

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF COLORADO

3 Case No. 18-cv-2074

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5 MASTERPIECE CAKESHOP, Incorporated, et al.,

6           Plaintiffs,

7 v.

8 AUBREY ELENIS, et al.,

9           Defendants.

10 \_\_\_\_\_

11                   Proceedings before SCOTT T. VARHOLAK, United States  
12 Magistrate Judge, United States District Court for the  
13 District of Colorado, commencing at 11:01 a.m., November 20,  
14 2018, in the United States Courthouse, Denver, Colorado.

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16                   WHEREUPON, THE ELECTRONICALLY RECORDED PROCEEDINGS  
17 ARE HEREIN TYPOGRAPHICALLY TRANSCRIBED...

18 \_\_\_\_\_

19                   APPEARANCES

20                   JONATHAN ANDREW SCRUGGS, Attorney at Law, appearing  
21 for the Plaintiffs.

22                   LEEANN MORRILL and GRANT T. SULLIVAN, Attorneys at  
23 Law, appearing for the Defendants.

24 \_\_\_\_\_

25                   MOTION HEARING

1 P R O C E E D I N G S

2 (Whereupon, the within electronically recorded  
3 proceedings are herein transcribed, pursuant to order of  
4 counsel.)

5 THE COURT: This is 18-cv-2064. Can I have entries  
6 of appearance, please.

7 MR. SCRUGGS: Jonathan Scruggs for the plaintiffs,  
8 Your Honor.

9 THE COURT: Good morning.

10 MS. MORRILL: Good morning, Your Honor. LeeAnn  
11 Morrill, First Assistant Attorney General, on behalf of the  
12 state officials. With me at counsel's table is Assistant  
13 Solicitor General Grant Sullivan.

14 THE COURT: Good morning.

15 So we are here today as a result of two motions  
16 filed. The first is No. 46. This is the State official's  
17 motion for order prohibiting plaintiffs' use of open record  
18 laws to circumvent discovery, and the second is Document No.  
19 48. This is the State official's motion to stay all  
20 disclosures and discovery. Those were responded to a  
21 Document No. 65 as a combined response and the reply, again,  
22 is a combined reply, at Document No. 66.

23 I'm prepared to take argument on these motions, but  
24 I'll take them together because I think that they are  
25 related. And what I want, in addition to anything else that

1 the parties wish to argue -- and I've reviewed the briefing  
2 on this, so there's no need to repeat the briefing. But what  
3 I do want is for somebody to address the issue of take this  
4 case out of it, assume this case were never filed, and  
5 plaintiff made a request through the Colorado Open Records  
6 Act for certain documents, and let's say it was overly broad.  
7 What would be the remedy that the State defendants could  
8 pursue in order to -- is there any remedy that the State  
9 defendants could use to protect against an overly broad CORA  
10 request?

11 So since these are the State's motions, I'll hear  
12 from the State first.

13 MS. MORRILL: Thank you, Your Honor.

14 It's a very sort of interesting question in the  
15 sense that I don't know that any Court that I'm aware of has  
16 sort of visited the question of whether Colorado Open Records  
17 Act encompasses any type of proportionality requirements  
18 similar to the -- the Rules of Federal Civil Procedure. And  
19 so, really, the inquiry in terms of CORA is, you know, are  
20 the records that are being sought public, and in the sense  
21 that they are made, kept, or maintained by a state agency for  
22 public purpose of demonstrating the expenditure of public  
23 funds? And if so, do any of the applicable exemptions from  
24 the definition of public records apply such that the agency  
25 or the official is authorized to withhold them?

1           And so, really, over, I think a long period of  
2 time, there really was no sort of statutory way for the State  
3 to counter an overly broad request outside of -- like your  
4 hypothetical poses, outside of the context of ongoing  
5 litigation. And over time, we have seen the legislature  
6 react to essentially the fact that CORA is incredibly  
7 burdensome for state agencies to comply with because they're  
8 always engaged in their regular day-to-day duties and CORA  
9 also falls on top of that.

10           THE COURT: Isn't that a fix for the legislature  
11 and not for this Court?

12           MS. MORRILL: Well, I think that sort of -- using  
13 your example, there is no pending litigation. Here we have  
14 pending litigation, and so I think that is why we are coming  
15 to the Court and relaying our concern about plaintiff's use  
16 of CORA post-filing of this case. Had they CORA'd our  
17 clients before they came to this forum, we wouldn't be here.

18           THE COURT: But -- but aren't you asking me -- are  
19 -- isn't you -- the thrust of your argument essentially  
20 there's a big problem with CORA, it allows individuals to  
21 seek overly burdensome documents, and the legislature won't  
22 fix it, and so therefore, we're asking you, Judge, to fix  
23 Colorado State's problem with the statute that they created?

24           Because as you said, I mean, they could do one of  
25 two things: They could have done this before they filed

1 suit.

2 MS. MORRILL: Sure.

3 THE COURT: Honestly, they could dismiss the case  
4 tomorrow without prejudice, go get all the records, and then  
5 come back two months from now and re-file again.

6 MS. MORRILL: Yes. Although we do think that there  
7 are different considerations that would be involved in -- in  
8 that eventuality under 41(d), I believe it is. There are  
9 penalties or sort of consequences to voluntary -- voluntarily  
10 dismissing an action and then re-filing the same action at a  
11 later point in time; namely, that the defendant can be  
12 entitled or request their costs and request a stay of the  
13 second action.

14 In fact, we have, you know, contemplated doing that  
15 in other actions, as the State, but I think to address the  
16 Court's primary question, the short answer is no. I disagree  
17 that this is legislative problem for the state of Colorado to  
18 fix. In fact, I think the statute, the plain language of the  
19 statute contemplates court orders limiting the use of CORA.  
20 And that's -- that's our sort of primary argument in -- in  
21 terms of the CORA motion, is that it says that the -- that  
22 this is a statute allowing access to public records unless  
23 prohibited by another law or the order of any Court.

24 And so what we do think is CORA anticipated this  
25 very eventuality, is that you have a plaintiff who has gone

1 and selected a forum and submitted themselves to a Court's  
2 jurisdiction. You have a Court who has every intention of  
3 setting a scheduling order and controlling the exchange of  
4 information between the parties, but then you have the same  
5 plaintiff trying to use CORA to circumvent or supplant that  
6 discovery limitation. And that is why the express language  
7 of CORA says, if you have an order prohibiting the disclosure  
8 or response to a CORA request that's otherwise lawful, that  
9 order controls.

10 THE COURT: But I'm not sure that that is what was  
11 anticipated here. And I point to Section 24-27-204(5)(b),  
12 and what that section provides is that, as a general rule, if  
13 there's a failure to comply with CORA, an individual who made  
14 the CORA request could get fees and costs in pursuing the  
15 documents.

16 The exception to that rule is in 24-72-204(5)(b),  
17 which says that -- or at least an exception, which says that  
18 if they could have gotten the documents through discovery,  
19 then they don't get fees and costs. It seems to me that that  
20 is contemplating the situation where CORA is a supplement to  
21 the typical discovery procedures. Because otherwise, that  
22 exception would never, ever apply because it would always be  
23 whatever the Court's discovery procedures were, and you would  
24 never have a situation where they could have gotten the  
25 records through discovery that they requested through CORA.

