

**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).

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Donna Walter and Mark Milliman, by and through the undersigned counsel, file this Complaint for Declaratory and Injunctive Relief against Defendants Governor Jared Polis, Boulder County Public Health Executive Director Jeffrey J. Zayach, and Fort Collins City Manager Darin Atteberry, in their official capacities, and allege as follows:

1. Plaintiff Mark Milliman is a resident of Boulder County, Colorado.
2. Plaintiff Donna Walter is a resident of the City of Fort Collins, Colorado.
3. Defendant Jared Polis is the Governor of Colorado. As Governor, he is vested with the executive power of the state. CO. CONST., art. IV, § 2.
4. Defendant Jeffrey J. Zayach is Executive Director of Boulder County Public Health.

5. Defendant Darin Atteberry is Fort Collins City Manager.

6. Defendants Governor Polis, Director Zayach, and Mr. Atteberry are sued in their official capacities only.

JURISDICTION AND VENUE

7. This Court has original jurisdiction over the subject matter of this action pursuant to Title 28 U.S.C. §§ 1331 and 1343 because the matters in controversy arise under the United States Constitution and under 42 U.S.C. §1983. This Court has authority to award attorneys fees pursuant to 42 U.S.C. §1988.

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because Defendants reside in this district and because a substantial part of the events and omissions giving rise to the claims herein occurred in this district.

9. This Court has the authority to enter a declaratory judgment and to provide injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202.

STATEMENT OF FACTS

10. Plaintiffs bring this action under 42 U.S.C. §§ 1983 and 1988 to remedy deprivations of rights, privileges, or immunities secured by the Constitution and laws of the United States.

11. Governor Polis proclaimed a disaster emergency in response to the COVID-19 epidemic. *Executive Order D 2020 003: Declaring Disaster Emergency Due to the Presence of Coronavirus Disease 2019 in Colorado*, March 11, 2020, available at <https://bit.ly/3jE57mS> (citing C.R.S. § 24-33.5-701, *et seq.*). The Colorado Disaster Emergency Act authorizes the

governor to issue executive orders, proclamations, and regulations and amend or rescind them. C.R.S. § 24-33.5-704(2).

12. Governor Polis ordered Coloradans to stay at home and ordered all business to close other than those qualified as “Critical Businesses” (“lockdown order”). *Executive Order D 2020 017: Ordering Coloradans to Stay at Home Due to Presence of COVID-19 in the State*, March 25, 2020, available at <https://tinyurl.com/yybgljxc>.

13. US economic lock downs were based on a flawed computer model. Sheri Fink, *White House Takes New Line After Dire Report on Death Toll*, New York Times, March 16, 2020, available at <https://tinyurl.com/wvxlpsl>. UK Imperial College developed the computer model for a March 16 research report. Imperial College COVID-19 Response Team, *Report 9: Impact of non-pharmaceutical interventions (NPIs) to reduce COVID-19 mortality and healthcare demand* (2020), available at <https://bit.ly/32Me5rk>. The model predicted 2.2 million Americans would die without lockdowns. *Id.* at 7.

14. The UK Imperial College computer model predicted 500,000 British deaths, reduced to 20,000 deaths, two weeks later. Stephen Adams, *Professor who predicted 500,000 Britons could die from coronavirus and prompted Boris Johnson to order lockdown accused of having 'patchy record of modelling pandemics'*, UK Daily Mail, March 25, 2020, available at <http://dailym.ai/2YUPkYX>. *Id.* This model was “totally unreliable”, according to experts who studied it. Peter Aitken, *Imperial College model Britain used to justify lockdown a 'buggy mess', 'totally unreliable', experts claim*, Fox News, May 16, 2020, available at <https://fxn.ws/2YUih78>.

15. Governor Polis also relied on a flawed computer model. Karl Dierenbach, *Insane Model Means Colorado's COVID-19 Policies Are Essentially Based on Tarot Cards*, The Federalist, August 13, 2020, available at <https://tinyurl.com/y246pau3>. That model predicted

80,000 Coloradans would die without mitigation. *Id.* The model's death rate predicts 4.5 million US deaths if applied to the US population (double the UK Imperial College Model). *Id.*

16. The computer model predictions were wrong. Only six percent of the more than 170,000 reported US COVID-19 deaths died from COVID alone (approximately 10,000). *Weekly Updates by Select Demographic and Geographic Characteristics*, Centers for Disease, Centers for Disease Control, September 2, 2020, available at <https://tinyurl.com/y7gbmjlw>. The other ninety-four percent averaged 2.6 additional causes of death. *Id.*

17. For children under age 18, the risk of death from COVID is one in one million according to CDC Director Robert Redfield. *COVID Webinar Series (Transcript): Robert Redfield, MD*, Buckeye Institute, July 14, 2020, available at <https://tinyurl.com/y6xgcq5f>. For people under age 50, the risk of death from COVID is one in ten thousand. *The infection fatality rate of COVID-19 in Stockholm*, Public Health Agency of Sweden, available at <https://tinyurl.com/y5uevj85>.

