

**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 capacity;
ANTHONY ARAGON, as member of the Colorado Civil Rights
Commission, in his official capacity;
MIGUEL "MICHAEL" RENE ELIAS, as member of the Colorado Civil
Rights Commission, in his official capacity;
CAROL FABRIZIO, as member of the Colorado Civil Rights
Commission, in her official capacity;
CHARLES GARCIA, as member of the Colorado Civil Rights
Commission, in his official capacity;
RITA LEWIS, as member of the Colorado Civil Rights Commission, in
her official capacity;
JESSICA POCOCK, as member of the Colorado Civil Rights
Commission, in her official capacity;
AJAY MENON, as member of the Colorado Civil Rights
Commission, in his official capacity; and
PHIL WEISER, Colorado Attorney General, in his official capacity,

Defendants.

**PARTIES' JOINT REPORT CONCERNING PROPOSED DATES FOR FILINGS AND
AN EVIDENTIARY HEARING IN CONNECTION WITH PLAINTIFFS' AMENDED
MOTION FOR PRELIMINARY INJUNCTION**

The parties submit this joint report in response to the Court's minute order instructing them to indicate by January 11, 2019, a set of proposed "dates for the filing of an amended motion for preliminary injunction, response to the amended motion for preliminary injunction, reply to the motion for preliminary injunction, dates for a possible evidentiary hearing on the motion for preliminary injunction, and time necessary for the hearing." Minute Entry, Doc. 90.

Plaintiffs proposed the following schedule to Defendants: (1) Plaintiffs file their amended motion for preliminary injunction by January 18, 2019; (2) Defendants file their response to that motion by February 1, 2019; (3) Plaintiffs file their reply by February 8, 2019; and (4) an evidentiary hearing on that motion, which the parties expect to last no longer than two days, be set for the week of February 25, 2019.

In response, Defendants proposed the following schedule: (1) Plaintiffs file their renewed motion for preliminary injunction by January 18, 2019, (2) Defendants file their response to that motion by February 8, 2019, (3) Plaintiffs file their reply by February 15, 2019, and (4) an evidentiary hearing on that motion, which is not expected to last longer than two days, be set for the week of March 11, 2019.

Plaintiffs will agree to Defendants' timeline (with the one change discussed below) if the parties are allowed to conduct discovery before the hearing on the motion for preliminary injunction. Plaintiffs have requested that the parties be allowed to conduct discovery before that hearing. *See* Joint Proposed Scheduling Order at 8-9, 12, Doc. No. 95; Transcript of Dec. 18, 2018 Hearing at 75 & 91 (Ex. A) (contemplating that the parties might conduct expedited discovery). In response, Defendants say that general discovery (*i.e.*, not expedited discovery related only to Plaintiffs' narrowed request for preliminary relief) should not begin until after the preliminary-injunction hearing. *See* Joint Proposed Scheduling Order at 9, 13, Doc. No. 95.

Defendants further say that the parties should be allowed to conduct limited expedited discovery related solely to Plaintiffs' narrowed request for preliminary relief, provided that each files a motion disclosing in detail what limited discovery they would like to obtain and the reasons why such discovery is legally permissible given the prosecutorial and adjudicative roles of the Defendants. The parties will discuss these discovery issues with the Magistrate Judge at the scheduling conference on January 15, 2019. If the parties are allowed to engage in discovery, whether general or limited expedited, before the preliminary-injunction hearing, Plaintiffs agree that it makes sense to push back that hearing until the week of March 11. But if they are not, Plaintiffs object to delaying the hearing until then.

The change that Plaintiffs request to Defendants' proposed timeline is that Plaintiffs' due date for their reply brief be changed from February 15, 2019, to February 22, 2019. Defendants' proposal gives themselves the full three weeks allotted under the local rules to respond to Plaintiffs' motion, but it gives Plaintiffs only half the allotted two weeks for their reply. That is unnecessary given Defendants' request that the hearing not occur until the week of March 11. If Plaintiffs file their reply brief by February 22, 2019, the Court would still have the desired "two-week hiatus or gap between when the briefing is finished and when we have the evidentiary hearing." Transcript of Dec. 18, 2018 Hearing at 90-91 (Ex. A).

Defendants agree to February 22, 2019 as Plaintiffs' due date for their reply brief provided that the parties' briefs on the amended preliminary injunction motion are limited to legal argument only and do not reference or attach any factual information or documents obtained during the limited expedited discovery window. This is consistent with the Court's direction that the hearing on Plaintiffs' amended motion for preliminary injunction be an evidentiary one and its express rejection of the parties' ability to proffer only affidavits or

declarations in support of or opposition to Plaintiffs' narrowed request for preliminary relief. Transcript of Dec. 18, 2018 Hearing at 81-82 (Ex. A); Minute Entry, Doc. 90. If the Court permits limited expedited discovery, Defendants propose that the window for conducting such discovery be set as follows: limited expedited discovery related only to Plaintiffs' narrowed request for preliminary relief opens on January 19, 2019, and closes on February 22, 2019.

Plaintiffs do not agree to forfeit their right to reference any information or attach any document that they possess now or in the future in support of their amended motion for preliminary injunction or any associated briefing. And in response to Defendants' proposed discovery window, Plaintiffs propose that general discovery should open January 16, 2019—the day after the scheduling conference—and that the parties be allowed to simultaneously pursue limited expedited discovery before the hearing on the amended motion for preliminary injunction. *See* Joint Proposed Scheduling Order at 8-9, 12, Doc. No. 95. Plaintiffs also do not agree to Defendants' request that Plaintiffs be required to file a motion to obtain discovery, which is part of the parties' dispute regarding the scope, timeline, and procedure related to any limited expedited discovery—a dispute set forth in the parties' Joint Proposed Scheduling Order (Doc. No. 95) and which they anticipate discussing during the upcoming scheduling conference before the Magistrate Judge.

Respectfully submitted this 11th day of January, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2019, the foregoing was filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

MASTERPIECE CAKESHOP, INCORPORATED, a
Colorado corporation, et al.,

Plaintiffs,

vs.

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

Defendants.

REPORTER'S TRANSCRIPT
MOTIONS HEARING

Proceedings before the HONORABLE WILEY Y. DANIEL,
Judge, United States District Court for the District of
Colorado, commencing at 10:03 a.m. on the 18th day of
December, 2018, in Courtroom A1002, Alfred A. Arraj United
States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiffs:

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Denver, CO 80294, (303)296-3056 (CA CSR No. 9162)

Proceedings reported by mechanical stenography;
transcription produced via computer.

1 (Proceedings commenced 10:03 a.m.,
2 December 18, 2018.)

3 THE COURT: All right, have a seat. This is
4 18-cv-2074, Masterpiece Cakeshop, Incorporated, a Colorado
5 corporation, and Jack Phillips versus Aubrey Elenis, Director
6 of the Colorado Civil Rights Division in her official and
7 individual capacities, and others.

8 Would counsel enter their appearances.

9 MR. CAMPBELL: Your Honor, James Campbell on behalf
10 of the plaintiffs.

11 MR. WARNER: Your Honor, Jake Warner on behalf of the
12 plaintiffs.

13 THE COURT: All right.

14 MS. MORRILL: Good morning, Your Honor. First
15 Assistant Attorney General LeeAnn Morrill on behalf of the
16 State officials. With me at counsel table is Assistant
17 Solicitor General Grant Sullivan, Senior Assistant Attorney
18 General Jacqueline Rich Fredericks, and Senior Assistant
19 Attorney General Vincent Morscher.

