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; and
PHIL WEISER, Colorado Attorney General, in his official capacity,

Defendants.

PLAINTIFFS' SUPPLEMENTAL BRIEF RESPONDING TO DEFENDANTS' POSITION IN PARTIES' JOINT STATEMENT CONCERNING DISCOVERY DISPUTES

Plaintiffs Masterpiece Cakeshop and Jack Phillips (collectively, Plaintiffs or Phillips) submit this supplemental brief responding to Defendants' position in the Joint Statement Concerning Discovery Disputes sent to Magistrate Judge Varholak on January 29, 2019.

INTRODUCTION

Defendants seek one-sided discovery in this case. Their interrogatories reveal that they want to ask Plaintiffs about their discussions concerning the state administrative prosecution pending against them and even explore matters as far-ranging as every custom cake request that Plaintiffs have declined to create over the last ten years. At the same time, Defendants refuse to appear for individual depositions to answer highly relevant questions regarding Defendants' discussions about or views concerning Plaintiffs (and other issues pertaining to Defendants' motives for prosecuting Plaintiffs). In support of this discovery bar, Defendants primarily offer common-law immunity doctrines of no relevance to Plaintiffs' remaining equitable claims. The Court should reject Defendants' bid to erect a shield of secrecy.

The information that Plaintiffs seek to learn from Defendants about the pending state prosecution, their discussions regarding it, and their views concerning it is of the utmost importance to this case. How can Plaintiffs probe Defendants' anti-religious hostility and bad faith without the chance to question them? Defendants go so far as to say that they will not provide this critical information even through written discovery—document requests or interrogatories. Joint Statement at 16 n.6 & 27 n.7 ("Jt. Stmt."). If Defendants have their way, an email that a commissioner wrote disparaging Plaintiffs' religious-based decision not to create the requested gender-transition cake (no matter who that email was sent to) will never see the light of day. Nor can Plaintiffs ask if any such communications occurred. Plaintiffs cannot be expected to litigate this case without the opportunity to access this kind of information.

Defendants protest that if Plaintiffs are permitted to depose the commissioners, then all judges in the country will be subject to depositions about their cases. Jt. Stmt. at 20. This is

baseless hyperbole. Allowing depositions in this case will not have any such impact, for at least four reasons. First, this Court has already found merit in Plaintiffs' claim that the commissioners are acting in bad faith toward them. Doc. 94 at 17-23. Second, the commissioners are not just administrative adjudicators. They are the enforcement officials who alone had the authority to launch the formal state prosecution against Plaintiffs. Colo. Rev. Stat. § 24-34-306(4) (authorizing the Commission to file a formal complaint if it "determines that the circumstances warrant"). A state agency cannot be allowed to insulate its enforcement officials from scrutiny—especially when there is a showing of bad faith—by combining enforcement, prosecutorial, and adjudicative tasks in the same person. Third, the commissioners perform many other enforcement duties not normally assigned to judges—duties like "investigat[ing] and study[ing] . . . discriminatory practices" and "formulat[ing] plans for the elimination of those practices." Colo. Rev. Stat. § 24-34-305(1)(c)(I). Fourth, the circumstances here are truly extraordinary—Defendants' agencies acted with "clear and impermissible hostility" toward a man's religious beliefs; the Supreme Court forcefully condemned that treatment; and Defendants continue to manifest that same hostility. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018) (*Masterpiece I*). Allowing depositions of these kinds of enforcement officials under these circumstances will not open the floodgates to judges being forced to testify.

The alternative discovery that Defendants offer—"Fed. R. Civ. P. 30(b)(6) depositions concerning non-privileged issues such as standard practices and processes," Jt. Stmt. at 15-16—is wholly insufficient. This case is not about mere procedural irregularities but about anti-religious hostility, bad faith, and improper government motives. In fact, Defendants have kept

their own motives at the forefront of this case by, among other things, continuing to contest the issue of bad faith even after the ruling on the motion to dismiss,[1] asserting in their answer that they have not acted with anti-religious hostility toward Plaintiffs,[2] and making an offer of proof that Defendants "have not exercised bad faith, animus, hostility, or bias towards plaintiffs."[3] Plaintiffs must be allowed to inquire into these key contested issues through individual depositions of the Division and Commission officials named as defendants.

