

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.

**DEFENDANT JEFFREY J. ZAYACH'S REPLY IN SUPPORT OF MOTION TO
DISMISS**

Defendant Executive Director of Boulder County Public Health Jeffrey J. Zayach
in his official capacity ("BCPH") submits this reply in support of BCPH's motion to
dismiss:

BACKGROUND

When BCPH filed its motion to dismiss, the United States had experienced
approximately 213,000 deaths from COVID-19. Now that number exceeds 350,000 and
is growing rapidly. See [https://covid.cdc.gov/covid-data-
tracker/#cases_casesper100klast7days](https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days). The United States Supreme Court has also
issued new *per curiam* opinions since the time BCPH filed its motion, but the Court
continues to recognize the seriousness of the COVID-19 pandemic: "Stemming the

spread of COVID-19 is unquestionably a compelling interest.” *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67, 208 L. Ed. 2d 206 (2020). Unlike *Roman Catholic Diocese*, which overturned non-neutral public health orders that were likely to cause irreparable harm to religious freedoms, this case involves challenges to broadly applicable face covering orders that do not cause any constitutional injuries to Plaintiffs. Thus, the Court should grant BCPH’s motion to dismiss.

ARGUMENT

I. Jacobson established the correct standard for evaluating the BCPH face covering Order.

In their Response, Plaintiffs rely on the concurrence by Justice Gorsuch in *Roman Catholic Diocese* to argue that “normal” constitutional standards apply and therefore *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) does not apply. However, *Jacobson* has not been overturned and remains binding precedent for this Court. Even in the concurring opinion, Justice Gorsuch recognized that *Jacobson* was correctly decided. Justice Gorsuch affirmed that the vaccination requirements at issue met modern constitutional standards because “Mr. Jacobson’s claimed right to bodily integrity . . . was avoidable and relatively modest.” *Roman Catholic Diocese*, 141 S. Ct. 63, 208 L. Ed. 2d at 213 (Gorsuch, J. concurring). Justice Gorsuch went on to state that the law “easily survived rational basis review, and might even have survived strict scrutiny . . .” *Id.*

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. In contrast, the order at issue in *Roman Catholic Diocese* affected fundamental First Amendment rights because it

unreasonably restricted attendance at religious services. *Id.* at 209. Moreover, the *Roman Catholic Diocese* order treated schools, factories, liquor stores, and bicycle repair shops, “less harshly” than houses of worship. *Id.* Here, the facts alleged in the complaint show that the BCPH Order is generally applicable and does not curtail Milliman’s fundamental rights. Further, Plaintiffs do not argue that the BCPH Order fails the rational basis test. Thus, under *Jacobson* and the applicable rational basis test, Milliman failed to state a claim against BCPH and the Court should dismiss the case.

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

Milliman does not dispute that the First Amendment protects only inherently expressive conduct. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). Nonetheless, Milliman asserts his act of complying with a law expresses the message that the law is necessary and effective. However, if mere compliance with a law constitutes speech that endorses that law, then every law that requires an individual to take a particular action (such as wearing a shirt and shoes in a restaurant or wearing a seatbelt) would be subject to strict scrutiny. Milliman fails to cite a case from any jurisdiction that supports this proposition.

Milliman also argues that he sufficiently alleged a speech-based claim because of the allegation in his amended complaint that Governor Polis made “harsh and insulting” statements regarding masks. (Resp. 10.) However, Milliman fails to point to a case where a statement by an elected official transformed a third party’s action into speech. Even assuming that such an allegation supports a speech claim against Governor Polis, Milliman fails to explain how Governor Polis’ alleged statements support his claims against BCPH regarding the constitutionality of its face covering order.

Finally, even assuming the BCPH Order regulates speech, the BCPH Order is not a content-based restriction subject to strict scrutiny. Milliman argues that implementation of a mask order is content based because it places limitations on non-verbal expression. However, Milliman's argument fails to show that these limitations are anything more than an incidental effect of a content-neutral regulation. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791(1989) ("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."). Because the BCPH Order does not regulate speech and is not content based, the order is subject only to rational basis review under *Jacobson*.

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

Milliman argues that a face covering meets the statutory definition of a medical device under the FDCA, 21 USC § 321(h), and therefore constitutes medical treatment for purposes of constitutional analysis. However, the FDCA is not the statute or regulation at issue, and Milliman fails to cite authority showing that a definition in a federal statute is dispositive or even relevant to analyzing the constitutional right to refuse medical treatment. Even if the FDCA were relevant, showing that a face covering is a "medical device" is not equivalent to showing that wearing a face covering constitutes medical "treatment" when the stated purpose of the face covering is prevention rather than treatment of epidemic disease.

Moreover, Milliman failed to respond to the argument that such treatment is not "involuntary" because Milliman can choose not to wear a face covering if he remains in his residence or socially distanced outdoors. Thus, the right to refuse medical treatment

is inapplicable because face coverings do not involve medical treatment, and, even if they do, such treatment is not involuntary.

CONCLUSION

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

Dated this 11th day of January 2021.

Respectfully submitted,

BOULDER COUNTY ATTORNEY

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