1 MS. MORRILL: I think -- Your Honor, I think that  
2 provision has never been interpreted by Colorado's courts  
3 that you're pointing to, and the provision that our clients  
4 are relying on is in the first instance in 24-72-203(1)(a)  
5 and 204(1)(c), which says: All public records shall be open  
6 for inspection by any person at reasonable times except as  
7 provided in this Part 2 or as otherwise provided by law," and  
8 then in 204, Subsection (1)(c), there's an exception, which  
9 is: Such inspection is prohibited by rules promulgated by  
10 the Supreme Court or by the order of any Court.

11 And that is the -- the provision of CORA in the  
12 first instance in the plain language that we are coming to  
13 this Court and saying, We believe you have authority to order  
14 plaintiffs to stand down on post-complaint filing of CORA.  
15 And it's really not a question of -- I think the provision  
16 that Your -- Your Honor is pointing us to really has only to  
17 do with the question of cost-shifting in the event that the  
18 -- the State doesn't object to the use of CORA to obtain  
19 materials that could be obtained in discovery, as we have  
20 here, and instead you have, you know a cost-shifting  
21 provision to protect the State from having to, you know --  
22 the pay-shifting issue.

23 THE COURT: Well, it -- it has been interpreted. I  
24 mean, I just did a quick search comes up with 40 results,  
25 including as most recently as July 26th of this year.

1           And what I'm saying is that that provision wouldn't  
2 be in there if it wasn't contemplated that both CORA and  
3 discovery could be two separate paths for -- for a plaintiff  
4 to pursue, because otherwise, you would never have this  
5 situation.

6           If it was automatic that they couldn't -- or  
7 presumed that they couldn't pursue -- pursue CORA as long as  
8 they were in discovery, then you're never going to have the  
9 situation where they could have gotten the documents through  
10 discovery and also through CORA, because the discovery would  
11 essentially cut off the CORA component of it, so you're never  
12 going to have that.

13           MS. MORRILL: I understand that, Your Honor.

14           THE COURT: Okay.

15           MS. MORRILL: And our position is not that the mere  
16 existence of a federal case or even a state case precludes  
17 the use of CORA. It's not that in the first instance. We're  
18 aware that they exist in separate realms and in -- usually in  
19 the instance of the federal case that's proceeding under the  
20 Rules of Civil Procedure, there's no intersection with a CORA  
21 request, unless the defendants who are in the federal case  
22 and who are the recipient of the CORA request, do as we did  
23 here and as we did in the Citizen Center case and raise it  
24 with the federal court and ask for an order. And we  
25 understand that it's within your discretion to grant or deny

1 and that it's not sort of a presumptive provision of CORA or  
2 a provision of federal law.

3 We do think it's well-supported in terms of plenty  
4 of cases, including another magistrate in this very court  
5 sustaining our position. But we understand in the first  
6 instance that there are provisions of CORA that do discuss  
7 the access to records in discovery, but I don't think any of  
8 those records speak to the issue that we have here, which is  
9 we are affirmatively seeking the federal court's prohibition  
10 of the use of CORA because we see plaintiffs intending to use  
11 it to essentially make us run and -- and respond to both  
12 types of requests when they have every opportunity to obtain  
13 discovery through us if the Court grants -- if the Court  
14 allows them to.

15 THE COURT: But Judge Watanabe -- and I'm assuming  
16 the case you're referring to is the Citizen Center V. Gessler  
17 case -- he didn't even go as far as you're asking me to go to  
18 in that one, he issued a scheduling order that contained a  
19 broad discovery -- broad ability to conduct discovery.

20 Here, you're asking to stay discovery entirely.  
21 And so to both prohibit CORA and to stay discovery; and 2, he  
22 reconsidered himself and said that to the extent that it's  
23 not a party to this action, non-parties were entitled to  
24 pursue CORA in any way.

25 MS. MORRILL: Correct.

1           THE COURT: You're not saying they can't pursue  
2 CORA, but you're essentially saying that everything that they  
3 obtain through CORA is shielded from the Court's view. So it  
4 seems that -- that -- to the extent that they can go out and  
5 ask some other interested party to pursue CORA, I think  
6 you're saying that's fine, in which case, you might be  
7 answering the same exact questions anyways.

8           MS. MORRILL: That's correct.

9           THE COURT: But then you're -- so -- so there's not  
10 really a burden-saving aspect of this because those same  
11 documents could be produced.

12           Really, what it is, is a throwaway, you know, a  
13 cover over the facts here and don't let the Court observe  
14 anything that is obtained through this. And -- and I don't  
15 see what the benefit of that is.

16           MS. MORRILL: Sure. And I mean, I think I would  
17 say -- ask the Court to step back with me for a moment and  
18 consider the way discovery typically plays out.

19           Say you were to enter a scheduling order in this  
20 case, and here we have, you know a request from plaintiffs to  
21 issue upward of 275 discreet recover -- discovery requests to  
22 the state officials. You have us responding with, No, we  
23 think 33 is more appropriate, given the parties' agreement in  
24 the -- in the joint proposed scheduling order that this case  
25 involves mainly disputed issues of law. We don't see the

1 need for this vastly disproportional discovery, but clearly,  
2 we have a dispute as -- as to what those things look like.

3 Say this Court agrees with us and limits each side  
4 to a total of 33 discovery requests. While you're correct  
5 that plaintiffs could use surrogates during that time when  
6 they are issuing their -- their 33 requests to us, and we're  
7 doing the same, to go and obtain records from us from sources  
8 that we don't have any reason to believe are, you know,  
9 plaintiffs or their agents, meaning heir attorneys, but are  
10 their surrogates, and then they could obtain those records,  
11 and then use those records to perfect -- well, first, if not  
12 limited from using the actual records themselves, they get to  
13 use those records to perfect their discovery requests --

14 THE COURT: But isn't --

15 MS. MORRILL: -- meaning, they have a preview into  
16 what the State has that we don't have access to into what  
17 they have. We have our 33 requests. We make those in the --  
18 in the best way that we know how, based on the -- the -- the  
19 claim -- the paragraphs and the allegations in the complaint,  
20 but they essentially have an endless ability to attempt to  
21 perfect their claims --

22 THE COURT: But isn't that the --

23 MS. MORRILL: -- through CORA.

24 THE COURT: -- nature of open records? In that --  
25 for example, obviously, the predecessor to this case went up

1 to the Supreme Court. Let's say you want to use something  
2 that was used in the -- in that -- in that case, a -- you  
3 want to use the transcript of oral argument because you  
4 believe that they made some statement in that case  
5 inconsistent with the position that they're taking here. You  
6 don't need to use a discovery request to do that. You just  
7 go get the transcript because it's -- it's a public record.

8           How is this any different? What's they're looking  
9 to get is simply what is, pursuant to Colorado's law, a  
10 public record. And in the same way that you can do a Google  
11 search and get public records or get Supreme Court documents  
12 or whatever, that's all they're doing, is they're going to  
13 get what is the public record in this case.

14           MS. MORRILL: Right. And in doing so, they're  
15 going to circumvent and supplant all the discovery rules that  
16 the Court has put in place between the parties to exchange  
17 their information. And that, we think, is not -- not -- it  
18 doesn't comport with the case law that says that open records  
19 are not intended -- that law is not intended to circumvent or  
20 supplant discovery. And the heart of it is it goes against  
21 the proportionality requirement of federal litigation. And  
22 that's inherent in Rule 1 and that's why we have taken it on  
23 ourselves.