I. Absolute immunity from damages does not shield Defendants from relevant discovery on Plaintiffs' remaining equitable claims.

Defendants insist that they cannot be deposed because this Court held that the Division Director and the commissioners are "absolutely immune from [Plaintiffs'] damages claims" due to their prosecutorial functions. Doc. 94 at 35, 41. That conclusion has no bearing on the discovery available for Plaintiffs' remaining equitable claims. Absolute immunity for prosecutors and even judges applies only to damages claims, not claims for equitable relief. *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984) ("[J]udicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity."); *Supreme Court of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 736 (1980) ("Prosecutors enjoy absolute immunity from damages liability, but they are natural targets for § 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law.") (citation omitted); *Lemmons v. Law Firm of Morris & Morris*, 39 F.3d 264, 267 (10th

[1] *See* Doc. 95 at 3 (Defendants assert that "Plaintiffs failed to provide any actual evidence of bad faith . . . sufficient to establish the bad faith exception to *Younger* abstention").
[2] *See* Doc. 103 ¶ 344 (denying Plaintiffs' allegation that Defendants' enforcement of state law shows hostility toward Plaintiffs because of their religious beliefs and practices).
[3] Doc. 96-1 at 87 (Transcript of December 18, 2018 Hearing).

Cir. 1994) ("[N]either qualified *nor absolute* immunity precludes prospective *injunctive relief* except in rare circumstances . . . . A prosecutor may not simply raise the shield of official immunity and continue to act in an unconstitutional manner without fear of judicial orders to the contrary."); *see also Samuels v. McDonald*, 723 F. App'x 621, 623 n.4 (10th Cir. 2018) ("Although the prosecutors' immunity bars the § 1983 claim for money damages, they may be sued for injunctive relief."). Many of Defendants' own cases recognize this. *E.g.*, *Moore v. Urquhart*, 899 F.3d 1094, 1104 (9th Cir. 2018) ("Common law judicial immunity . . . only bars suits seeking damages. It does not preclude a court from granting declaratory or injunctive relief."); *Horwitz v. State Bd. of Medical Examiners of State of Colo.*, 822 F.2d 1508, 1513 (10th Cir. 1987) ("Judicial immunity from damages is not a bar to injunctive relief against a judge for actions taken in his or her official judicial capacity."); Jt. Stmt. at 20-21.

Both Defendants and this Court have already acknowledged the distinction that absolute immunity draws between damages claims and equitable relief. In their motion to dismiss, Defendants argued only that "Plaintiffs' damages claims . . . are barred by absolute quasi-prosecutorial immunity." Doc. 64 at 10; *see also id.* at 20 (similar argument heading). And this Court understood that argument was limited to Plaintiffs' now-dismissed damages claim and confined its holding to that issue. Doc. 94 at 31-32 ("Director Elenis and the Defendant Commissioners contend they are protected from Phillips' claims for compensatory, punitive, and nominal damages by absolute prosecutorial immunity."); *id.* at 35, 41 (holding that the damages claims were dismissed). Indeed, this Court itself drew the "distinction" between "damages, as opposed to equitable relief," when discussing absolute quasi-prosecutorial immunity at the hearing on the motion to dismiss. Doc. 96-1 at 52 (Transcript of December 18,

2018 Hearing). This is why Defendants' point is unpersuasive when they say that they "should be entitled to the *full* protections of the absolute immunity granted to them by this Court." Jt. Stmt. at 23. The Court granted Defendants only quasi-prosecutorial immunity from Plaintiffs' damages claim because that is all they requested and all the law entitles them.

Nor does Defendants' discussion of the Federal Courts Improvement Act of 1996 (FCIA) affect this discovery dispute. Jt. Stmt. 21. The FCIA merely limits one form of equitable relief—injunctive relief—against a "judicial officer" acting in the scope of his or her "judicial capacity" if declaratory relief is available. 42 U.S.C. § 1983. It does not function as a limitation on discovery. Moreover, the FCIA has no bearing on this discovery dispute because Plaintiffs seek both injunctive and declaratory relief, *see* Doc. 51 ¶ 11 & Prayer for Relief, and as Defendants admit and this Court has recognized, Plaintiffs' claims focus not on the commissioners' conduct in their judicial capacity but on Defendants' "prosecutorial actions . . . taken to date," Doc. 94 at 32 n.7. Given this, it is inconceivable that FCIA curtails Plaintiffs' right to discovery on their equitable claims.

