

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:18-cv-02074-WYD-STV

MASTERPIECE CAKESHOP INCORPORATED,
a Colorado corporation; and
JACK PHILLIPS,

Plaintiffs,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official and individual capacities;
ANTHONY ARAGON, as member of the Colorado Civil Rights Commission, in his official capacity;
MIGUEL "MICHAEL" RENE ELIAS, as member of the Colorado Civil Rights Commission, in his official capacity;
CAROL FABRIZIO, as member of the Colorado Civil Rights Commission, in her official capacity;
CHARLES GARCIA, as member of the Colorado Civil Rights Commission, in his official capacity;
RITA LEWIS, as member of the Colorado Civil Rights Commission, in her official capacity;
JESSICA POCOCK, as member of the Colorado Civil Rights Commission, in her official capacity;
CYNTHIA H. COFFMAN, Colorado Attorney General, in her official capacity; and
JOHN HICKENLOOPER, Colorado Governor, in his official capacity,

Defendants.

SCHEDULING ORDER

**1. DATE OF CONFERENCE AND APPEARANCES OF COUNSEL
AND PRO SE PARTIES**

Date of Conference: October 24, 2018.

Appearing for Plaintiffs: James A. Campbell, Alliance Defending Freedom, 15100 N. 90th Street, Scottsdale, AZ 85260, 480-444-0020.

Appearing for Defendants: First Assistant Attorney General LeeAnn Morrill and Senior Assistant Attorney General Vincent Morscher, Colorado Attorney General's Office, 1300 Broadway, Denver, CO 80203, 720-508-6159/6588.

2. STATEMENT OF JURISDICTION

Plaintiffs: This case raises federal questions under the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act of 1871, 42 U.S.C. § 1983. This Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Defendants: Defendants deny subject matter jurisdiction under Fed. R. Civ. P. ("Rule") 12(b)(1). See ECF No. 43; statement of defenses below.

3. STATEMENT OF CLAIMS AND DEFENSES

Plaintiffs: Plaintiffs claim that Defendants have violated and continue to violate their rights under the First and Fourteenth Amendments to the United States Constitution. Defendants interpret the Colorado Anti-Discrimination Act, §§ 24-34-301 to –804, C.R.S. (2018) ("CADA"), to (1) force Plaintiffs (but not others like them) to create custom cakes expressing messages that violate their deepest beliefs and (2) ban Plaintiffs from publishing speech explaining the messages that they will not express through their custom cakes and the religious reasons why. CADA's publication ban also contains vague and overbroad language that is facially unconstitutional. And Defendants subject Plaintiffs to a biased and unfair administrative process. For these reasons, portions of CADA and Defendants' application of CADA to Plaintiffs violate Plaintiffs' rights—including their

rights to free speech, free exercise of religion, due process, and equal protection—under the First and Fourteenth Amendments.

Defendants: This Court lacks subject matter jurisdiction under Rule 12(b)(1) for three reasons. *First*, there is an ongoing civil enforcement proceeding by the Colorado Civil Rights Commission (collectively, the “Commission” or “Commissioners”) to decide a 2017 discrimination charge alleging that Plaintiffs violated CADA. As a result, this Court must abstain from exercising jurisdiction over Plaintiffs’ claims for equitable relief here based on the doctrine articulated in *Younger v. Harris*, and also should abstain under the *Pullman*, *Burford*, and *Colorado River* doctrines.

Second, Plaintiffs’ claims are barred by various immunities. Specifically, their damages claims against the Colorado Civil Rights Division Director (“Division Director”) are barred by absolute quasi-prosecutorial immunity, or alternatively by qualified immunity. Their claims for equitable relief against the Attorney General and Governor are barred by Eleventh Amendment immunity due to the lack of personal participation by either in the civil enforcement action related to the 2017 discrimination charge. And their claims for nominal damages against each of the Commissioners, the Attorney General, and the Governor are likewise barred by Eleventh Amendment immunity due to the fact that each is named only in her or his official capacity.

