IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

Plaintiffs,

v.

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

Defendants.

PLAINTIFFS' RESPONSE TO STATE OFFICIALS' FED. R. CIV. P. 72(a) OBJECTION TO THE U.S. MAGISTRATE JUDGE'S DISPOSITION OF THEIR CORA MOTION

Introduction

Plaintiffs Jack Phillips and Masterpiece Cakeshop (collectively, Phillips) design and create custom cakes that convey messages. Phillips creates his cakes for all people, but his religious beliefs keep him from expressing messages that violate his conscience. For exercising his faith this way, Defendants (collectively, Colorado) tried to punish Phillips in 2013. But Colorado lost at the Supreme Court because of its "clear and impermissible hostility toward [his] sincere religious beliefs." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018) (*Masterpiece I*). The Court cited two indicators of that hostility: (1) the "difference in treatment" between Phillips and other cake shops; and (2) state officials' comments manifesting bias toward Phillips and his faith. Within weeks, Colorado launched another effort to punish Phillips. That prompted this lawsuit, which is supported by even more evidence of Colorado's bias against him and his faith—including the fact that one Defendant has publicly called him a "hater."

Colorado asks the Court to dismiss this case while it continues the unequal enforcement practices that the Supreme Court just declared unconstitutional. That would be a costly decision for Phillips. He lost 40% of his business because of the state's prosecution in *Masterpiece I* and stands to lose everything this second time around. Colorado leans on *Younger* abstention, preferring to keep Phillips in a forum where state officials play the dual role of accuser and adjudicator, where some of them have publicly expressed their opposition and even animus toward him, and where all of them are disregarding key parts of the Supreme Court's recent decision against them. But *Younger* has no place where, as here, Phillips lacks a full and fair opportunity to litigate all his constitutional claims through the state administrative proceeding. Nor does it apply where, as here, enforcement officials are acting in bad faith to harass the accused.

In raising *Younger*, Colorado makes certain facts in this case critically important—facts about the state's bias and bad faith. But the state seeks to hide all information about its discriminatory enforcement practices and its hostile comments toward Phillips and his faith. It filed two motions to keep Phillips from obtaining *any* information on those topics, one to temporarily stay all discovery in this case, and another to block Phillips from using Colorado's Open Records Act (CORA) to access public documents that anyone else in the state could get. Magistrate Judge Varholak granted the former motion, and while he denied the latter one, Colorado filed an objection and still thwarts Phillips's efforts to obtain public records.

That objection should be rejected. Colorado says that Magistrate Judge Varholak's decision to deny its CORA motion was contrary to law, implying that Magistrate Judge Varholak believed he did not have *authority* to enter the requested order based on his discussion about one CORA provision. But that is incorrect. Magistrate Judge Varholak used that provision to counter the state's argument that Phillips forfeited his right to access public records that anyone else could get because he filed this lawsuit. And Colorado provided no case that supported its request to simultaneously shut down discovery here and shut off Phillips from accessing public records under CORA. In short, Magistrate Judge Varholak lawfully exercised his discretion to deny the state's motion. This Court should affirm that decision.

Background

In *Masterpiece I*, the Supreme Court marked two ways that Colorado showed hostility toward Phillips. 138 S. Ct. at 1729–31. First, the state treated Phillips unequally, allowing other cake artists to decline to create custom cakes that express messages they find objectionable while depriving Phillips of that freedom. *Id.* at 1730–31. In particular, Colorado allowed three other cake shops to decline "to create cakes with images" and religious messages "that conveyed disapproval of same-sex marriage," concluding that those shops acted lawfully in "refusing service." *Id.* at

1730. Second, officials made hostile comments about religion, ranging from the sentiment that certain people of faith are not "welcome in Colorado's business community," to outright animus that vilified Phillips's plea for religious freedom as a "despicable piece[] of rhetoric." *Id*. at 1729.

Phillips continues to exercise his faith by declining to create cakes that convey messages in conflict with his beliefs. Am. Compl. ¶¶ 109, 191, 304, 307–23, 327. In 2017, on the same day the Supreme Court announced that it would hear *Masterpiece I*, a Colorado attorney—who takes "great pride" in suing businesses that the lawyer considers discriminators and "serving them their just desserts"—called Masterpiece Cakeshop and requested a custom cake designed with a pink interior and blue exterior to celebrate the anniversary of a gender transition. *Id.* at ¶¶ 184–86. The lawyer said that "the design was a reflection of the fact that [the lawyer] transitioned from male-to-female" and that "the cake was 'to celebrate'" that transition. Am. Compl., Ex. A at 2; Am. Compl. ¶ 204 ("I requested that its color and theme celebrate my transition from male to female").

