

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

Defendants.

**PLAINTIFFS' COMBINED RESPONSE TO STATE OFFICIALS' MOTION TO STAY
ALL DISCLOSURES AND DISCOVERY & MOTION FOR ORDER PROHIBITING
PLAINTIFFS' USE OF OPEN RECORDS LAWS TO CIRCUMVENT DISCOVERY**

Introduction

Plaintiffs Jack Phillips and Masterpiece Cakeshop (collectively, Phillips) design and create custom cakes that convey messages. Phillips creates his cakes for all people, but his religious beliefs keep him from expressing messages that violate his conscience. For exercising his faith this way, Defendants (collectively, Colorado) tried to punish Phillips in 2013, but lost at the Supreme Court because of its “clear and impermissible hostility toward [his] sincere religious beliefs.” *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1729 (2018) (*Masterpiece I*). Within weeks, Colorado launched a renewed effort to punish Phillips again, prompting him to file this lawsuit, which is supported by even more evidence of Colorado’s bias against him and his faith, including the fact that one Defendant has publicly called him the “cake hater.”

With such damning evidence already coming to light, Colorado is desperately seeking a veil of darkness, asking that this Court not only shut down discovery but also ban Phillips from doing what anyone else in the state can do—request documents under the Colorado Open Records Act (CORA). Colorado’s position is so extreme that it even seeks to forbid Phillips from relying on public documents that others might obtain. That goes much too far. Allowing Colorado to hide beneath the cover of court-imposed darkness would be a mistake for two reasons.

First, stopping all discovery is the exception, not the rule, in this Court, and for good reason. This drastic measure often shifts the risk and burden of litigation to one party just to save the other from a little undesired work. That’s the case here. By asking this Court to stop all discovery, Colorado ignores Phillips’s ongoing loss of his free-exercise, free-speech, and due-process rights. That harm cannot be the price for letting Colorado keep back its information—especially when Colorado itself created an immediate litigation need for discovery by raising *Younger* abstention

in its motion to dismiss. Because Colorado raises that argument, Phillips must be allowed to come forward with more evidence of the state's bad faith and bias against him and his beliefs. He deserves discovery on this issue since it pertains directly to Colorado's efforts to dismiss his case.

Second, besides asking the Court to shut down all discovery, the state also requests an outright ban on Phillips's access to *and* use of public records in connection with this case. Colorado cites no case that would support this kind of stranglehold. On the contrary, the weight of authority establishes that litigants like Phillips do not forfeit access to public records when they sue the government. Why would they? Public records, at least in Colorado, are available to "any person" who asks for them. Colo. Rev. Stat. § 24-72-204(1). Phillips meets that requirement. But Colorado still vies for a litigation exception, saying that it likes discovery rules better. That's hard to believe because the state is doing everything it can to avoid discovery; and the protections they seek—such as safeguards for privilege and confidentiality—can be found in CORA. Colorado's extreme efforts to keep from giving Phillips *any* information raises a fundamental question: What's it got to hide?

Factual Background

In *Masterpiece I*, the Supreme Court marked two ways that Colorado showed its hostility toward Phillips. 138 S. Ct. at 1729-31. First, the state treated Phillips unequally, allowing other cake artists to decline to create custom cakes that express messages they find objectionable while depriving Phillips of that freedom. *Id.* at 1730-31. Second, state officials made hostile comments about religion, ranging from the sentiment that certain people of faith are not "welcome in Colorado's business community," to outright animus that referred to Phillips's plea for religious freedom as a "despicable piece[] of rhetoric" akin to "defenses of slavery and the Holocaust." *Id.* at 1729.

But even after the Court’s rebuke, nothing has changed. Colorado is now coming after Phillips again. Last year, on the day the Supreme Court announced that it would hear Phillips’s case, a Denver-area attorney, in an apparent setup, googled Masterpiece Cakeshop’s contact information, called the shop, and asked for a custom cake designed with a pink interior and blue exterior to celebrate the anniversary of a gender transition. Am. Compl. ¶¶ 184-86, Doc. No. 51. The lawyer said that “the design was a reflection of the fact that [the lawyer] transitioned from male-to-female” and that “the cake was ‘to celebrate’” that transition. Am. Compl., Ex. A at 2, Doc. No. 51-1. A few months later, the same lawyer called Masterpiece Cakeshop again and requested a custom cake celebrating Satan. Am. Compl. ¶¶ 311-16, Doc. No. 51.

