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' FED. R. CIV. P. 72(a) OBJECTION TO MAGISTRATE JUDGE'S ORDER FORBIDDING DEPOSITIONS OF DEFENDANT COMMISSIONERS

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INTRODUCTION

It is impossible for Plaintiffs Jack Phillips and Masterpiece Cakeshop (collectively, Phillips) to gather key evidence for the preliminary-injunction hearing if they are unable to depose the opposing parties—namely, the Defendant Commissioners. Those officials are the only ones with the information concerning their anti-religious hostility and bad faith, their views about Phillips and his actions, and their related conversations and comments. Without access to that information through depositions, Phillips is being forced to prove his case without sufficient opportunity to gather evidence, and this litigation is proceeding in an unfair and unequal manner.

This Court has already said that Defendant Commissioners' ongoing "disparate treatment" of Phillips reveals their "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)." Doc. 94 at 20-21. Now the parties are preparing for an evidentiary hearing on Phillips's motion for a preliminary injunction, and quickly moving through expedited discovery that permits each side to conduct four depositions over the next few weeks.

Phillips seeks to use some of those depositions on the Commissioners. But the Magistrate Judge, relying on absolute immunity and deliberative-process and mental-process privileges, has blocked Phillips from deposing the very officials acting in bad faith and with hostility toward him. Instead, the Magistrate Judge has instructed Phillips to conduct a Rule 30(b)(6) deposition to inquire into (1) objective indicators of the Commission's rationale for prosecuting Phillips and (2) certain Commissioner discussions. While that order left open the possibility of allowing limited depositions of Commissioners later, it effectively forecloses Phillips from deposing the Commissioners before the preliminary-injunction hearing.

That order is clearly erroneous and contrary to law. For one thing, absolute immunities do not forbid the requested depositions because those immunities apply to damages claims, not the equitable claims that remain in this case. Under the Magistrate Judge's logic, even though Phillips can enjoin the Commissioners' unconstitutional actions, he cannot depose them to learn key evidence necessary to prove the unconstitutionality of their actions. That is clear error. Moreover, the deliberative-process and mental-process privileges do not prohibit the requested depositions because those privileges do not apply here when objective and undisputed facts show that the government officials are acting in bad faith. Barring the Commissioners' depositions based on those privileges is thus contrary to law.

Allowing the Rule 30(b)(6) deposition does not fix these clear errors. It will not enable Phillips to test the credibility of the individual Commissioners who are denying their anti-religious hostility, bad faith, and various facts relevant to those issues. Nor is it adequate to force Phillips to learn second-hand about certain Commissioner communications through a representative rather than allowing him to question the individuals actually involved. That shortcoming is compounded by the flawed assumption that a 30(b)(6) deponent can somehow obtain all relevant information possessed by the Commissioners. Also, information recently disclosed to Phillips's counsel—that a current Commissioner has voiced to a third party concerns about anti-religious bias on the Commission—further justifies the need for individual depositions.

The Magistrate Judge's order is not only contrary to law, but also fundamentally unfair. It leaves Defendants (collectively, Colorado) free to depose Plaintiffs and their employees without limitation, yet stops Phillips from deposing the individuals acting in bad faith against him. In addition to producing inequity in the expedited discovery, that gives Colorado the upper hand at

the preliminary-injunction hearing. Colorado will have its chosen representative testify that the state is acting in good faith and without hostility, but Phillips will be prevented from accessing and fully exploring essential evidence, including Commissioner communications, necessary to refute that testimony. To avoid this, Phillips asks this Court to reverse the Magistrate Judge's order and allow Phillips to conduct expedited depositions of Commissioners.

As required by Local Rule 7.1(a), Phillips's counsel sought to confer with opposing counsel by leaving a voicemail with, and sending an email to, Colorado's counsel in the morning of February 18. Phillips did not hear back from Colorado's counsel before filing.

BACKGROUND

At the heart of this case are the issues of anti-religious hostility and bad faith. The Supreme Court just held that the Colorado Civil Rights Division and Commission—as shown by their prior comments about and disparate treatment of Phillips—acted with "clear and impermissible hostility" toward Phillips and his religious beliefs. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018) (*Masterpiece I*). Similarly, this Court, in its order denying Colorado's motion to dismiss, said that Colorado's ongoing "disparate treatment [of Phillips] 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." Doc. 94 at 20-21; *see also id.* at 23 ("The decision to pursue the discrimination charge . . . supports the existence of bad faith."). Colorado continues to deny that it has acted with hostility or in bad faith toward Phillips. *See* Doc. 116 at 6-12 & 12 n.7.

The parties are rapidly moving through an expedited discovery period to prepare for a preliminary-injunction hearing scheduled for March 14 and 15. This Court said that it wanted "to

have evidence presented . . . in the form of exhibits and witnesses who testify," Doc. 96-1 at 86 (Tr. of Dec. 18, 2018 Hearing), and that "it would be a fair hearing" for both Colorado and Phillips, *id.* at 74. The Court also anticipated that the parties might conduct "some expedited discovery" and emphasized that "it needs to be done in a fair way." *Id.* at 75. Colorado similarly requested that the "expedited discovery be limited, reciprocal, and bilaterally conducted." Doc. 95 at 9. The Magistrate Judge entered a Scheduling Order permitting expedited discovery that included five requests for production and interrogatories per side due February 5, and four depositions per side to be completed by February 28. Doc. 99 at 7-8.

On February 1, Colorado's counsel informed Phillips's counsel that they would not be able to produce all responsive documents until February 13. Ex. A at 3-4. Phillips's counsel objected, but indicated that, to keep the process fair, they would similarly delay their final production until February 13. *Id.* at 2. Phillips's counsel also asked that Colorado agree to extend the deposition deadline until March 5, which Colorado's counsel accepted. *Id.* at 1-2.

Colorado objected to Phillips deposing "any Commissioner individually." Doc. 95 at 10. Since this would thwart his discovery plans, Phillips raised this issue at the January 15 Scheduling Conference. The Magistrate Judge agreed to decide that issue and asked the parties to email him a Joint Statement by January 29. *See* Doc. 113 (filed February 5, 2019). In it, Phillips stated that he will not question the Commissioners about their eventual role adjudicating the pending state proceeding. *Id.* at 3. Rather, he wants to focus on their past prosecutorial actions against him and their discussions (both with other Commissioners and with third parties) and views about those prosecutorial actions and about Plaintiffs in general. *Id.* In addition, Phillips objected to Colorado's insistence that he cannot ask about: Commissioners' discussions and views regarding

religious freedom, religion, LGBT issues, and other personal characteristics; and information about other related cases decided by the Commission. *Compare id.*, *with* Doc. 95 at 10.

Colorado maintains that Phillips cannot depose any individual Commissioner about any topic. Doc. 113 at 15-16. The state relies on absolute immunity and deliberative-process and mental-process privileges for this position. *Id.* at 18-29. The Magistrate Judge requested supplemental briefs on the parties' positions by February 4, *see* Docs. 114 & 115; and he held a hearing the following day, *see* Doc. 112.

At that hearing, the Magistrate Judge ruled that (1) Phillips cannot depose the Commissioners at any time about their "personal feelings" regarding religion, gay rights, and the First Amendment and Fourteenth Amendment issues underlying this lawsuit, Ex. B at 51 (Tr. of Feb. 5, 2019 Hearing), and (2) Phillips cannot depose the Commissioners now about their decision to charge Phillips or their discussions about this case, similar cases, or Plaintiffs in general, *id.* at 52. Rather, Phillips is only allowed to conduct a Rule 30(b)(6) deposition, during which he may ask about "the rationale" for the decision to prosecute him (although that inquiry is limited to "the objective basis for the decision," *id.* at 58) and "any conversations that the commissioners had with each other . . . exclusive of attorney/client communication." *Id.* at 53.

The Magistrate Judge also encouraged the 30(b)(6) deponent to "be prepared to address discussions that any of the commissioners may have had with third parties" about "plaintiff or this case" "exclusive of things such as a spousal privilege." *Id.* at 54-55. He found that "no privilege prohibits" that questioning. *Id.* at 59; *accord id.* at 55 ("I don't see how that's privileged"). And he ordered Colorado to produce "any documents that are communications between commissioners, . . . not protected by the attorney/client privilege, . . . that talk about

plaintiff or this case." *Id.* at 55-56. The following day, the Magistrate Judge entered his written order, which contained some but not all of what he ruled at the hearing. Doc. 112.

The Magistrate Judge explained that his decision sought to "balance the concerns of avoiding disruptive discovery . . . with the needs of plaintiff in this case." Ex. B at 52; *see also id.* at 50, 55-56. As to absolute immunity, he recognized that Colorado cited no case that relied on absolute immunity to bar depositions of government defendants once the plaintiff's damages claims have been dismissed and only equitable claims remain. *Id.* at 48-49. He nevertheless blocked the individual depositions because he thought that absolute immunity case law "implicitly suggests that if the immunity question is decided in favor of immunity, . . . that discovery shouldn't take place." *Id.* at 4.

And as to the deliberative-process and mental-process privileges, the Magistrate Judge recognized that those privileges are "qualified" and overridden when "there is a finding of bad faith." *Id.* at 50. He then concluded that the bad-faith "finding[] that Judge Daniel makes on page 20 and 21 [of the motion-to-dismiss order] is largely based on undisputed facts in this case, and as a result, . . . I think Judge Daniel[']s] opinion concludes essentially that" the bad-faith exception to those privileges is satisfied. *Id.* at 51. Notably, Colorado's counsel agreed that the "allegations relied on by Judge Daniel" for his bad-faith finding are not "in dispute." *Id.* at 45-46. The Magistrate Judge also recognized the importance of allowing Phillips to inquire into the Commissioners' discussions about him, this case, and the decision to prosecute him. "If there are discussions that the commissioners are having about why they are making [the] decision" to prosecute Phillips, the Magistrate Judge explained, "that goes potentially to the heart of the case." *Id.* at 53. "That coupled with the bad faith that . . . Judge Daniel has found, overweighs any

privilege." *Id.* Despite this, the Magistrate Judge prevented Phillips from deposing the individual Commissioners.

While the Magistrate Judge contemplated that Phillips may eventually be allowed to conduct limited depositions of the Commissioners, Phillips first has to pursue the 30(b)(6) option. *Id.* at 54-55, 59-60. But that effectively forecloses him from deposing any Commissioner before the preliminary-injunction hearing. That result is all the more guaranteed now that Colorado's counsel indicated during a February 14 conferral discussion that they want to schedule any 30(b)(6) deposition near the end of the expedited discovery period. Thus, without this Court's intervention, Plaintiffs will not be able to depose individual Commissioners before the hearing.

Hoping that the documents produced by Colorado might obviate the need for individual depositions, Phillips waited until he received and reviewed the documents on February 13 before filing this objection. Having now reviewed them, Phillips determined that he has no choice but to press for his right to depose the Commissioners before the preliminary-injunction hearing.

ARGUMENT

On non-dispositive matters, a Magistrate Judge's order will be reversed if it is "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a). An order fails this standard if the Magistrate Judge abused his discretion or if the Court is left with a definite and firm conviction that a mistake has been made after viewing the record as a whole. *Gen. Steel Domestic Sales, LLC v. Chumley*, 129 F. Supp. 3d 1158, 1166 (D. Colo. 2015). Applying this standard, the order should be reversed because it is contrary to the law on absolute immunity and contrary to the well-settled rule that deliberative-process and mental-process privileges give way when the relevant state officials are acting in bad faith and their motives are relevant to the issues at hand.

I. The order denying expedited depositions of the individual Commissioners who are prosecuting Phillips in bad faith is clearly erroneous and contrary to law.

As the Magistrate Judge recognized, this Court has concluded that certain objective facts in this case—facts that Colorado admits are undisputed—establish that the Commissioners are acting in bad faith toward Phillips. Ex. B at 45-46, 51. This alone justifies Phillips's request to depose Commissioners before the preliminary-injunction hearing.

Colorado bears the burden to prevent discovery. *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir. 1984). But as explained below, its reliance on absolute immunity and the deliberative-process and mental-process privileges does not suffice. Because Colorado bears the burden, any doubt should be resolved in favor of allowing the requested depositions. It is clear error and contrary to law to do otherwise.