In the end, Defendants' absolute-immunity arguments prove too much, thereby exposing the holes in their reasoning. The logic of Defendants' position would dictate that this suit must end and that all discovery against them must cease, but no case law remotely supports that. Moreover, the implications are untenable, allowing parties into federal court only to be powerless—without the tools to succeed—once there. This Court should thus reject Defendants' unfounded view that absolute immunity curtails discovery on Plaintiffs' equitable claims.

Most of the cases that Defendants cite in support of their argument merely rehearse immunity rules and do not adjudicate discovery disputes. *E.g.*, *Tenney v. Brandhove*, 341 U.S.

367 (1951); *Pierson v. Ray*, 386 U.S. 547 (1967); *Imbler v. Pachtman*, 424 U.S. 409 (1976). And their few cases that actually address discovery questions do nothing to undermine Plaintiffs' right to depose the Division Director and individual commissioners. For example, several of those cases suggest that courts should decide immunity claims before allowing broad-reaching discovery. *E.g.*, *Mitchell v. Forsyth*, 472 U.S. 511 (1985). But that is exactly what this Court did by staying discovery pending the ruling on Defendants' motion to dismiss, Doc. 79, and allowing discovery only after dismissing Plaintiffs' damages claims based on quasi-prosecutorial immunity.

Defendants cite two trial-court decisions—*In re Lickman*, 304 B.R. 897 (Bankr. M.D. Fla. 2004), and *Ray v. Judicial Corrections Services, Inc.*, No. 2:12-cv-02819-RDP, 2014 WL 5090723 (N.D. Ala. Oct. 9, 2014)—that invoked judicial immunity to prevent the deposition of judicial officials. But neither of those cases justifies Defendants' request to bar Plaintiffs from deposing the commissioners. Critically, prior to the filing of the Joint Statement last week, the commissioners had neither requested nor been afforded quasi-judicial immunity in this case. In fact, Defendants admitted that at the motion-to-dismiss hearing, clarifying that they were not raising "the issue of quasi-judicial immunity because . . . it's not alleged in the Complaint that the State officials have adjudicated the state charge . . . . Instead, we are focused solely on . . . the prosecutorial actions they have taken to date." Doc. 96-1 at 50 (Transcript of December 18, 2018 Hearing); Doc. 94 at 32 n.7 (acknowledging this statement by Defendants' counsel).

In addition, both *Lickman* and *Ray* are inapposite for other reasons. *Lickman* rebuffed a request to depose a judge's law clerk and judicial assistant. Unlike the commissioners here,

those judicial officials did not also function as government actors charged with enforcing and prosecuting the challenged law. *Lickman* is thus inapplicable.

Ray is even less help to Defendants. That case considered a request to depose a municipal-court judge about decisions made both within and outside his judicial capacity. The court held that the judge need not testify about matters within his judicial role but must testify about matters outside it. 2014 WL 5090723 at *7-8. Plaintiffs here seek to depose the commissioners about their role as enforcement officials prosecuting Plaintiffs, a "function [not] normally performed by a judge." *Id.* at *7. Allowing that is consistent with *Ray*.

Finally, Defendants attempt to distinguish *Denver First Church of the Nazarene v. Cherry Hills Village*, No. 05-cv-02463-WDM-MEH, 2006 WL 7354733 (D. Colo. July 19, 2006), which held that government officials' motives are often relevant to religious-freedom claims and allowed depositions of individual city officials acting in quasi-judicial capacities. Defendants' primary response is to deny that motives are relevant here. Jt. Stmt. at 20-21. But *Masterpiece I* just held that acting with anti-religious hostility is one way to violate the Free Exercise Clause and that the Commission already violated Plaintiffs' rights in that exact way. 138 S. Ct. at 1729-32.