24           It's not like we're assuming that this is the --  
25 the state of the law that we have the right to deny their

1 requests. We knew we had to come to this Court and ask for  
2 relief, but we believe the relief that's we're requesting is  
3 reasonable, given the weight of authority and given  
4 plaintiffs own -- like intention to essentially try to scorch  
5 the earth in a case that they believe is largely about  
6 disputed legal claims.

7 THE COURT: Let me ask this: Who pays for -- let's  
8 say that they submit an overly broad request through CORA,  
9 and it costs, you know, eight employees eight-hour days to --  
10 to do it, who pays that cost? Is that -- is there some  
11 indication in the paperwork that it's going to be \$50,000 --

12 MS. MORRILL: Yes.

13 THE COURT: -- or something along those lines? Who  
14 -- is that -- do you send a bill to plaintiffs for that, or  
15 how does that work?

16 MS. MORRILL: Yes. Well, the short answer, Your  
17 Honor, is that state agencies receive appropriations for  
18 their staff time and their legal time for our office, the  
19 Attorney General. We bill our time to our clients for our  
20 work, whether it's in furtherance of responding to discovery  
21 requests properly propounded in this case or in responding to  
22 an open records request. And so we charge our clients an  
23 hourly rate. I think that averages around \$105 an hour. And  
24 then they have their staff time, which as I explained  
25 earlier, is largely devoted to their day-to-day duties, and

1 then CORA is on top of that.

2 Under the fee-shifting provision in CORA, the state  
3 agencies are allowed to produce an estimate for the cost of  
4 completing a request. That is statutorily kept under CORA at  
5 \$25, or no more than \$25 per hour for agency staff time in  
6 researching, retrieving and producing records responsive to  
7 their request. And in the case that the agency requires what  
8 the statute refers to as specialized assistance in responding  
9 to the request, the hourly cap is at \$30 an hour.

10 So our position is yes, we would, if -- and as we  
11 have attached to the CORA motion, our letter in response to  
12 the three pending CORA requests, coming up with a cost  
13 estimate for our clients to respond -- two of our clients to  
14 respond to two of the requests. The third request we believe  
15 is -- has not been clarified by the requester, such that we  
16 could even produce a cost estimate. But, yes, CORA allows  
17 some cost-shifting provision --

18 THE COURT: Okay.

19 MS. MORRILL: -- but it is statutorily capped, we  
20 believe at a significantly less amount than if we were to  
21 charge actual costs, both for legal time that the agency  
22 incurs and advice, which will be all the more necessary here.

23 I mean, there's no chance if these CORA requests  
24 proceed, that our, you know, litigation counsel to the  
25 commission and the other state officials will not be closely

1 involved in responding to CORA while at the same time dealing  
2 with responding to discovery.

3           We would, of course, want to know everything that's  
4 going out the door, especially here where Mr. Arrington made  
5 it very clear in his request that he is an agent of the  
6 plaintiffs. He copied their litigation counsel of record in  
7 this case, and so we need to protect our clients, and to  
8 fulfill our fiduciary duties, have to be closely involved in,  
9 both their response to the CORA request, as well as their  
10 response to discovery.

11           But the essential issue here is, you know, I -- I  
12 agree with you, we would not be here -- or we would not have  
13 come to federal court if we had received these CORA requests  
14 before plaintiffs initiated their lawsuit. And I think it's  
15 worth stepping back for a moment and looking at the timeline  
16 in of that self.

17           Here, the charge of discrimination was allegedly  
18 filed with the division in July of 2017, and the probable  
19 cause determination issued by the division director did not  
20 issue until June -- the end of June 2018. So in that  
21 one-year period, plaintiffs were well aware that they were  
22 under investigation by the State for this new charge of  
23 discrimination. They were actively responding to that  
24 investigation and asserting their various defenses.

25           They knew, as of June 28, 2018, that the division

1 director determined that there was probable cause. At any  
2 point between July 2017 and June 2018, did they issue a CORA  
3 request to our clients? Not that we're aware of.

4 Any point between June 28, 2018, when the division  
5 director finds probable cause for this charge and August 24,  
6 2018 when they come to this Court and avail themselves of its  
7 jurisdiction, do they issue a CORA request to our clients?  
8 Not that we're aware of. And, again, I mean, they had a  
9 multitude of opportunities.

10 And I think, really, the other sort of way that the  
11 CORA motion interfaces with the discovery motion is that we  
12 see in their combined response is that, Oh, we need  
13 information to overcome bad faith. We need that information.

14 Well, that's a separate issue, and I would caution  
15 the Court that it's somewhat of a red herring because these  
16 -- the CORA motion and the discovery motion are not mutually  
17 exclusive, the relief requested by them. The Court could  
18 grant one and -- and --

19 THE COURT: Right.

20 MS. MORRILL: -- deny the other. But similarly,  
21 what this Court or even the Article III judge does not have  
22 in front of them at this point in time is a motion under Rule  
23 26(d) for limited expedited discovery related to bad faith,  
24 as it relates to the Younger abstention argument that the  
25 defendants have raised and that we expect to be taken up

1 before the preliminary injunction.

2 And so we are basically saying, No discovery now at  
3 this time. Not ever. If we lose our motion to dismiss, we  
4 fully expect to be back in front of this Court to set a  
5 scheduling order and proceed through discovery.

6 Similarly, we do think that it's fair to say, No  
7 CORA. It goes to the heart of proportionality. It's  
8 well-supported by the case law and the --

9 THE COURT: But it's not --

10 MS. MORRILL: -- precedent of this Court.

11 THE COURT: It's not the proportionality of the  
12 discovery process, though. It's -- it's, again -- and this  
13 is what I keep coming back to, an issue that I have is, it  
14 seems like it's a -- to the extent it is a flaw, and I'll  
15 assume for the sake of argument that -- that is, that there's  
16 no way for you to limit, that seems like a flaw of the state  
17 legislature. And you're asking a federal court to  
18 essentially go in and, for purposes of this case, fix a flaw  
19 that is in the CORA statute. And that's what I have problem  
20 with. That's --

21 MS. MORRILL: I understand.

22 THE COURT: That's where I struggle, struggle that  
23 much more because I'm a federal court going in and basically  
24 saying, You screwed up, Colorado, in creating this, and now  
25 I'm going to fix it to save the burden on the State that they

1 otherwise would be completely legitimately subjected to but  
2 for the fact that we have a federal lawsuit going on. And  
3 that seems backwards to me.

4 MS. MORRILL: Well, and I would just say for Your  
5 Honor -- I mean, I understand where you're coming from, and I  
6 -- I think our position is a reliance on the plain language.  
7 It's CORA. It says such inspection is prohibited by the  
8 order of any Court, not a state Court, not a federal Court,  
9 it's any Court. We think you have the authority to fashion  
10 that order.