The shop declined that request not because of who the customer was but because the cake's design expressed messages that conflict with Phillips's faith. Am. Compl. ¶¶ 186–94. The design communicated that sex can be changed and expressed celebration for that idea. *Id*. at ¶ 191. But Phillips believes the opposite: that sex is given by God, is biologically determined, and cannot be chosen. *Id.* at ¶ 126. Masterpiece Cakeshop offered to create a different cake for the lawyer or to sell the lawyer any item available for purchase in the shop. *Id*. at ¶ 196. After this, the lawyer called the shop at least once more and requested a cake celebrating Satan. *Id.* at ¶¶ 311–15.

The lawyer filed a discrimination charge concerning the gender-transition cake. *Id*. at ¶ 200. Even though Colorado just told the Supreme Court that Phillips "is free . . . to *decline* to sell cakes with 'pro-gay' designs," *id.* at ¶ 68, the Colorado Civil Rights Division (Division) issued a probable-cause determination declaring that Phillips "violated" CADA by declining to

create the gender-transition cake, *id.* at ¶ 218. The Colorado Civil Rights Commission (Commission) then filed a formal complaint claiming that Phillips "denied service to [the lawyer] based on her sexual orientation (transgender status) . . . in a violation of [CADA]." *Id.* at ¶ 237. The Commission could have passed on filing its complaint, and the lawyer would have been authorized to file a civil action against Phillips in state court. *Id.* at ¶ 229.

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

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

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

Phillips has tried to get more evidence of Colorado's bias and bad faith. But the state has shut the door at every turn. After scrambling to file this lawsuit, Phillips had his attorneys prepare and submit three sets of open-records requests seeking information about two things: (1) Colorado's practice of treating Phillips (and other people of faith) worse than others when enforcing its public-accommodation law; and (2) Colorado's statements about Phillips and his faith. In response, Colorado said that it would move this Court to stop Phillips from using CORA to get information related to this case. Defs.' Mot. for Order Prohibiting Pls.' Use of Open Records Laws to Circumvent Disc. (Defs.' Open Records Mot.), Ex. D at 1, Doc. 46-4. Colorado added that if the Court denied its motion, it would "proceed with fulfilling" Phillips's public-records requests only if he paid the estimated costs, which came in at a staggering amount—over $50,000—and did not include projected costs for one set of requests. *Id*. at 3; *see id*. at 2–3.

Meanwhile, Colorado indicated that it wanted to stay all discovery and disclosures in this case because it had filed a motion to dismiss. But Phillips did "not agree to delay discovery" in this situation and asked for "discovery on the issue of bad faith" to begin immediately. Proposed Scheduling Order 12, Doc. 45. Colorado then filed two motions to keep Phillips from getting information about this case—one to stay all discovery, Defs.' Mot. to Stay All Disclosures & Disc.,

Doc. 48, and another to keep Phillips from using CORA to access public documents that anyone else could get, Defs.' Open Records Mot., Doc. 46.

At the hearing on those motions, Magistrate Judge Varholak granted the state's motion to stay all discovery. Minute Order, Doc. 79. And while he denied the state's motion to keep Phillips from using CORA to access public documents, *id*., Colorado filed an objection and still thwarts Phillips's efforts to obtain information, State Officials' Fed. R. Civ. P. 72(a) Objection to the United States Magistrate Judge's Disposition of their CORA Motion (Defs.' Obj.), Doc. 85. After Magistrate Judge Varholak's ruling, Phillips narrowed his open-records requests and even withdrew one of them to streamline the disclosure process. But the state only trimmed its projected costs to about $25,000 and indicated that it would refuse to disclose records until after this Court rules on its objection, Ex. B—even though filing an objection does not stay a Rule 72(a) decision, D.C.COLO.LCivR 30.2(b).