The shop declined both requests not because of who the customer was but because the cakes’ designs expressed messages that conflict with Phillips’s faith. *Id.* at ¶¶ 186-94, 311-16. The lawyer then filed a discrimination charge concerning the gender-transition cake, and just three weeks after the Supreme Court ruled for Phillips this past summer, the Colorado Civil Rights Division (Division) issued a probable-cause determination finding that Phillips “violated” the state public-accommodation law by declining that request. *Id.* at ¶ 218. Pressing forward, the Colorado Civil Rights Commission (Commission) filed a formal complaint last month claiming that Phillips “denied service to [the lawyer] based on her sexual orientation (transgender status) ... in a violation of [the state public-accommodation law].” *Id.* at ¶ 237.

When Phillips learned that Colorado was coming after him again, he needed to act quickly. So he had his attorneys put this lawsuit together and start compiling helpful information. Phillips learned early on that none of the Defendants—or the Division or Commission in general—had disavowed either Colorado’s unequal treatment of him or their hostile comments towards him.

This fact landed in the original complaint that was filed in mid-August. Ver. Compl. ¶¶ 216-18, Doc. No. 1. But Phillips thought more information must be out there.

A couple weeks later, he had his attorneys prepare and submit public-record requests seeking information mainly about two things: (1) Colorado’s general practice of treating people of faith worse than others when enforcing its public-accommodation law; and (2) Colorado’s statements about Phillips and his faith. After some communications back and forth between Colorado’s counsel and Phillips’s counsel, Colorado sent a letter announcing that it would move this Court to stop Phillips from using CORA to get information “related to the facts, claims, and defenses at-issue in the pending litigation.” Defs.’ Mot. for Order Prohibiting Pls.’ Use of Open Records Laws to Circumvent Disc. (Defs.’ Open Records Mot.), Ex. D at 1, Doc. No. 46-4. Colorado added that if the Court denied its motion, it would “proceed with fulfilling” Phillips’s public-records requests only if he paid the estimated costs, which came in at a staggering amount—over \$50,000—and did not even include projected costs for one agency’s work. *Id.* at 3; *see id.* at 2-3.

Meanwhile, Phillips’s attorneys were working with Colorado in early October to prepare a proposed scheduling order. At that time, Colorado indicated that it wanted to stay all discovery and disclosures because it had filed a motion to dismiss. But Phillips did “not agree to delay discovery” in this situation and asked for “discovery on the issue of bad faith” to begin immediately. Proposed Scheduling Order 12, Doc. No. 45. Because the state had raised *Younger* abstention in its motion to dismiss, Phillips wanted more information about Colorado’s bad faith to support his defense since bad faith, bias, and exceptional circumstances are long-recognized exceptions to the *Younger* doctrine. But so far, Phillips has had no opportunity to get any information from Colorado. And the state has now filed two motions to keep it that way, seeking

to stop Phillips from getting any information at all, either through discovery or the state open-records law.

As Phillips waits, he suffers ongoing constitutional harm. He filed a motion for preliminary injunction a couple weeks ago asking this Court to stop Colorado from violating his free-exercise, free-speech, and due-process rights. *See* Pls.’ Mot. for Prelim. Inj., Doc. No. 57. Each passing day, this harm only grows. He asks this Court to provide him with a meaningful opportunity to get the information he needs before it’s too late.

Argument

Phillips’s right to move forward with his case “should not be denied except under the most extreme circumstances.” *Morrill v. Stefani*, No. 17–cv–00123–WJM–KMT, 2017 WL 1134767, at *1 (D. Colo. Mar. 13, 2017) (citing *Commodity Futures Trading Comm’n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983)). This is especially true here, where Phillips seeks immediate injunctive relief to restore his constitutional freedoms and to keep from facing biased administrative officials who are hostile to him and his faith. *See* Pls.’ Mot. for Prelim. Inj., Doc. No. 57. But Colorado wants to stop this case in its tracks, highlighting some supposed “burdens” it wants to avoid—like having to produce discovery or respond to open-records requests while a motion to dismiss is pending. Defs.’ Mot. to Stay All Disclosures & Disc. 8-9, Doc. No. 48. These circumstances are far from extreme and do not justify the state’s demands.

I. Phillips deserves limited discovery.

Colorado seeks extraordinary relief—to stop all discovery. But stopping discovery is rare, even when a motion to dismiss is pending. *See Arch Specialty Ins. Co. v. 13 Pure, Inc.*, No. 11-CV-00461-PAB-MEH, 2011 WL 4485969, at *1 (D. Colo. Sept. 27, 2011) (“A stay of all discovery is generally disfavored in this District.”); *Chavez v. Young America Ins. Co.*, No. 06-CV-02419-PSF-BNB, 2007 WL 683973, at *2 (D. Colo. Mar. 2, 2007) (“It generally is the policy

in this district not to stay discovery pending a ruling on a motion to dismiss.”). And for good reason. Motions to dismiss often take months to decide and “are denied more often than they result in the termination of a case.” *Chavez*, 2007 WL 683973, at *2.

