

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, et al.,
Plaintiffs,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official and individual capacities, et al.,
Defendants.

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

Defendants, collectively referred to as the State Officials, reply to Plaintiffs' Response to State Officials' Rule 12(b)(1) Motion to Dismiss [Doc. 81] as follows.

INTRODUCTION

Plaintiffs argue that they must be able to decline orders for cakes bearing words or images with which they disagree or find offensive and therefore would not bake for *anyone*. Under the Colorado Anti-Discrimination Act ("CADA"), they may do so. *See* Br. for Resp't Colo. Civil Rights Comm'n at 35, *Masterpiece*, 138 S. Ct. 1719 (2018) (No. 16-111) (U.S. Oct. 23, 2017); Am. Comp. ¶¶65-69, 247. But the third-party discrimination charge that Autumn Scardina filed against Plaintiff Masterpiece Cakeshop Inc. (the "bakery") with the Colorado Civil Rights Division (the "Division") in July 2017 alleged something very different. Specifically, she alleged that the bakery declined to bake the very same birthday cake that it appeared both able and willing to bake for her *before* she disclosed in the ordering process that she is transgender and why she chose the colors blue for the exterior frosting and pink for the interior cake. *See* Doc. 51-1.

Plaintiffs admitted in their Amended Complaint here that they refused to bake the cake requested by Ms. Scardina [Doc. 51, ¶¶ 191, 203] and, notably, failed to allege that they have never baked and would never bake such a cake for *anyone*. *See* Doc. 51. To the contrary, the bakery’s website advertises that, “If you can think it up, Jack can make it into a cake!” and “Choose from any of our many flavors, frostings, and fillings.” *See* Doc. 64, p. 8 n.2. The ongoing state civil enforcement action will therefore decide whether CADA may require that, if Plaintiffs will bake a blue and pink cake for *anyone*, then they must do so for *everyone*. Whether the 2017 discrimination charge will be sustained in that action remains to be seen, but what is certain is that this Court lacks jurisdiction over Plaintiffs’ claims for equitable relief and damages in *this* action.

ARGUMENT

I. **Mandatory *Younger* abstention applies here.**

Plaintiffs do not contest that a CADA enforcement proceeding implicating important state interests is ongoing. *See* Doc. 81, pp. 8-18 (discussing *Younger v. Harris*, 401 U.S. 37 (1971)). Instead, they argue that they cannot fully and fairly litigate all of their federal claims in the state action and that the bad faith exception to *Younger* abstention applies. *Id.* These contentions lack merit; each *Younger* condition is met and therefore abstention is required.

A. **CADA affords Plaintiffs the opportunity to *fully* litigate their federal claims in the ongoing state proceedings.**

Where, as here, a place of public accommodation is charged with discrimination in violation of § 24-34-601, the procedures for adjudicating the charge are governed by §§ 24-34-306 and 307. Section 306(8) provides that a hearing, which in the underlying case will occur before an administrative law judge (“ALJ”), must “be conducted and decisions rendered in

accordance with section 24-4-105” of the Colorado Administrative Procedure Act (“CAPA”). Section 24-4-105(4) of CAPA, in turn, provides that an ALJ “conducting a hearing...shall have authority to: ...dispose of motions to dismiss for lack of agency jurisdiction over the subject matter or parties *or for any other ground.*” (emphasis added). Indeed, the Tenth Circuit cited this very provision of the APA with approval in *Amanatullah, M.D. v. Colorado Board of Medical Examiners*, 187 F.3d 1160, 1164 (10th Cir. 1999), where it affirmed the District Court’s decision to abstain under *Younger* because CAPA “provides an adequate forum to hear [the plaintiff’s] constitutional and civil rights claims raised in his federal complaint.” It further held that “[i]t is sufficient for purposes of *Younger* abstention that federal challenges, such as [the plaintiff’s] civil rights complaints, may be raised in state court judicial review of administrative proceedings.”¹ *Id.* (citations omitted).

