

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.

REPLY BRIEF FROM DEFENDANT DARIN ATTEBERRY

Defendant Darin Atteberry, through counsel, hereby respectfully submits this
Reply Brief, as follows:

1. First, Plaintiffs argue ***Roman Catholic Diocese of Brooklyn v. Cuomo***,
208 L.Ed.2d 206 (2020), supersedes ***Jacobson v. Massachusetts***, 197 U.S. 11 (1905),
and is applicable here. Neither proposition is correct. To avoid duplication, Mr. Atteberry,
incorporates herein the arguments and authorities presented by the other Defendants in
their replies on this issue.¹ Plaintiffs' reliance on the concurrence in ***Cuomo*** as
superseding ***Jacobson*** and creating another applicable standard is simply wrong.

¹ The same bases articulated by the other Defendants also serves to distinguish
the Supreme Court's remand in ***High Plains Harvest Church v. Polis***, 2020 U.S. LEXIS
6098 (Dec. 15, 2020), based on ***Cuomo***.

2. Second, Plaintiffs argue without any grounding in any of their claims the mask orders cannot survive strict scrutiny. [ECF 30, at 7-9]. However, the strict scrutiny standard applies only if Plaintiffs state a viable claim and this Court determines strict scrutiny applies to that claim. Simply asserting and assuming strict scrutiny applies until this Court makes the threshold legal determination of its applicability is incorrect.

3. Third, Plaintiffs contend the mask orders compel speech in violation of the First Amendment. [ECF 30, at 9-10]. Plaintiffs' conclusory assertion does not make it so. Absent from Plaintiffs' analysis is any response to the City's argument distinguishing between government action compelling speech and government action proscribing conduct. [ECF 24, at 7-10]. The Supreme Court's compelled speech precedent does not support any conclusion requiring a mask during a public health emergency represents compelled speech or an inherently expressive activity within the ambit of any prior precedent. Moreover, precedent during COVID-19 rejects the conclusion mask mandates are either compelled speech or an inherently expressive or rejects such a claim on other grounds. See, e.g., **Parker v. Wolf**, 2020 U.S. Dist. LEXIS 233348 at *35-36 (MD. Pa. Dec. 11, 2020) (dismissing compelled mask wearing claim on standing grounds); **Minn. Voters Alliance v. Walz**, 2020 U.S. Dist. LEXIS 183108 at *28-32 (D. Minn. Oct. 2, 2020) (rejecting compelled speech claim to mask mandate); **Stewart v. Justice**, 2020 U.S. Dist. LEXIS 220373 at *13-17 (S.D. W.Va. Nov. 24, 2020 (same)); **Antietam Battlefield KOA v. Hogan**, 461 F.Supp.3d 214, 236-37 (D. Md. 2020) (same). These courts analyze the First Amendment compelled speech issues and reject the Plaintiffs' argument sometimes applying both strict and intermediate scrutiny. Plaintiffs offer no contrary authority.

4. Fourth, Plaintiffs contend the mask orders are content-based not content neutral. [ECF 30, at 10-11]. Plaintiffs address only the Governor's argument and fail to address or distinguish the direct precedent relied upon by the City holding COVID-19 restrictions are content neutral. [ECF 24, at 10-12]. More recent COVID-19 precedent not previously cited holds pandemic restrictions are content-neutral. See, e.g., **Let Them Play MN v. Walz**, 2020 U.S. Dist. LEXIS 239106 at *11-18 (D. Minn. Dec. 18, 2020); **Hund v. Cuomo**, 2020 U.S. Dist. LEXIS 212698 at *15-24 (W.D.N.Y. Nov. 13, 2020); **Bimber's Delwood, Inc. v. James**, 2020 U.S. Dist. LEXIS 195823 at *32-37 (W.D.N.Y. Oct. 21, 2020).

5. Fifth, Plaintiffs maintain the substantive due process right to refuse medical treatment is implicated because masks are medical devices. Again, Plaintiffs offer no precedent whatsoever to support their theory other than a strained interpretation of the Food, Drug, and Cosmetic Act. [ECF 30, at 11-12]. As the City previously argued, available precedent does not support expansion of **Cruzan** to Plaintiffs' circumstances. [ECF 24, at 12-14]. Further, if this Court accepts Plaintiffs' invitation, the federal courts would become the new determiners of the propriety of many different public health measures challenged in the name of refusing medical treatment. A public health measure designed to prevent infection in a pandemic is distinct from medical care.² The lack of

² "Public Health and medicine approach the challenge of health and health care from distinct, complementary perspectives. In medicine, the focus is on the individual patient, within the context of family and community. In public health, the focus is on the health of populations, with expression of illness found in the lives of individuals." Commentary: Public Health and Medicine Where the Twain Shall Meet, American Journal of Preventative Medicine, Vol. 1, Issue 4, Supplement 3, October 1, 2011, found at <https://doi.org/10.1016/j.amepre.2011.07.013>

sufficient guideposts in the substantive due process realm makes this a particularly fraught task for this Court. See ***Collins v. City of Harker Heights, Tex.***, 503 U.S. 115, 125 (1992) (expressing the Supreme Court is “reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended.”).

WHEREFORE, for all the foregoing reasons, as well as all of the arguments and authorities presented in his Motion to Dismiss and in the Motions to Dismiss of the other Defendants, 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 11th day of January, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on the 11th day of January, 2021, 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:

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