20 THE COURT: All right. Good morning to all of you.

21 So let me tell you what we're going to do. As you
22 know, there are two motions that we are going to address. One
23 is the motion to dismiss filed by the defendants, and then we
24 have a motion for preliminary injunction -- maybe it's
25 preliminary and permanent injunction, but I'm treating it as a

1 motion for preliminary injunction -- filed by the two
2 plaintiffs. But before we get into that, I want to raise a
3 preliminary matter.

4 As you know, the First Amended Verified Complaint
5 alleges allegations against both Governor Hickenlooper and
6 Attorney General Coffman. And, of course, Hickenlooper is
7 term limited, and he goes out of power on January 3rd, 2019,
8 as does Attorney General Coffman.

9 So this is a question for plaintiffs' counsel. Is
10 there any reason why Governor Hickenlooper should not be
11 dismissed from this case? Because you are alleging things
12 against him in a way that requests prospective relief, and
13 there's no way that he personally could provide prospective
14 relief because he will be replaced by Governor Elect Polis.
15 And as part of your allegations against Hickenlooper, you note
16 that he was responsible for appointing all the current
17 commissioners of the Colorado Civil Rights Commission. So
18 when I looked at all this, it doesn't make any sense that he
19 should remain in the case, but I don't see how you could
20 substitute the Governor Elect for him going forward. So what
21 are your thoughts about whether or not he should just be
22 dismissed from the case at this time?

23 Go to the lectern --

24 MR. CAMPBELL: Sure.

25 THE COURT: -- please.

1 MR. CAMPBELL: Thank you, Your Honor. Our view on
2 that is I would focus specifically on the fact that we have
3 challenged what we refer to as the discriminatory selection
4 criteria for commissioners. So because we are challenging
5 those and we are challenging the way that they are selected,
6 for purposes of that claim the new governor should be
7 substituted in for Governor Hickenlooper.

8 THE COURT: All right. So we'll take all that up
9 when we get to that portion of the argument.

10 Regarding the Attorney General, I'm less concerned
11 about her because I think there could be a substitution to
12 Mr. Weiser when he becomes the Attorney General.

13 All right. Did the defendants have anything to say
14 about that on a preliminary matter? If not, we can wait and
15 deal with that when we get to the allegations that address the
16 claims against those two State officials.

17 MS. MORRILL: No, Your Honor, not at this time.

18 THE COURT: All right. Okay.

19 So let me review a little history on this case
20 because I want to make sure we are all on the same page, and
21 then we'll talk about these abstention doctrines which are
22 raised by the defendants in their motion to dismiss.

23 So, as you know, by way of background, the plaintiffs
24 filed a Complaint against the defendants on August 14, 2018,
25 basically alleging that defendants violated plaintiffs' First

1 Amendment rights of free exercise of religion and free speech
2 and plaintiffs' Fourteenth Amendment rights of due process and
3 equal protection related to the defendants' decision to file a
4 probable cause determination against plaintiffs for refusing
5 to create a custom cake after learning the cake would be used
6 to celebrate a transgender birthday.

7 Defendants filed a motion to dismiss on October 10,
8 2018, ECF number 43, but soon thereafter plaintiffs filed an
9 Amended Complaint on October 23rd, 2018. That's ECF number
10 51. Therefore, I denied the first motion to dismiss as moot
11 on October 24, 2018, ECF number 54.

12 Now, the parties have already engaged in extensive
13 discovery disputes. Defendants sought to stay discovery
14 pending the resolution of the motion to dismiss, ECF number
15 48. Defendants also filed a motion to prohibit plaintiffs
16 from using Colorado's Open Records Act to request documents
17 from defendants. Magistrate Judge Varholak granted
18 defendant's motion to stay but denied defendants' motion to
19 prevent plaintiffs from requesting records pursuant to the
20 Colorado Open Records Act or CORA. And then that order has
21 been timely appealed to me. I'm not going to deal with that
22 today, but I just want to note that by way of history.

23 So I want to talk a little bit about some of the
24 things that are raised in the pending litigation, and then
25 after that we are going to take up these abstention requests

1 from the defendants. Now, I've looked at all that, and I've
2 got some strong leanings about whether any of that applies,
3 but we will make a record on some of that and not all of it.
4 And we are going to spend more time today probably on the
5 motion for preliminary injunction than the motion to dismiss,
6 but I'm not going to make a final ruling on anything because
7 my instincts tell me that at some point whatever I do is
8 probably going to be appealed, so whatever my final decisions
9 are I probably need to reduce them to writing so that all of
10 my rationale is fully stated. Okay.

11 So going back to the chronology here, on June 26,
12 2017, the same day the United States Supreme Court granted
13 certiorari to hear *Masterpiece I*, which relates to events that
14 started in 2012 and sort of bubbled up in 2013, Autumn
15 Scardina, an attorney, called Masterpiece to request a cake
16 with a blue exterior and pink interior to celebrate her
17 transition from male to female. And that's noted at
18 Complaint, paragraph number 186. Scardina intended the cake
19 to be a birthday cake for her transition. And that, again,
20 that's in the Complaint, paragraphs 203 and 204. Masterpiece
21 declined to make the cake because the message conveyed by the
22 cake conflicted with Phillips's religious beliefs about
23 gender, that sex cannot be changed or chosen. And that's
24 Complaint, paragraphs 187 through 191. The cake would have
25 been displayed at Scardina's birthday of her gender transition

1 and would have communicated to viewers that Phillips approved
2 of the transition. That's paragraph 192 of the Complaint.

3 When I say "Complaint," I'm talking about in all
4 instances the First Amended Complaint, just so everybody is
5 clear.

6 Phillips declined to make the cake because of the
7 message the cake would have conveyed. That's paragraph 194.

8 Now, about a month after refusing to make the cake,
9 the Colorado Civil Rights Division informed Phillips that a
10 discrimination charge had been filed against him alleging that
11 he violated Colorado's anti-discrimination statute by
12 discriminating against Scardina because of her sex and
13 transgender status. That's Complaint, paragraphs 200 to 204.
14 Phillips responded to this charge by stating that he declined
15 to create the cake because of the message Scardina wanted to
16 portray. He also explained to Scardina that Masterpiece would
17 have sold her any premade cake or cakes. Paragraph 208 of the
18 Complaint.

19 Now, on June 28, 2018, or just 24 days after the U.S.
20 Supreme Court had announced its decision in *Masterpiece I* --
21 and I'm going to come back to some of what *Masterpiece I* talks
22 about because I think it has more significance than the
23 defendants want to give it at this time, and I think some of
24 what happened in *Masterpiece I* has a direct bearing on my
25 thoughts about what are viable claims and/or defenses in this

1 case. And, again, I'll come back to that. But going --
2 following up on what I just started to say, on June 28th,
3 2018, or 24 days after the U.S. Supreme Court announced its
4 decision in *Masterpiece I*, the Commission -- or strike that --
5 the Division issued a probable cause determination against
6 Phillips finding that there was probable cause to believe he
7 violated the anti-discrimination statute by refusing to make
8 the cake Scardina requested. And that's paragraphs 211 to
9 218.