Standard of Review

The Court must adopt a magistrate judge's ruling on a non-dispositive matter unless it finds that the ruling is "clearly erroneous or contrary to law." *Hutchinson v. Pfeil*, 105 F.3d 562, 566 (10th Cir. 1997); Fed. R. Civ. P. 72(a). An order is clearly erroneous only if the Court "is left with the definite and firm conviction that a mistake has been committed" after reviewing "the entire evidence." *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988). And an order is contrary to law only if the magistrate judge "applied the wrong legal standard or applied the appropriate legal standard incorrectly." *Paquet v. Smith*, No. 10-CV-00813-WJM-KMT, 2012 WL 569158, at *1 (D. Colo. Feb. 21, 2012). The Court may not "overrule" Magistrate Judge Varholak's decision denying the state's CORA motion unless he abused his discretion. *Ariza v. U.S. West Commc'ns, Inc.*, 167 F.R.D. 131, 133 (D. Colo. 1996).

Argument

Colorado seeks to hide information about its bias and bad faith. Besides asking for a discovery halt, the state also requested an outright ban on Phillips's access to *and* use of certain public records in connection with this case. Not surprisingly, Magistrate Judge Varholak denied the latter request. CORA does not provide a litigation exception for record-seekers; the state cites no precedent that supports shutting off access to public records during a complete discovery stay; and Colorado misdirects its complaints and overplays its fears about complying with CORA. The Court should reject the state's objection and affirm Magistrate Judge Varholak's decision.

I. Magistrate Judge Varholak properly recognized that Phillips can access Colorado's public records even during active litigation with the state.

Like anyone else in the state, Phillips has a right to inspect Colorado's public records. *See* Colo. Rev. Stat. § 24–72–203(1)(a) ("All public records shall be open for inspection by any person"). He does not forfeit that right when he files a lawsuit against state officials. *See People in Interest of A.A.T.*, 759 P.2d 853, 854 (Colo. App. 1988) ("[CORA] does not expressly limit access to any records merely because a person is engaged in litigation with the public agency from which access to records is requested."); *Mid-Atlantic Recycling Tech., Inc. v. City of Vineland*, 222 F.R.D. 81, 85 (D.N.J. 2004) (finding that public records "are no less subject to public access because the requestor filed a lawsuit against the governmental entity"); *Noland v. City of Albuquerque*, No. CIV-08-0056 JB/LFG, 2009 WL 5217998, at *3 (D.N.M. Oct. 27, 2009) (finding no reason that plaintiff "cannot make requests for public information while his lawsuit is pending"). When Phillips sought public records a few months ago, he deserved to get them.

But Colorado is holding them back. Implying that Phillips could not use CORA to access public records without this Court's permission, the state said that Phillips tried to "bypass" the federal rules of civil procedure to get them. Defs.' Open Records Mot. 5, Doc. 46. But Phillips's

use of an open-records law to "obtain public documents that are related to a simultaneous litigation does not conflict" with those rules. *Mid-Atlantic*, 222 F.R.D. at 85. As this Court has said before, CORA and the Federal Rules of Civil Procedure "are not in conflict; they are in harmony." *Morrison v. City & Cty. of Denver*, 80 F.R.D. 289, 291 (D. Colo. 1978). So the state manufactured an illusory conflict between two parallel disclosure laws, one available to all people and one available to litigants. *See Mid-Atlantic*, 222 F.R.D. at 85–86 (explaining how the Federal Rules of Civil Procedure and a standard open-records law work with, not against, each other).

Magistrate Judge Varholak properly rejected that supposed conflict. In so doing, he highlighted one CORA provision, Colo. Rev. Stat. § 24–72–204(5)(b), that contemplates CORA working with, not against, discovery in ongoing litigation. That provision permits courts to award "court costs and reasonable attorney fees" to record-seekers who successfully challenge the state's nondisclosure of public records, unless the record-seeker is engaged in litigation with the state and the requested records were "discoverable" in that litigation. Colo. Rev. Stat. § 24–72–204(5)(b). To Magistrate Judge Varholak, that provision undermines the state's argument that this litigation cuts off Phillips's right to seek public records under CORA. *See* Ex. A at 8 ("[T]hat provision wouldn't be in there if it wasn't contemplated that both CORA and discovery could be two separate paths for [obtaining public documents].").

