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 REPLY IN SUPPORT OF MOTION TO DISMISS

Like 37 other states and the District of Columbia, Colorado requires most individuals to wear a cloth face covering in public spaces. While some federal constitutional challenges have been raised as to those orders, such challenges have been uniformly rejected. *See, e.g.*, *Stewart v. Justice*, No. 3:20-0611, 2020 WL 6937725, at *5–7 (S.D.W.V. Nov. 24, 2020); *Minn. Voters Alliance v. Walz*, No. 20-CV-1688 (PJS/ECW), 2020 WL 5869425, at *11 (D. Minn. Oct. 2. 2020); *Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214, 237 (D. Md. 2020). Relying on a solo concurrence at the U.S. Supreme Court, not to mention an outdated legal standard,[1] Plaintiffs' Opposition ("Pls. Opp.") (Doc. 30), hopes this Court will hold differently. But the minimal authority marshalled for that extraordinary request is insufficient to justify such a departure. Plaintiffs' claims should be dismissed for failure to state a claim.

I. *Jacobson* remains good law notwithstanding *Roman Catholic Diocese*.

In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Supreme Court upheld a mandatory vaccination program and cautioned against second-guessing executive branch efforts to respond

[1] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007) ("*Conley*'s 'no set of facts' language has been questioned, criticized, and explained away long enough. . . . [A]fter puzzling the profession for 50 years, this famous observation has earned its retirement.").

to a public health crisis. The per curiam majority opinion in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), did not mention, much less overrule, that case. *See Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989) (holding that where a Supreme Court decision has direct application to a pending case, lower courts should follow it and leave to the Supreme Court "the prerogative of overruling its own decisions").

One Justice, Justice Gorsuch, questioned *Jacobson*'s continued applicability in a concurrence, but he wrote only for himself. In the months since *Roman Catholic Diocese* was decided, Courts have continued to invoke *Jacobson* for at least those claims that do not involve federal Free Exercise challenges. *See, e.g.*, *Heights Apartments, LLC v. Walz*, No. 20-CV-2051 (NEB/BRT), 2020 WL 7828818, at *10–11 (D. Minn. Dec. 31, 2020); *M. Rae, Inc. v. Wolf*, 1:20-CV-2366, 2020 WL 7642596, at *6 (M.D. Pa. Dec. 23, 2020); *Parker v. Wolf*, No. 20-cv-1601, 2020 WL 7295831, at *15 n.20 (M.D. Pa. Dec. 11, 2020); *but see Lawrence v. Polis*, 1:20-cv-00862-DDD-SKC, 2020 WL 7348210, at *4–6 (D. Colo. Dec. 4, 2020) ("[A]lthough the normal tiers of constitutional scrutiny are not suspended during an emergency, most emergency measures can pass a heightened level of scrutiny.").

At most, *Roman Catholic Diocese* holds that public health orders that "single out houses of worship for especially harsh treatment" are subject to strict scrutiny, especially where "statements made in connection with the challenged rules can be viewed as targeting" a religious community. 141 S. Ct. at 66. This holding does not apply to Plaintiffs' claims, which remain subject to *Jacobson*'s deferential framework.

II. Even absent *Jacobson*, the Executive Order does not trigger strict scrutiny.

A. Well-settled First Amendment principles foreclose the application of strict scrutiny to Plaintiffs' claims.

The First Amendment only applies to conduct that is "inherently expressive." *Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47, 66 (2006) ("*FAIR*"). In *FAIR*, plaintiffs challenged a rule requiring colleges and universities to provide military recruiters the same access to students as offered to other potential employers. *Id.* at 52. Before the rule, some institutions had "'expressed' their disagreement with the military by treating military recruiters differently from other recruiters." *Id.* at 66. But the Court held that this conduct was only expressive because the institutions "accompanied their conduct with speech explaining it." *Id.* Absent that explanation, someone observing the effects of the conduct would have "no way of knowing" that the institution was expressing disapproval of the military. *Id.*

So too here. Someone observing an unmasked individual has no way of knowing whether they are expressing a message, forgot a face covering, or have a medical exemption. Whatever expression may exist in wearing or not wearing a mask is not so "overwhelmingly apparent," *id.*, that it may establish a compelled speech claim.