11 But similarly, to the extent that plaintiffs want  
12 to, you know, engage in, you know, Well, if we just dismiss  
13 or claims, and then we'll issue the CORA request, I would  
14 remind the Court and the plaintiffs that we are engaged in a  
15 parallel state court proceeding, and we would likely consider  
16 very strongly availing ourselves of the same recourse in that  
17 state court proceeding if they were to turn around and CORA  
18 us for the same records that they've CORA'd us in this  
19 federal litigation; meaning, that we would actively pursue a  
20 state court order for closing CORA. And at the end of the  
21 day, I mean, this all --

22 THE COURT: Well, you can do this, regardless of  
23 what I do, right?

24 MS. MORRILL: That's -- yes, but they -- but I'm  
25 not -- we haven't sort of thought out the permutations on --

1 THE COURT: I -- I mean --

2 MS. MORRILL: -- what happens if we get one from  
3 one and not from the other.

4 THE COURT: I -- well, let's play that out for a  
5 minute.

6 Let's say, hypothetically, that I stay discovery in  
7 this case, I grant your motion to stay, I deny your motion to  
8 block with respect to CORA. And then you go over to the  
9 state court proceeding, and that judge decides that, reading  
10 state law and determining that it's appropriate to prohibit a  
11 CORA request, I don't think there's anything in that order  
12 that would necessarily be inconsistent with mine. It might  
13 disagree with mine --

14 MS. MORRILL: Right.

15 THE COURT: -- but I don't think it, you know, does  
16 anything to -- I mean, it disagrees with the --

17 MS. MORRILL: Offend yours.

18 THE COURT: -- reasoning, perhaps. Perhaps it says  
19 that it thinks it's better from the state court judge than a  
20 federal court judge or whatever. But I don't think there's  
21 anything necessarily in conflict, such that the two orders  
22 would be contradictory to each other that we would need a  
23 resolution of it, but I'll hear if -- if you disagree with  
24 that. It could be you haven't thought that all out yet.

25 MS. MORRILL: No. Your Honor, at this point, we're

1 reacting to --

2 THE COURT: Okay.

3 MS. MORRILL: -- yeah, the -- the things that are  
4 in front of us --

5 THE COURT: That's fair.

6 MS. MORRILL: -- in front of the federal court,  
7 which is -- you know, we're engaged in robust motions  
8 practice. I mean, we are at -- this -- this is where we're  
9 are. We're at a litigation crossroads. And you know, in our  
10 view, it's not even a very remarkable one in the sense that  
11 these are the types of motions that the State files as a  
12 matter of course. We engaged in extension discovery -- I'm  
13 sorry, not discovery -- extensive conferrals with plaintiff's  
14 counsel regarding both these motions and the scheduling order  
15 where we laid out for them that, you know, when we have a  
16 parallel state proceeding that's ongoing and is an exercise  
17 of the State's regulatory police power, we argue Younger, the  
18 State argues Younger as a matter of course.

19 When we have, you know, a dispute over the  
20 proportionality of discovery, and we have both jurisdictional  
21 defenses and serious immunity defenses that we think  
22 preclude, you know, a variety of inquiries that plaintiffs  
23 would propound to us, whether through CORA or through  
24 discovery, you know, we file these types of motions to stay  
25 as a matter of course. And to --

1 THE COURT: Sure.

2 MS. MORRILL: Yeah.

3 THE COURT: And I agree with that. And I -- you  
4 know, especially when qualified immunity is raised, I  
5 routinely grant the motion to stay. And now I'll ask  
6 plaintiff about that, but I think that the Supreme Court --  
7 the US Supreme Court case law --

8 MS. MORRILL: Right.

9 THE COURT: -- strongly supports staying discovery.  
10 But -- but this one's a little bit different, and -- and I've  
11 done my own research, and clearly the parties have, too. And  
12 we found one case that -- that deals with this, and it's not  
13 directly on point. So -- so this is new. I -- I agree the  
14 motion to stay, I see probably 30 times a year.

15 MS. MORRILL: Yeah.

16 THE COURT: This one's new. So -- so I just raise  
17 that because I think that this is -- this is unique.

18 MS. MORRILL: I agree, Your Honor, and we don't --  
19 we don't ask for this lightly. I mean, if we -- if we had a  
20 very narrow set of CORA requests from these -- from  
21 plaintiffs that were seeking, Your Honor, discreet documents,  
22 instead of CORA requests that read like discovery, you know,  
23 requests with the discreet subparts and, you know, all sorts  
24 of -- of -- of, you know, moving pieces, maybe we would have  
25 taken a different approach.

1           But we see -- just in our conferrals, again, about  
2 the proposed scheduling order and over these motions, we see  
3 a complete, you know, disconnect between the parties' view of  
4 what this case fundamentally entails and -- and where the  
5 claims and defenses are going to be borne out in terms of  
6 costly and burdensome discovery.

7           And if we have to respond to 275 discreet requests  
8 for production and interrogatories, we will -- we would  
9 prefer to take our chances there than to have unlimited -- I  
10 mean, they could CORA us every day, every other week. They  
11 could -- I mean, it could become a true tactic.

12           And I think the other thing I would ask the Court  
13 to keep in mind when considering the CORA motion is the Sica,  
14 (ph) the Connecticut case that plaintiffs cite in their  
15 response, which is neither a case regarding a motion to stay  
16 discovery or a case regarding a motion to prohibit the use of  
17 open records law.

18           But what it was, was a Rule 26(d) motion to obtain  
19 that early limited expedited discovery related to solely the  
20 issue of bad faith on the part of an administrative body,  
21 very similar to the one that's a defendant here. And the  
22 Court was seriously concerned. I mean, you can read it in  
23 the case. It comes across in the Court's opinion about what  
24 it was that the plaintiff was intending to inquire about, not  
25 just the number of, you know, interrogatories or depositions,

1 but who the plaintiff got to ask questions from and demand  
2 information from. And that, I think, is part of our concern  
3 here on behalf of your clients, is the Civil Rights  
4 Commission is going to be the neutral decision-maker with  
5 respect to the 2017 charge of discrimination.

6 They're not just a party defending themselves in  
7 this federal case. They are going to eventually hear, after  
8 the ALJ proceeding plays out, potentially exceptions from one  
9 or both sides related to that administrative law judge's  
10 decision, and they are going to have the final say.

11 And so we think that plaintiffs are, in many ways,  
12 not only intending to use discovery, if they can get it in  
13 this case while the motion to dismiss is pending, but to  
14 potentially also CORA to try and find information that  
15 doesn't go to the federal questions involved in this case,  
16 but that they will attempt to use our clients' positions  
17 against them when they are acting as the neutral  
18 decision-maker.

19 THE COURT: But absent this federal lawsuit, they  
20 could have done just that, right?

21 MS. MORRILL: Well, again, I think we would be in  
22 the state court parallel proceeding and potentially looking  
23 at seeking the same relief in that proceeding.

24 THE COURT: Okay. Okay. Thank you.

25 MS. MORRILL: Thank you.

1 THE COURT: I'll hear from plaintiff.

2 MR. SCRUGGS: Thank you, Your Honor.

3 I'd like to, I think, divide it up into two issues,  
4 first, the question you raise, and then we can focus on this  
5 case, which I think presents an even easier question.

6 But the question you raised, I think the answer is  
7 the costs that you discussed, that you and opposing counsel  
8 discussed there, that is provided for in the statute, and a  
9 good example of that is this case. We sent the CORA record  
10 request, they sent back a bill for \$50,000.