Defendants conveniently ignore *Masterpiece I* and instead point to *Grace United Methodist Church v. City of Cheyenne*, 427 F.3d 775 (10th Cir. 2005). Jt. Stmt. at 20-21. But the plaintiff in that case presented no evidence of "religious animus" or any indication that a law was unequally applied—by, for example, "allowing some groups to operate . . . while denying the [plaintiff] the same opportunity." *Grace United*, 427 F.3d at 786-87. Here, however, this Court has already determined that Plaintiffs made a sufficient showing of "disparate treatment"

manifesting anti-religious hostility. Doc. 94 at 20-21. *Masterpiece I* thus controls and, along with *Denver First Church*, establishes that Plaintiffs may depose the commissioners regarding matters that might reasonably lead to admissible evidence of hostility towards their religious beliefs and practices.

At bottom, Defendants' discussions about absolute immunity simply do not preclude Plaintiffs from conducting discovery to learn highly relevant information on their remaining equitable claims.

II. Nothing bars Plaintiffs from deposing the Division Director and commissioners about their prosecutorial roles.

Plaintiffs assert that they have the right to depose the Division Director and that they seek to do so in this case. Plaintiffs did not raise the deposition of the Division Director in its portion of the Position Statement because they were not planning to depose her during the expedited discovery period. Nevertheless, Plaintiffs wish to clarify that they intend to depose the Division Director and that the same reasons they are entitled to depose the commissioners about their prosecutorial functions establish why Plaintiffs are allowed to depose the Division Director.

Defendants do not cite a single case in their section about prosecutorial roles where a court invoked quasi-prosecutorial absolute immunity to limit the right of a plaintiff pursuing only equitable relief to obtain discovery from defendants performing prosecutorial functions. This absence of relevant authority is glaring, especially because Defendants bear the burden to justify their desired bar on individual depositions.

Defendants rely solely on policy arguments based on cases addressing general immunity and selective-prosecution principles. Those policy arguments, which are insufficient absent any

on-point authority, are unpersuasive in any event. Many of Defendants' concerns—like "deflect[ing] a prosecutor's energies," Jt. Stmt. at 22 (citing *Imbler*, 424 U.S. at 422-23)—are already occurring as a result of this case's filing, this court's prior rejection of Defendants' motion to dismiss, and existing written discovery obligations. Nor is it reasonable to assume that allowing depositions only after a showing that state officials are prosecuting a plaintiff in bad faith, as the Court found here, will "deter[] . . . able people from public service" or "discourage them from faithfully discharging their prosecutorial" duties. Jt. Stmt. at 19, 22 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Permitting that will dissuade only officials acting with improper motives—an outcome to encourage rather than avoid.

Also unavailing in this context is the desire to keep "the Government's enforcement policy" secret. Jt. Stmt. at 23 (quoting *Wayte v. United States*, 470 U.S. 598, 607-08 (1985)). Plaintiffs' allegations, as this Court has already explained, establish that Defendants are shifting their enforcement justifications to justify their disparate treatment of Plaintiffs. Doc. 94 at 20-22. Under these circumstances, Defendants' veiled enforcement policy must be brought to light, so the unequal treatment can stop. In addition, Defendants decry certain costs allegedly associated with "[e]xamining the basis of a prosecution," Jt. Stmt. at 23 (quoting *Wayte*, 470 U.S. at 607-08); but the case that they cite—*Wayte*—says that decisions to prosecute are "subject to constitutional constraints" and may not be "motivated by a discriminatory purpose." 470 U.S. at 608. That case thus confirms the relevance of—and vital need for Plaintiffs to obtain—discovery on Defendants' decision to prosecute them.

Finally, Defendants' attempt to bar any inquiry into their prosecution of Plaintiffs, if accepted, would render ineffective the bad-faith exception to *Younger*. Whenever that exception

is satisfied, the bad actor is an official functioning in a prosecutorial role. But Defendants argue that a plaintiff can never obtain any meaningful discovery on the decision to prosecute even though he or she has established bad faith. That cannot be, lest the plaintiff be allowed into federal court only to be stripped of the tools necessary to prove his or her case.

III. Nothing bars Plaintiffs from deposing the Division Director about her and her office's administrative and investigative work.