Delays impose unique and heavy costs on plaintiffs like Phillips who seek immediate relief to vindicate and restore their constitutional rights. Phillips, for example, will suffer continuing irreparable harm—the ongoing loss of his free-speech, free-exercise, and due-process rights—until this Court intervenes to stop it. Harms like that cannot be the cost for insulating defendants from a little discovery. Often, as here, a less drastic measure would suffice. Rather than stopping all discovery, the Court should allow Phillips to conduct limited discovery to support his claims that some *Younger* exceptions apply. Other courts have taken this more measured approach in similar circumstances. *See, e.g., Sica v. Connecticut*, 331 F. Supp. 2d 82, 88 (D. Conn. 2004) (allowing “limited discovery” for plaintiff “to buttress her claims that the *Younger* exceptions apply”).

This approach protects both parties. And it is consistent with this Court’s policy to stop discovery only when there is a need “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P. 26(c); *see Chavez*, 2007 WL 683973, at *1. Courts determine this need by weighing five factors: (1) the burden on the defendants; (2) the interest of plaintiffs in proceeding expeditiously with discovery and the potential prejudice to plaintiffs of a delay; (3) the convenience to the Court; (4) the interests of non-parties; and (5) the public interest. *String Cheese Incident, LLC v. Stylus Shows, Inc.*, No. 1:02-CV-01934-LTB-PA, 2006 WL 894955, at *2 (D. Colo. Mar. 30, 2006). All of these factors weigh in favor of moving forward with limited discovery in this case.

A. Stopping all discovery overprotects Colorado.

Colorado seeks shelter from all discovery demands because it filed a motion to dismiss. *See* Defs.’ Mot. to Stay All Disclosures & Disc. 8-9, Doc. No. 48. But Colorado is not entitled to an automatic stay just because it filed that motion. *See Chavez*, 2007 WL 683973, at *2. And providing some discovery is just a routine burden that comes with litigation. As this Court has recognized before, defendants always bear burdens “when they are sued, whether the case ultimately is dismissed; summary judgment is granted; the case is settled; or a trial occurs.” *Id.* Colorado suffers no “special burden” here. *Id.*

This holds true even though Colorado asserts some immunity defenses. While courts sometimes stay discovery when a party raises immunity defenses to suits seeking damages only, personal immunity defenses are “totally immaterial” to whether discovery should be stayed when plaintiffs also seek injunctive relief. *Lugo v. Alvarado*, 819 F.2d 5, 7 (1st Cir. 1987). No matter Colorado’s success in dismissing the damage claims, it will still have to provide discovery in connection with Phillips’s claims for injunctive relief.¹ The only way Colorado escapes this requirement is if its *Younger* abstention argument succeeds. But the *Younger* issue actually supports moving forward with limited discovery, not stopping it.

By raising *Younger* abstention, Colorado makes certain facts in the amended complaint critically important—facts that concern bad faith, bias, and extraordinary circumstances and that serve to establish any of these three long-recognized exceptions to *Younger* abstention. *See Kugler v. Helfant*, 421 U.S. 117, 124 (1975) (noting exceptions for bad faith and extraordinary circumstances); *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) (noting exception where state administrative agency “was incompetent by reason of bias to adjudicate issues pending before it”).

¹ The Attorney General and the Governor are the only defendants whose Eleventh Amendment immunity arguments could keep them completely out of the case.

Colorado's *Younger* argument invites discovery on at least those limited issues, and the Court should allow it. *See, e.g., Sica*, 331 F. Supp. 2d at 88 (allowing "limited discovery" for plaintiff "to buttress her claims that the *Younger* exceptions apply"). *Cf. Lugo*, 819 F.2d at 6-7 (considering a party's conduct before and after filing its motion to stay discovery in assessing the need for a stay). Otherwise Colorado would receive a windfall—relief from a burden it helped create and an unfair tactical advantage, something protective orders are supposed to prevent, not facilitate.