A. Absolute immunity does not bar the individual Commissioners' depositions.

That the "Commissioners are absolutely immune from Phillips' damages claims" due to their prosecutorial functions, Doc. 94 at 41, has no bearing on the discovery available for Phillips's remaining equitable claims. That is because absolute immunity for prosecutors and even judges applies only to damages claims, not claims for equitable relief.[1] This Court has already

[1] *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); *Brown v. Buhman*, 822 F.3d 1151, 1161 n.8 (10th Cir. 2016) ("Immunity defenses are not available . . . in suits seeking relief against a public official only in his or her official capacity."); *Lemmons v. Law Firm of Morris & Morris*, 39 F.3d 264, 267 (10th 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*

recognized the "distinction" that absolute immunity draws between "damages, as opposed to equitable relief." Doc. 96-1 at 52 (Tr. of Dec. 18, 2018 Hearing).

Thus, an immunity from damages does not erect a wall against discovery on equitable claims. Were the law otherwise, Phillips would have the right to enjoin the Commissioners' unconstitutional acts, but not be allowed to depose them about those acts. Yet that would be the precise result from following the Magistrate Judge's view that "if the immunity question is decided in favor of immunity, . . . that discovery shouldn't take place." Ex. B at 4. Moreover, that logic punishes Phillips for having brought a damages claim. Had he never asserted it, immunity would not have been raised, and discovery would be unaffected.

Tellingly, Colorado has not cited any case where a court invoked quasi-prosecutorial absolute immunity to prevent a plaintiff pursuing only equitable relief from obtaining discovery from defendants. The Magistrate Judge acknowledged this. Ex. B at 48-49. So did Colorado's counsel. *Id.* at 27-28. In fact, the only case that the Magistrate Judge cited to support his ruling—*Metro Pony, LLC v. City of Metropolis*, No. 11-cv-144-JPG, 2011 WL 2729153 (S.D. Ill. July 13, 2011), *see* Ex. B at 2—*actually reversed* a magistrate judge's ruling that used legislative immunity to prevent the deposition of a government official. This Court should thus conclude that barring the deposition of named defendants who this Court said are acting in bad faith, without any on-point legal authority supporting that conclusion, is clear error.[2]

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.").

[2] Qualified immunity case law supports this conclusion. That kind of immunity, like absolute immunity, "is a right to immunity *from certain claims*, not from litigation in general." *Behrens v. Pelletier*, 516 U.S. 299, 312 (1996). That is why courts have determined that qualified immunity from certain claims (such as claims for damages) does not justify curtailing discovery on other claims (such as claims for equitable relief). *See, e.g.*, *Lugo v. Alvarado*, 819 F.2d 5, 7

The Magistrate Judge's concern that allowing Phillips to depose the Commissioners would expose judges to depositions, *see* Ex. B at 4-5, is misplaced for at least four reasons. First, as Colorado admits, the Commissioners have taken no quasi-judicial action against Phillips,[3] and Phillips has disclaimed any attempt to depose the Commissioners about their adjudicative plans should they eventually review the ALJ's decision in the pending state proceeding. Doc. 113 at 3. Second, the Commissioners 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"). It is those prosecutorial actions—and discussions concerning them—that Phillips intends to ask about during the depositions. Third, this Court has already held that objective facts—which Colorado admits are undisputed—establish that the Commissioners "are pursuing the discrimination charges against Phillips in bad faith." Doc. 94 at 20-21; Ex. B at 45-46, 51. Fourth, the circumstances here are extraordinary. The Supreme Court just condemned the Division and Commission for acting with "clear and impermissible hostility" toward Phillips and his faith, *Masterpiece I*, 138 S. Ct. at 1729, and now those same agencies are continuing to engage in the

(1st Cir. 1987) (concluding that "the parties will have the right to engage in discovery as to the equitable claims" even if the damages claim is dismissed because the damages claim and "equitable requests stand on a different footing" for purposes of qualified immunity); *Alice L. v. Dusek*, 492 F.3d 563, 565 (5th Cir. 2007) ("To the extent that [the defendant] is subject to discovery requests on claims for which she does not or cannot assert qualified immunity, such discovery requests do not implicate her right to qualified immunity.").

[3] *See* Doc. 96-1 at 50 (Tr. of Dec. 18, 2018 Hearing) (acknowledging that Colorado was 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. 94 at 32 n.7 (acknowledging this concession).

same disparate treatment, Doc. 94 at 20-21. Allowing Phillips to depose these prosecutorial officials under these circumstances will not open the floodgates to judges being forced to testify.

Nor is there a realistic risk that allowing these depositions will result in widespread depositions of prosecutors in administrative agencies. If a plaintiff seeks damages for such an official's past actions, absolute immunity would apply and bar the suit. And if a plaintiff requests equitable relief against an ongoing prosecution, abstention doctrines would generally result in the case's dismissal. It is only in the small category of cases where an abstention exception applies that this issue will arise.

If, as the Magistrate Judge reasoned, depositions are unavailable even when abstention's bad-faith exemption applies, the results are untenable. Plaintiffs will be allowed into federal court but left without the tools necessary to prove their case. And prosecutors in administrative agencies will be free to act in bad faith and engage in unconstitutional acts without fear of direct inquiry into their conduct. No case cited by Colorado or the Magistrate Judge justifies this. The order thus constitutes clear error and is contrary to law.

B. Deliberative-process and mental-process privileges do not bar the individual Commissioners' depositions.

The Magistrate Judge determined that the deliberative-process and mental-process privileges do not apply here (1) because those "qualified" privileges are overridden when "there is a finding of bad faith," Ex. B at 50, and (2) because "Judge Daniel['s] opinion concludes essentially that" the bad-faith exception is satisfied, *id.* at 51. This is correct. Indeed, it is well established that a showing of "bad faith or improper behavior" justifies "inquiry into the mental processes of administrative decisionmakers," even quasi-judicial ones. *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).[4] To establish bad faith, Phillips has relied on not merely the undisputed facts that this Court said show disparate treatment, but also other evidence, *see* Doc. 113 at 6-7, including a social-media post from Commissioner Pocock calling Phillips a "hater," Doc. 104-26 at 5, and exhibits showing that Commissioner Aragon serves on a board of an advocacy group that filed amicus briefs against Phillips, *see* Doc. 104-30, Doc. 104-31, Doc. 104-29 at 3.

Two other legal arguments establish why the deliberative-process and mental-process privileges do not apply. First, those privileges have no place where, as here, government intent is directly at issue. *See* Doc. 113 at 4-5 (explaining this argument). And second, the factors for assessing whether those qualified privileges should be overridden weigh decidedly in favor of allowing the requested depositions. *See id.* at 7-10 (explaining this argument).

Despite all this, the Magistrate Judge prevented Phillips from deposing the individual Commissioners. The Magistrate Judge thought this was necessary to balance protection from discovery with Phillips's need for the information. But *Masterpiece I*, which relied in part on Commissioner comments to find anti-religious hostility, shows that Commissioners' discussions

[4] *See also Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1139 (10th Cir. 1999) (explaining that the privilege for administrative adjudicators announced in *United States v. Morgan*, 313 U.S. 409 (1941), "has an exception for cases involving 'a strong showing of bad faith or improper behavior'") (quoting *Overton Park*, 401 U.S. at 420); *Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995) (upholding the district court's rejection of the deliberative-process privilege where the plaintiffs demonstrated sufficient evidence of "discriminatory motives" and "bad faith" by the agency); *InfoReliance Corp. v. United States*, 118 Fed. Cl. 744, 749 n.10 (2014) (finding that information "relevant to plaintiff's claim of bad faith . . . cannot be sheltered under a claim of deliberative process privilege"); *Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212, 234 (E.D.N.Y. 2006) (noting that the deliberative-process privilege does not apply "to agency proceedings where a showing of bad faith has been made" and allowing agency officials to be deposed); *McGoldrick v. Koch*, 110 F.R.D. 153, 155–56 (S.D.N.Y. 1986) ("[W]here a party has made a *prima facie* showing that the decision by an agency or a judicial officer is tainted by impropriety, the decision-making process may be an appropriate subject of inquiry.").

and views about Phillips, this case, and the decision to prosecute him are of the utmost importance to Phillips's claims. 138 S. Ct. at 1729-30. Even the Magistrate Judge said that "[i]f there are discussions that the commissioners are having about why they are making [the] decision" to prosecute Phillips, "that goes potentially to the heart of the case." Ex. B at 53. He also added—and Colorado agreed—that if a Commissioner said that he or she chose to prosecute Phillips because of negative views about religion, that would justify the same outcome as in *Masterpiece I*. *Id.* at 36. With outcome-determinative evidence hanging in the balance, it was clearly erroneous and contrary to law for the Magistrate Judge to foreclose Phillips from deposing the individual Commissioners before the preliminary-injunction hearing (and possibly at all).

C. A Rule 30(b)(6) deposition is no substitute for deposing the individual Commissioners.

Allowing a Rule 30(b)(6) deposition of the Commission does not rectify the clear error of barring Plaintiffs from deposing the individual Commissioners. This is so for at least four reasons.

First, requiring Phillips to conduct the 30(b)(6) deposition effectively prevents him from deposing the Commissioners before the preliminary-injunction hearing. This puts Phillips at a distinct disadvantage as he prepares for that hearing. Colorado is free to depose Plaintiffs and any of their representatives, but Phillips is not allowed to depose named defendants who this Court said "are pursuing the discrimination charges against Phillips in bad faith." Doc. 94 at 21. That renders impossible the fair expedited discovery process and fair hearing that this Court requested.

Second, credibility determinations are relevant to Phillips's religious hostility and bad-faith arguments, but 30(b)(6) depositions are a poor vehicle for testing the credibility of individuals who are neither present nor under oath. Illustrating the importance of credibility in this case, this Court recognized that the Commissioners have shifted their rationale for Phillips's

prosecution, now relying on arguments that they did not raise in their formal complaint. Doc. 94 at 22. In addition, Commissioner Pocock denies that her "hater" post had anything to do with Phillips. *Compare* Doc. 51, ¶ 259, *with* Doc. 103, ¶ 259. And Commissioner Aragon denies his service with an advocacy group that filed an amicus brief against Phillips and claims to have never demonstrated "opposition" toward Phillips. *Compare* Doc. 51, ¶¶ 260-61, *with* Doc. 103, ¶¶ 260-61. The 30(b)(6) deposition will not allow Phillips to put these individual Commissioners under oath before the preliminary-injunction hearing.

Third, it is clear error to confine Phillips to asking a 30(b)(6) organizational representative about all the discussions that each Commissioner had with anyone concerning the decision to prosecute Phillips, this case, or Plaintiffs in general. Ex. B at 53-55. That deponent cannot possibly know enough to testify fully about those crucial conversations, the circumstances surrounding them, the intent behind them, and the people involved in them. This endeavor is bound to prove itself unworkable. And even if Phillips is later allowed to explore such discussions with individual Commissioners, by then it will be too late. If Phillips does not enjoin the pending state proceeding, he will be forced to endure much of the injury that this suit seeks to prevent.

Fourth, information recently disclosed to Phillips's counsel further demonstrates that the 30(b)(6) deposition will be inadequate. A Colorado legislator told Phillips's counsel that in November 2018, the legislator had a discussion with a current Commissioner during which that Commissioner expressed the belief that there is an anti-religious bias on the Commission. Ex. C, ¶ 6. In light of this highly probative evidence, it is imperative that Phillips be permitted to depose the individual Commissioners. Discussions like this must be explored directly. An organizational representative will not suffice.

II. The order denying inquiry into the Commissioners' views on religious freedom, religion, gay rights, and the legal issues underlying this lawsuit is clearly erroneous and contrary to law.

Commissioners' antagonistic views toward religious freedom or religion in general are relevant indicators of unlawful anti-religious hostility. Indeed, *Masterpiece I* relied on comments reflecting those views in finding a free-exercise violation. *See* 138 S. Ct. at 1729 (discussing Commissioners' comments about religion and religious freedom—statements indicating that "religious beliefs cannot legitimately be carried into the public sphere" and that "[f]reedom of religion and religion has been used to justify all kinds of discrimination throughout history"). Accordingly, it is contrary to law for the Magistrate Judge to bar Phillips from asking the Commissioners whether they hold similarly hostile views.