11 THE COURT: And you agree you're required to pay  
12 that \$50,000 for the --

13 MR. SCRUGGS: Well --

14 THE COURT: -- for the documents?

15 MR. SCRUGGS: Well, we would ask them to, again,  
16 statutorily substantiate that. But we would go into a  
17 process of what we typically do and how I typically handle it  
18 in other FOIA situations across the country, is you enter  
19 into that negotiation of, Okay, we'll pay our debt down.  
20 This request, we'll limit it in scope, and they pare down the  
21 number.

22 But the answer there, Your Honor, is provided for  
23 in the statute. If there's some very broad request that saw  
24 it, then that -- it's going to be reflected in an enormous  
25 number that's going to be shifted to the plaintiffs, to us.

1           So I think that's the answer, that these two  
2 systems are parallel. You've got the CORA system, you've got  
3 federal litigation. And if you take that CORA away, it's  
4 essentially penalizing us, penalizing the plaintiffs for  
5 being in federal court; that we are losing the rights that  
6 every other citizen in the state of Colorado has simply  
7 because we're here.

8           So if you view it that way and you have that kind  
9 of burden mechanism in CORA itself, that's the solution.  
10 Everything else is just an objection, as you note, to the  
11 legislature. So there's that issue.

12           But I think, really, this case presents an easier  
13 matter because in this situation, say if Colorado's trying to  
14 shut down both and they cite absolutely no case on point  
15 where a court has said you can't get CORA and you get any  
16 discovery -- and that's especially improper here, Your Honor,  
17 because the State has put the issue of bad faith and made it  
18 essentially a jurisdictional issue by raising Younger, which  
19 we have that, of course, bad faith exception to. And the  
20 Sica case has allowed discovery -- you know, it's one case  
21 that allowed discovery on that point.

22           Especially in this case, Your Honor, I think this  
23 case, for really both issues, stresses the need for, you  
24 know, kind of unusual circumstances. If there's any case  
25 that the public has an interest in obtaining benefit -- or

1 obtaining documents in, it is this case, and that's one of  
2 the purposes of CORA. So that's one issue.

3 But then with respect to the bad faith, it's not  
4 often that you have a litigant go to the US Supreme Court,  
5 the US Supreme Court declare that the government entity has  
6 demonstrated bad faith against this particular plaintiff, and  
7 then essentially repeat the mistake. And we have provided  
8 evidence just without any discovery of ongoing bad faith. So  
9 at that very minimum, we think that we should be able to get  
10 discovery on just that issue of bad faith.

11 THE COURT: But you haven't moved under 26(d).

12 MR. SCRUGGS: Well, Your Honor, because right now,  
13 it -- it's their burden to show -- to stay discovery. We're  
14 in a situation right now where --

15 THE COURT: I -- I agree with that, but cite me to  
16 one case post-Iqbal that has allowed discovery to proceed  
17 when qualified immunity's been raised.

18 MR. SCRUGGS: Sure. I've got it right here, Your  
19 Honor. I think -- just off the top of my head, there's a  
20 Western District of Arkansas case. That --

21 THE COURT: Okay. So you've got one case from the  
22 Western District of Arkansas, and I could probably pull up 50  
23 from this district quickly that have stated that as a result  
24 of Iqbal --

25 MR. SCRUGGS: Well, what --

1           THE COURT: And the -- and the Supreme Court's  
2 clear mandate that said the basic thrust of a qualified  
3 immunity doctrine is to free officials from the concerns of  
4 litigation, including avoidance of disruptive discovery.

5           MR. SCRUGGS: Well, exactly, Your Honor. But both  
6 Iqbal and Harlow involve solely damages, solely qualified  
7 immunity issues; they did not involve requests for equitable  
8 relief. And that's what the first circuit case that we  
9 cited, the Lugo case, distinguished that we have --

10          THE COURT: Which was before Iqbal.

11          MR. SCRUGGS: What was that?

12          THE COURT: Which was before Iqbal.

13          MR. SCRUGGS: But it was after Harlow and  
14 distinguished Harlow on that exact same analysis. And that's  
15 why we -- there are other cases that have happened since  
16 Iqbal that have adopted Lugo and applied that same analysis.  
17 And it just makes sense because when you have those parallel  
18 structures, when you have equitable relief on the table, it  
19 doesn't make sense to stop all discovery.

20                 And so that's why we're not seeking the -- the  
21 Court can issue -- can continue to discovery and issue  
22 guidelines about what -- what can and can't be discovered.  
23 All we're asking for is narrow limited discovery on the issue  
24 of bad faith in order to defend against a motion to  
25 dismiss --

1 THE COURT: Except --

2 MR. SCRUGGS: -- on the equitable claims.

3 THE COURT: Explain to me why it matters that  
4 you've got an equitable -- an injunctive claim if they're --  
5 if they are -- the actions are immune from suit on.

6 In other words, if -- if their actions are  
7 protected by qualified immunity and the Court goes through  
8 and says, I don't even need to address the constitutional  
9 component because I find that their actions were protected by  
10 qualified immunity, is your argument that the Court still,  
11 nonetheless, needs to address whether or not there are  
12 constitutional violations because the Court can -- can  
13 equitably enjoin?

14 MR. SCRUGGS: Yes, that's exactly right, Your  
15 Honor. That -- qualified immunity is not an offense against  
16 an official capacity equitable claim -- or request for  
17 equitable relief.

18 All that qualified immunity defends against is  
19 damages. And so that's the exact distinction that Lugo drew  
20 in saying, We will allow discovery only for issues relevant  
21 to the equitable relief. And that's all we're seeking. In  
22 fact, we're even seeking something more narrow than that.  
23 We're only seeking discovery right now on the issue of bad  
24 faith to defend against that motion to dismiss our equitable  
25 claims.

1           So in light of that --

2           THE COURT: Why won't you get that -- let's assume  
3 for a moment that I stay all discovery as part of the -- the  
4 litigation, but deny the motion to block the CORA request.  
5 Why don't you -- why don't can't you get the information that  
6 you need through the CORA request?

7           MR. SCRUGGS: Because, Your Honor, we -- we -- want  
8 to do more than just discovery or document requests. We want  
9 to do depositions, if that's necessary, to prove the issue of  
10 bad faith. That can be limited to the topic of bad faith.

11           So that's one reason that -- because we're here, we  
12 have essentially more rights than a typical citizen does in  
13 just submitting going through the CORA route.

14           So -- but, again, it's that distinction that, I  
15 think I'll -- a useful distinction that the Lugo court drew  
16 between equitable claims/damages claims. If this were just a  
17 case that involved, like Harlow and like Iqbal, that just  
18 involved damages-type claims and someone raised immunity  
19 defense, no question; case open and closed.

20           But that's not this situation. This is a situation  
21 where we have these equitable claims, defendants have put bad  
22 faith at issue in their motion to dismiss, really forcing us  
23 to fight one hand behind our back, Your Honor. We're having  
24 to defend against this motion to dismiss. The case could  
25 totally go away if we can't substantiate our bad-faith

1 exception.

2           So, really, all we're seeking is just that narrow  
3 discovery on just that topic to allow us to defend against  
4 that motion to dismiss.