B. Stopping all discovery risks irreparably harming Phillips.

In contrast, Phillips stands to lose a lot if the Court stops all discovery. He needs immediate relief from ongoing constitutional violations. *See* Pls.' Mot. for Prelim. Inj., Doc. No. 57. And any delay would harm Phillips in at least two ways. First, Colorado violates Phillips's free-speech rights every day this lawsuit is delayed. *See id.* at 13-25. Phillips lives under Colorado's continuing efforts to punish him. Because he creates custom cakes expressing messages, Colorado interprets its public-accommodation law to force him to create custom cakes expressing messages that conflict with his faith so long as the requested message somehow implicates a statutorily protected characteristic. *See id.* at 18-20. This coercion pressures Phillips to stop speaking through his custom cakes altogether. Anyone who hears about Phillips in the news can google his phone number, call his shop, and ask for a custom cake expressing a message that they expect will conflict with his faith, just like the lawyer did in this case. *See* Am. Compl. ¶¶ 181-99, Doc. No. 51. Keeping Phillips under this kind of pressure inflicts serious damage.

But Colorado not only pressures Phillips to stop speaking through his custom cakes, it *explicitly* silences him too. The state's public-accommodation law has two publication bans that forbid Phillips from publishing, distributing, or displaying certain communications. *See* Pls.' Mot. for Prelim. Inj. 22-23, Doc. No. 57 (detailing these laws). Colorado applies those bans to forbid

Phillips from announcing some messages that he will not express through his custom cakes and from explaining the religious reasons why he cannot express those views. Am. Compl. ¶¶ 270-71, 278-80, Doc. No. 51. One of those laws even subjects Phillips to criminal penalties, including jail time. Colo. Rev. Stat. § 24-34-705. This has forced Phillips to chill his desired speech on his website and in other places. Am. Compl. ¶¶ 270, 281, Doc. No. 51. Any delay would keep Phillips's protected speech under wraps even longer. That ongoing harm compounds daily.

Second, Colorado continues to violate Phillips's free-exercise and due-process rights by allowing biased and hostile commissioners to prosecute and ultimately decide Phillips's fate. A delay would ensure that Phillips will suffer some of the harm this lawsuit seeks to prevent before getting any resolution from this Court. In fact, Colorado has set the formal hearing in its administrative case against Phillips for February 2019. Then the Commission will decide that case. Subjecting Phillips to that proceeding deprives him of due process. *See id.* at 8-13, 25-29. That's a high cost for delay.

But delay is not the only problem with stopping discovery. It would give Colorado an unfair strategic advantage over Phillips. Even though the complaint catalogues Colorado's bad faith in detail, the state deems those allegations "wholly conclusory." Defs.' Mot. to Stay All Disclosures & Disc. 7, Doc. No. 48. That's not a fair characterization of the allegations. But more to the point, Colorado loses under its own argument. Even with general allegations, Phillips would still deserve the opportunity to "come forth with additional, supplemental evidence" to support his claims that the *Younger* exceptions apply. *Phelps v. Hamilton*, 122 F.3d 885, 890 (10th Cir. 1997). Toward that end, he should be allowed to conduct limited discovery. *See Sica*, 331 F. Supp. 2d at 88.

As mentioned above, Phillips has provided much more than general allegations of bad faith. Consider just a few examples of what Phillips has uncovered without having the chance to conduct discovery or even obtain public records.

First, Colorado still treats Phillips worse than other cake artists because it disapproves of his faith. In enforcing its public-accommodation law, Colorado created an “offensiveness” rule that allows cake artists “to decline to create specific messages [they] consider[] offensive.” *Masterpiece I*, 138 S. Ct. at 1728. Colorado applied that rule when approving “the refusal of bakers to create cakes with images that conveyed [religious] disapproval of same-sex marriage.” *Id.* at 1730. Yet Colorado discriminates in applying that rule, targeting Phillips for exercising his faith while allowing others to refuse messages that they deem offensive. This “difference in treatment between Phillips[]” and other cake artists is an “indication of hostility” toward Phillips’s religious beliefs. *Id.* at 1730; *see also* Am. Compl. ¶¶ 171-75, Doc. No. 51 (highlighting this hostility).

The Supreme Court condemned this discrimination in *Masterpiece I*. But Colorado has not changed its discriminatory practice since then. Far from it. When Phillips declined to create a custom cake celebrating a gender transition and others celebrating Satan, he did so not because of the person who requested it, but because he considered the message that the cakes would have conveyed offensive to his faith. *Id.* at ¶¶ 191–94, 307–24. Yet Colorado maintains that Phillips may not decline those requests. *Id.* at ¶¶ 218, 237, 325. The Commission has even issued a formal complaint insisting that Phillips violated the state’s public-accommodation law by declining to create the gender-transition cake. *Id.* at ¶ 230. This decision to prosecute Phillips again—this continued unequal treatment of him—confirms Colorado’s bad faith. *Id.* at ¶¶ 220-25, 231-44; *see also* Pls.’ Mot. for Prelim. Inj. 10-11, Doc. No. 57 (explaining Colorado’s unequal treatment in more detail).

