

**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' RESPONSE TO STATE OFFICIALS' RULE 12(b)(1) MOTION TO
DISMISS THE FIRST AMENDED VERIFIED COMPLAINT**

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INTRODUCTION

Plaintiffs Jack Phillips and Masterpiece Cakeshop (collectively, Phillips) design and create custom cakes that convey messages. Phillips's faith inspires him to serve all customers, regardless of their protected characteristics. But he can only create art consistent with the tenets of his faith, and that prevents 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, which reprimanded Colorado because its policies, practices, and comments manifested "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 of that rebuke, Colorado launched another prosecution of Phillips for declining to create a custom cake that expresses messages in conflict with his faith. That prompted this lawsuit, which is supported by even more evidence of Colorado's bias against Phillips, including the fact that one defendant has publicly called him the "cake hater."

Colorado's crusade against Phillips violates the Constitution in many ways. The state infringes free-exercise rights by continuing what the Supreme Court condemned in *Masterpiece I*—manifesting hostility toward Phillips's faith through unequal treatment. In particular, Colorado allows others to decline requests for cakes expressing messages they find offensive but punishes Phillips when he does the same thing for religious reasons. Colorado also disregards Phillips's free-speech rights by forcing him to create custom cakes that express messages he deems objectionable. And the state violates due process by subjecting Phillips to a biased and unfair state administrative proceeding in which members of the Colorado Civil Rights Commission (Commission) both file complaints *and* adjudicate claims. Phillips needs this Court to intervene.

Invoking every abstention theory imaginable, Colorado asks this Court to stay its hand while it continues conduct that the Supreme Court just declared unconstitutional. The state leans most heavily on *Younger* abstention, preferring to keep Phillips in a forum where commissioners play the dual role of accuser and adjudicator, where some of them have publicly expressed their opposition and even animus toward him, and where all of them are disregarding key parts of the Supreme Court's recent decision against them. But *Younger* has no place where, as here, Phillips lacks a full and fair opportunity to litigate all his constitutional claims through the state administrative proceeding. Nor does it apply where, as here, enforcement officials are acting in bad faith to harass the accused. No abstention doctrine exiles Phillips to a biased forum that just violated his constitutional rights and is doing so again. Allowing that would abdicate the federal courts' role to shield citizens from state actors who persistently violate the Constitution.

Colorado's remaining (non-abstention) arguments address ancillary issues like whether Phillips may recover damages and whether the Attorney General and the Governor are proper parties. On these points, too, the state is mistaken. Absolute immunity does not apply here because the relevant administrative officials lack meaningful checks on their actions, serve as both accuser and adjudicator, are charged with representing political interests, and disregard not only their own precedents but also relevant portions of Supreme Court rulings. Nor should this Court dismiss the claims against the Attorney General and Governor. Both of them are charged with administering parts of CADA that Phillips has challenged. As a result, sovereign immunity does not save them.

Phillips will suffer significantly if this Court abstains. Colorado's first prosecution, which generated death threats and vandalism, cost Phillips six years of his life, 40% of his family income, and most of his employees—harms that endure even though he eventually won. The potential toll

is greater this time because Colorado’s actions threaten to force Phillips—once and for all—to end his work as a custom cake artist. This Court should deny Colorado’s motion, exercise its jurisdiction over Phillips’s federal claims, and end Colorado’s discrimination against him and his faith.

BACKGROUND

Phillips is an expert cake artist and owner of Masterpiece Cakeshop. Am. Compl. ¶¶ 83–85, Doc. 51. He uses artistic skills such as designing, painting, and sculpting to create expressive cakes. *Id.* at ¶¶ 86–93. When customers request such a cake, Phillips collaborates with them on the design; then he sketches, sculpts, and hand-paints to bring the cake to life. *Id.*

Phillips is a Christian who seeks to follow Jesus Christ. *Id.* at ¶ 95. That mission informs how he runs his business and what art he creates. *Id.* at ¶¶ 95–99, 107. Phillips serves everyone, no matter their protected characteristics. *Id.* at ¶ 2. But he declines to create for anyone cakes with messages that violate his faith, including messages that demean LGBT people, express racism, celebrate Halloween, and promote marijuana use. *Id.* at ¶¶ 109–17.

In 2012, two customers asked Phillips to create a wedding cake celebrating a same-sex marriage. *Masterpiece I*, 138 S. Ct. at 1723. Phillips declined because the cake’s message violated his faith. *Id.* The customers filed a discrimination charge under the Colorado Anti-Discrimination Act (CADA), and after administrative proceedings, the Commission punished Phillips. *Id.*

Meanwhile, a man named William Jack asked three other cake shops “to create cakes with images” and religious messages “that conveyed disapproval of same-sex marriage.” *Id.* at 1730. The shops refused because the messages were offensive to them, and William Jack filed religious-discrimination charges. The Colorado Civil Rights Division (Division) and Commission concluded “that [those shops] acted lawfully.” *Id.* Those decisions established that Colorado

applies CADA using an “offensiveness” rule, which allows cake artists “to decline to create specific messages [they] consider[] offensive,” *id.* at 1728—a rule not applied in Phillips’s case.

Earlier this year, the Supreme Court vacated the Commission’s ruling in Phillips’s case because Colorado acted with hostility toward his faith. *Id.* at 1729. The Court relied on two factors. One was Colorado’s unequal treatment of Phillips compared to the three cake artists who declined to express religious messages opposing same-sex marriage. *Id.* at 1730–31. The other was commissioners’ bigoted comments about religion, ranging from the notion 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.” *Id.* at 1729.

Phillips continues to exercise his faith by declining to create cakes that convey messages in conflict with his beliefs. Am. Compl. ¶¶ 109, 191, 304, 307–23, 327. In 2017, on the same day the Supreme Court announced that it would hear Phillips’s case, a Colorado attorney called Masterpiece Cakeshop and requested a custom cake designed with a pink interior and blue exterior to celebrate the anniversary of a gender transition. *Id.* at ¶¶ 184–86. 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; Am. Compl. ¶ 204 (“I requested that its color and theme celebrate my transition from male to female”).

The shop declined that request not because of who the customer was but because the cake’s design expressed messages that conflict with Phillips’s faith. Am. Compl. ¶¶ 186–94. The design communicated that sex can be changed and expressed celebration for that idea. *Id.* at ¶ 191. But Phillips believes the opposite: that sex is given by God, is biologically determined, and cannot be chosen. *Id.* at ¶ 126. Masterpiece Cakeshop offered to create a different cake for the lawyer or

to sell the lawyer any item available for purchase in the shop. *Id.* at ¶ 196. After this, the lawyer called the shop at least once more and requested a cake celebrating Satan. *Id.* at ¶¶ 311–15.