Third, Plaintiffs lack standing to challenge the selection criteria set forth for Commissioners in section 24-34-303(1)(b)(I)-(III) of CADA. The Verified Complaint fails to allege that any, much less a majority, of the Commissioners named as Defendants here were appointed under those criteria, so they have not suffered an injury-in-fact related to the criteria.

Even if this Court possesses subject matter jurisdiction, Plaintiffs fail to state a claim as a matter of law. Specifically, the Division Director and Commission's interpretation and enforcement of section 24-34-601(2)(a) of CADA, which prohibits discrimination in places of public accommodation, comports with the First Amendment and does not violate Plaintiffs' free exercise rights under any as-applied theory, or their free speech rights under any as-applied or facial theory. The Division Director and Commission's interpretation and enforcement of section 24-34-601(2)(a) and the selection criteria for new Commissioners in section 24-34-303(1)(b)(I)-(III) likewise comport with the Fourteenth Amendment and do not violate Plaintiffs' due process rights under any as-applied or facial theory. Finally, the Division Director and Commission's interpretation and enforcement of section 24-34-601(2)(a) does not violate Plaintiffs' Fourteenth Amendment equal protection rights under any as-applied theory.

4. UNDISPUTED FACTS

Given that Defendants have moved to dismiss the lawsuit for lack of jurisdiction, the parties have not yet agreed upon stipulated facts. Should Defendants' motion to dismiss be denied, the parties will explore stipulating to facts after the Defendants have filed their answer.

5. COMPUTATION OF DAMAGES

Plaintiffs seek injunctive and declaratory relief to restore their constitutional freedoms, and they seek compensatory damages against Defendant Elenis for lost work time, profits, expenses, emotional distress, inconvenience, and reputational damage, punitive damages against Defendant Elenis in the amount of \$100,000, and nominal damages in the amount of \$1 against each Defendant.

**6. REPORT OF PRECONFERENCE DISCOVERY AND
MEETING UNDER FED. R. CIV. P. 26(f)**

- a. Date of Rule 26(f) meeting.

The Rule 26(f) meeting occurred during various phone conversations before Wednesday, October 3, 2018.

- b. Names of each participant and party he/she represented.

James A. Campbell on behalf of Plaintiffs. LeeAnn Morrill on behalf of Defendants.

- c. Statement as to when Rule 26(a)(1) disclosures were made or will be made.

Under Rule 26(a)(1), initial disclosures are due on October 24, 2018.

- d. Proposed changes, if any, in timing or requirement of disclosures under Fed. R. Civ. P. 26(a)(1).

Plaintiffs: Plaintiffs propose that initial disclosures under Fed. R. Civ. P. 26(a)(1) be exchanged by October 31, 2018.

Defendants: Defendants propose that all disclosures and discovery be stayed until the Court issues a ruling on Defendants' motion to dismiss [ECF No. 43]. If the Court denies the motion to dismiss, then Defendants propose that Rule 26(a)(1) disclosures should be made within thirty (30) days after the date of the Order denying same. Defendants will soon be filing a motion to stay all disclosure and discovery-related deadlines until after the Court resolves their motion to dismiss.

- e. Statement concerning any agreements to conduct informal discovery.

None.

- f. Statement concerning any other agreements or procedures to reduce discovery and other litigation costs, including the use of a unified exhibit numbering system.

None.

g. Statement as to whether the parties anticipate that their claims or defenses will involve extensive electronically stored information, or that a substantial amount of disclosure or discovery will involve information or records maintained in electronic form.

Because this Court has not yet decided Defendants' immunity defenses, Defendants have not yet answered the Complaint, and discovery has not commenced, the parties are uncertain whether discovery will involve extensive electronically stored information. The parties agree to preserve and maintain all electronic records, including emails and other electronic documents, in their current form. Any electronic records produced in response to discovery requests will be saved on a CD or flash drive for transmittal to opposing counsel.

h. Statement summarizing the parties' discussions regarding the possibilities for promptly settling or resolving the case.

The parties do not believe that a settlement conference or other form of alternative dispute resolution will be productive at this time because this case primarily involves disputed questions of law.