The Tenth Circuit also found that, because “[a]t the time that the district court abstained and dismissed [the] federal complaint, there had been no hearing before an [ALJ],” on appeal it was required to “consider [the plaintiff’s] claims as of that time.” *Id.* In doing so, it concluded that the plaintiff “would have had ample opportunity to present his constitutional and civil rights claims to the [ALJ] at the hearing. We assume that the [ALJ] would have followed his/her obligations under § 24-4-105 and considered [the] federal claims.” *Id.* (citing *Penzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987) (“[W]hen a litigant has not attempted to present his federal claims

¹ The Tenth Circuit also approved of the provision in the Medical Board’s statute authorizing judicial review by the Colorado Court of Appeals, for which CADA currently has a substantively identical provision in § 24-34-307. *Id.* at 1164 (citing §§ 12-36-119 and 24-4-106(11), C.R.S. (1999)). It further approved of § 24-4-106(7) of the APA because it required that “[i]f [the court of appeals] finds that the agency action is...contrary to constitutional right, power, privilege, or immunity, ... or otherwise contrary to law...the court shall hold unlawful and set aside the agency action.” *Id.* (quoting § 24-4-106(7), C.R.S. (1999)). The APA currently requires the same. *See* § 24-4-106(7), C.R.S. (2018) (substantively identical).

in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.”)). Plaintiffs cited *no* such “unambiguous authority” in their Response [Doc. 81], so the same assumption applies here.² Accordingly, under CADA’s current provisions, which are substantively identical to those that passed constitutional muster nearly twenty years ago, Plaintiffs have had and will continue to have the opportunity to fully litigate their federal claims in the ongoing state proceedings.³

The Response instead relies on *Gibson v. Berryhill*, 411 U.S. 564 (1973), and *Ward v. Vill. of Monroeville, Ohio*, 409 U.S. 57 (1972), for the proposition that the availability of judicial review does not cure an initial adjudication in which the decisionmaker was biased. Doc. 81, p. 14. Reliance on the latter case is misplaced because it did not address *Younger* abstention at all, but instead concerned the appeal of a municipal criminal conviction all the way up to Ohio’s Supreme Court and then to the U.S. Supreme Court.⁴ 409 U.S. at 57-58. And reliance on both cases is misplaced because the specific type of impermissible bias found to exist in each case—namely, a substantial financial interest—is *not* alleged by Plaintiffs here. *Gibson*, 411 U.S. at 579 (“[T]hose with substantial pecuniary interest in legal proceedings should not adjudicate these

² And contrary to Plaintiffs’ suggestion otherwise [Doc. 81, pp. 14-15], § 24-34-306(5) expressly provides that “[i]n accordance with rules adopted by the commission, discovery procedures may be used by the commission and the parties under the same circumstances and in the same manner as is provided by the Colorado rules of civil procedure after the notice of hearing...has been given.” *See also* 3 C.C.R. 708-1, Rules 10.5(F) and 10.8(A)(4) (Commission rules governing access to investigative file and discovery).

³ Assuming, of course, that they have standing to bring each claim, their claims are ripe for review, and there are no other jurisdictional defects or other bars to maintaining each claim.

⁴ Plaintiffs’ reliance on *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (“*Masterpiece I*”), also is misplaced for the same reason. *See* Doc. 81, p. 14. As a result, neither *Ward* nor *Masterpiece I* sheds any light on the *Younger* condition requiring the state court forum to be adequate for purposes of a plaintiff’s federal claims.

disputes. ... And *Ward v. Village of Monroeville*,...indicates that the financial interest at stake need not be...direct or positive[.]” (citations omitted)); *see* Doc. 51. Thus, the Court in *Gibson* only declined to abstain because the state administrative adjudicators were direct economic competitors with a financial stake in the outcome of the challenged delicensing action. *Id.*

The Response also improperly relies on *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975), and *Rodriguez v. Providence Cmty. Corrs., Inc.*, 155 F.Supp.3d 758, 765-66 (M.D. Tenn. 2015), to support Plaintiffs’ contentions that not all of Mr. Phillips’ constitutional claims may be litigated in the ongoing state action and that he must be given the opportunity to do so in this Court before any constitutional harm is inflicted. Doc. 81, p. 16. Neither is on-point because each case sought to enjoin state action that was collateral to the principal criminal prosecution, and therefore would not be prejudiced by such an injunction. *See* 420 U.S. at 105, and 155 F.Supp.3d at 765-66. Not only do *Gerstein* and *Rodriguez* fail to illuminate whether Plaintiffs may raise all of their federal claims in the state proceedings here, but they also are wholly inapposite because Plaintiffs are asking this Court to enjoin the state action in its entirety, which *would* prejudice the ability to enforce CADA’s important anti-discrimination protections.