Second, Colorado’s continuing discrimination against Phillips goes back on assurances the state made to the Supreme Court while briefing *Masterpiece I*. In explaining its offensiveness rule, Colorado said that it would allow cake artists to decline to create custom cakes with pro-LGBT designs and messages: “Under the Act, [a cake artist] is free ... to *decline* to sell cakes with ‘pro-gay’ designs or inscriptions.” Br. for Resp’t Colo. Civil Rights Comm’n at 35, *Masterpiece I*, 138 S. Ct. 1719 (2018) (No. 16-111) (U.S. Oct. 23, 2017); Am. Compl. ¶ 68, Doc. No. 51. That statement should protect Phillips’s decision not to create a custom cake with a design celebrating a gender transition. But Colorado ignored its own statement to the Supreme Court and launched another effort to prosecute Phillips again. That shows more bad faith.

Third, commissioners, both past and present, have made hostile statements toward Phillips and his faith. As the Supreme Court found, past commissioners “endorsed” the “inappropriate and dismissive” “view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain” and that “religious beliefs and persons are less than fully welcome in Colorado’s business community.” *Masterpiece I*, 138 S. Ct. at 1729. Also, one former commissioner—with “no objection” from the others—“disparage[d]” Phillips’s religion “by describing it as despicable,” “characterizing it as ... insubstantial,” and “compar[ing] [his] invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust.” *Id.*; *see also* Am. Compl. ¶¶ 146-53, Doc. No. 51. Colorado has done nothing to disavow or correct the Commission’s opposition toward Phillips and his faith.

Rather, current commissioners build on this tradition of hostility. Evidence already confirms that one current commissioner has publicly referred to Phillips as the “cake hater.” Am. Compl. ¶ 259, Doc. No. 51. And another, a self-described LGBT “activist,” revealed his personal opposition to Phillips through a rainbow-theme Facebook post about the Supreme Court arguments

in Phillips’s first case and his current service with a group—the National LGBTQ Task Force—that filed an amicus brief against Phillips. *Id.* at ¶¶ 260-61. No reasonable person could think that allowing Phillips to undergo another round of proceedings before these commission members satisfies the appearance of fairness, neutrality, and impartial justice. *Id.* at ¶ 263.

Fourth, Colorado slants the facts against Phillips in the formal complaint that it filed against him. For example, the complainant lawyer’s charge of discrimination admitted that the lawyer “disclosed” to Masterpiece Cakeshop that the cake’s design “was intended for the celebration of my transition from male to female,” that the lawyer “wanted my birthday cake to celebrate my transition by having a blue exterior and a pink interior,” and that the lawyer “requested that its color and theme celebrate my transition from male to female.” Am. Compl. ¶ 233, Doc. No. 51. But the Commission’s formal complaint omits all this. *Id.* This whitewashing is more evidence of the Commission’s prejudged conclusion, which it expressly provides later in its complaint: “Masterpiece denied service to [the lawyer] based on her sexual orientation (transgender status), as defined by § 24-34-301(7), C.R.S. (2018), in a violation of § 24-34-601(2)(a), C.R.S. (2018).” *Id.* at ¶ 237. The Commission picks the outcome from the start. And it gets the final say.

These examples confirm that Phillips has “a specific, factual basis for alleging bad faith.” Defs.’ Mot. to Stay All Disclosures & Disc. 7, Doc. No. 48. Yet the state just ignores it. And now that Colorado has raised *Younger* abstention as a basis for kicking Phillips’s case out of this Court, denying limited discovery would create an “undue burden,” not prevent one. Fed. R. Civ. P. 26(c). No protective order should help Colorado dodge a discovery burden it helped create, especially when doing so would hamstring Phillips’s only chance at a fair hearing. In short, staying discovery may lead to an unjust dismissal of this case, and nothing harms Phillips more than that.