10 On October 2nd, 2018, the Commission, and again
11 that's the Civil Rights Commission, voted to notice this
12 matter for a hearing and to file a formal complaint against
13 Phillips. Paragraph 228 of the Complaint. The Commission
14 could have declined to file a formal complaint, and if it had
15 done so, Scardina could have filed a civil action on her own
16 behalf. That's paragraph 229. Phillips alleges the
17 Commission acted in bad faith in issuing the probable cause
18 determination by disregarding comments made in *Masterpiece I*,
19 by ignoring Colorado's practice of treating the three other
20 bakeries differently, by disregarding what Colorado
21 represented to the U.S. Supreme Court in *Masterpiece I* that
22 cake artists may decline to bake cakes with pro-LGBT messages,
23 and by reciting a one-sided probable cause determination that
24 ignores the facts asserted by Phillips. And that can be found
25 at paragraphs 220 to 223 and paragraph 229.

1 Phillips alleges that he feels prohibited from
2 posting on Masterpiece's website communications that would
3 disclose some of the messages he cannot express through cake
4 making because of his religious beliefs and that would discuss
5 his religious beliefs that compel him not to express those
6 messages. That's paragraphs 268 and 269. He further alleges
7 that Colorado's interpretation of C.R.S. Section
8 24-34-601(2)(a) and C.R.S. Section 24-34-701 has chilled his
9 speech on Masterpiece's website and his comments in the media
10 about the messages that he will not express through his cakes
11 because of his religious beliefs. Paragraph 281.

12 So, as you know, a hearing before an administrative
13 law judge is scheduled for Monday, February 4, 2019. The
14 Commission alleges that Phillips denied service to Scardina
15 based on her sexual orientation, transgender status, as
16 defined by Section 24-34-301(7), C.R.S. 2018, and violation of
17 24-34-601(2)(a).

18 Now, we will get into some of that a little bit
19 later, but obviously the gravamen or essence of what plaintiff
20 is seeking through the motion for injunctive relief is for
21 this Court to, in effect, not allow the February 4th hearing
22 to go forward. And we'll get to that later.

23 As I previously noted, Governor Hickenlooper is
24 responsible for selecting the Commission members. He has
25 appointed many Commission members who are openly -- alleged to

1 be openly hostile to or opposed to Phillips, his religious
2 beliefs, and his religious practices. And that's at paragraph
3 298.

4 All right. So we'll talk more about all of these
5 state statutes, and I've got my book here, and I've read them,
6 and we'll see if we can explain what they mean, but the claims
7 asserted in the First Amended Verified Complaint are as
8 follows:

9 Claim one is violation of the plaintiffs' First
10 Amendment right to free exercise of religion. Claim two is
11 violation of plaintiffs' First Amendment right to freedom of
12 speech. And the third and fourth complaints are violation of
13 defendant's [sic] First Amendment right to due process --
14 strike that, not First Amendment, excuse me -- Fourteenth
15 Amendment right to due process and violation of his Fourteenth
16 Amendment right to equal protection. So we will talk about
17 what all those mean as we go along.

18 So what I want to take up first are some things that
19 are noted in the motion to dismiss. And I should note that on
20 November 6th, 2018 defendant filed a motion to dismiss
21 Phillips's claims pursuant to Federal Rule of Civil Procedure
22 12(b)(1). Now, the motion to dismiss is brought, as I just
23 said, pursuant to Federal Rule of Civil Procedure 12(b)(1). A
24 motion to dismiss for lack of subject matter jurisdiction
25 under 12(b)(1) must consist of either a facial or a factual

1 attack on the complaint. A facial attack on the complaint's
2 allegations as to subject matter jurisdiction questions the
3 sufficiency of the complaint. A facial attack happens when a
4 defendant files a Rule 12(b)(1) motion without accompanying
5 evidence. In reviewing and considering the allegations of
6 the -- of the Complaint regarding this motion to dismiss, I
7 must accept as true the allegations in the Complaint when
8 reviewing a facial attack.

9 All right. So as the defendants are aware, and all
10 the parties are aware, the defendants have raised basically
11 five grounds for dismissal in their motion to dismiss:

12 First, the Court should abstain due to the ongoing
13 civil enforcement action against plaintiffs in the Colorado
14 Civil Rights Commission.

15 Two, the Division Director and Commissioners are
16 entitled to absolute quasi-prosecutorial immunity from all
17 damages claims arising from the 2017 discrimination charge.

18 Three, the Division Director and Commissioners are
19 entitled to qualified immunity for all damages claims arising
20 from the 2017 discrimination charge.

21 Four, the Governor and the Attorney General are
22 protected by the Eleventh Amendment due to their
23 nonparticipation in the civil enforcement action.

24 And, five, plaintiffs lack standing to challenge
25 Section 24-34-701 because they fail to allege any injury

1 related to the enforcement of the statute.

2 So what we are going to take argument on first have
3 to do with these abstention doctrines that have been raised by
4 the defendants. Defendants argue this Court should abstain
5 from hearing this case based on four different abstention
6 doctrines. They are *Younger*, *Pullman*, *Burford*, and *Colorado*
7 *River*. Now, the *Younger* doctrine involves mandatory
8 abstention, while *Pullman*, *Burford*, and *Colorado River* involve
9 discretionary abstention.

10 Now, without going into a lot of detail, I want to
11 just note this about the *Younger* abstention doctrine. *Younger*
12 abstention remains an extraordinary and narrow exception to
13 the general rule that federal courts have no more right to
14 decline the exercise of jurisdiction which is given than to
15 usurp that which is not given. And there's case law to
16 support everything I'm saying.

17 Pursuant to the abstention doctrine set out in
18 *Younger versus Harris*, that's 401 U.S. 37, 1971, decided by
19 the Supreme Court, quote: "Even when a federal court would
20 otherwise have jurisdiction to hear a claim, the court may be
21 obliged to abstain when a federal court judgment on the claim
22 would interfere with an ongoing state proceeding implicating
23 important state interests."

24 Now, a federal court must abstain from hearing a case
25 pursuant to *Younger* where three conditions are met: 1, there

1 are ongoing state criminal, civil, or administrative
2 proceedings; 2, the state offers an adequate forum to hear the
3 federal plaintiffs' claims from the federal lawsuit; and, 3,
4 the state proceeding involves important state interests,
5 matters which traditionally look to state law for their
6 resolution or implicate separately articulated state policies.

7 Now, looking at all the briefing on this, while
8 plaintiffs don't concede that these three factors are met, it
9 seems like they are willing to acknowledge that they have been
10 met. But the one -- and by the way, there are two exceptions
11 then that the plaintiffs are raising. Plaintiff Phillips
12 argues -- and this is really Phillips. Phillips argues that
13 two exceptions to the *Younger* abstention doctrine apply. The
14 first is the extraordinary circumstance exception due to
15 defendants' bias and the bad faith exception.

16 Now, as I've looked at this, I'm not so sure I agree
17 that there is bias and, if it is, whether or not it's an
18 appropriate exception, but I find more merit in the bad faith
19 exception, and that's what we are going to actually talk
20 about. And let me just talk about what is meant by bad faith,
21 and then after I do that, we will then hear some argument
22 because I'm tired of hearing myself talk. All right.