The lawyer filed a discrimination charge concerning the gender-transition cake, *id.* at ¶ 200, and the Division issued a probable-cause determination declaring that Phillips “violated” CADA, *id.* at ¶ 218. The Commission then filed a formal complaint claiming that Phillips “denied service to [the lawyer] based on her sexual orientation (transgender status) . . . in a violation of [CADA].” *Id.* at ¶ 237. The complaint’s one-sided rendition of facts is more favorable to the lawyer than even what is recited in the discrimination charge. *Id.* at ¶¶ 202–04, 232–33. The Commission could have passed on filing its complaint, and the lawyer would have been authorized to file a civil action against Phillips in state court. *Id.* at ¶ 229.

Meanwhile, Phillips has been—and continues to be—hit with a barrage of insincere requests for custom cakes that express messages contrary to his religious beliefs. *Id.* at ¶¶ 304–05, 327–28. Four of those requests, at least one of which came from the lawyer who requested the gender-transition cake, *id.* at ¶ 313, sought cakes celebrating or otherwise supporting Satan: (1) a “red and black” design with “an upside down cross, under the head of Lucifer,” *id.* at ¶ 308; (2) a “red and black theme and an image of Satan smoking marijuana,” *id.* at ¶ 315; (3) a topper with Satan “licking a . . . black Dildo,” *id.* at ¶ 318; and (4) “a pentagram” design, *id.* at ¶ 320. Colorado interprets CADA to forbid Phillips from declining these requests. *Id.* at ¶¶ 325–26.

Facing Colorado’s intolerance and the threat of losing his livelihood, Phillips has begun, and plans to continue, communicating about Colorado’s mistreatment of him. *Id.* at ¶¶ 266–67. He also wants to inform the public about the kinds of messages he cannot express—like messages celebrating Satan or the idea that sex can be changed—and the religious reasons why. *Id.* at

¶¶ 268–70. But CADA’s two publication bans bar Phillips—with threat of jail time—from announcing that he will decline certain requests or from making some feel “unwelcome.” Colo. Rev. Stat. §§ 24-34-601(2)(a), 24-34-701, 24-34-705. Colorado interprets those bans to prohibit Phillips from communicating that he cannot create expressive cakes like the satanic and gender-transition cakes, and that has chilled Phillips’s desired speech. Am. Compl. ¶¶ 270–71, 278–81.

Colorado’s hostility toward Phillips since 2012 has been blatant. Past and current commissioners, all appointed by Governor Hickenlooper and many of whom are connected with an advocacy group—One Colorado—that consistently opposes Phillips, have openly expressed their disapproval of Phillips’s religious beliefs and exercise. In 2013, when tweeting about Phillips’s first case, a past commissioner wrote: “Freedom OF religion does NOT mean freedom FOR YOUR religion.” *Id.* at ¶¶ 155–56. And when her term expired, the Governor attempted to override senate opposition to keep her. *Id.* at ¶ 157. Another past commissioner referred to Phillips’s reliance on his faith as a “despicable piece[] of rhetoric” akin to “defenses of slavery and the Holocaust,” and yet another said that Phillips “cannot act on his religious beliefs ‘if he decides to do business in the state,’” *Masterpiece I*, 138 S. Ct. at 1729; Am. Compl. ¶¶ 147–53.

Without discovery or responses to public-records requests, Phillips has already learned of current commissioners’ opposition—and animus—toward him. When one of them discussed Phillips’s first case in a series of 2013 tweets, she referred to him as the “cake hater.” *Id.* at ¶ 259. And another, a self-described “LGBT activist,” posted a Facebook comment referencing the Supreme Court arguments in Phillips’s first case with an image of a rainbow-lighted White House. *Id.* at ¶¶ 260–62. That commissioner also serves with a group that filed an amicus brief against Phillips. *Id.* at ¶ 261. So despite commissioner changeover, the anti-Phillips sentiment remains.

Colorado’s continuing hostility and unconstitutional conduct prompted this lawsuit. In it, Phillips raises multiple constitutional claims that include but are not limited to the following. First, Colorado violates the Free Exercise Clause by (a) continuing to treat Phillips worse than other cake artists who are allowed to decline requests for cakes that express messages they deem offensive and (b) otherwise manifesting hostility toward him and his faith. Am. Compl. ¶¶ 340–54. Second, the state violates the Free Speech Clause by applying CADA to ban Phillips from declining to create custom cakes that express messages in violation of his faith. *Id.* at ¶¶ 355–65. Third, Colorado violates the Free Speech Clause by applying CADA’s publication bans to forbid Phillips from announcing the messages that he cannot express and the religious reasons why. *Id.* at ¶¶ 371–81. Fourth, Colorado violates the Due Process Clause by (a) subjecting him to unfair and biased administrative proceedings, (b) establishing discriminatory selection criteria for commissioners, (c) prescribing non-neutral interest for each commissioner to represent, and (d) allowing the commissioners to both approve the prosecution decision and adjudicate the case. *Id.* at ¶¶ 390–409. Fifth, Phillips raises a facial challenge to the “unwelcome” clauses in CADA’s publication bans, alleging that they are unconstitutionally vague and overbroad and afford unbridled discretion. *Id.* at ¶¶ 382–85, 410–12.

STANDARD OF REVIEW

Because Colorado facially challenges this Court’s jurisdiction—declining to “go beyond allegations” in the complaint—the Court must “accept the allegations in the complaint as true,” *Holt v. United States*, 46 F.3d 1000, 1002–03 (10th Cir. 1995), and “construe the complaint in favor of the complaining party,” *Cressman v. Thompson*, 719 F.3d 1139, 1144 (10th Cir. 2013).

ARGUMENT

I. This Court should not abstain in favor of an unconstitutional state proceeding.

Federal courts have a “virtually unflagging obligation” to decide cases under their jurisdiction. *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). Parallel state administrative proceedings “do not detract from that obligation.” *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013). Federal courts must find “extraordinary circumstances” before declining to exercise their jurisdiction. *Deakins*, 484 U.S. at 203. A few abstention doctrines cover those situations. Colorado stretches to say they all apply here, but this case fits none of them.

A. *Younger* abstention does not apply.

A fundamental requirement of *Younger* abstention is that a federal plaintiff must have “a full and fair opportunity to litigate his constitutional claim” through the existing “state administrative proceedings.” *Ohio Civil Rights Comm’n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 627 (1986). But Colorado has already demonstrated that it will not give Phillips that full and fair opportunity. In addition, exceptions to *Younger* exist for “bad faith,” “harassment,” and “other unusual circumstance[s].” *Younger v. Harris*, 401 U.S. 37, 54–55 (1971). Because Colorado has acted—and continues to act—in bad faith to harass Phillips, *Younger* has no place here.