C. Stopping all discovery frustrates judicial efficiency.

Any dismissal now would produce another problem—waste. Suppose the Court denied Phillips’s request for limited discovery, and Colorado eked out a dismissal on *Younger* abstention grounds. This dismissal would have to be *without prejudice*. See, e.g., *Morrow v. Winslow*, 94 F.3d 1386, 1398 (10th Cir. 1996) (vacating merits-based ruling and remanding with instructions to abstain and enter a *without-prejudice* dismissal); *Goings v. Sumner Cty. Dist. Attorney’s Office*, 571 F. App’x 634, 639 (10th Cir. 2014) (finding that “*Younger*-abstention dismissals” should be “*without prejudice*”). In that event, Phillips would immediately press or refile his open-records requests; Colorado would have to disclose the records it now seeks to conceal; and Phillips will refile his lawsuit with the new information he obtains. All that does is waste the Court’s time and effort by forcing it to start over with a new case. The reason that Colorado prefers this course, despite the waste of judicial resources, is obvious: the state will keep prosecuting Phillips in the meantime and hope that, by the time Phillips returns to federal court, the latest round of punishment will have been accomplished. That serves neither this Court’s nor Phillips’s interests.

D. Stopping all discovery does not help non-parties.

Phillips’s request for limited discovery to support his allegations that the *Younger* exceptions apply does not require him to involve non-parties because his burden is to show bad faith and bias on the part of Defendants themselves. While Colorado thinks it will need to depose non-parties when full discovery takes place, see Defs.’ Mot. to Stay All Disclosures & Disc. 8-9, Doc. No. 48, the people they name likely have no helpful information about Colorado’s bad faith, and this Court should not give the state reciprocal discovery permissions during this initial phase anyway. See *Sica*, 331 F. Supp. 2d at 88 (concluding that only “Plaintiff is entitled to *limited expedited discovery*” about facts supporting her claims for *Younger* exceptions).

E. Stopping all discovery undermines the public interest.

The public will profit from this case moving forward quickly. First, the public always has “a general interest” in seeing cases resolved in an “efficient and just” way. *Profitstreams LLC v. Ameranth, Inc.*, No. 11-CV-01710-RBJ-KLM, 2011 WL 5024912, at *3 (D. Colo. Oct. 21, 2011). The best way to accomplish that is to move forward with limited discovery, not to stop it altogether. Second, “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Verlo v. Martinez*, 820 F.3d 1113, 1127 (10th Cir. 2016). As explained above, Colorado is violating, and will continue to violate, Phillips’s free-exercise, free-speech, and due-process rights unless this Court intervenes immediately. *See* Section I(B) *supra*. Stopping all discovery would perpetuate this injury and so undermine the public interest.

II. Phillips deserves access to Colorado’s public records.

Colorado desperately seeks to keep Phillips from getting any information about its operations or communications. Besides asking the Court to shut down all discovery, the state requests an outright ban on Phillips’s access to *and* use of certain public records in connection with this case. That’s quite a stretch, and Colorado cites no precedent to support its two-prong approach.

A. Phillips can inspect Colorado’s public records even during active litigation with the state.

Like anyone else in the state, Phillips has a right to inspect Colorado’s public records. *See* Colo. Rev. Stat. § 24-72-203(1)(a) (“All public records shall be open for inspection by any person”). He does not forfeit this right when he files a lawsuit against state officials. *See People in Interest of A.A.T.*, 759 P.2d 853, 854 (Colo. App. 1988) (“[CORA] does not expressly limit access to any records merely because a person is engaged in litigation with the public agency from which access to records is requested.”); *Mid-Atlantic Recycling Tech., Inc. v. City of Vineland*, 222 F.R.D.

81, 85 (D.N.J. 2004) (finding that public records “are no less subject to public access because the requestor filed a lawsuit against the governmental entity”); *Noland v. City of Albuquerque*, No. CIV-08-0056 JB/LFG, 2009 WL 5217998, at *3 (D.N.M. Oct. 27, 2009) (finding no reason that plaintiff “cannot make requests for public information while his lawsuit is pending”). When Phillips sought public records a couple months ago, he deserved to get them.

But Colorado is holding them back. It thinks Phillips tried to “bypass” federal rules of civil procedure to get them. Defs.’ Open Records Mot. 5, Doc. No. 46. But Phillips’s use of an open-records law to “obtain public documents that are related to simultaneous litigation does not conflict” with those rules. *Mid-Atlantic*, 222 F.R.D. at 85. As this Court has said before, CORA and the Federal Rules of Civil Procedure “are not in conflict; they are in harmony.” *Morrison v. City & Cty. of Denver*, 80 F.R.D. 289, 291 (D. Colo. 1978). By casting Phillips as a rule-breaker, Colorado manufactures an illusory conflict between two parallel disclosure laws, one available to all people and one available to litigants. *See Mid-Atlantic*, 222 F.R.D. at 85-86 (explaining how the Federal Rules of Civil Procedure and a standard open-records law work with, not against, each other).