Even if the Executive Order could be construed as implicating the First Amendment—which it cannot—it is a content-neutral regulation. Plaintiffs' Opposition makes this point clear. The Executive Order applies to wearers who are smiling, as well as those who are frowning. Pls.' Opp. at 11. It applies to nonverbal expressions of displeasure to a spoken message, as well as nonverbal expressions of excitement to the same. Content-neutral restrictions must be "narrowly tailored to serve a significant government interest, and . . . leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

"Stemming the spread of COVID-19 is unquestionably a compelling interest," *Roman Catholic Diocese*, 141 S. Ct. at 67, and Plaintiffs have significant channels through which to broadcast their beliefs about the efficacy of masks, including Twitter and other online platforms.[2]

B. The Executive Order does not implicate fundamental rights.

In enabling governmental authorities to mandate vaccinations during a public health emergency, *Jacobson* forecloses Plaintiffs' substantive due process claims.

Regardless, establishing a fundamental right to refuse a cloth face covering would be a significant expansion of substantive due process, unmoored from the contexts in which the right to refuse medical treatment has previously been recognized.[3] *See Washington v. Glucksberg*, 521 U.S. 702, 706 (1997) (physician-assisted suicide); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990) ("the forced administration of life-sustaining medical treatment"). "The Supreme Court has cautioned many times" against such expansion. *Abdi v. Wray*, 942 F.3d 1019, 1029 (10th Cir. 2019); *Browder v. City of Albuquerque*, 787 F.3d 1076, 1078 (10th Cir. 2015) ("[T]he [Supreme] Court has warned that the [Substantive Due Process] doctrine should be applied and expanded sparingly."). Here, it cannot be said that requiring individuals to wear cloth face coverings implicates so great a right or liberty interest that it should be placed "outside the arena of public debate and legislative action." *Washington*, 521 U.S. at 720.

The Executive Order neither triggers the First Amendment, nor implicates a fundamental right. It is subject to rational basis review, and it plainly satisfies that standard.

---

[2] *See, e.g.*, @VoteDonnaWalter and @Milliman.

[3] Plaintiffs argue that surgical masks are a "medical device" under the Food, Drug, and Cosmetic Act, but so too are thousands of common items, including scales, 21 CFR § 880.2700, and even ice bags, *id.* § 880.6050.

III. The Mask Order satisfies strict scrutiny

Even if the Executive Order triggered strict scrutiny, it should still survive. "Stemming the spread of COVID-19 is unquestionably a compelling interest[.]" *Roman Catholic Diocese*, 141 S. Ct. at 67. And the Executive Order is narrowly tailored to apply only in public indoor spaces where spread is particularly likely. Plaintiffs argue that a less restrictive alternative would be to "require masks only for symptomatic individuals," Pls.' Opp. at 8, but the science does not support such a policy. The Centers for Disease Control and Prevention estimates that over half of all infections are caused by asymptomatic or presymptomatic individuals.[4] The Executive Order is necessary to prevent such spread.

CONCLUSION

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

Dated: January 11, 2021

PHILIP J. WEISER
Attorney General

/s Peter G. Baumann

Grant T. Sullivan, Assistant Solicitor General
Peter G. Baumann, Campaign Fin. Enforcement Fellow
1300 Broadway, Denver, CO 80203
Telephone: (720) 508-6349
Email: grant.sullivan@coag.gov; peter.baumann@coag.gov
Attorneys for Governor Jared Polis

[4] *Scientific Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2*, Centers for Disease Control and Prevention (Nov. 20, 2020), available at https://www.cdc.gov/coronavirus/2019-ncov/more/masking-science-sars-cov2.html. ("Masks are primarily intended to reduce the emission of virus-laden droplets . . ., which is especially relevant for asymptomatic or presymptomatic infected wearers who feel well and may be unaware of their infectiousness to others, and who are estimated to account for more than 50% of transmissions."); *see Garling v. U.S. Envtl. Prot. Agency*, 849 F.3d 1289, 1297 n.4 (10th Cir. 2017) (courts may take judicial notice of information from government sites).