Commissioners' views on LGBT issues are also highly relevant because the pending state prosecution seeks to punish Phillips for declining to create a cake with an expressive design reflecting and celebrating a gender transition. *See* Docs. 104-6 & 104-7. Given this background, Commissioners' views and discussions about those issues might shed light on the source of their hostility or bad faith. It is thus clear error for the Magistrate Judge to forbid Phillips from asking questions about those topics.

CONCLUSION

For the foregoing reasons, Phillips should be allowed to depose individual Commissioners during the expedited discovery period. The Magistrate Judge's order effectively prevents that, and in doing so, it is clearly erroneous and contrary to law and should be reversed.

Respectfully submitted this 18th day of February, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2019, the foregoing document and all its exhibits 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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Subject: RE: Masterpiece - Follow-Up on Call
Date: Friday, February 1, 2019 2:01:11 PM
Attachments: image001.png
Copy of Proposed Fields.xlsx

Jim,

Thanks for this. The State Officials agree to the revised language in paragraphs 1-3 of your February 1, 2019 email below. We also agree to extend the deposition window to March 5 if that becomes necessary; we too would like to complete depositions earlier if possible. We don't believe anything more formal is necessary to finalize this discovery-related agreement, but let us know if you feel differently.

Regarding production, are you comfortable with receiving our documents via FTP rather than a thumb drive (a thumb drive of course will take an extra day or so to arrive to you)? And can you please let us know what format you anticipate producing your documents to us in? We prefer natives or Load Files (i.e. - .opt, .dat, TIFF images, natives, and text files).

Thanks in advance.

Grant T. Sullivan
Assistant Solicitor General
Office of the Colorado Attorney General
State Services Section
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1300 Broadway, 6 h Floor
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Direct: (720) 508-6349
Email: grant.sullivan@coag.gov

From: Jim Campbell [mailto:jcampbell@adflegal.org]
Sent: Friday, February 01, 2019 10:43 AM
To: Grant Sullivan
Cc: Michael McMaster; Jacquelynn Rich Fredericks; Vincent Morscher; Roger Brooks; Jake Warner; Ryan Tucker
Subject: RE: Masterpiece - Follow-Up on Call

Grant,

Your adjustments to the proposed language are fine with us. Note that we suggest one slight

EXHIBIT A

clarification to No. 1 in order to make the first and second sentences consistent. I underlined the two words that we added. See below. And we also adjusted the language in No. 2 to correspond to the language that you've added and to make it clearer. I underlined that change as well. Assuming you're okay with these minor adjustments, here is what we have for the final language.

1. The parties agree that, for this expedited discovery period, they are not required to produce communications that occurred, or documents that were created, before June 26, 2017. For any document, such as an email string, containing both communications that occurred before June 26, 2017, and communications that occurred after that date, the producing party is only required to produce the communications that occurred on or after June 26, 2017.

2. The parties agree that they do not need to produce or log (1) communications between the Attorney General's Office and counsel for the complainants in *Masterpiece I* or counsel for the amici who filed briefs in Masterpiece I or (2) communications between Alliance Defending Freedom or Nicolle Martin and counsel for the amici who filed briefs in *Masterpiece I*.

3. The parties agree that (1) Defendants do not need to log communications concerning *Masterpiece I* or this case that occurred wholly within the Attorney General's Office or between the Attorney General's Office and their clients in those cases, and (2) Plaintiffs do not need to log communications concerning *Masterpiece I* or this case that occurred wholly within Alliance Defending Freedom, between Alliance Defending Freedom and Nicolle Martin, or between Alliance Defending Freedom, Nicolle Martin, and their clients in those cases.

As for the delay in your production, we object to it, but from what you report, it appears that nothing can be done under the circumstances. So we'll simply follow your lead and make an initial production on Feb 5 followed by another production on Feb 13. To account for the delay, we request that you all agree that the time to complete depositions be extended from Thursday Feb 28 to Tuesday March 5, although we hope to work with you as much as possible to get the depositions done before the week of March 4.

As for the timing on the privilege log, let's revisit that next week after the hearing with Magistrate Judge Varholak. I think that'll give us all a better sense for the burden that the privilege logs might entail.

Thanks,
Jim

From: Grant Sullivan [mailto:Grant.Sullivan@coag.gov]
Sent: Thursday, January 31, 2019 2:52 PM
To: Jim Campbell <jcampbell@adflegal.org>
Cc: Jon Scruggs <jscruggs@adflegal.org>; Michael McMaster <Michael.McMaster@coag.gov>; Jacquelynn Rich Fredericks <Jacquelynn.RichFredericks@coag.gov>; Vincent Morscher <Vincent.Morscher@coag.gov>; Roger Brooks <rbrooks@adflegal.org>; Jake Warner <jwarner@adflegal.org>; Ryan Tucker <rtucker@adflegal.org>

EXHIBIT A

Subject: RE: Masterpiece - Follow-Up on Call

Jim,

Thank you for sending over your draft language regarding our tentative agreements on these discovery issues. We had the following comments:

1. For the time being, we request removing the language "and for the remainder of discovery in this case" in paragraph 1. While we will likely agree to the post-June 26, 2017 timeframe for the whole case, not just this expedited discovery window, we do not want to make that call just yet. We would like to see how the PI hearing plays out. The judge's order on the PI may reveal that seeking written discovery going further back is necessary.

2. Can we please add the language "between the Attorney General's Office and counsel *for the complainants in Masterpiece I or counsel for* the amici who filed briefs in *Masterpiece I*." We believe the complainants' counsel in *Masterpiece I* is also covered by the common interest privilege we discussed.

3. Paragraph 3 looks good. As we discussed, if a non-client third party is joined on emails or correspondence with clients and/or attorneys, those communications would need to be produced or logged if a privilege is claimed.

Please let us know if these modifications are acceptable. We also discussed a later date for actually providing each side's more limited privilege log. Please let us what date you had in mind.

I also wanted to update you regarding the scope of our upcoming document production. Our IT support staff yesterday morning indicated that the volume of post-June 26, 2017 documents, while large, was manageable and could be reviewed and produced by Feb. 5. That review process is ongoing and we will produce those documents to you by Feb. 5. However, our IT staff's estimate erroneously overlooked a batch of emails; it also did not account for a batch of documents that we received from our clients yesterday afternoon.

Due to the volume, our review and production of these latter documents will unfortunately extend beyond Feb. 5. While our team has been putting in extensive hours preparing for our production by reviewing our clients' documents since we first received your requests on Jan. 21, the volume is such that reviewing and producing everything in a mere 15 days is not possible. As you know, a normal response period under Rule 34 is 30 days. We are also having to balance our document review process with our other litigation tasks, including preparing our PI response brief, drafting our Joint Statement re: Discovery Disputes, and preparing the newly-requested Response brief requested by Magistrate Judge Varholak on the discovery issues.

We estimate that we will be able to complete our last production to you by Feb. 13, as we

continue to review documents as we receive them. We will of course make every effort to produce the responsive documents sooner if possible. Please let us know if you have an objection to this revised timeframe. We realize this schedule cuts into your review time. As encouraged by Magistrate Judge Varholak, we are willing to work with you on the backend to reach agreements to extend the deposition window if that becomes necessary.

Please let us know if you have any questions. Thank you.

Grant

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From: Jim Campbell [mailto:jcampbell@adflegal.org]
Sent: Wednesday, January 30, 2019 12:05 PM
To: Grant Sullivan
Cc: Jon Scruggs; Michael McMaster; Jacquelynn Rich Fredericks; Vincent Morscher; Roger Brooks; Jake Warner; Ryan Tucker
Subject: RE: Masterpiece - Follow-Up on Call

Grant,

Thanks for following up with us. Here is the language that we developed. Let us know your thoughts.

1. The parties agree that, both for this expedited discovery period and for the remainder of discovery in this case, they are not required to produce communications that occurred, or documents that were created, before June 26, 2017. For any document, such as an email string, containing both communications that occurred before June 26, 2017, and communications that occurred after that date, the producing party is only required to produce the communications that occurred after June 26, 2017.

2. The parties agree that they do not need to produce or log (1) communications between the Attorney General's Office and counsel for the amici who filed briefs in *Masterpiece I* or (2) communications between Plaintiffs' counsel and counsel for the amici who filed briefs in

EXHIBIT A

Masterpiece I.

3. The parties agree that (1) Defendants do not need to log communications concerning *Masterpiece I* or this case that occurred wholly within the Attorney General's Office or between the Attorney General's Office and their clients in those cases, and (2) Plaintiffs do not need to log communications concerning *Masterpiece I* or this case that occurred wholly within Alliance Defending Freedom, between Alliance Defending Freedom and Nicolle Martin, or between Alliance Defending Freedom, Nicolle Martin, and their clients in those cases.

Thanks,
Jim

ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

Jim Campbell
Sr. Counsel
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jcampbell@ADFlegal.org
ADFlegal.org

From: Grant Sullivan [mailto:Grant.Sullivan@coag.gov]
Sent: Wednesday, January 30, 2019 8:20 AM
To: Jim Campbell <jcampbell@adflegal.org>
Cc: Jon Scruggs <jscruggs@adflegal.org>; Michael McMaster <Michael.McMaster@coag.gov>; Jacquelynn Rich Fredericks <Jacquelynn.RichFredericks@coag.gov>; Vincent Morscher <Vincent.Morscher@coag.gov>
Subject: Masterpiece - Follow-Up on Call

Jim,

Following up on our call yesterday, I've been able to confirm that our universe of documents from June 26, 2017 and after is more manageable and that we can likely produce them to you by February 5 (or the 6th at the latest). You mentioned that you had typed out some language regarding our tentative agreements from yesterday's call. Would you mind forwarding to us for review and confirmation?

Thanks in advance,

Grant T. Sullivan
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1300 Broadway, 6 h Floor
Denver, Colorado 80203
Direct: (720) 508-6349

EXHIBIT A

Email: grant.sullivan@coag.gov

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 18-cv-02074-WYD-STV

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 10:58 a.m., February 5, 2019, in the United States Courthouse, Denver, Colorado.

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

APPEARANCES

JAMES CAMPBELL, Attorney at Law, appearing for the plaintiffs.

GRANT T. SULLIVAN, VINCENT MORSCHER, JACQUELYN RICH FREDERICKS and MICHAEL McMASTER, Attorneys at Law, appearing for the Defendants.

DISCOVERY CONFERENCE

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-2074. Can I have entries of appearance, please.

MR. CAMPBELL: Good morning, Your Honor. James Campbell on behalf of the plaintiffs.

THE COURT: Good morning.

MR. SULLIVAN: Good morning, Your Honor. Assistant Solicitor General Grant Sullivan. With me is Senior Assistant Solicitor General Vince Morscher, Jacqueline Rich Fredericks and Assistant Solicitor General Michael McMaster.

THE COURT: Good morning. So I've reviewed the briefing by the parties. Let me tell what my preliminary thoughts are and where I struggle with this case. And it's this, and I think it's phrased best by a case which is not directly on point. I don't believe any of the cases cited by any party, nor my own independent research has really found that case that is directly on point to what we're dealing with here.

The closest I can find at least in balancing the analysis is a case entitled Metro Pony, LLC v. City of Metropolis, and that's a Southern District of Illinois case from 2011. It's at 2011 Westlaw 2729153, and it dealt with

absolute immunity in the legislative context. So I acknowledge initially that it's not directly on point, but the sentence that I think best exemplifies the problem that I have with this is the following, which says that some courts have applied broadly the testimonial privilege that a company's legislative immunity while there is a balanced legislative independence protected by the privilege with the need for full development of the facts. And it's that struggle that I deal with here.

Judge Daniel has already concluded a couple things in his motion to dismiss. The first is that the defendants, at least the commissioners, are entitled to absolute immunity, and there is case law out there that indicates that when absolute immunity is asserted, that discovery should cease until that decision can be decided. And the basis for that is that we should not be interrupting the activities of somebody who has asserted immunity in order to be engaged in a discovery process because ultimately that discovery need not be undertaken.