B. CADA affords Plaintiffs the opportunity to *fairly* litigate their federal claims in the ongoing state proceedings.

Plaintiffs’ contention that they lack the ability to fairly litigate their federal claims because CADA is structurally biased fails for two reasons. *See* Doc. 81, pp. 11-13. *First*, Plaintiffs cite no apposite authority for their contention that Commissioners “are chosen by discriminatory means.” *Id.*, p. 12. Rather, they rely solely on the Supreme Court’s decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), which addressed the very different context of jury

selection in a criminal case. Even if its holding could be applied outside of that context, *Batson* did not address whether the Constitution prohibits the affirmative *inclusion* of members of protected classes in a tribunal, but held only that it is unconstitutional to exclude “potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State’s case against a black defendant.” *Id.* at 89. Plaintiffs further fail to cite any authority for the proposition that they have a “right to adjudicators who are ‘indifferently chosen,’” or that the selection criteria here result in Commissioners who are unable to act neutrally. *Id.* (quoting *Batson*, 476 U.S. at 86-87). Indeed, numerous state and local governments have similar statutory criteria requiring members of public boards and commissions to be diverse and representative of specified protected classes.⁵ Despite these and other similar statutes having been on the books for years or even decades, the Response cited *no* legal authority invalidating one or more of them for offending the U.S. Constitution. *See* Doc. 81, p. 12. Thus, even if Commissioners Pocock and Aragon do represent LGBT interests, whether personally and/or professionally, [Doc. 81, pp. 9, 12], that does not mean they “will be unable

⁵ *See, e.g.*, Conn. Gen. Stat. § 4-9b(a) (requiring “the membership...of each state appointive board, commission, committee and council” to “closely reflect[] the gender and racial diversity of the state.”); Fla. Stat. § 760.80(1)-(3) (requiring proportional racial, ethnic, and gender diversity “[i]n appointing members to any statutorily created decisionmaking or regulatory board, commission, council, or committee of the state,” as well as to any “local board, commission, council, or committee[.]”); N.C. Gen. Stat. § 143-157.1(a) (requiring proportional gender diversity in membership of state and local public bodies); Or. Rev. Stat. § 182.100 (requiring members of state boards, commissions, and advisory bodies to be appointed in accordance with affirmative action policy to “eliminat[e] the effects of past and present discrimination, intended or unintended, on the basis of race, religion, national origin, age, sex, marital status or physical or mental disabilities[.]”); R.I. Gen. Laws § 28-5.1-3.1(a) (appointing authorities “shall endeavor to ensure that, to the fullest extent possible, the composition of the board, commission, or governing body reflects the diversity, including the racial and gender composition, of Rhode Island’s population.”); Tenn. Code § 10-7-611 (requiring appointing authorities to try to achieve “balance in the appointment of minority and non-minority persons to membership on statutorily created decision-making and regulatory boards, commissions, councils, and committees[.]”).

impartially to consider” the 2017 discrimination charge based on transgender status. *Batson*, 476 U.S. at 89.