B. Colorado cites no case that justifies banning access to public records and shutting down all discovery.

Without a conflict between the open-records law and this Court’s rules, Colorado is left asking for another discretionary protective order. To justify this request, Colorado mainly argues that Phillips “cannot accomplish through an open records request that which he ‘[is] unable to accomplish during civil discovery proceedings.’” Defs.’ Open Records Mot. 7, Doc. No. 46 (citing *Christmann & Welborn v. Dep’t of Energy*, 589 F. Supp. 584, 586 (N.D. Tex. 1984)). But Phillips is not trying to do that. As Colorado admits, he is seeking “records that would otherwise be available through the discovery process”—not records unavailable through routine discovery.

Defs.’ Open Records Mot. 5. So Colorado asks this Court to *create* a conflict from scratch—i.e. issue a discretionary protective order—that will disqualify Phillips’s otherwise lawful open-records requests. The state’s cases do not support that flanking maneuver.

Take Colorado’s collage of Freedom of Information Act (FOIA) cases. *See* Defs.’ Open Records Mot. 6-7, Doc. No. 46. Some of them involve record-seekers who chased information that they could not normally get under civil discovery rules. *See, e.g., United States v. Weber Aircraft Corp.*, 465 U.S. 792, 800-02 (1984) (requester sought privileged information); *Christmann*, 589 F. Supp. at 586 (same); *Williams & Connolly v. SEC*, 662 F.3d 1240, 1243 (D.C. Cir. 2011) (requester sought “work product” that is “not ‘routinely’ or ‘normally’ discoverable”). In contrast, Phillips seeks records that he could get through discovery. *See* Defs.’ Open Records Mot. 5, Doc. No. 46. While litigants cannot use CORA to obtain *more* records than normal, no rule keeps them from getting *any at all*. *See Mid-Atlantic*, 222 F.R.D. at 86 (“It does not stand to reason that because a party’s status as a litigant does not improve or increase that party’s rights to gain access of documents under [open-records law], a party’s access is decreased or limited by such status.”).

Colorado’s other FOIA cases provide even less help. Some turn on express open-records exemptions not at issue here. *See e.g., John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989) (applying 5 U.S.C. § 552(b)(7)’s FOIA exemption); *Johnson v. U. S. Dep’t of Justice*, 758 F. Supp. 2, 4 (D.D.C. 1991) (same). But Phillips seeks none of those. Another case Colorado cites gave the requestor far more than what Phillips wants from his requests: not only an order requiring the government to disclose documents that would help a record-seeker litigate its pending case before an administrative agency, but also an order enjoining agency proceedings until this disclosure was made. *Columbia Packing Co., Inc. v. USDA*, 563 F.2d 495, 499-500 (1st Cir. 1977). It’s hard to imagine that Colorado wants a similar outcome here.

Colorado instead wants the Court to follow an unreported decision that actually undercuts its requested relief. In *Citizen Center v. Gessler*, the court temporarily stopped a party from submitting CORA requests seeking information otherwise discoverable during the pending litigation. Order Regarding Emergency Mot. of Citizen Center for Magistrate’s Recons. & Stay Pending Recons. of Part of the Court’s June 4 Scheduling Order (Emergency Mot. Order), at Order ¶ 1, No. 12-cv-00370-CMA-MJW (D. Colo. July 16, 2012), Doc. No. 72. But the *Citizen Center* court did so only after allowing the parties extensive discovery. For example, the court allowed up to 70 interrogatories per side, 30 non-expert depositions per side, 25 requests for production per party, and 50 requests for admission per party. Scheduling Order at § 8, No. 12-cv-00370-CMA-MJW (D. Colo. June 4, 2012), Doc. No. 53. The court did not allow state officials to escape disclosing records under both CORA *and* discovery rules.

By pressing pause on the plaintiff’s open-records requests in *Citizen Center*, the court gave space for the parties to get the information they needed through just one channel, not two. Here, Colorado wants a chokehold on both. Rather than seeking to limit “discovery in excess of [court] limitations,” Colorado asks for a full stop. Emergency Mot. Order at ¶ 8, No. 12-cv-00370-CMA-MJW, Doc. No. 72. No discovery. No public-records access. Nothing. Colorado wants this Court to barricade Phillips from records that *anyone else can access*. That goes too far.

Finally, the court in *Citizen Center* realized that its initial order overreached. It had ruled that neither the organizational plaintiff nor its members could submit open-records requests to get information “otherwise obtainable using discovery.” Scheduling Order at § 8(d)(2), No. 12-cv-00370-CMA-MJW, Doc. No. 53. But when asked to reconsider this, the court found its original order “overbroad because it reache[d]” non-party members of the organizational plaintiff.