7. CONSENT

All parties [have] [have not] consented to the exercise of jurisdiction of a magistrate judge.

8. DISCOVERY LIMITATIONS

a. Modifications which any party proposes to the presumptive numbers of depositions or interrogatories contained in the Federal Rules of Civil Procedure.

Plaintiffs: None.

Defendants: Consistent with Rule 1’s mandate that the Rules of Civil Procedure “be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding,” Defendants propose that the following be limited to **thirty (30) for each side**: (1) written interrogatories to parties, including all discrete subparts, under Rule 33; (2) requests for production to parties under Rule 34; and (3) requests for admission to parties under Rule 36.

b. Limitations which any party proposes on the length of depositions.

None. Per Fed. R. Civ. P. 30(d)(1), each deposition will be limited to one (1) day of seven (7) hours.

c. Limitations which any party proposes on the number of requests for production and/or requests for admission.

Plaintiffs: None.

Defendants: See Defendants’ proposal in Paragraph 8(a) above.

d. Other Planning or Discovery Orders.

Plaintiffs: None.

Defendants: Consistent with Rule 1’s mandate that the Rules of Civil Procedure “be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding,” Defendants respectfully request that this Court enter the following discovery orders:

- (1) Plaintiffs are prohibited from deposing the Attorney General and the Governor;
- (2) Plaintiffs, their counsel of record, and all others working in concert with Plaintiffs and/or their counsel of record are prohibited from utilizing the Colorado Open Records

Act, §§ 24-72-200.1, et seq., C.R.S. (2018) (“CORA”), to obtain records related to any facts, claims, or defenses at issue in this case from the Defendants, the Colorado Civil Rights Division (the “Division”), and any other agency, department, official, employee, or agent of the State of Colorado during the pendency of Case No. 1:18-cv-02074; and

(3) Defendants are not required to respond to any CORA request for records related to any facts, claims, or defenses at issue in Case No. 1:18-cv-02074 received from Plaintiffs, their counsel of record, or any others working in concert with Plaintiffs and/or their counsel of record on or after August 14, 2018, including without limitation the requests dated August 29, 2018 that were issued by Barry K. Arrington of the Arrington Law Firm and are currently pending with the Division, the Governor’s Office, and the Attorney General’s Office.

9. CASE PLAN AND SCHEDULE

a. Deadline for Joinder of Parties and Amendment of Pleadings:

December 7, 2018.

b. Discovery Cut-off:

Plaintiffs: Plaintiffs ask that the discovery period open on October 24, 2018, and run for 180 days.

Defendants: If the Court denies their motion to dismiss [ECF No. 43], then Defendants propose 180 days from the date of the Order denying same.

c. Dispositive Motion Deadline:

Plaintiffs: Plaintiffs propose that any dispositive motions be filed no later than sixty (60) days following the close of discovery.

Defendants: If the Court denies their motion to dismiss [ECF No. 43], then Defendants propose 240 days from the date of the Order denying same.

d. Expert Witness Disclosure:

1. The parties shall identify anticipated fields of expert testimony, if any.

Plaintiffs: Plaintiffs anticipate needing an expert witness to provide testimony about economic damages.

Defendants: Defendants anticipate needing an expert witness to rebut Plaintiffs' economic damages expert.

2. Limitations which the parties propose on the use or number of expert witnesses.

The parties propose that no more than one (1) expert witness be allowed for each side.

3. The parties shall designate all experts and provide opposing counsel and any pro se parties with all information specified in Fed. R. Civ. P. 26(a)(2) on or before ninety (90) days before the discovery cut-off date.

4. The parties shall designate all rebuttal experts and provide opposing counsel and any pro se party with all information specified in Fed. R. Civ. P. 26(a)(2) on or before thirty (30) days before the discovery cut-off date.

e. Identification of Persons to Be Deposed:

Because this Court has not yet decided Defendants' immunity defenses, Defendants have not yet answered the Complaint, and discovery has not commenced, decisions on whether depositions are necessary and which witnesses may need to be deposed have not been made.