Defendants show the extent of their desire for secrecy by arguing that even the Division Director's "administrative" and "investigative" work is immune from discovery. Jt. Stmt. at 23-24. Going further still, Defendants also refuse to produce documents regarding the Division's or Commission's administrative and investigative work. *Id.* at 16 n.6. This extreme position leaves Plaintiffs wondering what, if anything, Defendants consider to be discoverable in this case.

Defendants claim that these administrative materials are immune from discovery because qualified immunity applies "when a prosecutor functions as an administrator or investigator." Jt. Stmt. at 24. But as with their absolute quasi-prosecutorial argument addressed above, Defendants cite not a single case in which a court used qualified immunity to limit the right of a plaintiff pursuing only equitable relief to obtain discovery from defendants performing administrative or investigative functions.

That is not surprising because qualified immunity, like absolute immunity, is a shield from damages rather than claims for equitable relief. *Meiners v. Univ. of Kansas*, 359 F.3d 1222, 1233 n.3 (10th Cir. 2004) ("Qualified immunity applies to claims for monetary relief against officials in their individual capacities, but it is not a defense against claims for injunctive relief against officials in their official capacities."); *Lemmons*, 39 F.3d at 267 ("[N]either qualified *nor absolute* immunity precludes prospective *injunctive relief* except in rare

circumstances"); *Rome v. Romero*, 225 F.R.D. 640, 643 (D. Colo. 2004) (noting that qualified immunity "is applicable only against claims for monetary damages, and has no application to claims for declaratory or injunctive relief"). Thus, a "qualified immunity discovery restriction is not applicable to equitable relief." *Wiggin v. Rollins*, No. C13-5057 BHS/KLS, 2013 WL 2470079, at *2 (W.D. Wash. June 7, 2013) (explaining that a "declaration of immunity from damage claims cannot avoid the diversion of [the officials'] attention from other official duties which the litigation [of the equitable claims] will occasion").

Defendants' reliance on *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), for their qualified-immunity arguments does not advance their cause. Jt. Stmt. at 19. *Mitchell* did not involve a request to limit discovery on an equitable claim. Rather, it addressed whether the denial of qualified immunity was immediately appealable. Thus, it does not shed light on the issues raised here.

Defendants' reliance on *Williamson v. U.S. Department of Agriculture*, 815 F.2d 368 (5th Cir. 1987), is similarly misplaced. Jt. Stmt. at 24. That case reviewed an order "staying discovery . . . pending resolution of the immunity issues." *Williamson*, 815 F.2d at 383. But here, the parties are long past that point in the case—the immunity issues have already been adjudicated and discovery is ongoing. Moreover, the court in *Williamson* held that under the heightened-pleading standard applicable to *Bivens* actions, no discovery should be allowed against federal officials where the plaintiff "fails to put into serious dispute the[ir] motivation" and where no evidence suggested that federal officials showed "intentional or . . . reckless disregard of constitutional rights." *Id.* at 381; *see also id.* at 382 (calling the lawsuit "insubstantial"). But this is not a *Bivens* action; thus no heightened pleading standard applies.

And this Court has already concluded that Plaintiffs convincingly alleged that Defendants acted in "bad faith" and with "hostility towards" their religious beliefs by "pursuing . . . discrimination charges" against them. Doc. 94, at 20-21. *Williamson* is thus irrelevant.

Not only is qualified immunity irrelevant to the disputed discovery issues now that Plaintiffs' damages claims have been dismissed, but also it bears emphasizing that Defendants are not entitled to qualified immunity in any event. Indeed, Defendants' claim that they are not violating any clearly established constitutional right conflicts with this Court's explicit reliance on the unequal-treatment analysis in *Masterpiece I* to conclude that Defendants are acting with "hostility towards Phillips" motivated by his religion. Doc. 94 at 20-21 ("As explained in *Masterpiece I*, this disparate treatment reveals Director Elenis' and the Defendant Commissioners' hostility towards Phillips, which is sufficient to establish they are pursuing the discrimination charges against Phillips in bad faith, motivated by Phillips' suspect class (his religion)."). For more on why Defendants are not entitled to qualified immunity, Plaintiffs refer the Court to their prior briefing on this issue. *See* Doc. 81 at 25-26.