But Colorado mistakes Magistrate Judge Varholak's pushback as evidence that he did not believe he had the *power* to enter an order enjoining Phillips from using CORA to access public records. For example, the state says that Magistrate Judge Varholak "erred as a matter of law in concluding that CORA does not expressly authorize the Rules and orders of this Court to trump its provisions authorizing access to public records." Defs.' Obj. 4, Doc. 85. And similarly, the state says that Magistrate Judge Varholak's decision contradicted the Colorado Supreme Court's

statement that "the legislature did not intend that the open records laws would supplant discovery practice." *Id*. at 7 (citing *Martinelli v. District Court in & for City & Cty. of Denver*, 612 P.2d 1083, 1093 (Colo. 1980)). That is incorrect. Magistrate Judge Varholak knew he had the power to enter the requested CORA order. Otherwise, he would not have envisioned other judges exercising their discretion differently. *See* Ex. A. at 19 (explaining that if, for example, a state judge entered the requested CORA order, "I don't think there's anything necessarily in conflict, such that the two orders would be contradictory to each other"); *id*. at 37 ("I [do not comment] on the ability of a state court judge . . . to exercise his [or her] discretion . . . as he or she deems fit."). He just did not think that this litigation demanded that harsh result under the current circumstances.

That conclusion is sound. Blocking Phillips's access to public records *and* staying all discovery in this case would punish him for filing this lawsuit. Phillips, like every other Coloradan, deserves to see the state's public records. But under Colorado's theory, Phillips would lose his right to those records simply because he exercises his right to access the federal court system. Colorado urges this penalty because it wants to hide public records from Phillips at all costs. After Magistrate Judge Varholak denied the state's CORA motion, Colorado filed this objection, indicated that it would refuse to disclose public records until this objection is resolved, Ex. B, and *threatened to file a similar CORA motion in the state proceeding*, Ex. A at 18 ("I would remind the Court and the plaintiffs that we are engaged in a parallel state court proceeding, and we would likely consider very strongly availing ourselves of the same recourse [there] . . . meaning[] that we would actively pursue a state court order for closing CORA.").

But Colorado's records "are no less subject to public access because [Phillips] filed a lawsuit against [government officials]." *Mid-Atlantic*, 222 F.R.D. at 85. To the contrary, it is the "public policy" of Colorado "that all public records shall be open for inspection by *any* person."

Colo. Rev. Stat. § 24–72–201 (emphasis added). And Phillips wants the desired public records for reasons other than this litigation too. For example, he needs to know if there is any way to operate his cake shop consistent with his faith and state law. Colorado told the Supreme Court that cake artists may decline cakes with designs, themes, and symbols—including those that are pro-LGBT—that convey messages offensive to their conscience. Am. Compl. ¶ 68 ("Under the Act, [a cake artist] is free . . . to *decline* to sell cakes with 'pro-gay' designs"); *id.* at ¶ 67 (Phillips does not violate CADA if he "would not sell a . . . cake with a particular artistic theme," such as a "cake featuring a symbol of gay pride," "to any customer"). But the state reneged on that promise. So Phillips hopes that public documents will give clarity about how he and other creative professionals can operate their expressive businesses consistent with their beliefs.

II. As Magistrate Judge Varholak properly recognized, Colorado cites no cases that shut down all discovery *and* ban access to public records.

Magistrate Judge Varholak did not abuse his discretion by refusing to strip Phillips of his right to access public records—a right belonging to every other citizen in the state. Colorado argues that Phillips "cannot accomplish through an open records request that which he '[is] unable to accomplish during civil discovery proceedings.'" Defs.' Obj. 9, Doc. 85 (citing *Christmann & Welborn v. Dep't of Energy*, 589 F. Supp. 584, 586 (N.D. Tex. 1984)). But Phillips is not trying to do that. As Colorado admits, he is seeking "records that would otherwise be available through the discovery process." Defs.' Open Records Mot. 5, Doc. 46. In reality, then, Colorado asks this Court to second-guess Magistrate Judge Varholak and issue a discretionary protective order that would disqualify Phillips's otherwise lawful open-records requests. The state's cases do not support that flanking maneuver.

Take Colorado's collage of Freedom of Information Act (FOIA) cases. *See* Defs.' Obj. 9–10, Doc. 85. Some of them involve record-seekers who chased information that they could not

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

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

Colorado wants the Court to follow an unreported decision that actually undercuts its requested relief. In *Citizen Center v. Gessler*, the court temporarily stopped a party from submitting CORA requests seeking information otherwise discoverable during the pending litigation. Order Regarding Emergency Mot. of Citizen Center for Magistrate's Recons. & Stay Pending Recons. of Part of the Court's June 4 Scheduling Order (Emergency Mot. Order) ¶ 1, No. 12-cv-00370-CMA-MJW (D. Colo. July 16, 2012), Doc. 72. But the *Citizen Center* court did so only after

allowing the parties extensive discovery. For example, the court allowed up to 70 interrogatories per side, 30 non-expert depositions per side, 25 requests for production per party, and 50 requests for admission per party. Scheduling Order at § 8, No. 12-cv-00370-CMA-MJW (D. Colo. June 4, 2012), Doc. 53. The court did not allow state officials to escape disclosing records under both CORA *and* discovery rules.