Now, plaintiff tries to distinguish that by saying we've already determined immunity decision here, and that's true, but that sort of -- that somewhat renders that line of cases meaningless in that if the point of avoiding discovery while the immunity question is pending is that you may ultimately not need to reach that level of discovery, then

that implicitly suggests that if the immunity question is decided in favor of immunity, that that discovery shouldn't take place.

I also struggle with the issue of allowing questioning into the decision makers who are acting in essentially a judicial capacity as to their thought process, and I struggle with that because I think that the -- they are in a quasi-judicial function here, and I don't know of a single case where we would allow the deposition of a judge on why the judge rendered the decision that the judge rendered, and certainly not a decision that would go into the judge's own personal feelings.

And the hypothetical that I pose is the following: Assume a pro se plaintiff brings a case in front of me for a 1983 case alleging racial discrimination against an employer, and I issue certain rulings that go against that pro se plaintiff. The pro se plaintiff then brings a second case. The first case is not completed yet. It's ongoing and I've issued discovery decisions against that pro se plaintiff. The pro se plaintiff then brings a second case alleging that the reason I have -- 1983 case alleging that the reason that I have ruled against him is because I have racial animus against him. And let's say that the allegations -- and again, in this case we're just beyond the 12(b)(6) stage, let's assume the allegations in my hypothetical are

sufficient to survive plausibility. Now, hopefully they're not true, but let's assume that they're plausibly pled and you have to accept as true what's pled -- what is in there.

In that scenario should the pro se plaintiff be entitled to depose me on why I reached the discovery decisions that I made previously and going further to what plaintiff wants in this case any views that I have on race or if it was a discri- -- you know, religious discrimination case on religion or any of those other things, and it strikes me as going much too far.

So those are my thoughts on the defendant's side of this case. I don't think that the distinction that plaintiff tries to draw, which is that this slippery slope isn't really that slippery because the -- this is a unique case where the commissioners who are also acting in a prosecutorial role and they only want to get into the prosecutorial decision is all that persuasive of a distinction because, again, take my hypothetical, but change it a little bit.

Let's assume that a prosecutor is bringing a prosecution against an individual. That prosecution is ongoing and the individual being prosecuted brings a 1983 case against that prosecutor alleging that that prosecutor's prosecution decision is motivated by some improper purpose. I don't see how -- when we have that factual scenario we would allow that prosecutor to be deposed, but I don't see

how that's distinguishable from the instant case.

On the flip side, and this is where again I struggle with this decision, is we have an opinion from Judge Daniel I think concluding that there is sufficient evidence of bad faith in this case to avoid the Younger abstention and move this case forward.

The issue then becomes how does plaintiff ultimately prove that aspect of bad faith without some discovery into the grounds for the decision. Now, I think -- and I'll certainly allow plaintiff to argue. I think plaintiff goes too far in suggesting that they should be able to depose on -- the commissioners on their personal beliefs on any of these topics because, again, the relevance of that I find to be much less than the relevance of the question of why they made a particular decision.

I see the relevance of why they made a particular decision. I think it is much more attenuated, their own personal beliefs, to the relevance of this case, and I think that that limited relevance is overcome by the desire to protect the immunities involved in this case. But when we get into the grounds for the decision, to the extent that we're making an as-applied challenge here, I do see how the grounds for the decision can be relevant to the ultimate question of whether the statute as applied is constitutional, and I don't know how they get the information to support that

without some limited discovery into that what that decision-making was.

Now, whether that limited discovery is depositions or whether it is 30(b)(6) or whether it is e-mail documentation, that's something that I'm trying to determine here, which gets me back to the Metro Pony analysis, which is the balancing at a legislative, in this case, quasi-prosecutorial, quasi-judicial independence protected by the privilege with a need for developing the facts.

So I lay that all out there because that's my preliminary thoughts. I've not made a decision yet as to what I'm going to do with this so I want to hear further argument, but I want at least those concerns to be addressed by -- by each side, because I think that each side makes valid points, and they're very difficult competing interests and I don't see a case that's directly on point that deals with anything quite like this.

I'll hear from plaintiff first.

MR. CAMPBELL: Thank you, Your Honor. I would like to focus really on the fact that this is key information that we need to prove our case. At the heart of our case is an allegation that there is the same sort of antireligious hostility that the Supreme Court just struck down in the Masterpiece One case. In particular --

THE COURT: Let me ask that because I want to get

to that a little bit to fully understand what is the heart of this case. Obviously the -- you're making two challenges. You're making a facial challenge to the statute and an as-applied challenge to the statute. The facial challenge I think has nothing to do with -- I think the information you seek, the discovery you seek is completely irrelevant to the facial challenge in this case because is the statute itself facially constitutional or facially unconstitutional.

Getting to the as-applied, as I indicated, I see some relevance to this information, but I'm not sure it has important -- to say that it's the heart of this because I think heart of this is, is it being applied in a discriminatory manner, and that doesn't necessarily mean that the commissioners have some sort of personal animus or even necessarily there is subjective rationale for it.

For example -- and I equate it to a disparate-impact-type analysis, that they may have a completely arguably nondiscriminatory thought process as to why they're doing this, but that nonsubjective discriminatory -- and nondiscriminatory subjective thought process results in a discriminatory outcome as applied by the statute.

So I think that there -- again, I'm not saying there is no relevance to this because if they're acting with outright animus as a result of religion, that's relevant to

the -- to the as-applied, but I don't think it's necessarily the entire tee of the as-applied challenge in this case.

MR. CAMPBELL: Your Honor, I think there are two ways to establish the hostility. One is through objective evidence of unequal treatment, which is something that the Supreme Court considered in Masterpiece One, but I think also there is -- there could be evidence of outright antireligious animus, in internal discussions and other things of that nature. So I think it's -- I don't know that one or the other -- they're exclusive. I think that they're -- we can proceed one way or we can proceed another way.

THE COURT: So why can't you get that through the 30(b)(6) deposition? In other words, what you want to know is why a certain decision was made. The -- and again, this case is, you know, procedurally a unique position and what you have remaining is the commissioners who are in their official capacity, not in their individual capacity. So -- and a commissioner sued in their official capacity is the same as suing the State, in -- which is essentially what -- why did the State make this decision.

If that's the case, why isn't the 30(b)(6) witness sufficient to answer that? The 30(b)(6) witness must know as required to be fully prepared on the 30(b)(6) deposition why the State made the decision, and, therefore, I think the 30(b)(6) witness needs to speak to each commissioner and say

why do you believe this to be -- again, assuming that -- because we're in between the prosecutorial stage and the adjudicatory stage.

So the question that they would need to ask each commissioner is why did you believe there was probable cause to believe that the refusal to bake the case was discriminatory? And each commissioner is going to need to ask, and then that 30(b)(6) witness is going to need to prepped on that question.

Why isn't that sufficient to get to your question of are they acting in a discriminatory manner?

MR. CAMPBELL: I think two things. First of all, the defendants have taken the position that the 30(b)(6) witness would only testify about process and procedures, (inaudible) which was practices and processes and we don't think that that's sufficient. So that's the first one.

THE COURT: What does that mean exactly?

MR. CAMPBELL: I'm not sure. That's just the language in their -- in their portion of the position statement.

The other thing I would say is I don't -- Your Honor, I don't know that it's sufficient to just allow us to inquire into why the commissioners made the decision to file the formal complaint. I think it's also important to allow to us inquire into the discussions that they had about it.

That to me is -- is very relevant to see their motivation, because whatever their motivation might be stated now through a 30(b)(6) witness might be very different than what they might have said in an e-mail or in a communication somewhere during the process. So --

THE COURT: Well, that's -- well, let's press that a little bit. There is two different possibilities. There is the first which is that during the deliberative process they initially thought one thing. Okay, let's take it out of this case. Let's take it to -- let's assume it's a warrant that's brought before me, a search warrant, and it's submitted and I e-mail my clerk and I say, you know, I don't think this has probable cause because I think it's missing this element. My clerk then writes me back, sends me a case law that says, No, that element is not needed or, No, this is sufficient is, and then I ultimately issue the probable cause determination.

What's relevant is why I issued the probable cause determination, not necessarily that at one point earlier I thought something else was relevant or something else was irrelevant. What matters is why I issued the probable cause determination.

So the one possibility is that you're arguing that no, no, what's relevant is everything leading up to it even if they were later disabused of some earlier notion. The

second thing you could be argue is that what the 30(b)(6) witness is now saying is the grounds is not truly the grounds and the 30(b)(6) witness is essentially committing perjury.

So which of those two are you -- are you arguing as to why the 30(b)(6) witness is not sufficient?

MR. CAMPBELL: Your Honor, I think it's the first one. It's the fact that whatever the 30(b)(6) witness might say doesn't reflect all that went into the -- all that went into the decision-making process.

And I think what's particularly important is when we have objective evidence of bad faith, which is what we have here, the State has taken the position that all we have are allegations of bad faith. I think that's not true. I think we have objective evidence of bad faith. I think that allows us more leeway to inquire into these things like the discussions that commissioners and division officials had about their decision to move forward with this case.

THE COURT: Okay.

MR. CAMPBELL: And, Your Honor, specifically on the bad faith question, I would -- I would point the Court to -- I would focus specifically on disparate treatment. This is something that the Supreme Court specifically focused on in Masterpiece One. It said that one of the indicators of hostility in that case was the difference in treatment between how the State was treating Mr. Phillips and how it

was treating other cake shops that were allowed to decline requests for cakes that had express messages in conflict with their -- with their beliefs.

Now, when Judge Daniel looked at the bad faith question, he focused specifically on that disparate treatment analysis, and he said, and I quote on page 20 to 21 of his order, As explained in Masterpiece One, this disparate treatment reveals that Director Elenis and the defendant commissioners' hostility -- I'm sorry, reveals Director Elenis's and defendant commissioners' hostility towards Phillips, which is sufficient to establish that they are pursuing the discrimination charges against Phillips in bad faith motivated by Phillips's suspect class, his religion.

So to dismiss everything that we've alleged about bad faith and simply say that all it is is allegations, I think that's -- that's not fair. It's not fair to what Judge Daniel said.

THE COURT: No, I agree. I think Judge Daniel went further than simply saying allegations.

MR. CAMPBELL: And, Your Honor, because of that I believe that that's one of the reasons for getting more information, whether you're looking at the deliberative process privilege or the mental process privilege. When there are allegations and there is objective evidence of bad faith, then that door opens to allow us to inquire into these

matters.

And so I would specifically focus on allowing us to ask commissioners about their discussions concerning plaintiffs and the decision to prosecute plaintiffs. I think that that is directly relevant to our case. I think it goes to the heart of again an aspect of our claims, the hostility-based free exercise claim.

Your Honor, I'm trying to figure out the best -- the best place to go. One of the other things that I would raise at this point in time is that the defendants seem to be taking a position -- I know that much of the position statement and the supplemental briefing focused on depositions, but there are a number of footnotes in the position statement that go further that go to the issue of written discovery.

So under their view, I think that they think that documents, including documents that discuss between the defendants discussing the plaintiffs would be immune from -- from discovery, and we think that that's going too far. Under their view, an e-mail from a defendant disparaging plaintiffs would be shielded from disclosure. Even -- they make the argument based on qualified immunity and administrative and investigative functions, that even administrative and investigative documents should be off limits. So it has left us wondering what documents they

believe are actually subject to discovery in this case.

Your Honor, we -- we firmly believe that particularly in light of that there really is no way for us to get this information about what the defendants considered, what they discussed and the motivation that they had in going forward with this pending state proceeding without a discovery of those -- without a deposition of those officials. Nothing that they point to -- pointed to is being sufficient is. As I explained already, we don't believe that the Rule 30(b)(6) is. There are limits on that witness's knowledge, and we don't think that that would suffice given the circumstances that we have here.

THE COURT: Why are there limits on that witness's knowledge? I mean, again, putting aside for a minute what they want to limit because I'm not exactly sure what practices and processes mean, but if I were to allow the 30(b)(6) to be deposed on the reasons for the decision in this case to prosecute, why is that 30(b)(6) witness's knowledge limited? They're required to be prepared on that topic.

MR. CAMPBELL: Well, Your Honor, I think they're inherently limited in terms -- well, again, we're looking for not just the motivation, but also the discussions concerning it, and I don't think that their knowledge on discussions is going to encompass everything that the other commissioners

talked about with others concerning this case.