IV. Plaintiffs should be allowed to depose commissioners about their work in other cases.

Plaintiffs have affirmed that they "will not ask how the commissioners intend to decide" Defendants' current case against Plaintiffs. Jt. Stmt. at 3. Regarding past cases, Plaintiffs do not know exactly what they would like to ask the commissioners because Plaintiffs have yet to obtain the documents that they requested about other cases. But Plaintiffs do know that they want to explore the factors that state officials use to determine when a place of public accommodation may decline a request because of an objection to its message. This kind of

inquiry is necessary to probe the very sort of unequal treatment that the Supreme Court condemned in *Masterpiece I*. *See* 138 S. Ct. at 1730-31.

Defendants believe that inquiries like that are barred by *United States v. Morgan*, 313 U.S. 409 (1941). But that case is different from the circumstances presented here. Nothing suggests that the administrative adjudicator in *Morgan* also acted in a prosecutorial role—much less that the parties who deposed him asked about his work in related enforcement matters in order to explore prosecutorial bias in a pending case. *Morgan* thus does not govern here.

Furthermore, while *Morgan* protects administrative adjudicators in certain situations, it "has an exception for cases involving 'a strong showing of bad faith or improper behavior.'" *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1139 (10th Cir. 1999) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)). As Plaintiffs' already explained in their part of the Joint Statement, that bad-faith exception applies here. Jt. Stmt. at 5-7, 11. Accordingly, Plaintiffs should be free to inquire into the commissioners' work in other cases.

Defendants ignore that exception and claim that *Morgan* established an impenetrable wall—arguing that when government officials' "duties take on a judicial quality—as here—there is no right to depose them." Jt. Stmt. at 26. But Defendants' own case law does not support that. There is no indication that the case they cite for that proposition—*Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586-87 (D.C. Cir. 1985)—even involved officials whose "duties [took] on a judicial quality." Jt. Stmt. at 26. The potential deponents there were four top Department of Labor officials—not administrative adjudicators—who "had no first-hand knowledge of the facts of th[e] case." *Simplex*, 766 F.2d at 586. That case is thus

irrelevant here. And one of Defendants' other cases—*State ex rel. Kaufman v. Zakaib*, 535 S.E.2d 727 (W. Va. 2000)—actually undermines their argument. That court distinguished between situations "when administrative decision makers may be deposed or have their records subpoenaed" and situations involving judges who "are in a different position, and are deserving of special protections." *Id.* at 734. It thus recognized that the protection afforded administrative decision-makers is less than the protection for actual judges.

It is unclear whether Defendants interpret *Morgan* as resting on quasi-judicial immunity and thus as a variation of the absolute-immunity arguments in their first section. To the extent that they do, the arguments in Section I. above refute their reliance on it. But if Defendants instead construe *Morgan* as resting on the deliberative-process or mental-process privileges, Plaintiffs' arguments in Sections I.1., I.2., and I.3. of their part of the Joint Statement explain why that argument fails. *See* Jt. Stmt. at 4-10. Defendants have the burden of establishing those privileges, and they have not come close to doing so.

V. The Division Director's and commissioners' discussions and views about Plaintiffs, Plaintiffs' religious beliefs and practices, and the decision to prosecute Plaintiffs are not shielded by the mental-process privilege.

Defendants claim that the mental-process privilege shields all the Division Director's and commissioners' "non-public, deliberative thought processes and discussions" about Plaintiffs and Plaintiffs' religious beliefs and practices as they relate to both "*Masterpiece I* [and] the ongoing administrative case(s)." Jt. Stmt. at 27. This argument falters both in its attempt to hide discussions and in seeking to veil views and thoughts.

Beginning with Defendants' discussions about Plaintiffs, the mental-process privilege simply does not cover them. It encompasses only "the thoughts of government officials that are

not communicated to others." *Denver First Church*, 2006 WL 7354733, at *7; *accord N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122-23 (N.D. Cal. 2003) (noting that the "mental process privilege . . . involves uncommunicated motivations"). Defendants thus cannot rely on the mental-process privilege to protect their discussions about Plaintiffs. Nor does the deliberative-process privilege shield all Defendants' "non-public . . . discussions" about Plaintiffs because (1) that privilege does not apply to discussions (whether public or non-public) with people outside the deliberative body and (2) that privilege simply does not apply in this case, as Plaintiffs have already explained. *See* Jt. Stmt. at 4-10.