Plaintiffs: Subject to that, Plaintiffs anticipate that depositions may be needed of the following witnesses:

- Aubrey Elenis
- Anthony Aragon
- Miguel “Michael” Rene Elias
- Carol Fabrizio
- Charles Garcia
- Rita Lewis
- Jessica Pocock
- John Hickenlooper
- Jack Phillips
- A Rule 30(b)(6) deposition of Masterpiece Cakeshop Incorporated
- Any additional witness identified during discovery or designated to testify at trial.

Defendants: Subject to that, Defendants anticipate that depositions may be needed of the following witnesses:

- Aubrey Elenis and/or a Rule 30(b)(6) deposition of the Division
- Anthony Aragon and/or a Rule 30(b)(6) deposition of the Commission
- Jack Phillips
- A Rule 30(b)(6) deposition of Masterpiece Cakeshop Incorporated
- Debi Phillips
- Lisa Eldfrick
- Autumn Scardina

- Any additional lay or expert witness identified during discovery or designated to testify at trial.

f. Deadline for Interrogatories:

Plaintiffs: Plaintiffs propose that Interrogatories must be served no later than thirty (30) days before the discovery cut-off.

Defendants: If the Court denies their motion to dismiss [ECF No. 43], then Defendants propose 150 days from the date of the Order denying same.

g. Deadline for Requests for Production of Documents and/or Admissions:

Plaintiffs: Plaintiffs propose that Requests for Production of Documents and/or Admissions must be served no later than thirty (30) days before the discovery cut-off.

Defendants: If the Court denies their motion to dismiss [ECF No. 43], then Defendants propose 150 days from the date of the Order denying same.

10. DATES FOR FURTHER CONFERENCES

a. Status conference will be held in this case fourteen (14) days after the Court rules on Defendants' motion to dismiss if the Court denies that motion.

b. A final pretrial conference will be held in this case sixty (60) days after the Court rules on any parties' motion for summary judgment. A Final Pretrial Order shall be prepared by the parties and submitted to the court no later than seven (7) days before the final pretrial conference.

11. OTHER SCHEDULING MATTERS

a. Identify those discovery or scheduling issues, if any, on which counsel after a good faith effort, were unable to reach an agreement.

Plaintiffs: First, Plaintiffs do not agree to delay discovery pending the Court's ruling on Defendants' motion to dismiss. One of Defendants' primary arguments is abstention based on *Younger v. Harris*. It is well established, however, that such abstention is inappropriate when the state is acting in bad faith. Plaintiffs thus request that discovery on the issue of bad faith begin now. This is particularly warranted given that the Supreme Court just found that the state agencies represented by Defendants have acted with "a clear and impermissible hostility toward [Plaintiffs'] sincere religious beliefs." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018).

Second, Plaintiffs do not agree to limit the number of interrogatories, requests for production of documents, or requests for admissions as Defendants propose. Plaintiffs believe that the full number of discovery requests available under the Federal Rules of Civil Procedure should apply.

Third, Plaintiffs do not agree to refrain from deposing the Attorney General or the Governor, although Plaintiffs do not anticipate needing to depose the Attorney General at this time. The Governor is charged by statute with selecting the members of the Colorado Civil Rights Commission and with administering one of the statutes that Plaintiffs have challenged in this case. See Colo. Rev. Stat. § 24-34-303(1)(b)(II)(A) (requiring that at least four Commission members must be from "groups of people who have been or who might be discriminated against because of disability, race, creed, color, sex, sexual orientation, national origin, ancestry, marital status, religion, or age").

Fourth, Plaintiffs do not agree to refrain from pursuing public-records requests under the Colorado Open Records Act. Any Colorado citizens may utilize that statute to

obtain public documents. Plaintiffs should not be stripped of that right simply because they are defending their constitutional rights in this Court.