THE COURT: Okay.

MR. CAMPBELL: We also believe that the documents that are still to be produced given the positions that the plaintiffs have taken will also be insufficient to enable us to establish the things we need to show in order to pursue the bad-faith claim and the hostility claim.

Your Honor, you talked a little bit at the outset about the role of immunity in this. I think you fairly characterized our position when you said that we believe that those immunity cases only apply to damages claims, and now that the damages claims are gone, there is no longer a role for those immunity cases.

THE COURT: Do you have any case that says that?

MR. CAMPBELL: Your Honor, we cited -- we cited cases in our -- in our position statement that -- or, I'm sorry, in our supplemental brief yesterday.

THE COURT: Yeah, but I don't -- I don't think that those cases are directly on point because I don't think that they get to the underlying -- I don't think they get to the -- go so far as to say you can therefore depose anybody about their rationales for making a prosecutorial decision, which is what -- which is what you want to do in this case.

MR. CAMPBELL: Your Honor, I think that the cases that we cite stand for the basic proposition that, for

example, the Supreme Court in the 1980 decision, and we cite this on page 4 of our supplemental brief. The decision is Supreme Court of Virginia vs. Consumers Union of the United States. There the Supreme Court said the prosecutors enjoy absolute immunity from damages liability, but they are natural targets for Section 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law. So cases like those, and that well established principle.

THE COURT: I agree it's well established principle that you can seek to enjoin them. Nobody is arguing that in this case. It's that step further of and, therefore, you get to depose them about their rationale for doing something that is the step further that you're seeking to go in this case and I think the cases that you've cited.

MR. CAMPBELL: Well, Your Honor, I do think that there are cases that are close. Certainly, this procedural posture is unique and I would say for two reasons we think that's the case. One is findings of bad faith exception to Younger are uncommon, and so that being the first point. And the second point being that most of the time States, while they combined prosecutorial and adjudicative functions in the same agency, most of the time these agencies will separate those among people. The thing that is unique here is that the State has combined those in the commissioners, and

that we believe they shouldn't be able to hide behind that now as a basis to insulate the commissioners from -- from deposition.

But a few cases that I would point the Court to with the acknowledgment that there are no cases directly on point. First case that I would point to is McGolrick vs. Coke (ph). That is a decision that we cited in our portion of the position statement. It's I believe a 1984 decision.

There it was dealing with a police officer who challenged procedures by which they were dismissed for brutality charges, and they were allowed written deposition of some officials and they were allowed oral deposition of others, and those officials included individuals who provided over -- presided over the proceeding during which they were dismissed, the prosecutor at that hearing and an assistant DA who assisted citizens in suing those plaintiffs. We believe that that case provides support for what we're seeking to do here.

I would also point the Court to North Pacifica vs. City of Pacifica. That's another case that we cited in our position statement. There it was involving a land developer that was suing a city agency regarding an equal protection violation.

Now, there they were allowed to inquire at trial into the decision-making process, including the motive and

intent of the commissioners or board members in that instance. And this included asking questions about the objective manification [sic] -- manifestations of the decision-making process, and so what the Court said there, for example, the plaintiff may ask the city council members about what they said to others about the plaintiff, what they heard, what they read, what they were told and so forth.

Now, the Court did say that they couldn't inquire into just their subjective views, so candidly it did not go exactly where we're asking this Court to allows us, but it certainly did go far further than the plaintiffs want to allow.

Your Honor, as a technical matter, while we review and try to analyze the defendants' arguments, we seem them coming in sort of two different waves. The first wave is an immunity-based argument, which I talked a little bit about before and why we think that argument doesn't apply because the damages claims are now gone, but the second wave of argument is the deliberative process privilege and the mental process privilege, and we think that those are -- I mean, it's well established that those are qualified immunities -- or those are qualified privileges, I'm sorry.

Under the circumstances here, we think that they are clearly overridden by the need for the information, the inability to get it elsewhere and some of the other -- the

significance of the constitutional issues at stake and a number of the other factors that the Courts have laid out when considering this balancing.

It's interesting to us that the defendants have not engaged with those factors. They haven't even made an argument to say why this qualified immunity shouldn't be overridden under these circumstances, and I think there is a strong argument, particularly in light of the objective evidence of bad faith based on the disparate treatment, that should allow us to engage in some of the discovery that we've requested here.

Your Honor, the last point I'll make is just to engage in what I believe is one of the defendants' primary arguments. They say that depositions are unwarranted because the administrative proceedings are ongoing and that the depositions might have an adverse impact on those. There are three responses to that.

The first one is, as we have said, we want to focus on the commissioners' procedural work. That's the intent here. We're not intending to ask them questions.

THE COURT: Well, you want to ask them why they think your client engaged in discriminatory practices, correct?

MR. CAMPBELL: We want to ask them and how they arrived at the decision to file the formal complaint against

them.

THE COURT: Which involves the question of why they believe it's discrimination necessarily, which is also the ultimate question that they're going to be asked in their judicial role.

MR. CAMPBELL: Your Honor, the ultimate question that they're going to be asked is going to be based on all the evidence that's before them at that time. What we want to know is what their thinking was based on the evidence that was before them when they made the prosecutorial decision.

To me it's a distinction between forward looking and backward looking. We want to ask them about what they said, what they thought, what they knew at that time. We're not asking them about what they're going to say, what they're going to think or what they're going to do, and that's why we think it's a workable line to allow us to inquire into the prosecutorial functions and into the prosecutorial discussions and motivations while leaving off the table the yet-to-come discussions and considerations on adjudication.

THE COURT: Okay, let's put this -- let's again take this out of this context but into a similar context. Prosecutor brings a -- files a complaint. Let's assume they don't need to go through an indictment process, where one of the states where they can just file a felony complaint.

They file a felony complaint against an individual

alleging felony charges, robbery. The individual who is claiming files a separate federal lawsuit saying that it's being brought out of some improper purpose. Are you telling me that that prosecutor can be deposed about the charging decision, but that that charging decision, which necessarily has to be based on some set of facts that were before the prosecutor when they brought the charging decision is not going to impact how the prosecutor may try the case down the road? I know that's not exactly the same because the commissioners aren't trying it, they're deciding it, but those facts are necessarily going to be intertwined and necessarily going to get into how ultimately that prosecutor tries the case.

MR. CAMPBELL: Well, Your Honor, I think what -- one thing that is an important distinction is that neither the commissioners nor the division director, the folks that we want to depose, are involved in that prosecutorial process from here forward.

THE COURT: I get that, but nonetheless, the same -- at least many of the same facts that is going to be brought before them in their adjudicative role were presumably the same facts that they used to make the -- for lack of a better term, the probable cause decision in this case. So how do you question them about that probable cause decision and the facts that they relied on there without

necessarily impacting what their ultimate decision is going to be down the road because it's many of the same facts? Maybe not all of them, but many of them.

MR. CAMPBELL: Well, Your Honor, I think that goes to the difference in the information that's in front of them at the time. They have different information when they make the prosecutorial decision than they do when they make the ultimate decision once an ALJ has rendered a proposed decision. And that to us is what makes it different.

In addition, when you -- when you consider what we're -- what we're looking at specifically, we want to know the discussions they've had, we want to know the things they were considering, the information that they had available to them at that time. That again -- the discussions they had in the past are different from the discussions they might have when they're -- when they're seeking to ultimately decide this case.

And the one other factor that I think distinguishes this from your hypothetical is again the objective evidence of bad faith. The disparate treatment is something that is objectively observable and something that Judge Daniel already found and I think it's something that gives us leeway to inquire into these matters.

And last point on that, Your Honor, is that the defendants are concerned that allowing these depositions or

any of this sort of discovery will potentially taint the state proceeding and we would say that the state proceeding has already been tainted by the disparate treatment that Judge Daniel recognized in his ruling. That's all I have at this point, Your Honor.

THE COURT: Thank you. I'll hear from defendants. And in particular, and maybe to start with, what discovery you agree is appropriate under, you know, the tag line practices and processes, what exactly that entails. Does it entail e-mails in the past about that maybe indicates some sort of hostility towards plaintiff or hostility towards plaintiffs' religion or rationale for making that decision?

MS. FREDERICKS: Yeah, Your Honor. Just to begin, because your clerk previously requested it, I'm Jacqueline Rich Fredericks on behalf of the State officials. And I will -- I will go ahead and take your question with respect to what -- what we do consider to be available in this instance.

I think that we stand very firmly on the immunity that's previously been awarded to each of our clients. They have been found to be prosecutorially immune because they act quasi-prosecutorially as set forth in the briefing. We also believe that they're entitled to that quasi-judicial immunity that the Court spoke of earlier.

In those instances, plaintiffs are not entitled to

discovery; however, we have agreed to and are in the process of producing and will be producing today answers to plaintiffs' interrogatories and as well as their request for production. They are receiving today 700 documents comprising thousands of pages that are responsive to the request that they have remitted.

The parties actually discussed and agreed previously that no party would inquire of the other prior to June 26, 2017. So plaintiffs indicate in their brief that we are drawing a unilateral line and saying it's good enough for one side and not the other. We can engage in discovery from your client, but you can't engage in discovery our client. That is incorrect. The parties are mutually engaged in the process of discovery, the give and take of information as contemplated under the federal rules. And in this instance we are providing responsive materials.

The parties agreed that materials between the clients and their attorneys would not be produced pursuant to attorney/client privilege, and at this time the parties have agreed to hold off on logging that in order to foreground pushing out to one another the most responsive materials that we can.

So at this point they're receiving 700 pages -- 700 documents. In addition, my clients have responded to their interrogatories, which include: Are you involved in any of

these many number of outside organizations? We don't really think that their participation or membership in those organizations is relevant, much as the Tenth Circuit decided when Judge Brimmer's affiliation with the Episcopal Church was called into question and the Tenth Circuit said it's not surprising that --

THE COURT: Again, I agree with you on the issue of personal participation in organizations and personal subjective beliefs. I think that that goes too far. And I think it goes too far, one, because I think that its relevance is suspect for many of the same reasons the Tenth Circuit said in that case, and two, because I think to allow discovery into those type of matters sets a dangerous precedent that will deter individuals from participating in prosecutorial functions, judicial functions, quasi-prosecutorial, quasi-judicial functions, so you don't need to argue that because I agree with you on that point, but that's different than what is being -- the more narrow information sought here. So let me ask a specific question.

If there is an e-mail from one commissioner to another saying, I will never allow plaintiff to -- or I will never turn down an allegation of discrimination against plaintiff where he's asserting his Christian right because I hate Christians, okay. Is that discoverable under your view of it? And if the answer is, no, because of immunity, do you

have any cases that say where bad faith has been found, because I think Judge Daniel found bad faith and I'm bound by his decision, and two, where the -- it's essentially a case against the official in their official capacity where a Court has shut down discovery or anything with respect to that component? Because the cases that both sides are citing to me I think are not on point.

Plaintiff is citing me a long series of cases that say that absolute or qualified immunity does not bar a suit against an official in an official capacity. I think that is very well settled. You are citing me a bunch of cases that say an individual sued in their individual capacity when given -- when asserting absolute or qualified immunity discovery should be stayed, I agree with that as I indicated at my last hearing.

What we have is that middle ground where we have an individual being sued in their official capacity who has immunity in their individual capacity, but not in their official capacity, and whether discovery should proceed on that.

Do you have any case that says, no -- that's not me faulting you because also in my limited -- in the research I've conducted, I can't find any case directly on point either. Again, the closest I found is the one that I said, which in the legislative-immunity context has said we need to

balance the need for the discovery versus the need for the privilege, and that's the closest I can find.

So do you have any case -- two it's a two-part question. The first is: Do you have any case that says what is at issue in this case? And the second is: If not, that e-mail that I proposed, should that be turned over to the plaintiff? And if no, why not?

MS. FREDERICKS: I'll answer your questions in the order you framed them, Your Honor.

THE COURT: If you can remember them.

MS. FREDERICKS: Yes, absolutely.

THE COURT: This is the downside --

MS. FREDERICKS: I may ask you to repeat them, I may circle back.

THE COURT: This is how I conduct my hearings in that I ask the question as it pops to my mind, and I know it puts you all in a tough position, but I'm trying to get the right answer.