Turning next to Defendants' views and thoughts about Plaintiffs, the mental-process privilege does not protect them under these circumstances, where (1) government motive is directly at issue, (2) Defendants are acting in bad faith, and (3) the privilege is easily overridden. Plaintiffs have already explained these arguments in Sections I.1., I.2., and I.3. of their portion of the Joint Statement. *See* Jt. Stmt. at 4-10.

Although Defendants attempt to address the mental-process privilege, their discussion of it is off base. They claim that it applies here, yet in support cite a string of cases addressing a different principle—discovery protections available to "high-ranking government officials." Jt. Stmt. at 27 (collecting cases). Not one of those cases even mentions the mental-process privilege. Nor do Defendants attempt to establish that they are the type of officials to which the rules about high-ranking officials apply. That's for good reason. Those rules, as Defendants' cases acknowledge, generally apply to officials with "no personal knowledge" about, *see United States v. Miracle Recreation Equip. Co.*, 118 F.R.D. 100, 104 (S.D. Iowa 1987), or direct involvement in, *see In re United States*, 985 F.2d 510, 512-13 (11th Cir. 1993), the challenged

government act. Those rules cannot apply to the Division Director or commissioners here because those officials have ample personal knowledge about, and direct involvement in, Defendants' actions against Plaintiffs. In addition, courts have recognized an "extraordinary circumstances" exception to the rules about high-ranking officials. *United States*, 985 F.2d at 512; *Simplex*, 766 F.2d at 586. That exception applies here because of the existence of bad faith. *See* Doc. 94 at 20-21.

Defendants discuss two cases—*United States v. Cross*, 516 F. Supp. 700, 707 (M.D. Ga. 1981), *aff'd,* 742 F.2d 1279 (11th Cir. 1984), and *United States v. Edwards*, 39 F. Supp. 2d 692, 705 (M.D. La. 1999)—to support their claim that allowing the commissioners to be deposed "risks arming Plaintiffs with grounds to later seek recusal of the only body with authority to adopt or reject the ALJ's decision." Jt. Stmt. 28. But those cases are nothing like this one. In both *Cross* and *Edwards*, the defendants sought testimony from judges as a baseless ploy to disqualify them from the defendants' cases. *Edwards*, 39 F. Supp. 2d at 705 ("Neither counsel nor a party may seek recusal of a judge by announcing that they intend to call the judge as a witness."). Here, however, depositions of the commissions are warranted by objective evidence of bad faith. *Cross* and *Edwards* thus do not bear on this case.

Defendants also rely on *Sica v. Connecticut*, 331 F. Supp. 2d 82, 88 (D. Conn. 2004). Jt. Stmt. at 28-29. Plaintiffs have already discussed that case in the Joint Statement and explained how it is consistent with Plaintiffs' request here. *See* Jt. Stmt. at 11-12. Only a few additional points are necessary. First, the court in *Sica*, contrary to Defendants' suggestion, did in fact allow the plaintiff to call as witnesses the "investigators" and "decision makers" who filed the administrative charges against her. *See id.* at 12. Second, in their discussion of *Sica*, Defendants

express concern about a federal court interfering with an ongoing state prosecution. *See id.* at 28-29. Yet once that federal court determines that abstention is unwarranted, which this Court has but the *Sica* court did not, the need to refrain from interfering in that proceeding dramatically declines—if not vanishes altogether.

To reiterate, Plaintiffs seek to explore Defendants' discussions and views concerning Plaintiffs and Defendants' prosecutorial actions against them. They do not want to probe how the commissioners plan to decide the pending state prosecution. It would be fundamentally unjust for Defendants to shield their bad-faith prosecution from discovery simply because the state assigned critical prosecutorial tasks to the same officials who serve as adjudicators. That practice is particularly suspect in light of the Supreme Court's recent pronouncement that allowing "the same person [to] serve[] as both accuser and adjudicator in a case" violates due-process guarantees. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016). The commissioners who had the sole authority under Colo. Rev. Stat. § 24-34-306(4) to institute the formal state prosecution should not be able to use their later adjudicative role as a basis to avoid highly relevant discovery.