23 So when we talk about bad faith -- okay. All right.
24 One exception to the application of *Younger* occurs when the
25 civil proceeding commenced is in bad faith or to harass. And

1 that's supported by *Middlesex Ethics Committee versus Garden*
2 *State Bar Association*, 457 U.S. 423, 435, 1982. So long as
3 there is no showing of bad faith, harassment, or some other
4 extraordinary circumstance that would make abstention
5 inappropriate, the federal courts should abstain. And that's
6 also supported by *Phelps versus Hamilton*, 59 F.3d 1058, 1063,
7 Tenth Circuit 1995.

8 Another exception to the application to *Younger*
9 relates to any such extraordinary circumstance creating a
10 threat of irreparable injury both great and immediate.

11 All right. Now, the bad faith argument really
12 relates to things that are noted in the First Amended Verified
13 Complaint. I'm going to read some allegations that struck me
14 as perhaps satisfying the bad faith exception to *Younger*. And
15 I'm indicating this is a leaning I have, and we'll take some
16 argument on it, but I want to just review a couple of the
17 allegations of the First Amended Verified Complaint.

18 So at paragraph 220 it reads as follows: "Director
19 Elenis acted in bad faith when she made this determination."
20 And that's the determination to find a basis, that is,
21 probable cause for a violation to be asserted against Phillips
22 and his business.

23 221. "Director Elenis disregarded the Supreme
24 Court's holding that Colorado is motivated by 'clear and
25 impermissible hostility toward Phillips's sincere religious

1 beliefs.'" *Masterpiece*, 138 Supreme Court at 1729.

2 Paragraph 222. "Director Elenis disregarded that
3 every Justice in *Masterpiece* who opined on the proper
4 interpretation of Colorado's public-accommodation law
5 indicated that cake artists do not violate that law by
6 declining to create cakes that express messages they will not
7 communicate for anyone."

8 Paragraph 223. "Director Elenis disregarded
9 Colorado's practice of allowing other cake artists to decline
10 requests to create custom cakes that express messages they
11 deem objectionable and would not express for anyone."

12 Paragraph 224. "Director Elenis disregarded what
13 Colorado represented to the Supreme Court, that cake artists
14 may decline to create cakes with pro-LGBT designs, themes, and
15 messages."

16 Paragraph 225. "Director Elenis's decision to
17 disregard the Supreme Court's holding in *Masterpiece*, the
18 Supreme Court's view of Colorado's public-accommodation law,
19 Colorado's practice when enforcing its public-accommodation
20 law, and Colorado's representations to the Supreme Court is
21 explainable only by bad faith and animus toward Phillips's
22 religious beliefs."

23 All right. And then we're going to go next to
24 paragraph 239 of the First Amended Verified Complaint, which
25 reads as follows: "The Commission members acted in bad faith

1 by proceeding with the formal complaint, particularly because
2 the formal complaint provides a one-sided recitation of the
3 facts that ignores practically all of the facts that
4 Masterpiece Cakeshop asserted in response to the charge of
5 discrimination and recounts a version of the facts that is
6 even more favorable to the complainant lawyer than what is
7 stated in the lawyer's charge."

8 And then we have paragraph 244, which reads, quote:
9 "The Commissioner members' decision to disregard the Supreme
10 Court's holding in *Masterpiece*, the Supreme Court's view of
11 Colorado's public-accommodation law, Colorado's practice when
12 enforcing its public-accommodation law, and their own
13 representations to the Supreme Court is explainable only by
14 bad faith and animus toward Phillips's religious beliefs."

15 And, finally, I want to note what's in paragraph 338,
16 which reads: "Director Elenis and Defendant Commission
17 members acted and are continuing to act in bad faith and with
18 hostility and animus toward Phillips and Masterpiece
19 Cakeshop."

20 So at this time I'm going to ask plaintiffs' counsel
21 what else they want to say regarding the record they believe
22 exists to show bad faith and harassment regarding the
23 allegations that have been made in this case.

24 MR. CAMPBELL: Thank you, Your Honor. If I may
25 clarify one point about --

1 THE COURT: Absolutely.

2 MR. CAMPBELL: -- the Court's recitation of our
3 arguments. The Court indicated that our bias argument would
4 only -- only falls under an exception to *Younger*. Actually,
5 our understanding of the case law is that the existence of
6 bias in a pending state proceeding actually nullifies the
7 application of *Younger* so that it's an additional requirement.
8 And we would point this Court specifically to *Gibson versus*
9 *Berryhill* for that proposition. There, there was a *Younger*
10 argument raised, and the court found that *Younger* didn't apply
11 because it said that the pending state proceeding was before a
12 biased administrative tribunal. So just to clarify.

13 THE COURT: Well, since you're on bias, I looked at
14 this. I don't really think there's bias. Why do you think
15 there's bias?

16 MR. CAMPBELL: Well, Your Honor, I would say there's
17 bias for seven factors, but I think they also show bad faith.
18 So I would highlight seven factors in addition to what the
19 Court just cited.

20 THE COURT: What I want to do is focus on bad faith,
21 because I have read all this, and I think that there is a
22 stronger argument that bad faith, as it relates to the
23 Complaint allegations that I must accept as true, may very
24 well exist here, and that's enough to defeat the defendants'
25 attempt to have me not hear the case based on *Younger*

1 abstention. So I really want you to focus on that for now.

2 MR. CAMPBELL: Sure, Your Honor. If I could
3 highlight the seven factors that we think go to bad faith.

4 THE COURT: You may.

5 MR. CAMPBELL: The first is the unequal treatment.
6 The Supreme Court specifically said that one of the indicators
7 of hostility towards Mr. Phillips was the fact that he was
8 being treated differently than other cake artists. And the
9 court specifically highlighted three ways in which he was
10 being treated differently. The first was he was punished
11 while the three other cake shops were not. The second is the
12 State used the fact that the other cake shops would otherwise
13 serve the customer in question as a basis to exonerate them,
14 but in Mr. Phillips's case they dismissed that as irrelevant.
15 And, lastly, the State made Mr. Phillips show that the message
16 of the requested cake in his first case would be attributed to
17 him rather than the customer, but the State completely ignored
18 that factor in the other case, in the case involving the three
19 other cake shops.

20 So this unequal treatment in all three of those ways
21 is continuing in the new proceeding. In the new proceeding,
22 the State is prosecuting Mr. Phillips, which is in direct
23 conflict with what they did in the three other cake shop cases
24 where they dismissed the charges. They are also dismissing as
25 irrelevant the fact that Mr. Phillips would gladly make

1 countless other cakes for the complainant in the pending state
2 proceeding even though, again, they used that factor to
3 exonerate the cake shops in the three other cases. And,
4 lastly, specifically on page 12 of the State's response to the
5 motion for preliminary injunction, they are continuing to
6 insist that Mr. Phillips must show that the message of the
7 cake will be attributed to him rather than someone else.

8 So in all the ways that the State treated
9 Mr. Phillips unequally the first time, they are continuing it
10 again. So that's the first factor, Your Honor, and that's
11 critical.

12 THE COURT: Now, let me just lift up some language
13 from *Masterpiece I*. And this is *Masterpiece Cakeshop versus*
14 *Colorado Civil Rights Commission*, 138 Supreme Court 1719,
15 decided on June 4, 2018. So -- and Justice Kennedy authored
16 this opinion. And I'm focusing now on the majority opinion,
17 although I know there was a concurrence from Justice Gorsuch
18 and some of the other justices that I've read, but I want to
19 focus on what's in the majority opinion.