MS. FREDERICKS: That's all right. It's a wonderful mental exercise.

The short answer to your first question with respect to directly on point of authority is, no, Your Honor. I spent a significant amount of time over the past two and a half weeks, and actually prior because we knew that this would become an issue, researching that very issue, and I

have not found a case that is directly on point.

What I have found is the well-settled authority with respect to immunity and why it applies and the rationales. And what I have done is extrapolated, as the Court has similarly, the purposes and the public policy which underlies that well-established authority, is that once immune they should not be able to obtain discovery?

And as the Court rightly pointed out before, it is very clear, and as this Court previously ruled, that until immunity is settled, discovery should not be had. In this instance, immunity is settled and it is settled in favor of the defendants who at this point remain only in their official capacities, and as such discovery should not be had from them on this settled issue, but I cannot provide the Court with any particularly on-point case that is actually tailored this exact circumstance, despite my best efforts and quite a few hours.

THE COURT: I can't find one either, so -- but that's why I want to make sure that I wasn't missing one that was in the brief --

MS. FREDERICKS: Surely.

THE COURT: -- somewhere that you believe to be directly on point.

MS. FREDERICKS: Surely. And many of the Court's hypotheticals and examples cut directly to defendants'

position here, and that is that the rationales which underlie immunity are there and in place to afford officials to conduct their business, and because as a matter of public policy we want the free exchange of ideas and we want rich discussion between and amongst those officials, and just as you gave the example of, if you e-mail with a member of your team and say, This is my initial thought and they e-mail back and say, well, Let's consider this, and then you make your ruling, our position is, that's fine, just as anyone in the public can have a copy of this Court's final order, we are willing to give over a copy of my client's decisions and have and are reproducing those same materials in this instance.

THE COURT: But what about the rationale for the decision?

MS. FREDERICKS: Yeah, and I think that this goes to -- if we're talking about mental process privilege and deliberative process privilege under Morgan and its progeny and Overton Park, which is that narrow abrogation of Morgan and its progeny where plaintiff has kind of staked their claim, I believe that we fall in the Morgan camp. We do not fall in the Overton Park camp because Overton Park is very narrow. And in this instance, the reason that Overton Park, the exception exists drilling down on that is because in that instance there was not factual findings. It was, this is my decision and there was nothing that underlined that. That's

not what we have here.

What we have here is probable cause determination by the division director. It is singled space a number of pages in length and it sets out these are the facts as each side has provided them. This is the authority. When I apply this to that, I arrive at this conclusion, I find that there is probable cause. And so it's not a blank slate. It's not similarly positioned as an Overton Park, and it is for that reason that the matter is distinguishable.

And so we believe that even under -- setting aside the immunity analysis that we cleave to that decision and believe that we are entitled -- my clients are entitled to the protections of immunity, even if we get into Morgan, if we get into these cases discussing that narrow abrogation of Morgan and the mental process privilege, this is not that situation because there is a holistic record. Materials that will be provided which provide the opportunity to inquire into this, the probable cause determination, the division's investigative file, including the daily entries into that investigative file, the materials from both of the parties, so both Ms. Gardenia (ph) as well as Mr. Phillips and their respective counsels, all of those materials are being provided.

In addition, they're receiving a probable cause determination. They're receiving the recommendation of the

division. They have a copy of the complaint that was filed on behalf of this Gardenia charge in the office of administrative courts and that provides a rich explanation of that charge.

At the end of this matter they will receive the final findings of the administrative law judge, and then the adoption or rejection of that by my clients in a public meeting.

And so there is a richness of documentation that is being provided and that evidentiary we -- is going to permit plaintiffs to make that analysis of objectivity and whether there is actual evidence of bad faith, but what they are talking about is not that objective piece, but the subjective piece, which is the mental processes, the thoughts, views, beliefs and characteristics of my clients, which are not relevant, and they don't get to inquire into.

THE COURT: Why not? Why are they not relevant? In other words, if the allegation here is that the statute facially -- and as I indicated, I think that the facial attack, I agree with you, your client's subjective beliefs are not relevant, but it's also being argued that it's as applied is unconstitutional.

MS. FREDERICKS: Sure.

THE COURT: And if -- and part of that as-applied challenge may be that the commissioners have a bias towards

my client based on his religion and, therefore, they are applying the statute in a way that shows hostility towards religion as the Supreme Court in Masterpiece One found was being applied. I mean, that was the basis for the Masterpiece One decision, is that the commissioners -- I know they're different commissioners, but the commissioners in that case had applied the statute with an outward hostility towards plaintiffs' religion.

If these commissioners are taking the same action, are doing the same exact thing, why is that not necessarily relevant as determined by the Supreme Court in Masterpiece One? In other words, why is it that they are prohibited from taking the same line of attack that proves successful in Masterpiece One and now Masterpiece Two?

MS. FREDERICKS: They can, but what the High Court found was that the objective statements, the public statements in the duly noticed public meeting when the ALJ's decision came back to my client clients for their final decision-making, there is a public meeting, they engage in debate, that is something that any member of the public can attend, the parties, Joe Smith off the street can attend that.

During that hearing that's where those statements were made. We don't have that at this point. Those objective statements they can have. What they cannot have --

if this Court says something from the bench, for example, that is a part of the record. If this Court says something in its written decision, that's part of the public record. What they don't get to do is come in and say, I want to know what you and your clerk talked about or I want to know what your rough draft of your decision ultimately did not go with looked like and why.

THE COURT: Right, but the difference is that the -- the difference is we have the finding by Judge Daniel in this case of bad faith in that the Supreme Court in Masterpiece One says that the on-the-record statements showed hostility, but they didn't base it -- they based it on the on-the-record statements, but not because it was on the record. In other words, they relied on on-the-record statements to conclude there was hostility, but there was nothing in the opinion that said that had those statements been made privately or had those statements been made -- one of them may have even been made to the TV media that they would have reached a different outcome.

So if on the record they are showing a -- the commissioners are showing a neutrality, but behind the scenes are basing their decision on a hostility towards religion, I think that Masterpiece One comes out the same way. If those -- if the judge in that case had allowed discovery into -- and I know it's -- I know that it's a different case

and different procedural posture in that case, but let's assume in Masterpiece One that the statements weren't made on the record, but plaintiff had evidence -- defendant in that case, had evidence that that was basis for the decision because they had a bunch of e-mails that had these exact same comments in them, but they weren't made on the record, I don't think Masterpiece One reaches a different outcome, do you?

MS. FREDERICKS: I don't think that they would have those e-mails because those e-mails -- and this calls me to address your second point in part, and here is why.

THE COURT: I know you're saying the privilege applies, but answer my question first. Let's assume that they had those e-mails. Do you think the Supreme Court in Masterpiece One reaches a different conclusion if those exact same comments relied on by the Supreme Court in Masterpiece One were off the record as opposed to on the record?

MS. FREDERICKS: Potentially.

THE COURT: Why? How does that change the rationale at all?

MS. FREDERICKS: Yeah, because that cuts more to -- it would depend on -- classic, it depends from law school. It would depend on the contents of the e-mail. I think that the factual findings in Masterpiece One are very fact specific and they go to whether there was fairness and

EXHIBIT B

neutrality in the decision that was made. If someone is expressing my belief -- in an e-mail, my belief system says something different with respect to this, but I'll have to set that aside when we make this decision, I don't think it comes out the same way.

THE COURT: But that's -- but that's not what I'm proposing. What I'm proposing is they make the same exact comments in behind the records. They don't have the qualifier that you just put on it and that, you know, but my belief system has something different, but the same exact comments relied upon by the Court in Masterpiece One is in a behind-the-scenes e-mail saying, This is why I'm reaching this decision. I'm reaching this decision because, you know, the one that's cited is religion has been used to justify all kinds of things.

So there is an e-mail out there that says just that: I'm reaching this decision, I don't buy this religion defense because religion has been used to justify a whole bunch of things, and that's in an e-mail from one commissioner to the other commissioner. And the Supreme Court has that. Do you think their decision is any different?

MS. FREDERICKS: Not fighting the hypo, in that example, no, I do not.

THE COURT: Okay.

MS. FREDERICKS: However, I would say that they still should not be able to obtain e-mails. And perhaps I should just address e-mails generally since we're very focused on that --

THE COURT: Sure.

MS. FREDERICKS: -- because I think that might alleviate this particular example.

THE COURT: Okay.

MS. FREDERICKS: Under Open Meetings Law in the state of Colorado, the communications of the commissioners have to take place in a duly noticed public meeting. So pursuit to Open Meetings Law, they are not to be e-mailing about matters that are before them. The only e-mails sanctioned under open meetings on the state of Colorado are, I can't be at next month's meeting, my kid has got something, or, I'm going to be out of town, can I dial in? Those are the correspondences blessed by Colorado's Open Meetings Law.

Any kind of substantive discussion regarding something that is before the Commission under Open Meetings Law is obliged to take place at the duly noticed public meeting.

THE COURT: And is that verbal communications also?

MS. FREDERICKS: I'm sorry.

THE COURT: Is that verbal communications also?

MS. FREDERICKS: Correct, because in the state of

Colorado when it comes to public meetings for state public bodies, any discussion or meeting between two or more members on something of substance regarding a matter before them must take place in a duly noticed public meeting. There is an exception for local public bodies, they get three. State public bodies we have a higher standard, it's two.

So the idea that there are rampant offline discussions is severely undermined by the reality that the commissioners handle public business at a public meeting. They put up a notice on their website, they say, We're discussing cases X, Y and Z on this date at this time. Public can come to those meetings. And so I think that that addresses a large part of that.

So the e-mails that are being produced in response to requests would be any e-mails to third parties. It would not include any e-mails with counsel because those -- the parties have agreed and the long-standing privilege is, which the Court is well aware, that those are privileged by attorney/client privilege, but this idea that there is this body of communication outside of a duly noticed public meeting is simply inconsistent with the reality of how open meetings work.

THE COURT: So -- so then in theory, if I were to order you to turn over any correspondence, including e-mail correspondence, regarding plaintiff in this case, other than

ones protected by the attorney/client privilege, there should be no problem with that because it's either going to be an e-mail that says, I can't make this meeting, an e-mail to a third party, or an e-mail that was submitted in violation of the open records act, open records law and, therefore, arguably isn't privileged anyways because it's done in violation of Colorado law.

MS. FREDERICKS: The Court doesn't have to make any order with respect to that because they've actually propounded an interrogatory and a request for production that cuts directly to that, and we are Bates-labeling, (inaudible) on point this afternoon and producing those very materials.

THE COURT: Okay. So you're not -- you're not withholding any e-mails other than those on attorney/client privilege with respect to that interrogatory -- or that request for production, excuse me?

MS. FREDERICKS: Attorney work product is also being withheld --

THE COURT: Okay.

MS. FREDERICKS: -- if we weigh in on a draft of something.

THE COURT: Okay.

MS. FREDERICKS: But I believe that's correct, Your Honor.

THE COURT: Okay.

MS. FREDERICKS: And I -- there is a team of us who reviewed several thousand pages and so I can't state unequivocally that no one else saw something of that nature.

THE COURT: Okay.

MS. FREDERICKS: I would say that if there is an assertion of deliberative process with respect to a particular e-mail that arose outside of OML's mandates, then we would have to assert that privilege with respect to that particular document and that's something that the parties would have to take on case-by-case basis.

THE COURT: Okay.

MS. FREDERICKS: But I'm not personally aware as I stand here at the podium of that particular scenario.

THE COURT: Okay. And so then the next question related is if the -- well, let's take the simplest example. If the commissioners were deposed on the questions of discussions that you've had about plaintiff outside of open meetings, the answer should be: I have -- and attorney/client, so take those two situations out, either an open meeting or an attorney/client privilege communication -- the answer should be: I have not had any such discussions.

MS. FREDERICKS: Correct.

THE COURT: And if there were any such discussions, then arguably that's not privileged because it's not being conducted -- it's at least being conducted in violation of

Colorado's open record -- or Open Meetings Law?

MS. FREDERICKS: I'm not comfortable going that far, Your Honor.

THE COURT: Okay.

MS. FREDERICKS: But arguably there should not be --

THE COURT: Okay.

MS. FREDERICKS: That's not how Open Meetings Laws work.