Defendants: Defendants agree that the parties have reached an impasse over four issues listed by Plaintiffs. First, as will be established in Defendants' forthcoming motion, discovery and disclosures should be stayed pending a ruling on their pending motion to dismiss, which raises only jurisdictional issues. Limited discovery on the issue of bad faith will be necessary only if this Court first concludes that the Verified Complaint establishes a prima facie case of bad faith, which it does not because Plaintiffs' factual allegations of same are wholly conclusory and based on their misapprehension of controlling law. Additionally, even assuming for the sake of argument that Plaintiffs could prove bad faith, the Division Director is entitled to absolute immunity from Plaintiffs' damages claims, which cannot be overcome by a showing of bad faith.

Second, the default limitations on interrogatories, requests for production, and requests for admission should be modified so that the limitations are imposed *per side*, not per party. There are currently nine defendants and only two plaintiffs. The default "per party" limits would unnecessarily multiply the discovery in and cost of this case, contrary to Rule 1's requirement of securing a just, speedy, and inexpensive determination. Such a result is especially untenable where, as here, the parties agree that this case primarily involves disputed questions of law. See Paragraph 6(h) above.

Third, Plaintiffs should not be permitted to depose the Governor or Attorney General because they cannot identify any subject or knowledge that is uniquely possessed by either Defendant. To the contrary, the Verified Complaint is largely devoid

of any factual allegations regarding their personal participation in the transactions giving rise to their claims. Any information sought by Plaintiffs can be obtained through other means, such as a Rule 30(b)(6) deposition of the Division or Commission.

Fourth, as will be established in Defendants' forthcoming motion, open records laws (such as CORA) cannot be used to circumvent or supplement a court's discovery limits. Plaintiffs should therefore be precluded from: obtaining any records through their pending CORA requests to Defendants; issuing any new CORA request for records related to the facts, claims, and defenses at-issue in this case to Defendants, the Division, or any other agency, department, official, employee, or agent of the State of Colorado during the pendency of this case; and using any documents in this case that were obtained outside of the discovery process.

b. Anticipated length of trial and whether trial is to the court or jury.

Plaintiffs: Plaintiffs anticipate that trial will take no more than four days and will be a jury trial.

Defendants: If this Court grants Defendants' immunity defenses [ECF No. 43], then Defendants anticipate that trial will take no more than three (3) days and will be a trial to Court. If this Court denies Defendants' immunity defenses, then Defendants anticipate that trial will take no more than five (5) days and will be a jury trial.

c. Identify pretrial proceedings, if any, that the parties believe may be more efficiently or economically conducted in the District Court's facilities at 212 N. Wahsatch Street, Colorado Springs, Colorado 80903-3476; Wayne Aspinall U.S. Courthouse/Federal Building, 402 Rood Avenue, Grand Junction, Colorado 81501-2520; or the U.S. Courthouse/Federal Building, 103 Sheppard Drive, Durango, Colorado 81303-3439.

None.

12. NOTICE TO COUNSEL AND PRO SE PARTIES

The parties filing motions for extension of time or continuances must comply with D.C.COLO.LCivR 6.1(c) by submitting proof that a copy of the motion has been served upon the moving attorney's client, all attorneys of record, and all *pro se* parties.

Counsel will be expected to be familiar and to comply with the Pretrial and Trial Procedures or Practice Standards established by the judicial officer presiding over the trial of this case.

With respect to discovery disputes, parties must comply with D.C.COLO.LCivR 7.1(a).

Counsel and unrepresented parties are reminded that any change of contact information must be reported and filed with the Court pursuant to the applicable local rule.

13. AMENDMENTS TO SCHEDULING ORDER

The parties agree that this Scheduling Order may be altered or amended only upon a showing of good cause, which presumptively exists if Plaintiffs amend the Verified Complaint [ECF No. 1], or this Court grants Defendants' motion to dismiss [ECF No. 43] in part or in total.

DATED at Denver, Colorado, this _____ day of October, 2018.

BY THE COURT:

United States Magistrate Judge
Scott T. Varholak

APPROVED:

s/ James A. Campbell

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2018, I electronically filed the foregoing SCHEDULING ORDER with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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