Second, CADA’s requirement that Commissioners serve as prosecutors in one phase of the state proceedings, and as adjudicators in another phase, does not offend due process. *See* Doc. 81, p. 12-13. To ensure the neutrality of the ALJ and Commission, § 24-34-306(8) requires that “no one presenting the case in support of the complaint shall counsel or advise the commission, commissioner, or [ALJ] who hears the case.” *See also* 3 C.C.R. 708-1, Rule 10.8(A)(3) (same). It further precludes the Division Director and her staff from “participat[ing] in the hearing, except as a witness,” or from “participat[ing] in the deliberations of, or counsel[ing] or advis[ing], the commission, commissioner, or [ALJ] in such case.” *Id.* And CADA expressly places the burden on counsel for the complaint to prove “that the respondent has engaged or is engaging in an unfair or discriminatory practice,” and requires that “the respondent’s conduct be presumed not to be unfair or discriminatory until proven otherwise.” *Id.* These built-in procedural safeguards expressly require Commissioners to “‘psychologically [un]wed’” themselves from their earlier prosecutorial decisions, and therefore are sufficient to create and maintain neutrality on the part of the Commissioners during the adjudicative phase. Doc. 81, p. 13 (quoting *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1906 (2016)).

Indeed, over forty years ago, the Supreme Court answered in the negative the question of whether “conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.” *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). In that case, the Wisconsin Examining Board investigated and temporarily suspended a licensed

physician pending a later merits hearing, and the physician sought a preliminary injunction in federal court to prevent the hearing from going forward. *Id.* at 42. The District Court preliminarily enjoined the administrative proceedings based on the physician’s claim that the Board members’ dual roles deprived him of his “property, absent the intervention of an independent, neutral and detached decision maker.” *Id.* The Supreme Court reversed and, in doing so, found that it is “very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings.” *Id.* at 56, and 47-53 (collecting cases). As a result, the Court held that “[t]his mode of procedure ... does not violate due process of law.” *Id.* at 56. *Withrow* is therefore dispositive of the same issue here.

In apparent recognition that *Withrow* undermines their argument, Plaintiffs repeatedly rely on *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), but that reliance is misplaced for two reasons. *First*, despite citing *Withrow* in several instances throughout its opinion when generally discussing a judge’s duty to recuse in certain circumstances, nowhere did *Williams* announce that *Withrow* was overruled. *Id.*; see *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (“We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent.”). *Second*, the holding in *Williams* is limited to its specific factual context—namely, whether an appellate judge’s refusal to recuse “presented an unconstitutional risk of bias” because, in his former role as the prosecutor in the same case, he “express[ly] authoriz[ed]” the decision to seek the death penalty, “one of the most serious discretionary decisions a prosecutor can be called upon to make.” *Id.* at 1907. Because *Williams* is a criminal case, and consistent with the Supreme Court’s longstanding view that “death is

different,” *Gregg v. Georgia*, 428 U.S. 153, 188 (1976), *Williams* simply did not undo *Withrow* and its related precedent rejecting due process challenges to CADA-like statutes that assign dual roles to administrative officials.

C. This Court’s duty to abstain under *Younger* is not overcome by Plaintiffs’ conclusory allegations of bad faith or exceptional circumstances.

A federal plaintiff who is being prosecuted in a state court action by a federal defendant bears the “heavy burden ... [of] setting forth more than mere allegations of bad faith or harassment” to overcome *Younger*. *Phelps v. Hamilton*, 59 F.3d 1058, 1065 (10th Cir. 1995) (“*Phelps I*”). To determine whether this burden has been met, courts assess whether the state prosecution was frivolous or hopeless, motivated by the federal plaintiff’s suspect class or in retaliation for the exercise of constitutional rights, or “conducted in such a way as to constitute harassment and an abuse of prosecutorial discretion, typically through the unjustified and oppressive use of multiple prosecutions.” *See Phelps v. Hamilton*, 122 F.3d 885, 889 (10th Cir. 1997) (“*Phelps II*”) (quoting *Phelps I*, 59 F.3d at 1065). Binding precedent establishes that the facts alleged in the Amended Complaint here do *not* satisfy Plaintiffs’ heavy burden.⁶ And the State Officials hereby object to the improper motion for limited expedited discovery that was embedded in their Response because it violates D.C.Colo.LCivR 7.1(d). *See* Doc. 81, p. 18.