THE COURT: Okay, and if --

MS. FREDERICKS: -- in the state of Colorado.

THE COURT: And so then if we go one last step further, if a 30(b)(6) witness were properly prepared and spoke with every single commissioner about any discussions that commissioner had with individuals about plaintiff, the answer -- again, outside of attorney/client and outside of open meetings, the answer should be that none of these -- you know, nobody had any such discussions?

MS. FREDERICKS: Two brief points and I'll answer directly.

THE COURT: Okay, sure.

MS. FREDERICKS: The first is, I think because of immunity, that type of question should not be asked. I believe that under Morgan, that that is an effort to pierce both deliberative process and mental process for which there

is no on-point exception that plaintiffs have pled into at this point, and then thirdly, I don't think that that's an appropriate generally 30(b)(6) topic because an institution is not obliged to necessarily know all the communications, conversations or offline discussions for each of its employees or members. However, in a 30(b)(6) deposition, a proper topic for the deposition would be with respect to what is your process and was it followed here or what are your procedures and what is your timeline and in matters of that nature that go to the institutional knowledge of the agency or of the board, of the division, and how they objectively discharge their duties, not subjectively how they discharge -- you know, what was the factor you considered here -- did you consider -- you know, in this particular case because I think that cuts directly to the heart of both mental process and deliberative process and that those are not proper topics for deposition for the individuals and not an appropriate topic for a 30(b)(6) institutional deposition.

Does that answer the Court's question?

THE COURT: Sort of. I mean, it's -- again, in theory, if they're not supposed to be having any discussions outside of the open meetings, then if they -- if each of the commissioners have complied with their -- with the law, then the 30(b)(6) answer should be nobody had such discussions, right? I'm not asking you if that is the answer. I'm not

asking you to waive any privilege or say that is the answer, but in theory under Colorado law that should be the answer to the question.

MS. FREDERICKS: I think that's correct.

THE COURT: Okay, all right. I've interrupted you plenty. If there is anything further that you wish to add.

MS. FREDERICKS: I just wanted to note because plaintiffs rested essentially on the authority of McGolrick as well as North Pacifica, and in addition to being out of circuit, they're not on point. They are cases interpreting the exception, the Overland park exception to the Morgan doctrine, they don't address immunity. Factually those cases were both -- underlying matters were concluded and so they are factually dissimilar to this case. And so for those reasons I don't think that they are on point or dispositive of this issue.

In addition, I do want to briefly address if I belabor my time at the podium just a bit longer.

THE COURT: No, no, that's fine.

MS. FREDERICKS: I do want to address the issue of factual findings versus allegations. I don't dispute that Judge Daniel made a finding that pursuant to 12(b)(1) the plaintiffs in this case adequately alleged bad faith. I reserve the right to dispute that they have established jurisdiction both before the district court and on any later

appeals, and so I want to make that clear. I'm not confessing or conceding any defenses that my client may have and that we believe that they are entitled to under the law, but what I am recognizing and what my client recognizes is the Court made a decision pursuant to 12(b)(1) that there were adequate allegations, but the standard set forth in Overland Park and its progeny, in order to overcome mental process and deliberative process is not mere allegation. And I wanted to provide, if I could, just some brief points with respect to that.

In Info Reliance Corporation cited in both of the parties' briefs at page 748 what was required was, quote, well-grounded allegations based on, quote, hard facts and more than innuendo or suspicion.

Under McGolrick, which plaintiffs have pointed to at page 157, a prima facie showing of impropriety is necessary.

Under Convertino vs. U.S. Department of Justice, 674 F.Supp.2d at 105 and that's DDC 2009, what was required was other than allegations, that there were facts that the employee -- other than allegations alleging that the employees disliked the plaintiffs, there was no evidence of misconduct, and to find otherwise and to permit discovery would render the privileges meaningless based on those mere allegations.

A couple more cases that I would put forth for the Court's consideration with respect to what is that standard in order to overcome, in Hinckley vs. U.S., 140 F.3d 277 at 285, which is DC Circuit 1998, there was a denial of the request for documents because, quote, no colorable showing, end quote, was made that the reviewing board in that instance had acted with impropriety, so there the standard was a colorable showing.

Under Franklin Savings Association vs. Ryan, which is 922 F.2d 209, 211 to 12, Fourth Circuit 1999, what was required was a clear showing of misconduct. And under Thomas v. Cate 715 F.Supp.2d 1- -- I'm sorry, 1012 at 1022, which is Eastern District of California 2010, what was required was, quote, a strong showing, end quote, to overcome.

THE COURT: And I agree with you that it's more than just the basis of the allegations, but I think that Judge Daniel's opinion goes further because what he relies upon in finding this hostility is two things. One, that the Division and Commission brought this case because in spite of the fact that Phillips declined to create the blue and pink cake because of the religious objections to the cake's messages, I don't think that's really truly in dispute in this case. Obviously the case had been brought. I don't think there is any denial that the stated grounds for refusing to bake the cake is Phillips's stated religious

objections to it. And the fact that Colorado has allowed other cake artists to decline request to create custom cakes that expresses messages they deem objectionable, and I don't think that's in dispute on this -- in this case.

And so those are the two grounds that Judge Daniel concludes demonstrate animus, and I don't think those two grounds are truly in dispute in this case.

Now, what is in dispute is whether that is, in fact, animus, but what Judge Daniel says, as explained in Masterpiece One, the disparate treatment reveals Director Elenis's and defendant commissioners' hostility towards Phillips, and Judge Daniel is one level higher than me. I can't overrule that decision even if you want me to. So I'm bound by that decision as well as by Masterpiece One, and I agree with you that simply the allegations may not be enough, but I don't think those allegations relied on by Judge Daniel are truly in dispute in this case. Am I wrong on that?

MS. FREDERICKS: I don't think you're wrong; however, I do think that we're at a different stage. There was a decision made by Judge Daniel, and I'm not asking you to overrule that, I understand -- I understand that would be a bad call for everyone in the room, and I don't overrule my boss either.

THE COURT: I might not be in this job that much longer.

MS. FREDERICKS: Surely, and I would not be either. I understand that and so I respect that, although I reserve the right as I previously stated to disagree with it moving forward throughout the litigation; but the decision made at that stage under 12(b)(1) with respect to Younger is a different analysis than the analysis that has to be made currently under Morgan and it's a different standard.

The Court previously ruled that they have met the threshold showing for an exception to Younger under 12(b)(1). We're done with that at this point.

What we are arguing about today and what we urge the Court to consider is that the standard for bad faith under Morgan is a different standard than the standard for bad faith that the Court analyzed under 12(b)(1) for Younger, and so there must be another decision made under the standards of proof that are required for those doctrines.

And what I would urge is that under the authority that I did read out and under the standard of Morgan itself, plaintiffs have not met that threshold showing, and so I am not in any way asking you to dispute or take issue with that prior showing. I am simply saying that at this stage for this purpose plaintiffs have not met the required showing to move forward with what they're seeking at this time.

May I have a moment, Your Honor?

THE COURT: Sure.

MS. FREDERICKS: Does the Court have any further questions for me with respect to that point or any other?

THE COURT: I don't, I don't, thank you. What I'm going to do is I'm going to take a brief recess of hopefully no more than ten minutes, and then I'll come back out and issue my decision.

(Recess was taken).

THE COURT: Okay. Let me first state where I think the law is on this, which is, as I think everybody indicates, very unsettled with no clear guidance from any case, and then I will turn to the -- ultimately what I'm going to do in this case, which will probably make neither side happy, but I hope balances the competing interest in this case.

There is essentially two immunities that are -- two sets of immunities that are at issue here. The first is absolute immunity. And here, as I indicated in oral argument, both sides have presented me with cases that I think set forth truth as to where the law is right now, but don't cover the exact situation, and I don't fault the parties for that. I think the parties put quite a bit of time in this and cited the most applicable cases that they could find, but unfortunately, we're in, I think, unchartered territory. So I don't make any of this as a criticism to the parties, because I think that the briefing was good, the argument was very helpful here today. We're just in

unchartered territory.

And the two truisms are, one, that absolute or qualified immunity applies to an individual in their individual capacity, but not to an individual in their official capacity, and, two -- and that's the defendants' position. And two, that when an individual is sued in their individual capacity and cites qualified or absolute immunity, that discovery should be stopped, and that's the plaintiffs' position. And I think both of those are very settled principles of law.

But what happens when we have what we have here, which is an individual is sued in their official capacity and they are granted absolute immunity or assert absolute immunity? And I don't think it much matters the difference between the two, because I don't agree with the distinction plaintiff is trying to make, which is once we have a decision the protections from discovery simply go away.

And here I equate it to an individual, because they're sued in their official capacity is essentially being -- it's essentially the State being sued. And there needs to be some level of discovery that occurs to know why the State made its decision, but I think some of the protections at least, or at least some of the rationale for why the immunity doctrine is there to begin with, which is to allow -- and why discovery is stayed when the immunity is

raised, which is that these are governmental officials and discovery can be disrupted, I think that that rationale still holds to some extent.

And so my ultimate decision today attempts to balance those two competing concerns, which is to protect officials from disruptive discovery and to still allow discovery into the rationale of the State's decision.

The second immunity that is at issue is the deliberative process or mental process privileges. And as both sides indicate, those can be qualified, and one way in which those can be qualified is if there is a finding of bad faith. And here I think that Judge Daniel has made that finding. Now, I agree with the defendants that it was based on a different standard of the -- based on the pleadings in the complaint. And in certain cases that could be a very important distinction.

I'll go back to one of the examples I used earlier, which is the situation where I'm sued by a pro se plaintiff. The pro se plaintiff may be able to avoid a motion to dismiss by sufficiently alleging that I am bias, yet in order to get -- to get past the mental process or deliberative process privilege, in order to get to my communications with my law clerks, they need to show more and submit something that shows that I have the biases that alleged in the complaint. And so I agree with defendants that those are different

standards.

The problems that the defendant has here is the findings that Judge Daniel makes on page 20 and 21 is largely based on undisputed facts in this case, and as a result, while the standards are different, I think they're met under -- I think Judge Daniel opinion concludes essentially that they're met under either standard. And so as a result, then, we get into a situation where the need for the evidence needs to be balanced against the government's interest in confidentiality.

And then I go back to the Metro Pony case that says this is ultimately what the Court needs to do is balance this protection that is at issue with the need for the information, and so how do we do that? And this is how I am going to do it.

I am going to deny plaintiffs' request without prejudice to depose the commissioners, and I am going to deny -- well, deny it in part with prejudice and in part without prejudice. I'm going to deny it with prejudice to the extent that plaintiff seeks to inquire into the commissioners' personal feelings about religion, about gay rights, about the topics that are -- underlie the competing Fourteenth Amendment and First Amendment issues here.

And I do so because I think that there is strong precedent and there must be strong precedent that somebody

acting in either a prosecutorial or a judicial capacity must have the ability to set aside those personal beliefs in order to fairly make a prosecutorial or a judicial decision. And I think absent some finding, some clear showing, which we don't have here, that these commissioners in -- that were involved in this decision have a personal animosity or personal belief that is so strong that it could not be overcome in making a decision in this case, that I am not going to allow discovery into those personal thought processes. I think that creates a very dangerous precedent and I think that it will discourage individuals from going into prosecutorial positions, judicial positions, quasi-prosecutorial or quasi-judicial positions, because to subject your own personal beliefs to such a deposition where there has been no showing that these commissioners made a decision based upon those personal beliefs I think will discourage that.

I am going to deny it without prejudice to questioning these commissioners on decisions, discussions that they had about this particular case, similar cases, however we define that, and because I'm denying it without prejudice, I need not define it here today, or plaintiff in general. And I'm doing that because I'm attempting to balance the concerns of avoiding disruptive discovery, which is at the heart of an immunity protections, with the needs of plaintiff in this case.

Right now what I know is that the one side of this, which is the avoiding disruptive discovery, weighs in favor of not allowing that discovery. What I don't yet know is the need for that discovery because we're not far enough along in this case yet, which turns to what I am going to allow.