Emergency Mot. Order, No. 12-cv-00370-CMA-MJW, at ¶ 14, Doc. No. 72. So the court scaled back its order to “delete mention of the association members.” *Id.*

Colorado invites this Court to make a similar mistake here. The state wants an order that prevents Phillips from “using any records obtained through any third-party open records request for any purpose in this litigation.” Defs.’ Open Records Mot. 10, Doc. No. 46. This is not only unreasonable but also unworkable. The Court should not forbid Phillips from *using* public records obtained by third parties. Many record-seekers, for example, publish records they receive, either to support their research or simply to inform the public. Keeping Phillips from using this information does nothing to lighten Colorado’s litigation load but could mean the difference between proceeding with the case or a dismissal for Phillips. That’s a harsh result. Moreover, managing an order like the one Colorado requests would be a challenge. Suppose Phillips files a public record as an exhibit in support of a motion in this case. Must he check how his source got the document? Or affirm that he did not get it through a third-party public-records request? Colorado cites no support for such an unworkable demand.

C. Colorado overplays its burden to secure an unfair advantage over Phillips.

Phillips just wants access to public records that anyone else could get. But Colorado blocks him at every turn. If Phillips seeks records through CORA, Colorado says discovery works better. But if Phillips asks for limited discovery, Colorado tries to shut that down, saying the Court has no jurisdiction in the first place. Colorado cannot have it both ways. So while Colorado worries about an alleged “unfair advantage” that Phillips would have if allowed to use the state open-records law to get public documents, the state hustles to secure its own unfair advantage over Phillips. Defs.’ Open Records Mot. 8, Doc. No. 46.

In reality, Colorado has little to fear for three reasons. First, the state inflates its own risk. Colorado frets about “respond[ing] to multiple, repeated CORA requests” at the same time that it may have to “respond[] to properly issued discovery requests.” *Id.* But Colorado admits that the same records Phillips seeks under CORA “would otherwise be available through the discovery process.” *Id.* at 5. So the state’s work would largely overlap.

Second, Colorado miscalculates the relative costs of moving forward with discovery and open-records requests. The state thinks it will “incur considerable ‘unnecessary expenses’” in this situation, while Phillips will generally “avoid any added burden or expense.” *Id.* at 8. That is incorrect. Moving forward with open-records requests will not be cheap for Phillips. Colorado says he must pay an exorbitant amount—over \$50,000—to get his desired records.² That’s a steep price to see records that Phillips should get through discovery anyway.

Third, Colorado downplays its procedural protections. For example, the state says the open-records requests deprive it of “the right to object to a discovery request and withhold responsive information or documents because it is not reasonably calculated to lead to the discovery of admissible evidence.” *Id.* at 8. But Phillips is entitled to public records under CORA even if Colorado deems them irrelevant to this case. The Court has no reason to keep off-topic public documents away from Phillips. And suppose Phillips got such a document and sought to admit it as evidence in this case. Colorado could still “object to [its] admissibility.” *Mid-Atlantic*, 222 F.R.D. at 87. So the state’s argument rings hollow.

Harping on the need for procedural protections, Colorado also says that it would lose the right to shield disclosure of “confidential or privileged information.” Defs.’ Open Records Mot.

² This estimate is both unbelievable and unsubstantiated. Even so, more costs are on the way. One of the three agencies that Phillips seeks records from has yet to give a specific estimate for its production fee. *See* Defs.’ Open Records Mot., Ex. D at 2, Doc. No. 46-4.

8-9, Doc. No. 46. But that is untrue. CORA itself already protects the state against sensitive disclosures. *See Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874, 880 (Colo. App. 1987) (finding that § 24–72–204(3)(a)(IV) includes common-law “privileges for attorney-client communication and attorney work product”). So Colorado is wrong to suggest that it is unable to protect its sensitive documents from disclosure.

Conclusion

Phillips wants information that anyone else can get. But Colorado is doing everything it can to make sure that does not happen. It wants to do its work under cover of darkness. It does not want its operations or communications to see the light of day. The extreme nature of Colorado’s dual request smacks of desperation. Given its track record of past and current commissioners who openly express their hostility toward Phillips, it’s no wonder Colorado has something to hide. Meanwhile, Phillips has already shown that the requested documents are vital to his case—both to the merits and to his ability to stay in court and avoid an unjust, biased proceeding. Given this, a little discovery is fair. Colorado’s requests are not.

Respectfully submitted this 7th day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2018, the foregoing document and all its attachments were filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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