20 So at page 1730 the Court says the following:

21 "Another indication of hostility is the difference in
22 treatment between Phillips' case and the cases of other bakers
23 who objected to a requested cake on the basis of conscience
24 and prevailed before the Commission.

25 "As noted above, on at least three other occasions

1 the Civil Rights Division considered the refusal of bakers to
2 create cakes with images that conveyed disapproval of same-sex
3 marriage, along with religious text. Each time, the Division
4 found that the baker acted lawfully in refusing service. It
5 made these determinations because, in the words of the
6 Division, the requested cake included 'wording and images the
7 baker deemed derogatory,' and then it cites a reference to
8 the charges in those other matters.

9 But continuing on with the rest of the quote: "The
10 treatment of the conscience-based objections at issue in these
11 three cases contrasts with the Commission's treatment of
12 Phillips' objection. The Commission ruled against Phillips in
13 part on the theory that any message the requested wedding cake
14 would carry would be attributed to the customer, not to the
15 baker. Yet the Division did not address this point in any of
16 the other cases with respect to the cakes depicting anti-gay
17 marriage symbolism. Additionally, the Division found no
18 violation of CADA" -- that's the Colorado Anti-Discrimination
19 Act -- "in the other cases in part because each bakery was
20 willing to sell other products, including those depicting
21 Christian themes, to the prospective customers. But the
22 Commission dismissed Phillips' willingness to sell 'birthday
23 cakes, shower cakes, and cookies and brownies' to gay and
24 lesbian customers as irrelevant. The treatment of the other
25 cases and Phillips' case could reasonably be interpreted as

1 being inconsistent as to the question of whether speech is
2 involved, quite apart from whether the cases should ultimately
3 be distinguished. In short, the Commission's consideration of
4 Phillips' religious objection did not accord with its
5 treatment of these other objections."

6 And that's what you are talking about regarding --
7 okay. Now, you are going to hear an argument from the
8 defendants that really I should disregard what's in
9 *Masterpiece I* because we have different commissioners,
10 et cetera. What is your response to what I'm likely to hear
11 from them on that issue?

12 MR. CAMPBELL: Sure, Your Honor. Well, in terms of
13 whether it should be ignored because we have different
14 commissioners, I will add that there are -- three of the
15 current commissioners were on the Commission at the time the
16 decision in the three other cake shop cases arose, and we
17 alleged that in the Amended Complaint. I can get you the
18 paragraph number, Your Honor, if you'd like.

19 THE COURT: All right.

20 MR. CAMPBELL: So this idea that there's been
21 complete and total changeover in the Commission is simply not
22 true.

23 But what's probably more important is that what the
24 Supreme Court condemned in talking about the unequal treatment
25 was not the decision of one particular individual or the

1 decision of another individual. It's the decision of an
2 agency. And the Court didn't care that there had been some
3 changeover between the ruling in Mr. Phillips's case and the
4 ruling in the three other cake shop cases. The problem, in
5 the Supreme Court's mind, was that the policies and practices
6 of the State were inconsistent. So that's one response we
7 would emphasize.

8 Another response is that the State comes back and it
9 says Mr. Phillips has failed to allege unequal treatment.
10 That's one of their main arguments in their reply. And they
11 say that the three other cake artists wouldn't create a cake
12 expressing the requested message for anyone, but the State
13 claims that Mr. Phillips has not made a similar allegation
14 about the requested gender-transition cake. Your Honor,
15 that's simply not true. In paragraph 190 of the Amended
16 Complaint Phillips says that he has never created a cake like
17 that before. And in paragraph 193 he says he would not create
18 a custom cake that expresses the messages of that cake for any
19 customer, no matter the customer's protected characteristic.

20 So what the State then shifts its focus to is it
21 says -- it basically tries to manipulate the analysis. It
22 says that the question isn't whether Mr. Phillips will decline
23 to express the message of the gender-transition cake for
24 anyone; the question is whether he will decline to create
25 pink-and-blue cakes for anyone. But that argument has to be

1 rejected for a number of reasons.

2 First, it ignores what the complainant in the state
3 proceeding expressly requested. The complainant asked for a
4 cake designed with a pink interior and a blue exterior to
5 reflect and celebrate a gender transition.

6 In addition, the argument ignores the fact that
7 different pink-and-blue cakes communicate different messages
8 depending on exactly how they are constructed and the context
9 that they're placed in. So, for example, a cake with a pink
10 interior and a blue exterior means something very different at
11 the celebration of the anniversary of a gender transition than
12 it does at, say, a graduation party or a birthday party.
13 Surely the State realizes it, but they continue to ignore that
14 things like the details of the cake and the context in which
15 it's placed matters.

16 The State also -- and I think this is a critical
17 point. By manipulating the analysis the way that the State
18 does and trying to shift the focus away from messages to an
19 artificial construct like the colors, that's further evidence
20 of the fact that they are treating Mr. Phillips unequally.
21 And this is a point that Justice Gorsuch made in his
22 concurrence. In the cases of the other cake shops, the State
23 focused on the messages of the cake's design, said that the
24 cake shops wouldn't make those messages or communicate those
25 messages for anyone, and moved on, dismissed the complaints.

1 But in Mr. Phillips's case, in this new case where they
2 brought charges against him, the State ignores the requested
3 message of the cake's design. It says that Mr. Phillips will
4 make similar-looking cakes, and then it prosecutes him. That
5 double standard is direct evidence of bias and bad faith, Your
6 Honor.

7 The last point that I will emphasize on this response
8 to the State's position is that adopting the State's focus on
9 similar appearances instead of the same message will create a
10 mechanism for people to harass business owners like Jack
11 Phillips. All a customer needs to do is request a design or a
12 symbol that means one thing in one context and another thing
13 in another context, and that customer can force a business
14 owner to express messages that violate their conscience.

15 So, for example, Your Honor, an African-American cake
16 artist could be forced to create a cross-shaped cake for a
17 white supremacist religious group's rally simply because he or
18 she is willing to make a similar cross cake for the Lutheran
19 church. Or, to use another example, a Muslim cake artist
20 could be forced to create a cake with a pentagram, which is a
21 star-shaped symbol, for a satanic celebration simply because
22 he or she would create a cake with stars for a child's
23 birthday party. This is not the view of the nondiscrimination
24 law that the State adopts in other contexts, nor is it a fair
25 one, and for that reason this Court should reject the State's

1 effort to shift the analysis.

2 THE COURT: Okay.

3 MR. CAMPBELL: Your Honor, do you want me to discuss
4 the other indicators of bad faith that I didn't --

5 THE COURT: Go ahead, in a briefer fashion, please.

6 MR. CAMPBELL: I will, Your Honor. In fact, I will
7 rattle them off as quickly as I can.

8 THE COURT: Don't talk fast, though, because when you
9 talk fast --

10 MR. CAMPBELL: I will not talk fast.

11 THE COURT: -- the court reporter goes crazy.

12 MR. CAMPBELL: The court reporter has the hardest job
13 in this place this morning.

14 THE COURT: Well, maybe the Judge has some difficult
15 things to consider too. All right.

16 MR. CAMPBELL: The other factor I would highlight is
17 that current Commissioner Pocock publicly vilified
18 Mr. Phillips as a hater on social media and now stands to be
19 an adjudicator in his case and participated in the decision to
20 approve the filing of the formal administrative complaint
21 against him. Your Honor, that is evidence of bad faith.