1. The Commission proceeding does not give Phillips a full and fair opportunity to litigate his constitutional claims.

Federal courts do not abandon plaintiffs to biased state administrative forums. *E.g.*, *Gibson v. Berryhill*, 411 U.S. 564, 577–79 (1973) (declining to abstain under *Younger* where litigants could not get a fair hearing). Five factors show that Phillips is unable to fully and fairly litigate his federal claims in the pending administrative proceeding. First, the Commission harbors personal

bias against Phillips. Second, the Commission’s practices are systemically biased against Phillips. Third, the Commission is structurally biased against Phillips. Fourth, the opportunity for state appellate review does not undo the unfairness of the Commission proceeding. And fifth, the state proceeding does not allow Phillips to litigate all his federal claims. In short, *Younger* doesn’t apply because Colorado is “incompetent . . . to adjudicate” Phillips’s constitutional claims. *Id.* at 577.

a. The Commission is personally biased against Phillips.

Both past and current commissioners have made hostile statements toward Phillips and his religious exercise. While former commissioners made many such comments, *see* Am. Compl. ¶¶ 146–55, most notable, as the Supreme Court said, is that a 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.” *Masterpiece I*, 138 S. Ct. at 1729.

Colorado has done nothing to disavow that remark. Instead, current commissioners have continued this tradition of hostility. One commissioner publicly referred to Phillips as the “cake hater.” Am. Compl. ¶ 259. 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 an advocacy group that filed an amicus brief against Phillips. *Id.* at ¶¶ 260–62. Such open opposition to Phillips irreparably taints the Commission’s proceeding.

b. The Commission’s practices are systemically biased against Phillips.

The Commission’s patterns and practices also manifest hostility toward Phillips and his faith. Most critically, the Commission excludes Phillips from its “offensiveness” rule, punishing

him for declining to create cakes that express messages contrary to his faith, while allowing other cake artists “to decline to create specific messages [they] consider[] offensive.” *Masterpiece I*, 138 S. Ct. at 1728. The Supreme Court already held that this “difference in treatment between Phillips[]” and others is an “indication of hostility” toward his religious beliefs. *Id.* at 1730; *see also* Am. Compl. ¶¶ 171–75 (highlighting this hostility). But the Commission has not changed its discriminatory practice. Far from it: when Phillips declined to create the custom cake celebrating a gender transition and others celebrating Satan, he did so not because of the person who requested them, but because he considered the *message* that the cakes would have conveyed offensive to his faith. Am. Compl. ¶¶ 191–94, 307–24. Those facts must be accepted as true. Yet the Commission maintains that Phillips may *not* decline those requests. *Id.* at ¶¶ 218, 230, 237, 325. This continued unequal treatment of Phillips confirms the Commission’s ongoing bias. *Id.* at ¶¶ 220–25, 231–44.

Worse, Colorado is doing the opposite of what it told the Supreme Court: that cake artists may decline cakes with pro-LGBT designs, themes, and symbols. *Id.* at ¶ 68 (“[Phillips] is free . . . to *decline* to sell cakes with ‘pro-gay’ designs”); *see also id.* at ¶¶ 66–69 (cataloguing similar statements). The gender-transition cake sought a design that expressed such a message. The lawyer who requested it told Masterpiece Cakeshop 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. *Id.*, Ex. A at 2; Am. Compl. ¶ 204 (“I requested that its color and theme celebrate my transition from male to female”). Colorado has acknowledged that the shop declined that request because Phillips does not want to create designs conveying that sex (male or female) is not “immutable.” Am. Compl., Ex. A at 3. And Phillips has never before created, and will not create, cakes that express those messages “for any customer”—more facts that must be accepted as true. Am. Compl.

¶¶ 126–28, 190, 193. By going back on what it told the Supreme Court and prosecuting Phillips anyway, the Commission leaves no doubt about its bias against Phillips.

In short, the Commission defers to the message-based objections of cake artists whose views it likes but ignores state law and “*presume[s]*” that Phillips violates CADA when he declines to express certain messages that offend his faith. *Masterpiece I*, 138 S. Ct. at 1736–37 (Gorsuch, J., concurring); *see* Colo. Rev. Stat. § 24-34-305(3) (requiring the Commission to “presume that the conduct of any respondent is not unfair or discriminatory”). This disregard of state law is more evidence that Colorado is hostile toward Phillips and his religious beliefs.

Colorado pretends that personnel changes at the Division and Commission dispel that bias. *See* Mot. to Dismiss 7, Doc. 64. But that logic conflicts with *Masterpiece I*. In denouncing Colorado’s unequal treatment, the Court did not compare who made the decisions against Phillips in *Masterpiece I* with who made the opposite decisions concerning the other three cake shops. They were different people. *See* Am. Compl. ¶ 82 (three current commissioners, none of whom issued the final agency order in *Masterpiece I*, were all commissioners when the three other cases were decided). Yet that did not insulate Colorado or its policies. *See Masterpiece I*, 138 U.S. at 1730. Otherwise, Colorado could issue discriminatory agency rulings without accountability. Because Colorado has changed only personnel—not policies—its systemic bias remains.

c. The Commission is structurally biased against Phillips.

Three abiding flaws in the Commission’s composition and procedures cement its bias and render its adjudicative process constitutionally infirm. Phillips must get an “opportunity to address [this] constitutional harm[] . . . *before* the harm is inflicted” on him. *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758, 766 (M.D. Tenn. 2015). *Younger* does not apply in this situation.

First, commissioners are chosen by discriminatory means. Am. Compl. ¶¶ 293–98, 400–01, 405. A majority of them must be “members of 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.” Colo. Rev. Stat. § 24-34-303(1)(b)(II)(A). These selection requirements violate Phillips’s right to adjudicators who are “indifferently chosen” by “nondiscriminatory criteria.” *Batson v. Kentucky*, 476 U.S. 79, 86–87 (1986). And in practice, Colorado largely, if not entirely, excludes people of faith who share Phillips’s beliefs. Am. Compl. ¶¶ 296–97; *see Batson*, 476 U.S. at 94 (“[S]ystematic exclusion . . . raises an inference of purposeful discrimination”). This composition renders the Commission a “suspect adjudicative body.” *Gibson*, 411 U.S. at 571. Even the Governor, when questioned about it, was not able to assure the media that “people who come before the [Commission] get a fair shake.” Am. Compl. ¶ 265.