18. Deaths from cardiac arrests soared during Governor Polis' lockdown order. John Ingold, *Denver doctors may have found the answer to a pandemic mystery: What happened to all the heart attacks?*, Colorado Sun, August 17, 2020, available at <https://tinyurl.com/yysw67dp>. Heart attack deaths increased because fear of COVID-19 made people afraid to go to the hospital. Brain Krans, *Why the Heart Attack Death Rate Has Doubled During COVID-19*, Healthline, August 11, 2020, available at <https://tinyurl.com/yy7byw6m>.

19. Governor Polis ordered healthy people to wear non-medical face coverings in public indoor spaces. *Executive Order D 2020 138: Ordering Individuals in Colorado to Wear Non-Medical Face Coverings* at 1,2, July 16, 2020, available at <https://tinyurl.com/y2e2cmo4>. Governor Polis extended his order forcing healthy people to wear non-medical face coverings in

public indoor spaces. *Executive Order D 2020 164: Ordering Individuals in Colorado to Wear Non-Medical Face Coverings* at 1, August 14, 2020, available at <https://tinyurl.com/y49sp4ph>.

20. Boulder County Public Health Director Jeffrey Zayach ordered healthy people to wear face coverings when outside their home and not able to maintain social distancing. *Boulder County Public Health Order 2020-04: Requiring Facial Coverings in Public*, June 29, 2020, available at <https://tinyurl.com/yxdjnl5v>. Director Zayach extended and amended his order requiring healthy people to wear masks when outside their home and not able to maintain social distancing. *Boulder County Public Health Order 2020-04: Extension and Amendment Requiring Facial Coverings in Public*, July 24, 2020, available at <https://tinyurl.com/y5gzfab5>.

21. Fort Collins City Manager Darin Atteberry ordered healthy people entering commercial or retail businesses to wear face coverings. *Fort Collins Emergency Regulation 2020-18* at 1,2, May 28, 2020, available at <https://tinyurl.com/yxbr4jd6>.

22. “From a medical perspective there is no proven effectiveness of masks,” stated Tamara Van Ark, Dutch Minister of Medical Care, rejecting mask orders. *Dutch government will not advise public to wear masks – minister*, Reuters, July 29, 2020, available at <https://reut.rs/2YWI3aY>. Mask orders are not based on sound data. Dr. Lisa Brosseau, Dr. Margaret Sietsema, *COMMENTARY: Masks-for-all for COVID-19 not based on sound data*, Centers for Disease Research and Policy, April 1, 2020 (updated July 16, 2020), available at <https://bit.ly/3hRvwx0>. Cloth masks and face coverings poorly filter the smaller particles responsible for COVID-19 transmission. *Id.*

23. CDC pandemic guidance concluded that “*little evidence* supported [mask] use in community settings *when well*”, but recommended masks *when ill*. *Community Mitigation Guidelines to Prevent Pandemic Influenza*, CDC (2017) at 11,14, available at <https://tinyurl.com/>

wuwx7nz (emphasis added). World Health Organization (WHO) pandemic guidance concluded that, “There was no evidence that face masks are effective in reducing transmission of laboratory-confirmed influenza” but recommended masks only for *symptomatic* individuals. *Non-Pharmaceutical Public Health Measures for Mitigating the Risk and Impact of Epidemic and Pandemic Influenza*) at 9,26, WHO (2019), available at <https://tinyurl.com/qwm2npc> (emphasis added).

24. Executive Order 138 orders non-medical face coverings. *Executive Order D 2020 138, supra*, at 1.

25. Boulder Public Health Order 2020-04 does not require medical face coverings but defines “face covering” as “a covering made of cloth, fabric, or other soft or permeable material”. *Amended Boulder County Public Health Order 2020-04, supra*, at 4.