Magistrate Judge Varholak recognized this distinction in rejecting Colorado's argument. He said that the *Citizen Center* court froze access to public records because it "had issued a scheduling order that set forth extensive discoverability and details as to how that discovery would be conducted." Ex. A at 34. By staying discovery in this case but allowing Phillips to access public records through CORA, Magistrate Judge Varholak, like the *Citizen Center* court, gave space for Phillips to get information he wants through at least one channel. But Colorado wants a chokehold on everything. No discovery. No public-records access. Nothing. Colorado insists that this Court barricade Phillips from records that *anyone else can access*. That goes too far.

Finally, Magistrate Judge Varholak recognized that the *Citizen Center* court overreached. It had ruled that neither the organizational plaintiff nor its members could submit CORA requests to get information "otherwise obtainable using discovery." Scheduling Order at § 8(d)(2), No. 12-cv-00370-CMA-MJW, Doc. 53. But when asked to reconsider this, the court found its original order "overbroad because it reache[d]" non-party members of the organizational plaintiff. Emergency Mot. Order at ¶ 14, No. 12-cv-00370-CMA-MJW, Doc. 72. So the court scaled back its order to "delete mention of the association members." *Id*. When Colorado asked Magistrate Judge Varholak to make a similar mistake, requesting that he keep Phillips from showing the Court *any* public records obtained by *anyone*, Magistrate Judge Varholak declined. *See* Ex. A at 34 (Colorado "is seeking to prohibit any documents obtained by anybody to be introduced here."); *id*.

at 10 (characterizing this request as "a throwaway" and an effort to cast "a cover over the facts" that might help the Court decide this case).

But the state still seeks a complete public-records blackout for this case. In its objection, Colorado asks that the Court forbid Phillips from "using any records obtained through any third-party open records request . . . for any purpose in this litigation." Defs.' Obj. 13, Doc. 85. That is not only unreasonable but also unworkable. The Court should not forbid Phillips from *using* public records obtained by third parties. Many record-seekers, for example, publish records they receive, either to support their research or simply to inform the public. Stopping Phillips from using this information does nothing to lighten Colorado's litigation load but could mean the difference between proceeding with the case or a dismissal for Phillips. That's a harsh result. Moreover, managing an order like the one that Colorado requests would be a challenge. Suppose Phillips files a public record as an exhibit in support of a motion in this case. Must he check how his source got the document? Or affirm that he did not get it through a third-party public-records request? Colorado cites no support for such an unworkable demand.

III. Magistrate Judge Varholak properly recognized that Colorado misdirects and overplays its concerns about complying with CORA.

The state is arguing out of both sides of its mouth. If Phillips seeks records through CORA, Colorado says discovery works better. But if Phillips asks for limited discovery, Colorado tries to shut that down. The state cannot have it both ways. So while it worries about an alleged "unfair advantage" that Phillips would have if allowed to use CORA to get public documents, Colorado hustles to secure its own unfair advantage over Phillips. Defs.' Obj. 11, Doc. 85. In reality, the state misdirects its concerns, as Magistrate Judge Varholak indicated, and overplays its fears.

Colorado does not want to give Phillips access to public documents because it "lack[s] the parallel ability to submit CORA requests to [him]." *Id*. But that is a feature of CORA, not a reason

to rewrite it. No open-records law gives the government a reciprocal right to obtain records from record-seekers. And by asking this Court to superimpose proportionality and discovery limits on CORA requests, the state invites this Court to rewrite state law and penalize Phillips for filing this lawsuit. *See id*. at 11–12. Magistrate Judge Varholak correctly declined that invitation. *See* Ex. A at 17 (directing Colorado's concerns to the "state legislature").