22 In addition, current Commissioner --

23 THE COURT: Well, on that point, tell me if I've got
24 this right, you allege in your Complaint that two current
25 Commission members, Pocock and Aragon, have demonstrated their

1 hostility towards Phillips. Pocock, who was a former field
2 coordinator for One Colorado, an LGBT advocacy organization,
3 called Phillips the, quote, cake hater, unquote, and said,
4 quote, apparently cake bakers should be able to discriminate,
5 in a series of tweets in January 2013 directed at
6 *Masterpiece I*. That appears at paragraphs 149 and 259. And
7 Aragon posted on Facebook, quote, today is an important day in
8 our nation's capital, unquote, with a picture of a rainbow
9 over the White House, when *Masterpiece I* was argued. That's
10 at paragraph 260.

11 Is that what you are referring to?

12 MR. CAMPBELL: It is what I am referring to, Your
13 Honor.

14 THE COURT: Okay. Go ahead.

15 MR. CAMPBELL: In addition, Commissioner Aragon also
16 publicly serves on the National Action Council of an
17 organization that filed an amicus brief against Mr. Phillips
18 in his first case.

19 THE COURT: Okay.

20 MR. CAMPBELL: And Commissioner Aragon is charged by
21 statute with representing pro-government interests in his role
22 as a commissioner, and in his case those governmental
23 interests are pro-LGBT in nature because his position is the
24 LGBT liaison to the Mayor of Denver. So that's what I'm
25 referring to there, Your Honor.

1 Another indicator of bad faith here is that the
2 State -- the Commissioners, in particular, are acting as both
3 accusers and adjudicators. And so all of the State
4 Commissioners come in on the front end, and they make the
5 decision whether to file a formal administrative complaint
6 against Mr. Phillips. And then they are invited in on the
7 back end, and they have the final say over the administrative
8 ruling. That sort of a dual role is, particularly under the
9 circumstances of this case, is evidence of bias and bad faith
10 because they have made this decision to move forward with the
11 prosecution, and now there's a substantial risk that they will
12 be psychologically wed to that decision on the back end.

13 Two other points, if I may briefly, Your Honor, on
14 the bad faith issue. The first is that the State is refusing
15 to give Mr. Phillips any information about its enforcement
16 practices or its communications about him. And in the state
17 proceeding, the State does not consider the Commission itself
18 to be a party, and so it appears almost impossible for us to
19 get this information through that proceeding. We are trying
20 to get it in this proceeding, but so far discovery has been
21 stayed. But the State has gone so far as to even refuse to
22 respond to Mr. Phillips's public record requests that anyone
23 else in the state could submit. That's more evidence of bias
24 and bad faith.

25 And lastly are the facts that this case arose as an

1 obvious setup and attempt to harass Mr. Phillips. And by
2 "this case" I mean the pending state proceeding, so let me
3 correct what I said. The pending state proceeding arose as an
4 obvious attempt to harass and set him up. And so, when you
5 look at the facts of that case, the request for that
6 gender-transition cake came just hours after the media
7 announced that the first Masterpiece case would be heard by
8 the Supreme Court. And the attorney that submitted the
9 request advertises on the Internet that -- a desire to seek
10 out and file LGBT discrimination cases. In addition, the
11 attorney asked Masterpiece's representative to repeat herself
12 so that someone else could overhear. And, lastly, just weeks
13 after that request, the same attorney called Masterpiece again
14 and asked for a cake with satanic images and messages.

15 So instead of just declining to take up that case and
16 allowing the complainant to do whatever the complainant wanted
17 to do in state court, the State decided to go along with this,
18 and in doing so it has adopted that harassment as its own.

19 Thank you, Your Honor.

20 THE COURT: All right. So it's obvious from what
21 I've said that I have got a strong leaning here that based on
22 the Complaint allegations, which I must accept as true, that
23 there is -- that there most likely is enough in the Complaint
24 to satisfy the bad faith exception to application of the
25 *Younger* abstention doctrine. So I want to hear from the

1 defendant now on why my leaning isn't probably the right
2 result as it relates to not applying the *Younger* abstention in
3 a way that would require this Court to abstain from
4 considering the claims in this matter.

5 MS. MORRILL: Thank you, Your Honor. At the outset I
6 would like to note, with respect to the standard of review,
7 that while we agree with the Court that it must accept the
8 well-pled factual allegations in the Complaint as true, it is
9 not required nor, in fact, is it permitted to accept
10 conclusory allegations, including allegations that entail
11 legal conclusions, as true. And that is well settled under
12 Tenth Circuit cases like *Smith v Plati*. And then in the
13 *Lantec, Inc. v Novell, Inc.* case, that was the Tenth Circuit
14 2002, discusses specifically allegations in a complaint that
15 is verified, like the one at issue here, saying that the court
16 must reject any allegations that are conclusory or for which
17 Mr. Phillips lacks personal knowledge and, therefore,
18 foundation.

19 And so the State officials have specifically objected
20 to Mr. Phillips' foundation based on personal knowledge to
21 make any statements under averment in a verified complaint
22 under declaration of penalty of perjury, as these were made,
23 regarding the beliefs or motivations of the State officials or
24 others besides himself, including the charging party,
25 Miss Scardina.

1 I think it would be error on this Court's part to
2 accept allegations that are conclusory or legal conclusions as
3 true, as distinguished from well-pled facts. We agree that
4 the Court must accept those as true, but in looking at the
5 Complaint, we think that those are very limited and do not
6 demonstrate bad faith, especially where, as here, I think it's
7 notable that in counsel's argument to the Court he cites not a
8 single case in the Tenth Circuit or the U.S. Supreme Court
9 where a court found bad faith based on allegations similar to
10 the one alleged in Mr. Phillips' Complaint here.

11 And I'll get into those with more specificity as we
12 go on, but I do think it's very important to highlight the
13 standard of review for this Court because I do think they are
14 asking you to accept as true his reading of the hearts and
15 minds of State officials which he has no foundation to make,
16 as well as a legal conclusion, which is what constitutes bad
17 faith on the part of a administrative body where, as here,
18 they are tasked with two discrete functions. Here we have
19 acts in furtherance of the prosecutorial function to date, and
20 then later will come acts in furtherance of the adjudicative
21 function.

22 So specifically looking at some of the claims or
23 bases that plaintiffs allege demonstrate bad faith, I would
24 start with the *Gibson v Berryhill* example where they are
25 arguing that it is a sort of carve-out to *Younger* abstention

1 if the Court finds that there is sort of a structural -- a
2 structural bias embedded in the state proceeding that's
3 ongoing and that the federal plaintiff is trying to enjoin.
4 And notably *Gibson v Berryhill* is very easily distinguishable
5 from this case because the alleged bias and structural defect
6 there was a pecuniary interest on the part of the state
7 optometrists who were tasked with regulating members of their
8 own profession. And there the U.S. Supreme Court, in perhaps
9 one of the last cases where it recognized that *Younger*
10 abstention was not appropriate, it did so because it found a
11 demonstrated direct economic protectionism and pecuniary
12 interest. Plaintiffs do not allege that here. It's nowhere
13 in the original or the Amended Verified Complaint.

14 THE COURT: Let me just interrupt you.
15 *Gibson v Berryhill* deals with bias, not bad faith. And as I
16 said at the beginning, I'm focusing more on bad faith.