⁶ Although a Rule 12(b)(1) motion to dismiss that mounts a facial attack admits all well-pled facts in the complaint, it does not admit any conclusory allegations or legal conclusions drawn from those well-pled facts. *See Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001). Because the Amended Complaint here is verified, this Court must reject any allegations that are conclusory or for which Mr. Phillips lacks personal knowledge and therefore foundation. *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1019 (10th Cir. 2002). Mr. Phillips is not competent to testify about the understandings, beliefs, feelings, or motivations of any of the State Officials, or others besides himself. *See* Doc. 51, ¶¶ 1, 8, 192, 220, 225, 239, 244, 329, 338.

Not Frivolous or Hopeless. Merely commencing an initial administrative action for alleged violations of state law does not, by itself, demonstrate evidence of bad faith or harassment. *See Schwab v. Kansas*, 691 Fed.Appx. 511, 515 (10th Cir. 2017) (mere filing of state child protective services action did not constitute bad faith). Nor does merely commencing a second administrative action against the same individual after the conclusion of the first. *See Amanatullah*, 187 F.3d at 1164 (subsequent prosecution of same individual not bad faith); *Masterpiece I*, 138 S. Ct. at 1732 (foreshadowing subsequent prosecutions of the bakery). This would be true even if the Division Director and Commissioners were *not* new, and instead were the same as those whose decision was reversed in *Masterpiece I*. *See Withrow*, 421 U.S. at 49 (“Certainly it is not the rule of judicial administration that ... a judge is disqualified from sitting in a retrial because he was reversed on earlier rulings. We find no warrant for imposing upon administrative agencies a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing.” (quotation omitted)). But it is especially true here because the second prosecution was commenced by a new Division Director and new slate of Commissioners than those who decided the 2012 discrimination charge. *See Withrow*, 421 U.S. at 47, 55 (noting that there is “a presumption of honesty and integrity in those serving as adjudicators” and “state administrators ‘are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.’” (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941))). Moreover, the Amended Complaint fails to allege that Plaintiffs would not bake a blue and pink cake for *anyone*. *See* Doc. 51. The second prosecution for their alleged refusal to bake such a cake for Ms. Scardina based on her transgender status is therefore *not* frivolous or hopeless. *Masterpiece*

I, 138 S. Ct. at 1728 (“It is unexceptional that Colorado law can ... protect other classes of individuals[] in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.”).

Not Based on Mr. Phillips’ Religion or Retaliation for Masterpiece I: Notably, the Amended Complaint fails to allege that the current Division Director or any Commissioner has made any statement regarding the 2017 discrimination charge that was hostile to Mr. Phillips’s religion or that expressed doubt as to the sincerity of his religious beliefs. *See* Doc. 51. Indeed, neither the “cake hater” social media comment that Commissioner Pocock made as a private citizen in 2013 before joining the Commission, nor the image of the White House lit up in rainbow colors that Commissioner Aragon posted on his personal social media account when *Masterpiece I* was argued before the Supreme Court, concerned religion at all, much less Mr. Phillips’ religion specifically. Doc. 51, ¶¶ 259-60. And even if such private speech reflects general (*i.e.*, *non-religious*) animus toward Mr. Phillips, a demonstrated history of “personal animosity” between a prosecutor and a defendant is not, by itself, sufficient to allege that a state prosecution was commenced in bad faith. *Phelps I*, 59 F.3d at 1063. In *Phelps I*, despite finding that the federal defendant made public promises during her campaign for district attorney that, if elected, she *would* initiate criminal prosecutions against the federal plaintiffs and “ban ‘hate,’ ‘prejudice,’” and even called out one plaintiff by name in her statements, the Tenth Circuit still held that her alleged bad faith did not overcome *Younger* abstention. *Id.* at 1062. Sensing that the absence of any statement evincing hostility toward Mr. Phillips’ religion is fatal to their bad faith theory, the Response contends that such hostility is shown by the alleged inconsistency between the new Division Director and Commissioners’ decision to prosecute the 2017 discrimination