Colorado has little to fear in complying with CORA anyway. First, the state miscalculates the relative costs of moving forward with Phillips's CORA requests. Colorado thinks it will incur "onerous costs" in complying with CORA, but it ignores the fees that Phillips must pay. Defs.' Obj. 11, Doc. 85. While the price that the state has quoted Phillips—about $25,000—is unbelievable on its face and appears to have been set to chill Phillips's CORA requests, the final sum imposed on Phillips will defray the state's costs.

Second, Colorado downplays its procedural protections. For example, the state says that the open-records requests deprive it of "the right to object to a discovery request and withhold responsive information or documents because it is not reasonably calculated to lead to the discovery of admissible evidence." *Id*. at 12–13. But Phillips is entitled to public records under CORA even if Colorado deems them irrelevant to this case. The Court has no reason to keep off-topic public documents away from Phillips. And suppose Phillips got such a document and sought to admit it as evidence in this case. Colorado could "object to [its] admissibility." *Mid-Atlantic*, 222 F.R.D. at 87. So the state's argument rings hollow.

Harping on the need for procedural protections, Colorado also says that it would lose the right to shield disclosure of "confidential or privileged information." Defs.' Obj. 13, Doc. 85. But that is untrue. CORA already protects the state against sensitive disclosures. *See Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874, 880 (Colo. App. 1987) (finding that § 24–72–204(3)(a)(IV)

includes common-law "privileges for attorney-client communication and attorney work product"). So Colorado is wrong to suggest that it is unable to protect its sensitive documents from disclosure. The state likely overplays its fears because it is so desperate to keep from giving Phillips any information about its operations or internal communications.

Conclusion

Colorado asks this Court to strip Phillips of his right to see public documents that anyone else in the state could get. Worse, Colorado also seeks to keep Phillips from showing the Court any public records obtained by third parties. Nothing justifies those requests here. Magistrate Judge Varholak did not abuse his discretion by denying the state's motion and, in doing so, declining to punish Phillips for filing this lawsuit. The Court should affirm his decision.

Respectfully submitted this 18th day of December, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2018, the foregoing document and all its attachments were filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 18-cv-2074

MASTERPIECE CAKESHOP, Incorporated, et al.,

Plaintiffs,

v.

AUBREY ELENIS, et al.,

Defendants.

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

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

APPEARANCES

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

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

MOTION HEARING

P R O C E E D I N G S

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

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

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

THE COURT: Good morning.

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

THE COURT: Good morning.

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

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

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

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

MS. MORRILL: Thank you, Your Honor.

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

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

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

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

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

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

suit.

MS. MORRILL: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

MS. MORRILL: I understand that, Your Honor.

THE COURT: Okay.

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

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

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

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

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

MS. MORRILL: Correct.

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

MS. MORRILL: That's correct.

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

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

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

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

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

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

THE COURT: But isn't --

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

THE COURT: But isn't that the --

MS. MORRILL: -- through CORA.

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

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

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

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

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

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

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

MS. MORRILL: Yes.

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

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

then CORA is on top of that.

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Right.

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

before the preliminary injunction.

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

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

THE COURT: But it's not --

MS. MORRILL: -- precedent of this Court.

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

MS. MORRILL: I understand.

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

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

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

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

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

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

THE COURT: I -- I mean --

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

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

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

MS. MORRILL: Right.

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

MS. MORRILL: Offend yours.

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

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

reacting to --

THE COURT: Okay.

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

THE COURT: That's fair.

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

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

THE COURT: Sure.

MS. MORRILL: Yeah.

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

MS. MORRILL: Right.

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

MS. MORRILL: Yeah.

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay. Okay. Thank you.

MS. MORRILL: Thank you.

THE COURT: I'll hear from plaintiff.

MR. SCRUGGS: Thank you, Your Honor.

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

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

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

MR. SCRUGGS: Well --

THE COURT: -- for the documents?

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. SCRUGGS: Well, what --

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

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

THE COURT: Which was before Iqbal.

MR. SCRUGGS: What was that?

THE COURT: Which was before Iqbal.

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

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

THE COURT: Except --

MR. SCRUGGS: -- on the equitable claims.

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

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

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

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

So in light of that --

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

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

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

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

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

exception.

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

THE COURT: Anything further from either side?

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

THE COURT: Sure.

MS. MORRILL: -- to Lugo?

THE COURT: Sure.

MS. MORRILL: Thanks.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. MORRILL: Thank you.

THE COURT: -- or my order on these.

(A recess was taken.)

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

stay all disclosures and discovery.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

discovery.