5           THE COURT: Anything further from either side?

6           MS. MORRILL: Your Honor, may I respond briefly --

7           THE COURT: Sure.

8           MS. MORRILL: -- to Lugo?

9           THE COURT: Sure.

10          MS. MORRILL: Thanks.

11          As with the Morrell, Chavez, and I think Arch  
12 specialty cases cited in the plaintiffs' response, their  
13 reliance on Lugo is likewise misplaced. While they are  
14 correct, as a factual matter, that Lugo v. Alvarado did not  
15 include equitable claims, it only -- it -- it, likewise, did  
16 not include any Younger -- Younger abstention defense on the  
17 part of defendants to equitable relief claims, like the ones  
18 we have here.

19          Additionally, the defendant in Lugo only asserted  
20 qualified immunity from suit, which is a lesser immunity and  
21 is often from damages and not from suit; whereas the State  
22 officials here have additionally asserted absolute immunity,  
23 which is a complete bar to suit that eclipses qualified  
24 immunity. So I think Lugo is distinguishable very easily by  
25 this Court on those grounds.

1           Additionally, interestingly, the first circuit sort  
2 of circuitous, you know -- where they start in that decision  
3 versus where they end is focused on, really the -- the State  
4 -- the government officials' bad faith in requesting a stay  
5 of discovery. Because there, the officials had engaged in  
6 all the dis- -- discovery pro- -- provided by the Court and  
7 allowed to the parties. And it was the plaintiff who had  
8 failed to press their case through discovery; but the  
9 defendant did, you know, in fact engage in all the discovery  
10 they wanted, and then they moved for summary judgment, and at  
11 the same time, sought a stay of discovery to prohibit the  
12 plaintiff from trying to -- to overcome summary judgment.  
13 And that's not what we have here.

14           I mean, the first circuit used the word chutzpah in  
15 describing the government officials' motion and said it  
16 bordered on bad-faith gamesmanship by the government that was  
17 of the nature that it would, you know, implicate estoppel  
18 argument.

19           I mean, again, Lugo is entirely distinguishable for  
20 a variety of reasons. But again, it's a qualifying immunity  
21 case, not an absolute immunity case, and there's no Younger  
22 abstention.

23           So I think where plaintiffs are really presenting  
24 and -- and argue, a moving target for both this Court to keep  
25 up with and us to respond to, is that the stay motion is to

1 stay generally all discovery and disclosures in this case.  
2 And it has nothing to do whatsoever with the preliminary  
3 injunction and whether plaintiffs can overcome the Younger  
4 abstention defense that the -- that the State officials have  
5 advanced.

6 And the simple solution for this Court to both, you  
7 be, grant our requested stay and consider potentially if the  
8 Article III judge refers such a motion to this Court, but  
9 consider a request for limited expedited discovery in advance  
10 of the PI hearing to prove that the bad-faith exception to  
11 Younger applies, is for plaintiffs to file the Rule 26(d)  
12 motion that the plaintiffs in Sica, the case that they cite,  
13 actually filed; and for them to articulate what it is, in  
14 fact, that they need in order to overcome bad faith.

15 Because I will tell you that we have looked at this  
16 complaint over and over again. And both the original and  
17 verified -- and the amended are verified by the plaintiffs;  
18 meaning, at the time they filed, they had a basis for  
19 alleging bad faith on the part of the State officials.

20 So it's an open question in our minds what, if any,  
21 discovery they should need if they had a basis in information  
22 and fact on which to make those verifications. But even  
23 putting that aside, let them file a 26(d) motion. Let them  
24 articulate to the Court what discovery they feel is  
25 appropriate and why they need it and who it should come from.

1 And let us -- well, let's see if it gets referred to you  
2 versus kept with the Article III judge. And then let us have  
3 a response that articulates our concerns about what exactly  
4 the plaintiffs are asking for.

5 And that's why, you know, Local Rule 7.1(d) has the  
6 prohibition on embedding a motion for affirmative relief in a  
7 response or a reply.

8 And so I think that's what plaintiffs are doing  
9 here, and I think there's an easy way for this Court to kind  
10 of navigate through that. And that's to accept our position  
11 that the stay is general, it's related to all disclosures in  
12 discovery, it's well-founded in the wake of *Ashcroft v. Iqbal*  
13 on the idea of immunities being absolute, both in qualified,  
14 but being immunities, not just from damages, but from suit  
15 and from the burdens of discovery.

16 THE COURT: Thank you. I'm going to take a brief  
17 five-minute recess, and then I'll come out with my opinion on  
18 these --

19 MS. MORRILL: Thank you.

20 THE COURT: -- or my order on these.

21 (A recess was taken.)

22 THE COURT: Currently pending before me are  
23 Documents No. 46, is the State official's motion for order  
24 prohibiting plaintiffs use of open record -- records law to  
25 circumvent discovery; and 48, the State official's motion to

1 stay all disclosures and discovery.

2 As I indicated earlier, the plaintiff has responded  
3 to each of these motions in a combined response at Document  
4 No. 65; and the State defendants have replied to that  
5 combined response and a combined reply, Document No. 66.

6 I'm going to take up first what I think is the more  
7 difficult of the two motions, which is No. 46, the State  
8 official's motion for order prohibiting plaintiffs use of the  
9 open record laws to circumvent discovery.

10 And here I note that there is very limited case law  
11 from Colorado on this issue. The only case that either side  
12 has cited that is on point, although does not go as far as  
13 what the State is seeking in this case, is Citizen Center v.  
14 Gessler, the Judge Watanabe opinion from July 16, 2012 in  
15 Case No. 12cv370-CMA/MJW in which he did prohibit the use of  
16 the open records law to supplement the discovery in that  
17 case; although, that case is distinguishable on -- in two  
18 respects.

19 The first is in that case, the Court had issued a  
20 scheduling order that set forth extensive discoverability and  
21 details as to how that discovery would be conducted. And  
22 second, unlike here where the State is seeking to prohibit  
23 any documents obtained by anybody to be introduced here,  
24 Judge Watanabe limited to the use of CORA to the parties that  
25 were involved in that case.

1           The argument that is made by the State is that  
2 allowing the plaintiffs to use CORA requests would  
3 essentially be an end-around around the discovery limitations  
4 that at some point will be imposed in this case, and I'm not  
5 certain that that's accurate. I'm not certain that it's  
6 accurate because what is being requested through CORA, one,  
7 are simply documents. And we're not talking about  
8 interrogatories, we're not talking about depositions  
9 obviously, we're solely talking about documents. And it's  
10 documents that, by definition in Colorado, are open records;  
11 in other words, they're public documents.

12           Now, they have to be requested, and there's  
13 certainly the ability to redact aspects of it. But,  
14 nonetheless, by definition, we are talking about open  
15 records. And the example that I used in questioning, I think  
16 is an apt example, which is: If the State in this case  
17 thought that the oral argument from the Supreme Court  
18 proceedings in the parallel case in this was critical, they  
19 could obtain that without it being a violation of -- or  
20 without them using one of their requests for production.  
21 It's a public record.

22           And in the same way that if you Google something  
23 and you obtain documents through Google, it's a public  
24 record. And doing so and conducting your own research is not  
25 a violation of the discovery standards. It's a supplement to

1 it. And here, I think that that is the equivalent.