26. Fort Collins Emergency Regulation 2020-18 discourages medical face coverings and requires “a uniform piece of material that securely covers a person’s nose and mouth and remains affixed in place ... [including] but ... not limited to, bandanas, medical masks, cloth masks and gaiters.” *Emergency Regulation 2020-18* at 1, 3.

27. Surgical masks and cloth masks are not effective at reducing COVID-19 spread, according to the National Academies of Sciences. *Rapid Expert Consultation on the Effectiveness of Fabric Masks for the COVID-19 Pandemic* at 4, April 8, 2020, available at <https://bit.ly/2Gs9sv5>. Cloth masks can trap the virus and become a potential contamination source when masks become saturated with moisture. *Id.* at 4. Workers who wear cloth masks experience higher rates of influenza-like illness. *Id.* at 6. Cloth face masks will not protect the wearer against airborne transmissible infectious agents due to loose fit and lack of seal or

inadequate filtration, according to the Occupational Safety and Health Administration (OSHA).
See, <https://www.osha.gov/SLTC/covid-19/covid-19-faq.html>.

28. Executive Order 2020-138 claims that “widespread mask use is a low cost and highly effective way to reduce the spread of COVID-19 infections by as much as 65%”. *Id.* at 1.

29. Boulder Public Health Order 2020-04 claims that “people can be infected with the COVID-19 virus and be asymptomatic yet still be contagious”. *Public Health Order 2020-04, supra*, at 2. Amended Public Health Order 2020-04 claims that “people can be infected with the COVID-19 virus and be asymptomatic yet still be contagious.” *Amended Public Health Order 2020-04, supra*, at 3.

30. 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>. *Id.* She rejected claims of up to 40% asymptomatic spread because “those are from models”. *Id.*

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). However, “There is little evidence regarding the [potential] transmission [from] ... asymptomatic or presymptomatic individuals with COVID-19”. *Id.* at 6.

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>.

33. Executive Order 2020-138 makes exceptions to face covering requirements, including individuals seated at a food service establishment. *Executive Order D 2020 138*, *supra*, at 3.

34. Fort Collins Emergency Order 2020-18 makes exceptions to face covering requirements, including people eating or drinking at a restaurant. *Fort Collins Emergency Regulation 2020-18*, *supra*, at 2.

35. Executive Order 138 provides for civil and criminal penalties. *Executive Order D 2020 138*, *supra*, at 2.

36. Boulder Public Health Order 2020-04 threatens violators with criminal penalties, including fines and imprisonment. *Amended Boulder County Public Health Order 2020-04*, *supra*, at 5.

37. Fort Collins Emergency Regulation 2020-18 provides for criminal penalties against violators. *Fort Collins Emergency Regulation 2020-18*, *supra*, at 3.

38. People who refuse to wear masks are “selfish bastards”, says Governor Polis. *Colorado Governor Calls Anti-Maskers ‘Selfish Bastards’, Extends COVID Orders*, Bryan Kirk, Newsweek, July 13, 2020, available at <https://tinyurl.com/y52n85cp>. He called Coloradans “stupid” for not wearing masks. *Polis: ‘I’m calling on Coloradans not to be stupid’*, Andrew Kenney, The Durango Herald, July 28, 2020, available at <https://tinyurl.com/yxunrotb>.

ARGUMENT

Mask Orders are Ineffective Against the Spread of COVID-19

39. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

40. Forcing healthy uninfected individuals to wear face coverings is ineffective at reducing the spread of COVID-19. Healthy uninfected people pose no risk of spreading the virus because they are not infected with the virus.

41. Forcing healthy asymptomatic individuals to wear face coverings is ineffective at reducing the spread of COVID-19. Asymptomatic individuals pose negligible risk because the risk of asymptomatic spread is negligible. The required face coverings are ineffective against asymptomatic spread because they poorly filter the aerosols and nanoparticles associated with asymptomatic spread theory.

42. Forcing symptomatic individuals to wear face coverings may be effective at reducing the spread of COVID-19. Symptomatic people pose greater risk because they suffer symptoms of a respiratory virus. The masks may be effective at reducing symptomatic spread because they better filter the respiratory droplets associated with symptomatic spread.

43. Mask orders are ineffective at limiting the spread of COVID-19 because the required face coverings are ineffective for most people since most people are not infected or are asymptomatic, where face coverings are ineffective. However, face coverings may reduce spread by symptomatic individuals.