Second, CADA prescribes non-neutral interests for commissioners to represent while on the Commission. Colo. Rev. Stat. § 24-34-303(1)(b)(I)(A)-(C); *see* Am. Compl. ¶¶ 287–92, 402. For example, one commissioner charged with representing government interests currently represents LGBT-specific interests in his role as a Denver employee. Am. Compl. ¶¶ 289, 402. Statutes requiring decisionmakers to represent such non-neutral interests impermissibly “tempt [them] to disregard neutrality” and foster an unfair proceeding. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 878 (2009).

Third, the Commission’s adjudicative procedures contravene constitutional limits. Am. Compl. ¶¶ 56, 59, 406–09. “[A]n unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case.” *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905

(2016). People qualify as “accusers” if they approve a significant prosecutorial decision, even if they do not conduct an investigation or actively participate in the prosecution. *Id.* at 1907. Having approved a decision to prosecute, such individuals “cannot be, in the very nature of things, wholly disinterested in the [outcome].” *Id.* at 1906. There is an impermissible “risk” that they will be “psychologically wedded to [their] previous position.” *Id.* (quotation marks omitted).

Here, all commissioners act as both accusers and adjudicators. Am. Compl. ¶¶ 407–08. After a probable-cause finding, they decide whether to prosecute by “determin[ing]” whether “the circumstances warrant” issuing “a written notice and complaint requiring . . . a formal hearing,” Colo. Rev. Stat. § 24-34-306(4), as they just did in Phillips’s case, Am. Compl., Ex. B. In that complaint, the commissioners charge Phillips with violating CADA and “seek[] . . . relief”—i.e., penalties against Phillips—for that presupposed violation. *Id.* at 1, 3-4. Later, the commissioners will review the administrative law judge’s decision and “vot[e] on the case,” *Masterpiece I*, 138 S. Ct. at 1725, which gives them final administrative say on whether Phillips will be punished.

This arrangement offends due process. The risk is far too great that the Commission will be “psychologically wedded” to its decision to prosecute. *Williams*, 136 S. Ct. at 1906. That is especially true in the immediate wake of the Commission’s failed attempt to punish Phillips the first time. It would be very embarrassing—to say the least—for the Commission to launch another prosecution only to admit that it was wrong. Thus, the Commission’s structure and procedure, particularly as applied to Phillips here, violate due process. *Younger* does not apply when the ongoing state proceeding is itself constitutionally deficient.

d. The opportunity for state appellate review does not undo the unfairness of the Commission proceeding.

Colorado argues that *Younger* applies because state appellate courts are able to review whatever the Commission decides. Mot. to Dismiss 13. But this argument ignores that Phillips has a right to “a neutral and detached [adjudicator] in the first instance.” *Ward v. Vill. of Monroeville, Ohio*, 409 U.S. 57, 61–62 (1972). Indeed, when the Supreme Court held that *Younger* abstention did not apply to a state administrative proceeding that was biased, it explicitly said that the availability of “judicial review, de novo or otherwise, . . . at the conclusion of the administrative proceedings” did *not* change the outcome. *Gibson*, 411 U.S. at 577. By the time the administrative case reaches appellate review, it will be too late to protect Phillips’s federal rights. He not only will have lost his chance at a fair proceeding from the start, but also will have already suffered some of the harm that this lawsuit seeks to prevent.

Masterpiece I supports this. Even though Phillips appealed the Commission’s ruling all the way through the state appellate courts, the Supreme Court did not accept that the review process cured the free-exercise violation. Similarly, the opportunity for appellate review here does not wash away the deep-seated administrative flaws that persist this time around.

What’s more, the unfair Commission proceeding will taint the entire process. Phillips’s free-exercise and due-process claims depend in part on evidence of Commission hostility. Am. Compl. ¶¶ 343–44, 397–99. So the strength of those claims will be directly impacted by the evidence that Phillips gets from the Commission. But so far, the Commission has been committed to withholding information from Phillips, going so far as to (unsuccessfully) try to shut down his public-records requests. *See* Defs.’ Mot. for Order Prohibiting Use of Open Records Laws, Doc. 46. In the Commission proceeding, it is far from certain whether the Commission will even allow

itself to be subject to any discovery requests. If the Commission continues its practice of withholding materials, Phillips will be left to litigate on an incomplete record. In addition, whatever facts the Commission finds “shall be conclusive” on appeal “if supported by substantial evidence.” Colo. Rev. Stat. § 24-34-307(6); Am. Compl. ¶ 62. Given that the Commission already slanted the facts against Phillips in its administrative complaint, Am. Compl. ¶¶ 232–38, a one-sided version of the facts may infect the review process.

Moreover, the harm to Phillips from an unfair Commission proceeding is great, regardless of what happens on appeal. In his first case, Phillips had to wait six years for the Supreme Court to vindicate his constitutional rights. And during that time, he endured death threats, harassment, and vandalism; his family lost 40% of their income; and more than half of his employees lost their jobs—harms that all persist even now. *Id.* at ¶¶ 4–5, 166–69, 179–80. This time, the threatened harm is even greater. At stake is whether Phillips may remain a custom cake artist. *Id.* at ¶¶ 302–30. The administrative case will decide whether people wanting to harass and punish Phillips can do so by requesting custom cakes with designs that the customers say will express messages contrary to Phillips’s faith. *Id.* ¶¶ 302, 330. If they can, the deluge of requests, which has already begun, risks driving him out of business before he has the chance to finish the years-long appeals process. *Id.* at ¶¶ 303–30.

e. Phillips cannot even raise many of his constitutional claims in the Commission proceeding.

The claims in this lawsuit are far broader than what is at issue in the state proceeding. Phillips will not have *any* opportunity, much less a fair one, to litigate many of his constitutional claims before the Commission. That agency charged Phillips with violating CADA for declining to create the requested gender-transition cake. Am. Compl. ¶ 237. In that proceeding, he will not

be able to raise his claim that Colorado’s application of CADA unconstitutionally requires him to create custom cakes that celebrate or otherwise express support for satanic themes or beliefs. *Id.* at ¶¶ 307–26, 363–64 & Prayer for Relief ¶¶ 1, 5. The same goes for his as-applied and facial challenge to CADA’s publication bans, which Colorado interprets to forbid him from disclosing the messages he cannot express or explaining the religious reasons why. *Id.* at ¶¶ 266–85, 371–85, 410–12 & Prayer for Relief ¶¶ 2–3, 6–7.¹ Because these claims cannot “be raised” in the state proceeding, they are “not barred” by *Younger*. *Gerstein v. Pugh*, 420 U.S. 103, 108 n. 9 (1975).

