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IN THE FOURTH DISTRICT COURT
FOR THE STATE OF WYOMING

Crosby Taylor, et al.,	)	
Petitioners	)	
vs	)	Case No . CV-2021-0009
	)	
Governor Gordon, et. at.,	)	
Respondents	)	

PETITIONERS' MEMORANDUM IN SUPPORT OF
THEIR REPLY TO RESPONDENTS' MOTION TO DISMISS

Comes now by and through their attorney Nick Beduhn, Petitioners submit this Memorandum in support of their Reply to the Respondents' Motions to Dismiss and their Memorandum is support thereof.

Throughout their Memorandum, Respondents ignore, mischaracterize, and discount both facts and Petitioners' rights; rights that are supposed to hold Constitutional protection. Numerous cites are then used in an effort to support their distortions. The majority of the Petitioners have one thing in common. They spoke out against the unlawful acts of the Respondents and were then targeted in one way or another. It is clear that First Amendment

interests were either threatened or were/are in fact being impaired. Petitioners contend that "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. See New York Times Co. [427 U.S. 347, 374] v. United States, 403 U.S. 713 (1971). 29"[1] Elrod v. Burns 427 U.S. 347 at 373-74.

Constitutional rights are personal and may not be asserted vicariously. See McGowan v. Maryland, 366 U.S. 420, 429 -430 (1961). These principles reflect the conviction that under our constitutional system, courts [413 U.S. 601, 611] are not roving commissions assigned to pass judgment on the validity of the Nation's laws. See Younger v. Harris, 401 U.S. 37, 52 (1971). Constitutional judgments, as Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court:

> "So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." Marbury v. Madison, 1 Cranch 137, 178 (1803).

The Supreme Court has altered its traditional rules of standing to permit - in the First Amendment area - "attacks on overly broad statutes with no requirement that the person

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1 The timeliness of political speech is particularly important. *See Carroll v. Princess Anne,* 393 U. S. 175, 393 U. S. 182 (1968); *Wood v. Georgia,* 370 U. S. 375, 370 U. S. 391-392 (1962).

"[T]he purpose of the First Amendment includes the need . . . 'to protect parties in the free publication **of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them**.'" (emphasis added)

making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." Dombrowski v. Pfister, 380 U.S., at 486 . Litigants, therefore, are permitted to challenge a statute **not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others *not before the court* to refrain from constitutionally protected speech or expression**.

Claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate "only spoken words." Gooding v. Wilson, 405 U.S. 518, 520 (1972). See Cohen v. California, 403 U.S. 15 (1971); Street v. New York, 394 U.S. 576 (1969); Brandenburg v. Ohio, 395 U.S. 444 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). In such cases, it has been the judgment of the Courts that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of *others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes*.[2] Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations. See Keyishian v. Board of Regents, 385 U.S. 589 (1967); United States v. Robel, 389 U.S. 258 (1967); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Shelton v. Tucker, supra.

2 See: **The Government's War on Free Speech: Protest Laws Undermine the First Amendment**

https://www.rutherford.org/publications_resources/john_whiteheads_commentary/the_governments_war_on_free_speech_protest_laws_undermine_the_first_amendment

Facial [413 U.S. 601, 613]

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

The First Amendment of the federal Constitution prohibits the enactment of laws "abridging the freedom of speech." The Wyoming Constitution also provides a shield against the abridgment of free expression[3]. No government official has authority 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, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 115, 118.

The Respondents' emergency and health orders 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.

3 Article 1 Sec. 20

Mask Orders Violate First Amendment Protections Against Compelled Speech

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).

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 Respondents' 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.

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[4] 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. Therefore, the Respondents' emergency and health orders that mandate the wearing of face covering are content-based speech regulations that are presumptively unconstitutional, subject to strict scrutiny, and cannot survive strict scrutiny.

Petitioners Have Standing to Challenge Protected Speech Violations

In light of the above, Petitioners contend that they have standing to challenge the various unlawful orders because those orders have resulted in threats and violations of protected speech resulting in injury-in-fact from their enforcement. The Petitioners are permitted to challenge any law or order infringing on free expression whether or not their own rights of free expression are violated, because the very existence of such laws or orders may cause others not before the court to refrain from constitutionally protected speech or expression. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

4 See Petitioners' Exhibit 11; see also: **A Masked Society Is a Slave Society** https://www.lewrockwell.com/2020/12/gary-d-barnett/a-masked-society-is-a-slave-society/

Petitioners' Right to Determine Their Own Personal Medical Treatment

The 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).

Furthermore, the individual right to make his or her own health care decisions is directly protected by Art. 1 Sec. 38 of the Wyoming Constitution. This provision also protects the rights of "parent, guardian or legal representative of any other natural person . . . to make health care decisions for that person."

The emergency and health orders issued by the Respondents have sought to force all citizens, even healthy citizens 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/y6ex6eqe. The Respondents cannot deny that their

various orders to use face coverings to prevent disease are medical devices. Thus, the emergency and health orders are *forced medical treatment* because they force individuals to wear medical devices to prevent disease and as such are mandates that force medical treatment. Moreover, such devices are potentially harmful because they restrict breathing and increase the likelihood of flu-like illness. (See Petitioners' Exs. 10, 11 & 12) These orders force medical treatment that is unsafe and ineffective.

The Respondents' emergency and health orders violate the fundamental right to refuse medical treatment under Fifth and Fourteenth Amendment Due Process and Art. 1 Sec. 38 of the Wyoming Constitution because they force medical/health treatment on individuals *without their consent*. These orders deny the right to refuse medical treatment because they threaten violators with criminal penalties, and because they have denied individuals the ability to engage in commerce. These orders are presumptively unconstitutional, are subject to strict scrutiny, and cannot survive strict scrutiny.

Mandatory Mask Orders Cannot Survive Strict Scrutiny

Orders such as a mandatory mask order are subject to strict scrutiny and 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).

Orders 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).

The Respondents' emergency and health 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. Furthermore, the various orders of the Respondents were and 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 an 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.[5] Thus, the Respondents' various 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.

Petitioners' Petition qualifies this Case as a Public Interest Case

Petitioners assert and contend that laws and orders that result in violations of such basic and fundamental rights as set forth herein - especially when such laws or orders affect

5 See Petitioners' Ex. 14 and 15.

every citizen, qualifies for designation as a public interest cause that is ripe for judicial consideration as a public interest case under the Brimmer test[6].

Submitted this _____ day of _____. 2021.

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I served a copy of the foregoing Petitioners' Memorandum in Support of Their Reply To Respondents' Motion To Dismiss a copy thereof to all current Respondents this _____ day of April, 2021.

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Nick Beduhn

6 Brimmer v. Thomson 521 P2d 574