fabric Masks*, at 4, 5 (emphasis added). 32. There is little "information regarding whether masks offer any protection for a contact exposed to a symptomatic or asymptomatic patient," according to the CDC. *Public Health Guidance for Community-Related Exposure*, Centers for Disease Control, July 31, 2020, available at https://tinyurl.com/t7fnvba.

stemming the epidemic. These orders are underinclusive, are not narrowly tailored, and do not serve a compelling government interest.

III. PLAINTIFFS STATE A PLAUSIBLE CLAIM THAT MASK ORDERS VIOLATE FREE SPEECH PROTECTIONS AGAINST COMPELLED SPEECH

A compelled speech claim requires that the plaintiff 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 First Amendment protects conduct that is "inherently expressive." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). Symbolic speech or conduct must be "sufficiently imbued with elements of communication" *Cressman v. Thompson*, 798 F.3d 938, 951–52 (10th Cir. 2015) (*Cressman II*) (internal quotations omitted). A compelled speech claim with regard to symbolic speech requires the plaintiff to 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.

A complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations. *Twombly*, at 555. The complaint need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz*, at 998. The Court should not dismiss a case on the pleadings alone "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." *Conley,* at 45 (emphasis added). In order to survive a motion to dismiss, a plaintiff need only "nudge his claims across the line from conceivable to plausible"'. *Ridge at Red Hawk, supra,* at 1177.

Plaintiffs state a plausible claim that mask orders violate free speech protections against compelled speech. There is no doubt that Plaintiffs' Amended Complaint satisfies *Semple*'s

second and third prongs: (ii) the speaker's objection and (iii) government compulsion. The Complaint alleges facts sufficient to satisfy the first prong (speech) that gives the defendants fair notice of what the claim is and the grounds on which it arrests. The Amended Complaint alleges facts regarding Governor Polis' harsh and insulting public statements regarding masks ("selfish bastards", etc.). This is sufficient for a reasonable person to infer that mask wearing carries an "objectively identifiable message" – a harsh political meaning. *But See*, Governor MTD at 7-8; *See*, *Cressman*, at 961. Likewise, it can hardly be argued that state ordered masks don't carry the express message that masks are both necessary and effective. A reasonable person can hardly draw an inference otherwise. Otherwise, why would the state mandate them? Thus, the Complaint alleges facts sufficient to only "nudge his claims across the line from conceivable to plausible"'. *Ridge at Red Hawk, supra,* at 1177.

IV. PLAINTIFFS STATE A PLAUSIBLE CLAIM THAT MASK ORDERS ARE CONTENT-BASED RESTRICTIONS THAT VIOLATE FREE SPEECH PROTECTIONS

Government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). 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). A speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints. *Reed v. Town of Gilbert, Arizona*, 576 U.S. 155, 169 (2015). Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute. *Reed,* at 167. Content-based speech regulation is presumptively unconstitutional and may be justified only if narrowly tailored to serve compelling state interests. *Simon & Schuster*, at 115, 118.

The Governor's argument that mask orders aren't content-based fails because the Governor simply misapplies *Reed*. The Governor argues that a) mask wearing is not expressive activity and b) mask orders aren't content based. Governor MTD at 10. As discussed above, Plaintiffs allege sufficient facts that mask wearing is expressive activity. The Governor argues that mask orders are not content based because to be so the regulation must "on its face [draw] distinctions based on the message a speaker conveys." *Reed*, 576 U.S. at 163 (internal quotations omitted). The Governor contends that muzzling nonverbal expression is not content based because it is does so without drawing distinctions on the speech or expression expressed. Governor MTD at 10. This is *reductio ad absurdum*. These orders draw distinctions by distinguishing between verbal and nonverbal expression. Put differently, these orders muzzle smiles. They muzzle frowns. These expressive acts are subject to the distinctions drawn by these orders. Thus, these orders are content based restrictions subject to strict scrutiny.

Plaintiffs state a plausible claim that defendants' mask orders are content-based restrictions that violate free speech protections. Plaintiffs have alleged that the defendants' mask orders literally muzzle speech and facial expression by covering individuals' noses and mouths. They have alleged that restrictions stifle protected nonverbal expression like smiling, frowning, and other important human communication. Plaintiffs have alleged that mask orders punish this protected expression. Thus, the Complaint alleges facts sufficient to only "nudge his claims across the line from conceivable to plausible". *Ridge at Red Hawk, supra,* at 1177.

V. PLAINTIFFS STATE A PLAUSIBLE CLAIM THAT MASK ORDERS VIOLATE THE FUNDAMENTAL RIGHT TO REFUSE MEDICAL TREATMENT

Fifth and Fourteenth Amendment Due Process protects an individual's right to refuse unwanted medical treatment. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 278 (1990). Id. at 278. A substantial infringement on the right to refuse medical treatment is subject

to strict scrutiny and must be narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 766-767 (Souter, J. concurring) (1997).

Plaintiffs state a plausible claim that mask orders violate the fundamental right to refuse medical treatment. The Food, Drug, and Cosmetic Act ("FDCA") defines a medical "device" as "an instrument, apparatus, implement, machine, contrivance … or other similar or related article, including any component, part, or accessory, which is … intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals". 21 USC § 321(h), Plaintiffs allege that the defendants order the use of face coverings to prevent disease. Therefore, masks are medical devices as a matter of law. Laws forcing individuals to wear medical devices to prevent disease are laws that force medical treatment. Plaintiffs allege that these devices are potentially harmful because they restrict breathing and increase the likelihood of flu-like illness. Therefore, these laws substantially infringe on the right to refuse medical treatment by mandating treatment that is unsafe and ineffective. Thus, the Complaint alleges facts sufficient to only "nudge his claims across the line from conceivable to plausible". *Ridge at Red Hawk, supra,* at 1177.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court deny defendants' Motions to Dismiss the Complaint in their entirety.

RESPECTFULLY SUBMITTED on this 11th day of December, 2020.

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