2. Colorado prosecutes Phillips in bad faith.

Younger also does not apply because Colorado is acting in bad faith and harassing Phillips. Courts consider three factors when analyzing this issue: (1) whether prosecutors acted unreasonably by initiating the proceeding; (2) whether they were “motivated by the [accused’s] suspect class or in retaliation for the . . . exercise of constitutional rights”; and (3) whether they harassed the accused and abused prosecutorial discretion through “unjustified and oppressive” conduct. *Phelps v. Hamilton*, 122 F.3d 885, 889 (10th Cir. 1997). One factor suffices, but Colorado’s prosecution fits all three.

First, immediately after the Supreme Court rebuked Colorado for its discriminatory enforcement practices, the state prosecuted Phillips again under the same rules and policies. *See* Section I.A.1.b *supra*. *Masterpiece I* recognized that Colorado’s offensiveness rule allows some cake artists to decline to create cakes that convey messages they “consider[] offensive,” 138 S. Ct.

¹ It is also unclear whether the Commission will allow Phillips to challenge the discriminatory selection criteria for commissioners, CADA’s assignment of non-neutral representational interests to commissioners, and the Commission’s constitutionally suspect procedures. Am. Compl. ¶¶ 286–301, 400–09 & Prayer for Relief ¶¶ 4, 8. While Colorado says Phillips can raise some of those claims, Mot. to Dismiss 15, it cites no legal authority confirming that.

at 1728, that the state treated Phillips differently, and that this “difference in treatment” was an “indication of hostility” toward Phillips’s religious beliefs in violation of his free-exercise rights, *id.* at 1730. Despite this, Colorado continues to treat Phillips worse than other cake artists, and its recent prosecution proves it. *See* Section I.A.1.b *supra*. By pursuing that, Colorado disregarded *Masterpiece I*’s holding, Am. Compl. ¶¶ 221, 240, and contradicted what it told the Supreme Court—that cake artists may decline to create cakes expressing pro-LGBT messages that they will not communicate for anyone, *id.* at ¶¶ 224, 243. Again, the lawyer who filed the administrative complaint against Phillips “requested that its color and theme celebrate [a] transition from male to female.” *Id.* at ¶ 204. And Phillips has never before created, and will not create, cakes that express that message “for any customer.” *Id.* at ¶¶ 126–28, 190, 193. At this stage, where this Court must accept all alleged facts as true, the Commission’s decision to prosecute Phillips again is objectively unreasonable and a manifestation of bad faith.

Second, Colorado’s prosecution is motivated by Phillips’s suspect class—his religion. *See Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1322 n.10 (10th Cir. 2010) (“Religion is a suspect classification.”). Indeed, the Supreme Court already held that Colorado’s actions in treating Phillips worse than others—the latest prosecution being another example of that—demonstrates the state’s “clear and impermissible hostility toward [his] sincere religious beliefs.” *Masterpiece I*, 138 S. Ct. at 1729. Moreover, Colorado is upset that it did not succeed in punishing Phillips the first time, so it is retaliating against him for exercising his right not to express messages that conflict with his faith. Such anti-religious and retaliatory motives are further evidence of bad faith.

Third, Colorado’s new prosecution is oppressive and unjust. The lawyer’s request for a gender-transition cake was a setup to harass Phillips: it came only hours after the Supreme Court

decided to review Phillips's first case; the lawyer admittedly takes "great pride" in filing cases like these; and the lawyer later requested at least one satanic cake from Phillips. Am. Compl. ¶¶ 184–85, 199, 311–15. The Commission did not need to pursue the new case. *Id.* at ¶ 229. Had it declined, the lawyer could have filed "a civil action" against Phillips in state court. Colo. Rev. Stat. § 24-34-306(11). But the Commission wanted to handle the matter because it continues to be staffed with commissioners who despise Phillips and his faith so much that one of them called him a "hater." Am. Compl. ¶¶ 257–61. Needlessly instituting the state administrative proceeding shows that Colorado is oppressing Phillips and complicit with others who wish to do the same.

Colorado seeks not only to extend Phillips's legal battles with the state for potentially another six years, but also to force him out of business. *Id.* at ¶¶ 327–30. As discussed above, if the Commission punishes Phillips in the state proceeding, Colorado will empower people who want to harass Phillips to call his shop and ask for a custom cake expressing a message that conflicts with his faith, *id.* at ¶¶ 302, 330, just like the lawyer who requested the gender-transition cake did, *id.* at ¶¶ 181–99. This Court should not allow that to happen.

The foregoing discussion more than suffices to show bad faith and harassment, particularly because this Court must take all allegations and inferences in Phillips's favor. But if the Court disagrees, it should order limited expedited discovery on this issue before dismissing Phillips's case. *See Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1326 (10th Cir. 2002) (holding that a party "should be allowed discovery on the factual issues raised by [a Rule 12(b)(1)] motion"); *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").

B. *Pullman* abstention does not apply.

Colorado also invokes *Pullman* abstention. That discretionary doctrine applies only when (1) an uncertain issue of state law underlies a federal constitutional claim, (2) a potential interpretation may obviate or substantially narrow the need for a ruling on the constitutional issue, and (3) an incorrect decision of state law would hinder important state policies. *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1118–19 (10th Cir. 2008). Those conditions are not met.

Most notably, Colorado offers no uncertain issue of state law underlying Phillips’s federal claims. Sure, the state says that it wonders whether CADA “must be interpreted and enforced in a manner that exempts objections based on religious beliefs.” Mot. to Dismiss 16. But that’s a federal constitutional question (and an inaccurate characterization of Phillips’s constitutional claims at that); it is not an uncertain issue of state law. Colorado admits as much a few lines later: “Colorado courts should be given the first opportunity to consider whether *Plaintiffs’ constitutional claims have merit.*” *Id.* at 17 (emphasis added). But “abstention cannot be ordered simply to give state courts the first opportunity to vindicate . . . federal claim[s]”—even when the challenged state law has yet to be “interpreted by a state court.” *Zwickler v. Koota*, 389 U.S. 241, 251 (1967). Tellingly, Colorado nowhere doubts that Phillips violates CADA when he declines to create custom expressive cakes like the gender-transition cake. That makes sense given the state’s position in the pending administrative matter. Am. Compl. ¶¶ 218, 237. Under Colorado’s own argument, then, there is no uncertain question of state law, and *Pullman* does not apply.

Colorado’s failure to meet *Pullman*’s first condition means that it cannot satisfy the other two either. Without an uncertain issue of state law, nothing will obviate the federal questions that Phillips raises, nor will this Court render an incorrect view of state law that thwarts state policies.