charge against Plaintiffs, and their predecessors' decisions declining to prosecute William Jack's discrimination charges against other bakeries that denied him service. *See* Doc. 81, pp. 9-10, 16-17. But in failing to allege that Plaintiffs would not bake a blue and pink cake for *anyone*, the Amended Complaint also fails to allege unequal treatment. Rather, it shows that Plaintiffs were, in fact, treated the same as the bakeries against which William Jack filed discrimination charges that were dismissed by the former Division Director and Commissioners because each bakery responded that it would not bake the cake requested by Mr. Jack for *anyone*. *See* Doc. 51, ¶¶70-79; *Masterpiece I*, 138 S. Ct. at 1733 (Kagan, J., concurring) (“In refusing that request, the bakers did not single out [Mr.] Jack...but instead treated him in the same way they would have treated anyone else—just as CADA requires.”). Finally, the Amended Complaint establishes that the current Division Director and Commissioners assumed jurisdiction over Ms. Scardina's charge nearly a year before *Masterpiece I* was decided, [Doc. 51, ¶¶ 183-84], so Plaintiffs' allegation that the second prosecution was in retaliation for their having successfully challenged the first is wholly conclusory and must be rejected by this Court. *Smith*, 258 F.3d at 1174; *Amanatullah*, 187 F.3d at 1163-64 (state proceedings began when notice of investigation sent to physician). This Court also must reject the Amended Complaint's conclusory allegation that the state court complaint evidences hostility by failing to acknowledge Mr. Phillips' religious objection to baking the cake because it is contradicted by Plaintiffs' own exhibit. *Compare* Doc. 51, ¶ 236, *with* Doc. 51-2, ¶ 9 (state court complaint expressly noting his religious objection).

Not Unjustified or Oppressive Number of Prosecutions: The second administrative action against Plaintiffs is not “unjustified” for the same reasons discussed above as to why it is not “frivolous” or “hope[less].” *Phelps II*, 122 F.3d at 889. And even if the Amended Complaint's

conclusory allegations establish a prima facie case of bad faith, Ms. Scardina's filing of a discrimination charge credibly alleging a denial of service in violation of CADA is a "legitimate, articulable, objective reason[]" to justify the decision to initiate" the second action, such that abstention is still required. *Phelps II*, 122 F.3d at 889-90 (quotations omitted). Nor do two prosecutions based on two separate charges over the course of six years total an "oppressive" number. *Id.* at 890-91 (concluding no bad faith despite finding that the same prosecutor initiated more than *twenty* cases against church members).

No Exceptional Circumstances: Where, as here, no bad faith is proven, the only other circumstances in which *Younger* abstention is not mandatory are "extraordinary" ones "where irreparable injury can be shown." *Amanatullah v.*, 187 F.3d at 1165. But the Tenth Circuit has declined to find such circumstances and refused to enjoin ongoing state prosecutions in which equally serious preliminary and permanent relief was sought by the State. *See Schwab*, 691 Fed.Appx. at 513 (separating minor children from parents pending a later hearing); *Amanatullah*, 187 F.3d at 1165 (revoking a medical license). That Plaintiffs are required to participate in state administrative and court proceedings, or the reality that all legal proceedings take time, is not, by itself, sufficient to establish great and immediate irreparable injury. *See Younger*, 401 U.S. at 46; *Dolack v. Allenbrand*, 548 F.2d 891, 894 (10th Cir. 1977). This Court must abstain.⁷

⁷ It also should abstain under the *Burford*, *Pullman*, or *Colorado River* doctrines based on longstanding principles of comity and federalism. Plaintiffs resist these doctrines based on the asserted lack of a state law question, and an adequate state court forum to decide federal claims. *See Doc. 81*, pp.19-22. The latter is fully rebutted above in Sections I(A) and (B). The former is without merit because the ongoing state action involves at least three questions of state law that Colorado's administrative officials and courts should be given the first opportunity to decide: (1) whether Plaintiffs violated CADA; (2) whether any of their defenses, including the non-federal defense that the alleged denial of service was justified based on the William Jack bakeries' offensiveness standard, should be sustained; and (3) whether CADA's protections may be read to defer to religious objections. These "difficult questions of state law

II. The State Officials are entitled to absolute, qualified, and/or Eleventh Amendment immunity; Plaintiffs lack standing to challenge § 701.