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

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

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

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

As far as any unique prejudice, the plaintiff cites

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay. Yes. Yes.

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

MR. SCRUGGS: April?

THE COURT: 2nd.

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

THE COURT: Okay. All right.

MR. SCRUGGS: Your Honor?

THE COURT: Yes?

MR. SCRUGGS: Could I ask a clarifying question?

THE COURT: Sure.

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

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

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

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

MR. SCRUGGS: Thank you, Your Honor.

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

MS. MORRILL: Thank you.

THE COURT: We'll be in recess.

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

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

/s/ Brittany Leis November 28, 2018

Signature of Transcriber Date

EXHIBIT B

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State Services Section

November 28, 2018

Barry K. Arrington
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RE: Colorado Open Records Act Requests

Dear Mr. Arrington:

I received your November 21, 2018, e-mail withdrawing your August 29 and 30, 2018 Colorado Open Records Act (CORA) requests to the Governor's Office, the Attorney General's Office, and the Colorado Civil Rights Division. In that same e-mail you submitted two new CORA requests: one to the Colorado Civil Rights Division and the Colorado Civil Rights Commission, and one to the Governor's Office.

As you know, on October 19, 2018, our clients filed a Motion for Order Prohibiting Plaintiffs' Use of Open Records Laws to Circumvent Discovery in the pending litigation that we believe your CORA requests relate to (U.S.D.C. Case No. 1:18-cv-02074-WYD-STV, *Masterpiece Cakeshop, et al. v. Aubrey Elenis, et al.*). Although Magistrate Judge Varholak denied that motion on November 20, 2018, our clients plan to file an objection for Judge Daniel's consideration. Subject to a final ruling on that objection and without waiving any of their objections to your CORA requests, below is each of our clients' preliminary responses to the new requests.

The Governor's Office: Under section 24-72-205(6)(a), C.R.S., the Office of the Governor may impose a fee in response to a request for the research and retrieval of public records, exclusive of the first free hour of time. Per its CORA policy, which is publicly available here: https://www.colorado.gov/governor/CORA, the Office may charge an hourly rate not to exceed $30 an hour (after the first hour) when specialized document production or specialized skills are required to research, retrieve, review, locate, compile or produce records pursuant to a records request, including the use of third-party contractors. Based on its preliminary search for records responsive to your request, the Governor's Office estimates it will cost $4,824 to fulfill the request. Please note that we will notify you if the actual cost is lower or higher and, as applicable, will make arrangements to refund any overpayment or obtain your agreement to pay any higher cost. It is also important to note that the cost estimate is simply for the specialized staff time necessary to

review the records and does not guarantee that any records reviewed ultimately will be produced.

The Governor's Office will not begin processing your request until you approve the total cost estimate and provide an upfront deposit of one-half, equaling $2,412. Additionally, the statutory timeline for responding is tolled until it has received the deposit.

The Colorado Civil Rights Division and Commission: Under section 24-72-205(6)(a), C.R.S., the Colorado Civil Rights Division may impose a fee in response to a request for the research and retrieval of public records, exclusive of the first free hour of time. In accordance with its CORA policy, which is publicly available here: https://drive.google.com/file/d/0B8bNvcf083ydWkxkMUFRU09rZ2c/view, when searching, retrieving, and redacting the records consumes more than one hour of staff time, the Division charges $25 an hour for all staff time. Because the Division uses several methods to store its records, including but not limited to, microfiche, microfilm, electronic data, and archived records housed in off premises storage facilities, the Division estimates it will cost $20,137.50 to fulfill the request. Please note that we will notify you if the actual cost is lower or higher and, as applicable, will make arrangements to refund any overpayment or obtain your agreement to pay any higher cost. It is also important to note that the cost estimate is simply for the staff time necessary to search for and review the records and does not guarantee that any records reviewed ultimately will be produced.

The Colorado Civil Rights Division will not begin processing your request until you approve the total cost estimate and provide full payment of $20,137.50. Additionally, the statutory timeline for responding is tolled until it has received the payment.

If Judge Daniel denies our clients' objection and declines to prohibit Plaintiffs' use of CORA to circumvent discovery in the pending litigation, then the Governor's Office and the Colorado Civil Rights Division and Commission will proceed with fulfilling your CORA requests subject to the above cost estimates.

Sincerely,

FOR THE ATTORNEY GENERAL

/s/

STEFANIE MANN
Senior Assistant Attorney General