Moreover, Colorado acknowledges that “courts have been reluctant to abstain” in cases like this that involve “facial challenges on First Amendment grounds.” Mot. to Dismiss 17; *see City of Houston v. Hill*, 482 U.S. 451, 467 (1987). *Pullman* is thus particularly ill-suited to Phillips’s facial challenge to the “unwelcome” clauses in CADA’s publication bans. Am. Compl. ¶¶ 382–85, 410–12 & Prayer for Relief ¶¶ 3, 7. And Colorado is wrong to suggest that *Masterpiece I* casts doubt on that claim, Mot. to Dismiss 17, because that case did not consider those clauses.

C. *Burford* abstention does not apply.

Colorado next calls for *Burford* abstention. That argument fails at the outset. *Burford* does not apply unless “timely and adequate state-court review is available.” *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) (*NOPSI*). But as explained above, the state administrative proceeding does not provide that to Phillips. *See* Section I.A.1 *supra*.

In addition, *Burford* requires either (1) that there are “difficult questions of state law bearing on policy problems of substantial public import” or (2) that federal review would disrupt “state efforts to establish a coherent policy with respect to a matter of substantial public concern.” *NOPSI*, 491 U.S. at 361. Neither condition is satisfied.

First, this case does not involve any “questions of state law.” *Id.* Colorado does not even allege that in its *Burford* paragraph. *See* Mot. to Dismiss 17–18. Nor could it because this case “does not involve a state-law claim, nor even an assertion that the federal claims are ‘in any way entangled in a skein of state-law that must be untangled before the federal case can proceed.’” *NOPSI*, 491 U.S. at 361; *see* Section I.B *supra*.

Second, this Court’s ruling would not disrupt any state “efforts to establish a coherent policy with respect to a matter of substantial public concern.” *NOPSI*, 491 U.S. at 361. Colorado’s

run-of-the-mill administrative process does not remotely compare to the intricacies of the Texas oil-and-gas regime, which was the “complex state regulatory system” in *Burford*. *Id.* at 361–62. Notably, *Burford* “does not require abstention” just because a state has a uniform and complex administrative process. *Id.* at 362. Colorado must highlight a risk that this Court’s decision will interfere with its “efforts to establish” coherent policies about a “substantial” state or local matter. *Id.* at 361. It has not done so. Thus, *Burford* does not apply.

D. Colorado River dismissal or stay is improper.

As a last-ditch effort, the state resorts to *Colorado River*. But far from supporting abstention, that case cautioned against it. The Court there confirmed the long-recognized rule that parallel state proceedings “generally” do not “bar” simultaneous federal litigation about the “same matter.” *Colorado River*, 424 U.S. at 817. That rule controls this case. Only in “exceptional” situations—and only to preserve judicial resources—may federal courts “dismiss or stay a federal action” in favor of state proceedings. *Fox v. Maulding*, 16 F.3d 1079, 1080–81 (10th Cir. 1994). This case is not one of those situations.

Contrary to what Colorado says, federal courts resist prescribing “hard and fast rule[s]” under *Colorado River*.² *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983) (*Moses Cone*). They instead balance a loose set of factors—“with the balance heavily weighted in favor” of exercising jurisdiction. *Id.* at 16. Those factors include: “(1) whether either court has assumed jurisdiction over property; (2) the inconvenience of the federal forum; (3) the

² Colorado misreads *Colorado River*. That case did not crunch abstention doctrine quick-takes into a new three-part test for discretionary dismissal or stay. *Compare* Mot. to Dismiss 18 (converting short recaps of three abstention doctrines into *Colorado River* factors), *with Moses Cone*, 460 U.S. at 14 (confirming that those recaps were the Court “canvassing the three categories of abstention”).

desirability of avoiding piecemeal litigation; . . . (4) the order in which the courts obtained jurisdiction,” *Fox*, 16 F.3d at 1082; (5) whether “federal law” controls; and (6) whether the state forum provides an “adequate vehicle” for resolving the dispute, *Moses Cone*, 460 U.S. at 23, 28; *see id.* at 23–28. Nothing in those factors tilts the scales towards abstention.

First, this case involves no property. Second, Colorado does not complain about this forum’s convenience. And third, this case involves only federal questions—a fact that “always” weighs heavily against abstention. *Id.* at 26; *see* Section I.B *supra*. Colorado says nothing about those factors, which all favor moving forward in this Court.

Fourth, a dismissal or stay would promote piecemeal litigation because Phillips cannot bring all of his claims in the Commission proceeding. *See* Section I.A.1.e *supra*. Fifth, the priority factor is a wash. True, Colorado assumed jurisdiction over the parallel state proceeding before Phillips filed this lawsuit. But federal courts take a “flexible” approach with this factor. *Moses Cone*, 460 U.S. at 21. They consider not only “which complaint was filed first, but [also] how much progress has been made in the two actions.” *Id.* Not much has happened at the Commission, while a motion to dismiss and a motion for preliminary injunction are almost fully briefed in this case, and discovery-related motions have already been argued and resolved. Sixth, as explained above, the Commission does not provide an adequate forum for Phillips’s claims. *See* Section I.A.1 *supra*. Given that the case under *Colorado River* is so weak, “it would be a serious abuse of discretion to grant [a] stay or dismissal.” *Moses Cone*, 460 U.S. at 28.

II. Colorado officials are not entitled to personal immunity.

Colorado also fails in its attempt to evade Phillips’s claims for damages. When a plaintiff alleges a claim for “damages arising from unconstitutional action,” state officials normally have

only “qualified immunity” as a defense. *Butz v. Economou*, 438 U.S. 478, 507 (1978). When they seek absolute immunity “from personal liability for unconstitutional conduct,” they “bear the burden of showing” that they are entitled to it. *Id.* at 506. Here, the commissioners and the director (collectively, Colorado officials) have not shown that they get any immunity at all.

A. Colorado officials are not entitled to absolute immunity.

Colorado officials exercise more power with less accountability than a “prosecutor” in state court. Mot. to Dismiss 21. That disqualifies them from absolute immunity. “Absolute immunity flows . . . from the nature of the [state officials’] responsibilities.” *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985). Federal courts consider six factors in determining whether state officials deserve absolute immunity: (1) the need to assure that the officials can perform their functions without harassment or intimidation; (2) the presence of safeguards that reduce the need for private damages; (3) insulation from political influence; (4) the importance of precedent; (5) the adversarial nature of the process; and (6) the possibility of correcting errors on appeal. *Id.* at 202. Colorado officials fall short on showing that they are entitled to exceptional protection.