Absolute Immunity: The Response failed to discuss how Plaintiffs’ damages claims against the Division Director and Commissioners survive binding, on-point precedent to the contrary in *Butz v. Economou*, 438 U.S. 478, 508 (1978), and *Horwitz v. Colo. State Bd. of Med. Exam’rs*, 822 F.2d 1508 (10th Cir. 1987). *See* Doc. 81, pp. 23-24. Instead, they cite only *Cleavinger v. Saxner*, 474 U.S. 193, 206 (1985), in which the Supreme Court declined to extend absolute immunity to federal prison officials because “[u]nder the...disciplinary policy in effect at the time of [the prisoners’] hearings, few of the procedural safeguards contained in the Administrative Procedure Act under consideration in *Butz* were present,” and “the prison officials had no identification with the judicial process of the kind and depth that has occasioned absolute immunity.” *Id.* As explained above in the Sections I(A) and (B), CADA’s procedures expressly incorporate the APA, which the Tenth Circuit in *Amanatullah* held created a state forum that safeguarded a plaintiff’s federal rights, so Plaintiffs’ contentions otherwise are unavailing. *See* Doc. 81, pp. 23-24. Finally, the contention that § 24-34-306(13) of CADA waived the common law-based absolute immunity afforded to the State Officials by creating a statutory-based good faith immunity is identical to the one advanced in, and squarely rejected by, the Tenth Circuit in *Horwitz*, 822 F.2d at 1516.

Qualified and Eleventh Amendment Immunity: The Response also does not overcome the State Officials’ entitlement to qualified immunity because, as discussed above in Section I(C),

bear[] on problems of substantial public import” and federal review would disrupt state efforts to create “coherent policy.” *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) (applying *Burford*); *Vinyard v. King*, 655 F.2d 1016, 1018 (10th Cir. 1981) (applying *Pullman*).

Plaintiffs fail to allege that they would not bake a blue and pink cake for *anyone*. As a result, Plaintiffs have not alleged that they *were*, in fact, treated differently than the bakeries against which William Jack filed discrimination charges because each bakery *did* respond that it would not bake the cake requested by Mr. Jack for *anyone*. Absent such allegations, neither Plaintiffs' misreading of *Masterpiece I* nor *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004), overcome qualified immunity based on longstanding precedent upholding CADA-like laws.⁸ Finally, the Response fails to articulate how the Attorney General and Governor are engaging in an *ongoing* violation of federal law, and only complains about the former's generalized duty to enforce CADA, and the latter's past seating of Commissioners according to statutory criteria over which he has no discretion, which are insufficient to overcome Eleventh Amendment immunity precedents. *See* Doc 64, pp. 27-28.

Lack of Standing: Plaintiffs concede that no State Official has directly threatened to civilly enforce § 24-34-701 against them, and none have jurisdiction to do so criminally, as the Amended Complaint mistakenly implied. Docs. 81, pp. 29-30; 51, ¶ 277; *see* § 24-34-306(1)(b). And Mr. Phillips fails to allege that he intends to make any statements on the bakery's website that would actually violate § 24-34-701 by announcing that services will be denied to members of a protected class. *Compare* Doc. ¶ 270 (intent to post anti-discriminatory statement), *with* 303 *Creative LLC v. Elenis*, No. 16-cv-02372-MSK-CBS, 2017 WL 4331065, at *3, 5 (D. Colo. Sept. 1, 2017) (finding intent to publish statement denying service to same-sex couples). As a result, they cannot challenge § 24-34-701. *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003).

⁸ *See Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 n.5 (1968); *United States v. Lee*, 455 U.S. 252, 261 (1982); *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 879 (1990).

DATED: December 11, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2018, I served a true and complete copy of the foregoing **STATE OFFICIALS' REPLY TO PLAINTIFF'S RESPONSE TO RULE 12(b)(1) MOTION TO DISMISS THE FIRST AMENDED VERIFIED COMPLAINT** upon counsel of record in this matter through ECF or as otherwise indicated below:

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