I am going to allow a 30(b)(6) deposition that goes into the rationale for the decision that was made and any conversations that the commissioners had with each other outside of open meetings and exclusive of attorney/client communication. So they can't ask about attorney/client communications. They can ask about discussions that are had in open meetings, but those are -- that's in an open meeting, so presumably they already have that; but any conversations that occurred between commissioners outside of the open meetings I'm going to allow, and I'm going to do it because, one, I think that the relevance of that, if it exists, is relevant. If there are discussions that the commissioners are having about why they are making a certain decision, that goes potentially to the heart of the case.

That coupled with the bad faith that again I believe Judge Daniel has found, overweighs any privilege because, one, the privilege may very well be waived by the fact that discussion shouldn't have occurred because it violates the Colorado's Open Meetings Law, and two, to the extent it's not waived, it's minimized because the purpose of

the Open Meetings Law is that all such discussions should be occurring in open meetings and not behind closed doors.

Now, there may not be any discussions. This commissioner may have completely complied with the Open Meetings Law in which case there are no such discussions and the answer in the 30(b)(6) is, We haven't had any; but to the extent that there have been, then I think that's waived.

I encourage, but I'm not making a finding on this, for the 30(b)(6) deponent to also be prepared to address discussions that any of the commissioners may have had with third parties exclusive of things such as a spousal privilege that would apply.

I don't know the answer to this, which is why I'm not making a finding. It may be that there were no such discussions or very limited such discussions such that a 30(b)(6) witness would be able to get up to speed on any such discussions. If that's the case, and the 30(b)(6) witness is capable of answering any questions about discussions that commissioners -- and I'm talking current commissioners, the defendant commissioners -- had about this case, then -- and they're able to answer all of those, then I would be less inclined to open back up the commissioners to depositions in this case on those topics.

On the other hand, I recognize that if we're talking hundreds of conversations such that a 30(b)(6)

witness cannot be prepared to answer that, then they can simply say it's overly broad, I cannot answer that question; but this why I'm denying without prejudice the questioning of the commissioners because then I think that this topic may be relevant to the extent that they're discussing with third parties, plaintiff or this case, and if they are, I don't see how that's privileged because it's certainly not the deliberative process.

And with respect to the absolute immunity, again what I think I need to do with where we are on absolute immunity is balance the need for it versus the relevance for it, and I think that that information could be relevant and there could be a need for it, but I'm trying to balance that with the protection, and here the protection I think is more limited because it's discussing it with third parties as opposed to part of a deliberative process.

Because documents have been discussed in this case, if there are any documents that are communications between commissioners, e-mails or correspondence not protected by the attorney/client privilege, then I'm ordering those to be produced because, again, I think that they shouldn't have occurred -- again, these are between commissioners, nonattorney client privileged -- they shouldn't have occurred, clearly relevant, and so weighing the relevance of them, which I think is relevant -- and again, these are

communications that talk about plaintiff or this case -- they're relevant and the privilege is diminished if not waived entirely because it shouldn't have occurred outside the Open Meeting Law.

Now, again, there may not be any. If they completely complied with the Open Meeting Law there wouldn't be any, but if there are any, I'm ordering those to be turned over. They can't be withheld on the deliberative process protection.

So that is ultimately how I am attempting to strike the balance in this case. I recognize it may require us going back to the deposition of the commissioners at some point, but I think I need more information in order to evaluate the need for that information because I don't know what is going to be produced in the documents that are going to be turned over and what is going to come out in the 30(b)(6), and I think I need to see that first before I can properly balance that last component of this, which is the need to actually depose the commissioners.

But again, absent something coming out in the discovery here that shows that any of the commissioners acted upon, made their decision based upon a bias that they had, I'm not going to allow the subjective -- their subjective personal beliefs on any of this, okay.

Any need for clarification of my order here today?

MR. CAMPBELL: Just to make sure it picks up, Your Honor. One point of clarification is when you were talking about inquiries that could be made and documents that should be produced, you talked about communications between commissioners about plaintiffs, this case, or the pending state proceeding?

THE COURT: Correct, correct.

MR. CAMPBELL: What about -- so -- just so that -- and then you had a separate statement about the statements that they would make with third parties.

THE COURT: Right.

MR. CAMPBELL: And you said both of the -- so I guess my one question is, on the document production, I think you were clear on the 30(b)(6) deposition that we could ask to inquire about the communications with third parties. How does that fall on the -- on the communications involving a commissioner and a third party and a document? Is that something that you believe should be produced?

THE COURT: Let me ask, Are there any such documents?

MS. FREDERICKS: I think if they exist, they're already being produced.

THE COURT: Okay, all right. Well, there is the answer, then, they're being turned over already.

Any clarification from the defendants?

MR. SULLIVAN: Yes, Your Honor, thank you. Grant -- this is Grant Sullivan, assistant solicitor general for the state officials. Your Honor, you said that -- on the 30(b)(6) representative, I heard you to say that you're allowing inquiry in two areas, one the rationale for the decision. Do I understand Your Honor's ruling to be you're only allowing inquiry into kind of the objective manifestations of the rationale? So if there is a memo that one of the commissioners prepared or that division staff prepared or there is a transcript from one of their hearings, inquiry into those topics is allowed, but I understood Your Honor's ruling to disallow questions about their subjective feelings about why they might have voted one way or another.

And just to be clear, there is a transcript of the hearing. I don't know if it has been prepared, but there is certainly a recording of the hearing where commissioners voted to proceed with this case in the state hearing. It's currently protected by Colorado's Executive Session Law, so I have a question about that as well if you're trying to pierce that privilege.

THE COURT: I am going to order that document because I think that that document is necessary to get to the rationale behind the prosecutorial decision. At this point I'm going to leave the 30(b)(6) to the objective basis for the decision as well as any communications that may have

occurred.

MR. SULLIVAN: Sure.

THE COURT: I am not ruling out the possibility once we get through that of allowing some inquiry into subjective basis for each individual commissioner decision, but I think -- I need to see where this first round of discovery gets us and to whether or not there is a need for that further inquiry.

MR. SULLIVAN: Understood. And then the -- I think Your Honor cleared up my second point. So you're allowing -- the second point was any conversations amongst the commissioners --

THE COURT: Right.

MR. SULLIVAN: -- which again, there should be no, if Open Meetings Law has been complied with, but you're also allowing inquiry amongst conversations between a commissioner and a third party?

THE COURT: What I'm doing with that is I'm finding that no privilege prohibits that.

MR. SULLIVAN: Right.

THE COURT: I'm not reaching whether or not the separate question of whether it's overly broad to be conducted in a 30(b)(6) is a proper objection to it. That's something that you may want to waive because, as I indicated, if -- if it is, if there is too many conversations to have --

MR. SULLIVAN: Right.

THE COURT: -- I'm not saying I will, but I may very well down the road then say, okay, fine, these are clearly relevant and now the burden on the commissioner -- on each individual commissioner is outweighed by the need to get this information and I'm going to allow the individual commissioner's deposition; but I don't know, it could be that none of the commissioners have talked about this case, you know, other than to their spouse, and, therefore, there aren't any communications.

MR. SULLIVAN: Right.

THE COURT: It could be that somebody is walking around having, you know, everybody they meet, they say, Hey, I'm on the Masterpiece Cake case and you want to know my personal thoughts? I just don't know where we are at this point on that and so that's -- that -- the overly burdensome for a 30(b)(6) I'm not deciding yet --

MR. SULLIVAN: Understood.

THE COURT: -- because I don't know the answer to that question.

MR. SULLIVAN: Understood.

THE COURT: Okay.

MR. SULLIVAN: That's all I had --

THE COURT: Okay.

MR. SULLIVAN: -- as far as clarifying. We do have

a couple housekeeping matters.

THE COURT: Okay.

MR. SULLIVAN: But --

MR. CAMPBELL: One more clarifying point. Thank you, Your Honor. One thing that the defendants talked about was that they produced or that we already had access to the administrative file. A number of things that were provided to us so far, and it might be that what they're going to produce today isn't similarly redacted, but, for example, there is a communications log. It's part of the administrative file that has names and other information redacted. I'm just -- I'm wondering how your order applies to that.

THE COURT: I don't -- I don't know what's redacted or why. I think I've made clear my view of the balancing here. And so if -- if -- it's going to apply to the documents too, so if that affects anything that has been redacted, the defendant should unredact it. If it doesn't or if they're being redacted on other grounds and there needs to be a -- you know, you need me to conduct an in-camera review, we'll get there, but I can understand that things may have been redacted prior to today that now given my ruling aren't redacted anymore, but I don't know the answer to that because I don't know the grounds for that.

MR. CAMPBELL: Your Honor, that's absolutely fair.

And then just one other point that we know of a document that's out there that we haven't received yet is a draft of the proposal cause determinations. The e-mail communications, the log that the Division has indicated that it went through some -- some drafting, and so that's something that we requested in our written discovery request and I'm just curious to where that might fall in what you've said today.

THE COURT: I'll hear brief argument from each side on that.

MS. FREDERICKS: With respect to the first point that counsel raised, the redacted log, that wasn't produced by us. That's something that was produced in the underlying administrative case. Our production is forthcoming today, and so I think it would be premature to make any rulings with respect to that until we see what we've actually produced, and then if there was some privilege asserted, address it point by point. I don't anticipate that the particular item he's discussing would bear redactions in our production. So that's first point.

As to the second point, the draft of the probable cause is protected by attorney/client privilege and attorney work product. Billy Seiber is counsel to the Commission. He's an AAG with the Office of the Attorney General, and he provided and weighed in on specific language, and so I

believe that that is very clearly well protected by both his attorney/client privilege with respect to communications between and amongst himself and his client seeking advice as well as it is his work product weighing in on the probable language.

THE COURT: Okay. Then at least preliminarily I'm going to find that it's covered by attorney/client and work product. If you think that that's improperly being withheld on that, we can address that at a different time.

MR. CAMPBELL: Okay.

THE COURT: Okay. All right.

MR. SULLIVAN: Your Honor, if we could address a couple housekeeping matters.

THE COURT: Sure.

MR. SULLIVAN: So one issue, I will have to confer my clients, I don't know if we'll want to seek Judge Daniel's review of your ruling today, but in the event that we did, could we ask that the briefs that have been submitted to you by e-mail be filed on the docket?

THE COURT: Sure, sure.

MR. SULLIVAN: Thank you, Your Honor. The other issue is counsel has been negotiating a protective order in advance of today's production. I think we have a couple issues we're going to discuss after today's hearing. Hopefully we can reach agreement on those issues --

THE COURT: Okay.

MR. SULLIVAN: -- and then will file it for Your Honor's entry.

THE COURT: It will need to get referred to me, but when they do, we turn them around in a day or so, so it will be in place soon.

MR. SULLIVAN: Great, thank you, Your Honor.

THE COURT: Okay.

MR. CAMPBELL: Nothing else from me.

THE COURT: All right. Thank you everybody, appreciate it.

(Whereupon, the within hearing was then in conclusion at 12:38 p.m.)

CERTIFICATE OF TRANSCRIBER

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/ Dyann Labo — February 8, 2019

Signature of Transcriber — Date

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.

DECLARATION OF DAVE WILLIAMS

I, Dave Williams, declare as follows:

1. I am over the age of 18, am competent to testify, and make this declaration based on my personal knowledge.

EXHIBIT C

2. I am a State Representative on the Colorado General Assembly and am concerned about the Colorado Civil Rights Commission's treatment of Jack Phillips and Masterpiece Cakeshop.

3. As a result of that concern, sometime after this case was filed, I sent a message through Facebook to one of the current commissioners of the Colorado Civil Rights Commission.

4. On November 26, 2018, that commissioner called me on the phone and left a voicemail.

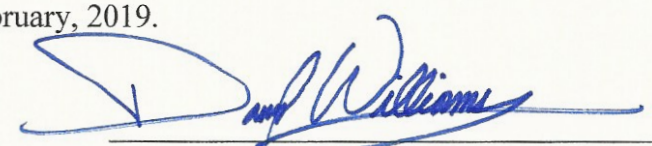
5. The following day, I returned that commissioner's call, and we spoke for about 20 minutes.

6. During the call, that commissioner said that they believe there is anti-religious bias on the Commission.

7. Also during the call, that commissioner expressed a willingness to speak publicly about this anti-religious bias, but feared what might happen if they did.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed on this the 18th day of February, 2019.



Dave Williams

EXHIBIT C