Commission proceedings lack “many checks” that constrain the typical judicial process. *Butz*, 438 U.S. at 512. First, commissioners do not function as “classic” prosecutors or adjudicators. *Cleavinger*, 474 U.S. at 203. They decide who to prosecute and get the final say in whether the accused gets punished. As explained above, the commissioners’ dual role as accuser and adjudicator violates—rather than protects—constitutional rights. *See* Section I.A.1.c *supra*.

Second, commissioners have the power to manipulate the factual record. They pick what facts go in the formal complaint, control the evidence available to the parties, and determine the facts when deciding the case. Am. Compl. ¶¶ 56, 59, 230–38. No way is it a “neutral and detached’

hearing body.” *Cleavinger*, 474 U.S. at 204. More troubling still, the Commission’s facts “shall be conclusive” on appeal in most situations. Colo. Rev. Stat. § 24-34-307(6). That handcuffs judicial review and hampers the opportunity to correct errors on appeal.

Third, commissioners are not insulated from political influence but are actually charged with representing niche political interests. Am. Compl. ¶¶ 287, 402. Some “represent the interests of the business community”; some represent “the interests of government entities”; and others represent “the community at large.” *Id.* at ¶¶ 288–92. These political interests “embed bias in the very structure” of the Commission. *Id.* at ¶¶ 300, 404.

Fourth, Colorado officials ignore legal precedents. The state admits as much when it argues that swapping commissioners and directors wipes away the constitutional problems that the Supreme Court identified with its past rulings and practices. *See* Mot. to Dismiss 7, 20. That argument shows two ways that Colorado ignores precedent. For one, it has no regard for its own past rulings. Colorado believes that it can continue to treat Phillips unequally—it can continue to act inconsistently with what it has done in other cases—because it has new personnel. *See* Section I.A.1.b *supra*. For another, it shows that Colorado disregards the Supreme Court—specifically, its finding that the state applies its offensiveness rule to discriminate against Phillips, *Masterpiece*, 138 S. Ct. at 1730–31—by continuing that practice still today. *See* Section I.A.1.b *supra*.

Separate and apart from these factors, absolute immunity does not apply for another reason. In the statute that sets the procedures for Commission proceedings, the legislature waived absolute immunity for commissioners and others who act in bad faith in performing their duties. *See* Colo. Rev. Stat. § 24-34-306(13) (installing good-faith condition for immunity). Because Colorado officials are acting in bad faith, they are not immune here.

B. Colorado officials are not entitled to qualified immunity.

Qualified immunity does not apply when state officials (1) violate federal constitutional rights and (2) those rights were “clearly established at the time” they acted. *T.D. v. Patton*, 868 F.3d 1209, 1220 (10th Cir. 2017). Colorado officials assume that Phillips satisfies the first prong and contests only the second. *See* Mot. to Dismiss 25. But those officials do separately address each of the constitutional claims that Phillips raises. Rather, they pretend that Phillips’s entire case—and every claim he raises—is based exclusively on *Masterpiece I*’s holding. *See id.* at 26–27. That is not true. A host of authorities, many of which are cited in Phillips’s motion for preliminary injunction, establish the relevant constitutional violations. *See generally* Mot. for Prelim. Inj., Doc. 57.

In their discussion of *Masterpiece I*, Colorado officials assume a caricature of Phillips’s claims and adopt a view of *Masterpiece I* that ignores parts essential to its holding. As to Phillips’s claims, he does not argue that the entirety of CADA is unconstitutional on its face (he raises a facial claim only as to the “unwelcome” clauses in CADA’s publication bans). Nor does he contend that Colorado officials can never apply CADA to him. His claims are far narrower. He argues that the Free Speech Clause bars Colorado officials from applying CADA in the limited situation where it compels him to create custom cakes that express messages he deems objectionable.³ And he contends that the Free Exercise Clause forbids Colorado officials from treating him unequally under CADA—by applying the state’s offensiveness rule in a discriminatory fashion—and from

³ *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572–73 (1995) (holding that a public-accommodation law could not be applied to compel speech); *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015) (announcing a three-part test for compelled-speech claims).

openly manifesting opposition to him and his faith.⁴ Colorado officials’ *Masterpiece I* discussion—which primarily considers whether “CADA *itself* is . . . neutral and generally applicable,” Mot. to Dismiss 27—is irrelevant to determining whether Phillips’s actual claims assert clearly established rights.

Missing from Colorado’s discussion of *Masterpiece I* is the Supreme Court’s holding that the state treats Phillips worse than other cake artists, and that such “difference in treatment” is an “indication of hostility” that established the free-exercise violation. 138 S. Ct. at 1730–31. That omission dooms their qualified-immunity argument because that portion of *Masterpiece I* (among others) clearly established precedent upon which Phillips bases his free-exercise claim. Moreover, the Free Exercise Clause has long prohibited “discriminatory application[s]” of government rules that disadvantage people of certain faiths. *Axson-Flynn*, 356 F.3d at 1300–01. In fact, the Tenth Circuit, when rejecting a qualified-immunity defense in 2004, already recognized that principle. *Id.* Colorado officials have no excuse for ignoring these precedents. Qualified immunity does not shield officials who “knowingly violate the law.” *White v. Pauly*, 137 S. Ct. 548, 551 (2017).

III. The Attorney General and Governor are not entitled to sovereign immunity.

The Eleventh Amendment “does not bar a suit against state officials in their official capacities if it seeks prospective relief for officials’ ongoing violation of federal law.” *Harris v. Owens*, 264 F.3d 1282, 1290 (10th Cir. 2001). Phillips seeks prospective relief against the Attorney General and the Governor—each of whom enforce some of the CADA provisions that Phillips

⁴ See *Masterpiece I*, 138 S. Ct. at 1729–32 (ruling that the state’s unequal treatment and hostile comments violated the Free Exercise Clause); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004) (prohibiting rules that are “discriminatorily applied to religious conduct”).

challenges—for their ongoing violation of his constitutional rights. The Eleventh Amendment does not bar Phillips’s claims against them.

A. The Attorney General directly enforces CADA, keeping Phillips under fear of enforcement and silencing his speech.

Phillips seeks injunctive relief against the Attorney General. He asks the Court to forbid her from forcing him to create custom cakes conveying messages that conflict with his faith—such as the gender-transition and satanic cakes that have been requested of him—and from banning his desired speech on those subjects. *See* Am. Compl., Prayer for Relief ¶¶ 1–3.