17 MS. MORRILL: Okay.

18 THE COURT: That's why I read those Complaint
19 allegations. And so I'd like to have you focus more, if you
20 can, on bad faith --

21 MS. MORRILL: Sure.

22 THE COURT: -- rather than bias.

23 MS. MORRILL: Well, turning then to the allegations
24 based on the unequal treatment of Mr. Phillips vis-à-vis
25 William Jack, which notably the Commission made its decisions

1 regarding Mr. Phillips with respect to the wedding cake
2 requested by the gay couple in the 2012 card -- or 2012 charge
3 of discrimination, and then later declined to find probable
4 cause with respect to the William Jack charges against the
5 other area bakeries. I think this is notable for several
6 reasons because here, I mean, we have in *Masterpiece I* -- and
7 I want to be very clear to the Court that we don't in any
8 way -- the State officials do not discount the Supreme Court's
9 holding in *Masterpiece I*. The day that that decision was
10 announced, as the Amended Complaint alleges, the State
11 officials, in particular the Division of Civil Rights and the
12 Commission for Civil Rights, issued a public press release
13 acknowledging the Supreme Court's direction with respect to
14 administrative bodies and their adjudicative functions and the
15 express requirement that they act with the requisite level of
16 neutrality. Similarly, as is attached to plaintiffs' Amended
17 Verified Complaint at 51-2 or, I'm sorry, 51-1, is Director
18 Elenis's probable cause determination which specifically cites
19 *Masterpiece I* as direct evidence that she both read that and
20 incorporated her understanding of the U.S. Supreme Court's
21 holding in that case when deciding whether there was probable
22 cause to proceed with the 2017 charge of discrimination filed
23 against Mr. Phillips by Miss Scardina.

24 So, again, what we have is we have a different set of
25 Commissioners who have inherited the decision with respect to

1 the 2012 charge against Mr. Phillips and the decisions with
2 respect to the 2015 charges against -- filed by Mr. William
3 Jack and the -- and also inherited the U.S. Supreme Court's
4 decision in *Masterpiece I* telling them that they must at all
5 times act with neutrality and not demonstrate religious
6 hostility. And so, with respect to their findings that there
7 was unequal treatment on the part of the former Commissioners
8 with respect to William -- Mr. Jack and Mr. Phillips, I think
9 it's important to see here that the Commission and the
10 Division, in finding probable cause and deciding to set this
11 2017 charge for a hearing, have not attempted to treat him
12 unequally. And instead they have, what I will refer to as the
13 Kagan rule, tried to hew away from weighing offensiveness and
14 weighing the basis for a baker's perceived offense to a cake
15 that is requested and instead are now hewing to the Kagan rule
16 which says that if you will make a pink-and-blue cake for one
17 customer, then you must make a pink-and-blue cake for any
18 customer who comes in your door and requests a pink-and-blue
19 cake.

20 And so here our assertion is simple, that plaintiffs
21 have not alleged that Mr. Phillips has been treated unequally
22 because nowhere in the Amended Complaint does he allege that
23 he would never make a pink-and-blue cake for anyone. We also
24 think that there's no way that he could credibly amend his
25 Complaint to include such an allegation especially where, as

1 here, in his reply in support of his motion for preliminary
2 injunction at document 83-1, he has signed a declaration to
3 this Court saying that he would make a pink-and-blue cake for
4 certain customers but he would not make the same pink-and-blue
5 cake for Miss Scardina. So the equal treatment here, and in
6 the wake of *Masterpiece I* the Commission is trying to hew to a
7 objective, nonsubjective, non-delving into the hearts and
8 minds of bakers and their bases for refusing to make a certain
9 product for one customer and making it for another customer.
10 It's simply this. It's a bright-line test. If you make
11 product 1 for customer 1, you make product 1 for customer 2.
12 And that is what the 2017 charge of discrimination alleged is
13 that Miss Scardina requested a pink-and-blue cake, and by all
14 accounts she was well on her way to securing that cake until
15 she disclosed in the process what the requested colors meant
16 to her.

17 And, now, I know that plaintiffs have staked their
18 First Amendment and free exercise claims on the idea that
19 there are messages, and the same pink-and-blue cake that means
20 one thing to customer 1 can mean something different to
21 customer 2, and that the baker must be allowed to object, but
22 I think that this Court is bound by the safe harbor rule
23 established in *Smith* where CADA, which on its face is a
24 neutral law of general applicability, and you have here the
25 Commission who is applying a bright-line standard test that is

1 objective and, again, not subjective about the hearts and
2 minds of bakers, that they are entitled to regulate conduct.
3 And in this case, the conduct that the State of Colorado is
4 deciding whether to regulate or deciding whether, you know, it
5 has been violated is the unequal provision of goods and
6 services in the marketplace.

7 So, again, we feel that nothing with respect to
8 plaintiffs' claims of unequal treatment have been established
9 through the factual allegations alleged in the Verified
10 Complaint. You can accept all of them as true, but they have
11 not told you that they would not make a pink-and-blue cake for
12 anyone. Instead, they have said elsewhere the opposite under
13 oath. And, therefore, there is at a minimum probable cause,
14 which again this is, I think, an important distinction with
15 respect --

16 THE COURT: Well, wait a minute. I don't -- I
17 understand what you are saying about probable cause, but
18 really the discrete argument that we are focusing on here is
19 whether or not the plaintiffs have sufficiently alleged bad
20 faith in the Complaint, focusing on factual allegations, such
21 that it would be inappropriate for me to rule that *Younger*
22 abstention applies. And obviously I understand that some of
23 what we are arguing now we are also going to use for other
24 purposes, so we don't have to repeat all this, particularly
25 when we get to the preliminary injunction.

1 So do you have anything else you want to say on the
2 issue of bad faith?

3 MS. MORRILL: Yes, Your Honor. And to move on from
4 unequal treatment --

5 THE COURT: By the way, let me just note this. In
6 his concurring opinion, Justice Gorsuch noted the following in
7 *Masterpiece I*, and it reads as follows, and this is at page
8 1736 of the decision:

9 "The problem here is that the Commission failed to
10 act neutrally by applying a consistent legal rule. In
11 Mr. Jack's case, the Commission chose to distinguish carefully
12 between intended and knowingly accepted effects. Even though
13 the bakers knowingly denied service to someone in a protected
14 class, the Commission found no violation because the bakers
15 only intended to distance themselves from 'the offensive
16 nature of the requested message.' Yet, in Mr. Phillips's
17 case, the Commission dismissed the very same argument as
18 resting on a 'distinction without a difference.' It concluded
19 instead that 'an intent to disfavor' a protected class of
20 persons should be 'readily presumed' from the knowing failure
21 to serve someone who belongs to that class. In its judgment,
22 Mr. Phillips's intentions were 'inextricably applied to the
23 sexual orientation of the parties involved' and essentially
24 'irrational.' Nothing in the Commission's opinions suggests
25 any neutral principle to reconcile these holdings."

1 I just wanted to note that. You don't have to
2 respond to it. Go ahead.

3 MS. MORRILL: Thank you, Your Honor. And I would ask
4 the Court to look at page 1723 of the *Masterpiece Cakeshop*
5 decision in which Justice Kennedy in the majority opinion
6 states that: "The free speech aspect of this case is
7 difficult, for few persons who have seen a beautiful wedding
8 cake might have thought of its exercise as a creation [sic] of
9 protected speech." And, again, nowhere in *Masterpiece I* did
10 the U.S. Supreme Court reach the merits of plaintiffs' free
11 speech or free exercise claims. And with all due respect to
12 Justice Gorsuch, not all of the Justices did agree that a
13 wedding cake, which is far different than what we have in this
14 new charge of discrimination, which is simply a cake with blue
15 frosting and a pink exter- -- interior, constitutes expressive
16 activity that falls within the protection of free speech or
17 the free exercise of religion.