VI. Plaintiffs should be free to explore all areas of potential anti-religious hostility and bad faith, including the Division Director's and the commissioners' views, beliefs, and characteristics.

Views on Religious Freedom. The Court should not bar Plaintiffs from inquiring into the Division Director's and the commissioners' views regarding religious freedom. *See* Jt. Stmt. at 13-14. Defendants say that "[i]t is unclear what purposes these lines of inquiry would serve." *Id.* at 29. The answer to that is simple: they seek to uncover the same indicators of anti-religious hostility that the Supreme Court just relied on in *Masterpiece I*. *See id.* at 13-14 (citing

examples where "*Masterpiece I* found that the commissioners' views about religious freedom were relevant indicia of unlawful religious hostility").

Defendants argue that "dissenting views regarding religious freedom" are "not disqualifying." Jt. Stmt. at 31. It is unclear what Defendants mean by the term "dissenting," other than to imply disagreement with the Supreme Court's views in *Masterpiece I*. But more to the point, Defendants' focus on recusal and judicial disqualification is misplaced. Plaintiffs are not trying to establish grounds for recusal; they are seeking to show possible sources of bias underlying Defendants' bad-faith and hostile prosecution. The standard for inquiry when hostility and bad faith are at issue is not whether a fact, by itself, is sufficient to establish bias necessitating recusal. Instead, the standard is whether the requested fact is "relevant to [Plaintiffs'] claim" that Defendants are acting in bad faith and with hostility toward their religious beliefs and practices. Fed. R. Civ. P. 26(b)(1). In the wake of *Masterpiece I*, there is no doubt that Defendants' views about religious freedom are relevant to Plaintiffs' claims.

Views on LGBT Issues. Defendants' views on LGBT issues are also highly relevant because the pending state prosecution seeks to punish Plaintiffs for their decision not to create a cake with an expressive design reflecting and celebrating a gender transition. In light of this background, Defendants' views on LGBT issues might illuminate why or whether they are acting with hostility and in bad faith against Plaintiffs.

Religious Beliefs and Personal Characteristics. Defendants couch their arguments against inquiry into their religious beliefs and personal characteristics in recusal terms, insisting that membership in a class alone is not disqualifying. Jt. Stmt. at 29-31. But as discussed above, the recusal standard does not control. The relevance test does. Plaintiffs have alleged that (1)

"during the last six years, the Commission has not had a Christian member" or "any religious member" who "shares Phillips's religious beliefs about marriage and sex" and (2) the commissioners appointed during that time "are openly hostile or opposed to" Plaintiffs' religious beliefs. Doc. 51 ¶¶ 296-98. Those facts, if established, are directly relevant to assessing why or whether Plaintiffs are acting with bad faith and anti-religious hostility. Plaintiffs should be able to explore those areas.

Plaintiffs also raise a due-process and equal-protection challenge to the state statutory requirement that at least four commissioners be "members of groups of people who have been or who might be discriminated against because of disability, race, creed, color, sex, sexual orientation, national origin, ancestry, marital status, religion, or age." Doc. 51 ¶¶ 293, 299-300, 400-05, 415, 423-25 (quoting Colo. Rev. Stat. § 24-34-303(1)(b)(II)(A)). Defendants could have tried to dismiss those claims on their merits, but they did not. Because of that, Plaintiffs should now be allowed to conduct discovery relevant to those due-process and equal-protection claims.

CONCLUSION

For the foregoing reasons, the Court should allow Plaintiffs to depose the Division Director and the commissioners. In addition, the Court should decline to impose any of the limitations that Defendants request during those depositions. Finally, because Defendants have made clear that they are planning to withhold documents and answers to written discovery based on their unfounded immunity and privilege arguments, the Court should clarify that those arguments are as insufficient to shield written discovery responses as they are to bar Plaintiffs from deposing the Division Director and the commissioners.

Respectfully submitted this 4th day of February, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2019, the foregoing document was emailed to Magistrate Judge Varholak at Varholak_Chambers@cod.uscourts.gov and to opposing counsel listed below:

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