Mask Orders Violate the Fundamental Right to Refuse Medical Treatment

44. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

45. The U.S. Constitution includes no public health exception. The Court has upheld compulsory vaccination laws against constitutional challenges. *See, Jacobson v Massachusetts,*

197 U.S. 11 (1905) (smallpox vaccination was constitutional). While the Court in *Jacobson* deferred to legislative judgment, it warned that such laws might go so far beyond what is reasonably required as to compel the courts to interfere to protect people. *Id.* at 26. *Jacobson* predates Fourteenth Amendment incorporation doctrine. *See, e.g., Gitlow v. New York*, 268 U.S. 652 (1925) (Fourteenth Amendment due process protects free speech against the states). *Jacobson* predates modern substantive due process. *See, e.g., Loving v. Virginia*, 388 U.S. 1,12 (1967) (Fourteenth Amendment protects due process fundamental right to marriage). The U.S. Constitution better protects fundamental rights than when *Jacobson* was decided.

46. 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).

47. Executive Order 138, Boulder Public Health Order 2020-04, and Fort Collins Emergency Regulation 2020-18 force people to wear medical devices. 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); *See also, FDA's How to Determine if Your Product is a Medical Device* (Dec. 16, 2019), available at <https://tinyurl.com/y6ex6e9e>. The defendants order the use of face coverings to prevent disease and cannot deny these are medical devices.

48. Executive Order 138, Boulder Public Health Order 2020-04, and Fort Collins Emergency Regulation 2020-18 are forced medical treatment because laws that force individuals to wear medical devices to prevent disease are laws that force medical treatment. These devices are potentially harmful because they restrict breathing and increase the likelihood of flu-like illness. These laws force medical treatment that is unsafe and ineffective.

49. Executive Order 138, Boulder Public Health Order 2020-04, and Fort Collins Emergency Regulation 2020-18 violate the fundamental right to refuse medical treatment under Fifth and Fourteenth Amendment Due Process because they force health treatment on individuals without their consent. These orders deny the right to refuse medical treatment because they threaten violators with civil and criminal penalties, and because they deny individuals the ability to engage in commerce. These orders are presumptively unconstitutional, are subject to strict scrutiny, and cannot survive strict scrutiny.

Mask Orders Cannot Survive Strict Scrutiny

50. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

51. 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).

52. 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).

53. 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.

54. Executive Order 138, Boulder Public Health Order 2020-04, and Fort Collins Emergency Regulation 2020-18 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.

55. Executive Order 138, Boulder Public Health Order 2020-04, and Fort Collins Emergency Regulation 2020-18 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.

56. Executive Order 138, Boulder Public Health Order 2020-04, and Fort Collins Emergency Regulation 2020-18 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.

57. Executive Order 138, Boulder Public Health Order 2020-04, and Fort Collins Emergency Regulation 2020-18 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

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

58. Executive Order 138 is underinclusive also because it sweeps in less than required by excluding risks that raise doubts whether the government is pursuing the interest it invokes. Executive Order 138 exempts individuals seated at food service establishments but not the same individuals going to or from their table. If individuals pose a risk while going to or from their table, they pose a greater risk while seated because exposure duration is greater, but they are exempted. Thus, Executive Order 138 is underinclusive, is not narrowly tailored, and does not serve a compelling government interest.

59. Fort Collins Emergency Regulation 2020-18 is underinclusive also because it sweeps in less than required by excluding risks that raise doubts about whether the government is pursuing the interest it invokes. Regulation 2020-18 exempts people participating in indoor gym recreational activities. If individuals pose a risk requiring face coverings in public indoor spaces, they pose a greater risk while exercising because they exhale more and breathe more deeply, but they are exempted. This exemption is underinclusive and does not advance the interest of stemming the epidemic. Thus, Regulation 2020-18 is underinclusive, is not narrowly tailored, and does not serve a compelling government interest.

Mask Orders are Content-Based Restrictions that Violate Free Speech Protections

60. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

61. The First Amendment prohibits the enactment of laws “abridging the freedom of speech.” U.S. CONST., Amend. 1. 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). 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.

62. Executive Order 138, Boulder Public Health Order 2020-04, and Fort Collins Emergency Regulation 2020-18 are facially content-based speech restrictions that literally muzzle speech and facial expression by covering individuals' noses and mouths. These restrictions stifle protected nonverbal expression like smiling, frowning, and other important human communication. Mask orders punish this protected expression. These content-based speech restrictions are presumptively unconstitutional, are subject to strict scrutiny, and cannot survive strict scrutiny.