The Attorney General has “some connection with the enforcement” of CADA. *Ex Parte Young*, 209 U.S. 123, 157 (1908). CADA allows her to “make, sign, and file” discrimination charges against business owners. Colo. Rev. Stat. § 24-34-306(1)(b); Am. Compl. ¶ 23. And because she has never “suggested” that she will not enforce the law against him, this Court should not “assume otherwise.” *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 393 (1988).

The Attorney General applies CADA in the same discriminatory way that the Division and Commission do. Am. Compl. ¶¶ 140, 251. That chills Phillips’s desired speech, *see id.* at ¶¶ 266–81, and causes him to live under constant fear of enforcement, *id.* at ¶¶ 302–03. Those are two distinct injuries that will remain if the Attorney General is not enjoined. *See Ward v. Utah*, 321 F.3d 1263, 1269 (10th Cir. 2003) (concluding that plaintiff “suffer[ed] from an injury in the form of a ‘chilling effect’ on his desire to engage in First Amendment activities”); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014) (concluding that “threatened Commission proceedings . . . may give rise to harm sufficient to justify pre-enforcement review”). The Attorney General is thus a proper defendant in this case, and Eleventh Amendment immunity does not apply.

B. The Governor directly administers CADA’s discriminatory selection criteria for commissioners.

Phillips also seeks prospective relief against the Governor, asking this Court to enjoin him from enforcing the discriminatory selection criteria for commissioners in Colo. Rev. Stat. § 24-34-303(1)(b). Am. Compl., Prayer for Relief ¶ 4. Only the Governor can appoint commissioners. *See* Colo. Rev. Stat. § 24-34-303(1)(b)(I); Am. Compl. ¶¶ 25, 42, 157, 294–95. And he has performed that duty by appointing “every member of the Commission” for “nearly the last eight years.” Am. Compl. ¶ 295. The Governor therefore has a “duty to ‘enforce’ the statute in question and a demonstrated willingness to exercise that duty.” *Prairie Band Potawatomi Nation v. Wagon*, 476 F.3d 818, 828 (10th Cir. 2007). He is not immune from this suit under the Eleventh Amendment.

IV. Phillips has standing to challenge Colo. Rev. Stat. § 24-34-701’s publication ban.

CADA’s two publication bans—the final two clauses in Colo. Rev. Stat. § 24-34-601(2)(a) and all of Colo. Rev. Stat. § 24-34-701—present Phillips with a choice: announce the messages that he cannot express and the religious reasons why and suffer punishment, or stay silent to avoid penalties. He has decided to silence himself for fear of punishment. Colorado denies this injury, but its arguments fall flat.⁵

To establish standing, Phillips must show that he has (1) suffered an injury in fact that is (2) fairly traced to Colorado’s actions and (3) redressable by the Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The Tenth Circuit sets out two tests for identifying an injury in the free-speech context. Under the first, plaintiffs may show “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and

⁵ Colorado confines its standing argument to Section 24-34-701, apparently conceding that Phillips has standing to challenge the publication ban in Section 24-34-601(2)(a).

there exists a credible threat of prosecution thereunder.’’ *Ward*, 321 F.3d at 1267. And under the second, a plaintiff may show that “a credible threat of future prosecution” has a “*chilling effect* on his desire to exercise his First Amendment rights.” *Id.* Phillips suffers both injuries here.

First, Phillips wants to publish a specific statement on his website that, under Colorado’s logic, violates Section 24-34-701. *See* Am. Compl. ¶ 270 (statement). Colorado says that Phillips’s desired statement does not violate the law, but it mentions only the first sentence: “Masterpiece Cakeshop serves all people—no matter who they are or what protected characteristics they have.”

Mot. to Dismiss 30 (quoting Am. Compl. ¶ 270). Another part reads:

[B]ecause of our belief in the teachings of the Bible and our reliance on those teachings as the only source of ultimate truth, we cannot create custom cakes that through words, designs, symbols, themes, or images express messages that demean people, celebrate divorce, express racist views, are vulgar or profane, celebrate Halloween, promote use of illegal drugs, marijuana, or alcohol, celebrate gender transitions, or support Satan or satanic themes or beliefs.

Am. Compl. ¶ 270. Colorado’s recent probable-cause determination and formal complaint against Phillips unequivocally announce its view that CADA bars Phillips from declining to create a cake that through designs, symbols, and themes expresses messages that celebrate gender transitions. If CADA forbids Phillips from declining such requests, then neither may he announce his intent to do so. Colorado’s actions thus belie its claim that Phillips is not subject to a threat of enforcement. It has not come close to providing “compelling contrary evidence” that disproves “a credible threat of prosecution.” *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003).⁶

⁶ *See 303 Creative LLC v. Elenis*, No. 16-CV-02372-MSK-CBS, 2017 WL 4331065, at *5 (D. Colo. Sept. 1, 2017) (concluding that plaintiffs who want to announce on their business’s website that they cannot create messages celebrating same-sex marriage were “subject to a credible threat of enforcement” under CADA’s publication ban and had standing to challenge it).

Second, Phillips is censoring his speech. Am. Compl. ¶¶ 268–70. Colorado suggests that is not true because Phillips’s website generically states that “[h]e cannot create custom cakes that express messages or celebrate events that conflict with his religious beliefs.” Mot. to Dismiss 8, 30. But as explained above, Phillips wants to identify the specific messages that he cannot express (such as celebration for gender transitions) and explain the religious reasons why. Am. Compl. ¶¶ 268–70. Phillips has not posted that specific statement on his website because the logic of Colorado’s position forbids it.

Those two injuries are fairly traced to Colorado and redressable by this Court. The state does not contest that, but confuses matters by discussing Section 24-34-705. Mot. to Dismiss 30. That provision prescribes some of the penalties available for a violation of Section 24-34-701, but it is Section 24-34-701—not Section 24-34-705—that Phillips challenges. Am. Compl., Prayer for Relief ¶¶ 2–3, 6–7. No one doubts that Colorado has the power to enforce Section 24-34-701. *See* Colo. Rev. Stat. § 24-34-306(9) (Commission has authority to issue “an order” requiring a place of public accommodation to stop any “discriminatory or unfair practice” “defined in parts 4 to 7 of this article,” which includes Section 24-34-701). Phillips thus has standing to challenge it.

CONCLUSION

Phillips wants to peacefully live out his faith through his work as a cake artist by serving all people while declining to express messages that violate his beliefs. But Colorado doesn’t even want to afford Phillips a fair forum to decide whether the Constitution gives him that freedom. Federal court is the only tribunal that will give him that from start to finish. Phillips asks this Court to deny Colorado’s motion to dismiss and exercise its jurisdiction over this case.

Respectfully submitted this 27th day of November, 2018.

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CERTIFICATE OF SERVICE

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