2 Now, certainly I agree with the State that this  
3 runs the risk of there being -- of plaintiff issuing numerous  
4 CORA requests and the State having to respond to numerous  
5 CORA requests and -- and the time and expense of doing that,  
6 but that's not a function of this lawsuit.

7 That is a function of CORA. And if CORA has issues  
8 such that it doesn't provide any limitations on requests  
9 through CORA or any ability of the State to come in and say,  
10 These are overly burdensome or these are irrelevant, or  
11 anything else, that's a problem for the legislature.

12 And I believe it particularly inappropriate for me,  
13 as a federal judge, to come in and attempt to fix holes in  
14 CORA that aren't there, in and of itself. And I think that  
15 the clear intent of the legislature to allow both discovery  
16 requests in a case and CORA requests in a case is illustrated  
17 in Colorado Revised Statute section 24-72-204(5)(b).

18 Because there, again, in discussing the attorneys'  
19 fees and costs, the legislature created an exception, such  
20 that a requester cannot get fees and costs if the requester  
21 could have obtained the requested documents through the  
22 discovery procedure in a case.

23 Well, that would be -- there's no point of having  
24 that in there if the legislature intended CORA to essentially  
25 be blocked as soon as a State case is -- as soon as any

1 litigation is filed because there would be no ability to  
2 obtain the documents through litigation if there's no pending  
3 litigation. And so I think that that evidence is a clear  
4 intent of behalf of the Colorado legislature to not simply,  
5 on a regular basis, block CORA requests because there is  
6 pending litigation.

7           There is no dispute that plaintiff could have  
8 obtained all of these documents through a CORA request, had  
9 they done so prior to the litigation, and I see no reason to  
10 block it now that there is federal litigation.

11           I want to be clear that my ruling in no way  
12 reflects, or is intended to reflect, any intent of what in a  
13 parallel state proceedings a state court judge can do.

14           If the plaintiffs are using somehow CORA requests  
15 improperly to effect those state court proceedings and a  
16 state court judge deems it necessary to block that improper  
17 use of CORA, then a state court judge is obviously free to do  
18 so. And I am in no way commenting on the ability of a state  
19 court judge in the parallel proceeding to exercise his  
20 discretion interpreting -- his or her discretion interpreting  
21 Colorado law as he or she deems fit to address those CORA  
22 requests.

23           And so as a result of all of that, I am going to  
24 deny No. 46, which is the State official's motion for order  
25 prohibiting plaintiffs' use of open record laws to circumvent

1 discovery.

2 With respect to 48, I'm going to grant the opposite  
3 conclusion, and I'm going to grant No. 48, which is the State  
4 official's motion to stay all disclosures and discovery.

5 Here, what is being implemented is clearly this  
6 Court's jurisdiction and this Court's ability to manage  
7 discovery in this case. And in doing so, the Court looks to  
8 a number of issues, including the factors that are considered  
9 in this district routinely and initially set forth as a group  
10 in String Cheese Incident, LLC v. Stylus Shows, Inc. That's  
11 a 2016 Westlaw 894955 at star 2.

12 And these factors are, one, the burden to the  
13 plaintiff in staying litigation, including the need to  
14 expeditiously proceed with a case; two, the burden on the  
15 defendants with allowing discovery; three, the convenience to  
16 the Court; four, the interest of persons not parties to the  
17 civil litigation; and five, the public interest. And here  
18 weighing these factors, I find that those factors support  
19 staying discovery until the motion to dismiss is resolved.

20 The first is the plaintiffs' interest in proceeding  
21 expeditiously with the civil action and any potential  
22 prejudice to the plaintiff of a delay. Certainly, there is  
23 always prejudice to any plaintiff in a civil rights action  
24 with delaying moving forward with a case.

25 As far as any unique prejudice, the plaintiff cites

1 two factors. The first is plaintiff argues that the  
2 defendants continue to discriminate against plaintiff and  
3 that that continued discrimination places plaintiff in a  
4 unique position.

5 But I note that in this case, plaintiffs have filed  
6 a motion for preliminary injunction in this matter, which is  
7 currently, I believe might even be fully briefed, but is  
8 currently up with Judge Daniel. If Judge Daniel finds that  
9 weighing the factors with regard to a preliminary injunction  
10 that such an injunction is appropriate, then any continued  
11 further discrimination can be -- he can issue the appropriate  
12 order.

13 Again, I don't mean my comments to suggest in any  
14 way my view of the preliminary injunction, but I just note  
15 that there is a manner in which plaintiffs can seek to  
16 prohibit continued alleged discrimination, and in fact, they  
17 are pursuing that currently.

18 The second argument made by the plaintiffs is that  
19 they cannot adequately respond to the Younger abstention  
20 issue that is raised in the motion to dismiss without some  
21 limited discovery into bad faith.

22 I note, one, that as a result of my ruling on CORA,  
23 they are going to be able to obtain, barring some injunction  
24 by the state court in the parallel proceeding, but at least  
25 obtain some discovery related to this. And two, the Rules of

1 Civil Procedure contain a mechanism in which they -- if they  
2 believe that they cannot adequately answer the motion to  
3 dismiss, which through Younger may be converted into a motion  
4 for summary judgment in which they can seek limited  
5 discovery -- and that's Rule 56(d) motion. And in doing so,  
6 they can detail why exactly they need to the limited  
7 discovery that they need and what exactly the discovery that  
8 they need is. That hasn't been filed at this point. If it  
9 is, I will address that once it's filed if it's referred to  
10 me. But at this point, it's not, and as a result, I find  
11 that the -- while there is some prejudice to the plaintiff in  
12 staying discovery, it is not particularly unique in this  
13 case.

14           The second is the burden on any defendants. And,  
15 here, I find that that factor weighs significantly in favor  
16 of staying discovery. Initially, I do note that there is  
17 qualified immunity that has been raised in this case, and  
18 while I agree that that qualified immunity may not --  
19 technically, will not resolve the issue of any injunctive  
20 relief that is sought in this case, at least to the extent  
21 that any decision would be based upon the clearly -- clearly  
22 established prong of qualified immunity. Obviously if it's  
23 decided on the constitutional prong of qualified immunity,  
24 the first prong, it may impact the equitable relief sought  
25 because there would be a determination that there had not

1 been, again, before the motion to dismiss a plausibly pled  
2 constitutional violation.

3           But to the extent that we're looking at the second  
4 prong only, that may not impact any equitable relief.  
5 Nonetheless, the discovery may still be limited to the extent  
6 that qualified immunity is determined to apply because it may  
7 limit any discovery into damages, which is certainly an  
8 aspect that remains in the case now.

9           Moreover, as counsel for the State indicated, there  
10 are other defenses that are raised here. One of them that is  
11 particularly concerning is the Younger abstention doctrine,  
12 which goes to the heart of this Court's subject matter  
13 jurisdiction. And if Judge Daniel, who will be deciding the  
14 motion to dismiss, determines that the Court lacks subject  
15 matter jurisdiction, we certainly should not be engaging in  
16 what would likely be, one, discovery; and, two, any discovery  
17 disputes that arise through the course of this litigation.  
18 The -- and so I find that the second factor weighs heavily in  
19 favor of a stay.