Mask Orders Violate First Amendment Protections Against Compelled Speech

63. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

64. The First Amendment protects individuals against compelled speech. It protects the right to speak and the right to refrain from speaking. *Board of Education v. Barnette*, 319 U.S. 624, 645 (Murphy, J., concurring) (1943) (schools may not compel students to participate in the pledge of allegiance). The right to speak or refrain from speaking are components of "individual freedom of mind." *Id.*, at 637 (Jackson, J). The First Amendment protects an individual's right not to be the state's messenger. *Wooley v. Maynard*, 430 U.S. 705, 706 (1977) (Free speech forbids requiring individual to display ideological message on his private property for purpose of observation by public). Laws that compel speech are content-based regulation of

speech that is presumptively unconstitutional and subject to strict scrutiny. *National Institutes of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

65. Wearing a mask or refusing to wear one are express and implied speech and expression. Refusing to wear masks may express peaceful protest against mask orders. The defendants' mask orders close off dissent by criminalizing peaceful protest. *But see, Tinker v. Des Moines Independent Community School District*. 393 U.S. 503 (invalidating regulation prohibiting wearing black armbands to school as protest). Wearing a mask may express "you care", are not "stupid", and are not a "selfish bastard". Masks are also symbolic speech that communicate implied messages that masks are necessary and effective.

66. The state cannot force healthy individuals to wear ineffective masks just as it cannot force individuals to pledge allegiance to the flag. These masks are symbolic speech no less than saluting the flag is symbolic speech. The state cannot force individuals to display messages on their face for public observation just as they cannot require individuals to display ideological messages on their private property for public observation. The state cannot punish the dissenting speech of refusing to wear a mask as protest just as they cannot punish the dissenting speech of wearing a black armband to school as protest.

67. Executive Order 138, Boulder Public Health Order 2020-04, and Fort Collins Emergency Regulation 2020-18 are content-based speech regulations that are presumptively unconstitutional, subject to strict scrutiny, and cannot survive strict scrutiny.

Plaintiffs Have Standing to Challenge First Amendment Free Speech Violations

68. Plaintiffs have standing to challenge these orders for First Amendment free speech violations because they suffer injury-in-fact from their enforcement. Plaintiffs are permitted to challenge laws infringing on free expression whether their own rights of free

expression are violated, because those laws very existence may cause others not before the court to refrain from constitutionally protected speech or expression. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

Plaintiffs Are Entitled to Injunctive Relief

69. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

70. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from enforcing these orders.

71. The injury to plaintiffs' Constitutional rights by enforcement of these orders outweighs any injury sustained by Defendants as a result of injunctive relief because enforcement of unprecedented face covering orders on the healthy has no public health benefit.

72. Injunctive relief would not adversely affect public policy or the public interest because enforcement of unprecedented face covering orders on the healthy has no public health benefit.

COUNT I

(Executive Order D 2020-138 Violates First Amendment Free Speech Protections Against Compelled Speech)

1. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

2. For the reasons stated, Executive Order D 2020-138 is compelled speech that violates First Amendment free speech protections and cannot survive strict scrutiny.

3. For the reasons stated, plaintiffs have standing to challenge these orders for First Amendment free speech violations.

COUNT II

(Boulder Public Health Order 2020-04 Violates First Amendment Free Speech Protections Against Compelled Speech)

1. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

2. For the reasons stated, Public Health Order 2020-04 is compelled speech that violates First Amendment free speech protections and cannot survive strict scrutiny.

3. For the reasons stated, plaintiffs have standing to challenge these orders for First Amendment free speech violations.

COUNT III

(Fort Collins Emergency Regulation 2020-18 Violates First Amendment Free Speech Protections Against Compelled Speech)

1. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

2. For the reasons stated, Regulation 2020-18 is compelled speech that violates First Amendment free speech protections and cannot survive strict scrutiny.

3. For the reasons stated, plaintiffs have standing to challenge these orders for First Amendment free speech violations.

COUNT IV

(Executive Order D 2020-138 is a Content-Based Restriction that Violates First Amendment Free Speech Protections)

1. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

2. For the reasons stated, Executive Order D 2020-138 is a content-based restriction that violates First Amendment free speech protections and cannot survive strict scrutiny.

3. For the reasons stated, plaintiffs have standing to challenge these orders for First Amendment free speech violations.

COUNT V

(Boulder Public Health Order 2020-04 is a Content-Based Restriction that Violates Free Speech Protections)

1. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

2. For the reasons stated, Public Health Order 2020-04 is a content-based restriction that violates First Amendment free speech protections and cannot survive strict scrutiny.