20           Third is the convenience to the Court. And here I  
21 find that this factor, too, supports staying the matter.  
22 There is certainly some inconvenience to the Court in that by  
23 staying the matter, it will cause some disruption to the  
24 Court's calendar and the ultimate setting of this case for  
25 future hearings. Nonetheless, we're early in the litigation,

1 and it's not like I would be vacating really any hearings,  
2 given that we had already vacated the scheduling conference.  
3 And, two, to the extent that ultimately there is a decision  
4 in this case that limits, to some extent, the case or gets  
5 rid of the case entirely, that could greatly impact the  
6 Court's calendar as far as avoiding discovery disputes and  
7 other disputes that the Court need not address.

8           Again, I don't make those comments to suggest my  
9 personal view as to the merits of the motion to dismiss. I  
10 only make it to the extent that, one, if, for example, the  
11 motion to dismiss were granted in its entirety, there would  
12 then be absolutely no need for any of the discovery disputes  
13 here.

14           If, on the other hand, the motion to dismiss is  
15 granted in part, such as, for example, the qualified immunity  
16 component being granted and the damages claims being  
17 dismissed, it would limit the discovery that would move  
18 forward and the Court's need to address any of those  
19 discovery disputes. And so I find that the third factor,  
20 too, supports a stay of discovery in this case.

21           The fourth is the interest of persons not parties  
22 to the civil litigation. Here I find that that factor  
23 potentially has the benefit of favoring in -- of weighing in  
24 favor of a stay in that, through the discovery process, there  
25 is likely to be individuals who would be potentially

1 questioned, potentially deposed, potentially who documents  
2 would be requested from who are not parties who would be  
3 disrupted as a result of that. I don't find that that factor  
4 weighs heavily in support of the stay, but I do think that --  
5 that it does potentially weigh in favor of the stay.

6           And the fifth is the public interest. And here I  
7 find that this factor is essentially neutral. There is  
8 certainly a public interest in this case. That's evidenced  
9 by the fact that for what is essentially a discovery dispute,  
10 we have several people in the courtroom here who, I believe,  
11 are unrelated to the case, at least not directly related to  
12 the in-state case. And given that this case went up to the  
13 Supreme Court and given the issues that are involved in the  
14 case and the fact that those issues touch on numerous  
15 societal issues, I think that there is certainly an interest  
16 in this case. And that would weigh in favor of allowing the  
17 case to move forward. Moreover, there is always a public  
18 interest in the expeditious resolution of disputes, and that,  
19 too, generally weighs in favor of allowing a case to move  
20 forward and not staying it.

21           On the flip side of that, however, is, one, the  
22 qualified immunity that has been raised and the clear  
23 language from the Supreme Court in *Iqbal* that government  
24 officials should not be unnecessarily pulled away from  
25 governmental functions when an issue of qualified immunity is

1 raised. And instead, that issue should be -- the issue of  
2 qualified immunity should be decided first before pulling  
3 government officials away from their tasks.

4           And the second in this case is -- the second that  
5 weighs against moving this case forward is the public  
6 interest in the concept that federal courts should -- are  
7 courts with limited jurisdiction and should only be deciding  
8 issues that they have jurisdiction over. And again here,  
9 what is raised is a Younger abstention defense and argument  
10 that this Court lacks jurisdiction. And I think that there  
11 is a public interest in not having courts weigh in on issues  
12 that may ultimately be determined that the Court lacks  
13 jurisdiction over it. And so weighing the competing concerns  
14 in the fifth topic of the public interest, I find that that  
15 public interest is largely neutral.

16           So having considered all five of the factors that  
17 the Court must consider in determining whether or not to stay  
18 litigation pending the resolution of the motion to dismiss, I  
19 determine that the factors weigh in favor of staying this  
20 matter. And I will, therefore, stay any future discovery --  
21 any further discovery in this case pending resolution of the  
22 motion to dismiss. Again, that's without prejudice to any  
23 56(d) motion that plaintiff may file in the future.

24           So considering then that the motion to dismiss was  
25 just recently filed, we are looking at briefing not being

1 completed at the earliest until the end of December. And  
2 given the length of the motion to dismiss, I certainly would  
3 not be surprised to see motions for extension to respond and  
4 to reply being filed. And then, obviously, Judge Daniel will  
5 need to -- time to rule on that motion. I could be very  
6 surprised if we have any ruling before the end of March, and  
7 that's honestly probably being optimistic.

8 So I think what makes sense is to set this for  
9 status in early April. One of three things will happen. If  
10 the motion to dismiss is not decided come that April date, I  
11 will simply look for another status date down the road, again  
12 trying to anticipate when the motion might be decided.

13 If the motion to dismiss is granted in its  
14 entirety, obviously, this case goes away, and that status  
15 date will likewise go away.

16 If the motion to dismiss is denied in any part,  
17 then at that April date, I'll start looking to a date for a  
18 scheduling conference in this matter.

19 So how does April 2nd at 10:30 a.m. look to the  
20 parties for a status? And you can appear telephonically for  
21 that.

22 MS. MORRILL: 10:30 a.m., Your Honor?

23 THE COURT: Okay. Yes. Yes.

24 MS. MORRILL: Yes. Yes. That works for us.

25 MR. SCRUGGS: April?

1 THE COURT: 2nd.

2 MR. SCRUGGS: Yes, Your Honor. We can.

3 THE COURT: Okay. All right.

4 MR. SCRUGGS: Your Honor?

5 THE COURT: Yes?

6 MR. SCRUGGS: Could I ask a clarifying question?

7 THE COURT: Sure.

8 MR. SCRUGGS: If you -- it's my understanding that  
9 we can't -- plaintiffs can't file a Rule 56(d) motion because  
10 it's not a summary judgment that's being sought under  
11 Younger.

12 THE COURT: Well, wait. What I was under the  
13 assumption of was if it gets converted into a summary  
14 judgment motion. If it's not and if it's decided simply on  
15 the allegations in the complaint, then -- then it's going to  
16 be decided on the allegations in the complaint, and  
17 discovery's not going to be needed to address the bad-faith  
18 component of it.

19 If -- if instead, it gets into an area where you  
20 need discovery limited to bad faith and it's converted, you  
21 can file it as a 56(d). If you think you need discovery into  
22 bad faith simply to respond to the motion to dismiss, then  
23 you can file a motion for limited discovery in order to  
24 respond to the motion to dismiss. It's essentially,  
25 identical to what a 56(d) motion would be, but if you feel

1 you can't -- you can't even respond to the motion to dismiss,  
2 then -- then you can file a motion detailing in the same way  
3 you would through a 56(d) what exactly it is that you need.  
4 They'll have the chance to respond to it. You can reply, and  
5 then if it's referred to me, I'll take it up at that point,  
6 okay?

7 MR. SCRUGGS: Thank you, Your Honor.

8 THE COURT: You're welcome. All right. Thank you,  
9 everybody.

10 MS. MORRILL: Thank you.

11 THE COURT: We'll be in recess.

12 (Whereupon, the within hearing was then in  
13 conclusion at 12:11: p.m.)

14

15

16 I certify that the foregoing is a correct transcript to the  
17 best of my ability to hear and understand the audio recording  
18 and based on the quality of the audio recording from the  
19 above-entitled matter.

20

21 /s/ Brittany Leis

November 28, 2018

22 Signature of Transcriber

Date

23

24

25