3. For the reasons stated, plaintiffs have standing to challenge these orders for First Amendment free speech violations.

COUNT VI

(Fort Collins Emergency Regulation 2020-18 is a Content-Based Restriction that Violates Free Speech Protections)

1. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

2. For the reasons stated, Regulation 2020-18 is a content-based restriction that violates First Amendment free speech protections and cannot survive strict scrutiny.

3. For the reasons stated, plaintiffs have standing to challenge these orders for First Amendment free speech violations.

COUNT VII

(Executive Order D 2020-138 Violates the Fundamental Right to Refuse Healthcare Protected by Fifth and Fourteenth Amendment Due Process)

1. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

2. For the reasons stated, Executive Order D 2020-138 violates the Fundamental right to refuse healthcare protected by Fifth and Fourteenth Amendment Due Process and cannot survive strict scrutiny.

3. Plaintiffs have standing to challenge these orders for Fifth and Fourteenth Amendment violations because they suffer injury-in-fact from their enforcement.

COUNT VIII

(Boulder Public Health Order 2020-04 Violates the Fundamental Right to Refuse Healthcare Protected by Fifth and Fourteenth Amendment Due Process)

1. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

2. For the reasons stated, Public Health Order 2020-04 violates the Fundamental right to refuse healthcare protected by Fifth and Fourteenth Amendment Due Process and cannot survive strict scrutiny.

3. Plaintiff Mark Milliman has standing to challenge this order for Fifth and Fourteenth Amendment due process violations because he suffers injury-in-fact from its enforcement.

COUNT IX

(Fort Collins Emergency Regulation 2020-18 Violates the Fundamental Right to Refuse Healthcare Protected by Fifth and Fourteenth Amendment Due Process)

1. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

2. For the reasons stated, Regulation 2020-18 violates the Fundamental right to refuse healthcare protected by Fifth and Fourteenth Amendment Due Process and cannot survive strict scrutiny.

3. Plaintiff Donna Walter has standing to challenge this order for Fifth and Fourteenth Amendment due process violations because she suffers injury-in-fact from its enforcement.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs ask this Court to enter a judgement in their favor and provide the following relief:

- a. A declaratory judgment declaring that Executive Order D 2020-138 violates First Amendment free speech protections against compelled speech.
- b. A declaratory judgment declaring that Boulder County Public Health Order 2020-04 violates First Amendment free speech protections against compelled speech.
- c. A declaratory judgment declaring that Fort Collins Emergency Regulation FC-2020-08 violates First Amendment free speech protections against compelled speech.
- d. A declaratory judgment declaring that Executive Order D 2020-138 is a content-based restriction that violates First Amendment free speech protections.

- e. A declaratory judgment declaring that Boulder County Public Health Order 2020-04 is a content-based restriction that violates First Amendment free speech protections.
- f. A declaratory judgment declaring that Fort Collins Emergency Regulation 2020-18 is a content-based restriction that violates First Amendment free speech protections.
- g. A declaratory judgment declaring that Executive Order D 2020-138 violates the fundamental right to refuse healthcare protected by Fifth and Fourteenth Amendment due process.
- h. A declaratory judgment declaring that Boulder County Public Health Order 2020-04 violates the fundamental right to refuse healthcare protected by Fifth and Fourteenth Amendment due process.
- i. A declaratory judgment declaring that Fort Collins Emergency Regulation 2020-18 violates the fundamental right to refuse healthcare protected by Fifth and Fourteenth Amendment due process.
- j. A permanent injunction prohibiting the Governor from implementing, administering, and enforcing Executive Order D 2020-138.
- k. A permanent injunction prohibiting Boulder County Public Health Executive Director Jeffrey J. Zayach and Boulder County Public Health from implementing, administering, and enforcing Public Health Order 2020-04.
- l. A permanent injunction prohibiting Fort Collins City Manager Darin Atteberry and the City of Fort Collins from implementing, administering, and enforcing Emergency Regulation 2020-18.
- m. An order requiring Defendants to pay Plaintiffs' reasonable attorney's fees, including litigation expenses and costs; and

- n. Awarding Plaintiffs such other and further relief as this court deems just and proper.

CERTIFICATION AND CLOSING

Under Federal Rule of Civil Procedure 11, by signing below, I certify to the best of my knowledge, information, and belief that this complaint: (1) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the complaint otherwise complies with the requirements of Rule 11.

s/Mark C. Patlan

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