18 So, again, we think that the Complaint fails to
19 establish as a matter of well-pled facts unequal treatment.
20 The Commission is attempting to follow the *Masterpiece I*
21 decision by adopting an objective, uniform way of
22 distinguishing between claims that or charges that allege a
23 credible claim for violation of CADA and those that do not.
24 And it's simply whether a place of public accommodation will
25 make a product, and if they will make it and sell it to

1 customer 1, they must make the same product and sell it to
2 customer 2.

3 Similarly, I note that plaintiffs focus on
4 Commissioner Pocock and Commissioner Aragon and their
5 perceived animus towards plaintiffs. And again, you know,
6 they, respectfully, do not have foundation to see into the
7 hearts and minds of those commissioners and make allegations
8 that are well pled regarding what motivates them or animates
9 their participation in the 2017 charge today.

10 I would say with respect to -- but even if the Court
11 wants to accept the allegations of animosity, we would note
12 two things. One, there's no reference in any way to
13 Mr. Phillips' religion or to religion at all, much less a
14 disparaging comment regarding religion, such as was found by
15 certain commissioners in the *Masterpiece I* proceeding.

16 Similarly, in *Phelps I* and *II*, again, binding Tenth
17 Circuit precedent, the court found that a demonstrated history
18 of personal animosity between the state prosecutor and the
19 state court defendants did not demonstrate bad faith on the
20 face of the complaint and dismissed without an evidentiary
21 hearing, dismissed without reaching the preliminary injunction
22 hearing on the merits.

23 We think the same is true here. Even if this Court
24 wants to accept that, again, these statements which -- which
25 are not clear on the face of the Complaint that they were made

1 by the Commissioners, again, directed at Mr. Phillips
2 personally or regarding his religion or even while they were,
3 in fact, commissioners at the same time. At least with
4 respect to Commissioner Pocock, the Complaint is unclear as to
5 whether she was making that speech in her private capacity
6 before taking office as a commissioner.

7 Again, the other evidence of bad faith, the fact that
8 commissioners wear the one hat as accusers or prosecutors, as
9 we contend, and then later as adjudicators, that is foreclosed
10 by *Withrow v Larkin*. That's bedrock constitutional law dating
11 to 1975. And plaintiffs cite no case on point ever
12 demonstrating that *Withrow* has been overturned.

13 And I think *Withrow* is particularly instructive for
14 this Court because what it says is that had *Masterpiece I* not
15 included, at the end, the decision by the U.S. Supreme Court
16 to vacate the entirety of the first state court proceeding and
17 instead had remanded to the same Commission, whether
18 differently comprised commissioners or not, but remanded for
19 the same charge to be taken for further state court
20 proceedings, *Withrow v Larkin* says that state administrative
21 adjudicators are entitled to the presumption that they will
22 follow the law, they will follow *Masterpiece I* on that remand,
23 and that they are not presumed to be acting in bad faith
24 simply because they were reversed by a higher court.

25 The same is especially true, even more so, here

1 because this is not a remand. This is a new charge of
2 discrimination. And I think that, in fact, is the most
3 significant basis for why this Court cannot find bad faith.

4 Returning to *Phelps v Hamilton*, the core bases for a
5 court to conclude that there is bad faith in the initiation of
6 a state court prosecution are that the prosecution is
7 frivolous or hopeless, and that can be rebutted by a
8 legitimate articulable basis for initiating the prosecution.

9 Here that basis is Miss Scardina's 2017 charge of
10 discrimination. It alleges that she requested a pink-and-blue
11 cake. She requested it for the occasion of her birthday. She
12 was in the process of obtaining that pink-and-blue cake,
13 including being solicited as to how many individuals it needed
14 to serve, by what date it was needed, and that it was only
15 when she disclosed in the process of ordering the cake that
16 she intended to serve it on her birthday which coincided with
17 the date of her transgender -- or her transition from male to
18 female that she was denied the same cake that she believed she
19 would have obtained had she not made that disclosure.

20 So, again, the case law is firm, and I think it is
21 telling that plaintiffs spend no time focusing on it as to the
22 lack of bad faith because it is not a frivolous or hopeless
23 prosecution.

24 Similarly, for the reasons I've already discussed,
25 again, the case law shows that it's not based on his religion

1 or retaliation of *Masterpiece* -- for *Masterpiece I*. If
2 anything, it's a direct response in following *Masterpiece I*
3 which says you are not to judge offensiveness as State
4 officials. Instead, you are to accept and treat neutrally
5 bases for offensiveness and objections to providing certain
6 products to certain individuals. And here Colorado has
7 attempted to do so by articulating a bright-line objective
8 test.

9 THE COURT: Okay. I want to stop you there because I
10 want to move on. I want you to assume, just for purposes of
11 argument today, that after all is said and done I am most
12 likely not going to abstain from this case based on the
13 *Younger* rule. And so that really leaves us with the other
14 abstention doctrines which are narrower, and they are not
15 binding on the Court.

16 I have looked at *Pullman*, and I want the parties just
17 to rest on their briefs because I don't think *Pullman* applies.
18 I don't think there have been sufficient arguments and
19 assertions made by the defendant to convince me that the test
20 in *Pullman* has been satisfied. So I'm going to decide that
21 without oral argument because this has all been briefed.

22 So that next gets us to *Burford*, and I do want to
23 hear some argument about *Burford*. Tell me why you think that
24 *Burford* applies and, more specifically, how it can apply to
25 the free exercise and free speech claims. And then after that

1 tell me how *Burford* may or may not apply to the equal
2 protection and due process claims.

3 MS. MORRILL: Well, Your Honor, our argument is that
4 abstention, whether under *Younger* or under one of the
5 alternative discretionary doctrines, is applicable to all of
6 plaintiffs' claims for equitable relief. We don't distinguish
7 between the basis for free exercise, free speech, equal
8 protection, or due process. So I just note that at the
9 outset.

10 THE COURT: Well, let me ask it this way. Tell me
11 how -- give me your best argument, and I don't necessarily
12 mean your longest argument, but your best argument as to why
13 *Burford* can apply to the constitutional claims, meaning the
14 free exercise or free speech claims.

15 MS. MORRILL: Why it can apply?

16 THE COURT: Yeah. Why it should apply.

17 MS. MORRILL: Sure, Your Honor. The *Burford*
18 abstention is basically a recognition that states have their
19 own laws to regulate certain subjects that are not subject to
20 federal law. Here public accommodation is a classic example
21 of one such state regulatory scheme. And the doctrine in
22 *Burford*, as in *Pullman* or *Colorado River*, is a recognition
23 that federal courts, in respect of principles of comity and
24 federalism, should abstain from deciding cases that involve
25 complex issues of state law.

1 And here the issue is whether or not there has been a
2 violation of CADA. We have not -- that decision has not been
3 made. Again, bad faith goes only to the issue of the -- was
4 it improper to initiate the prosecution. Plaintiffs concede
5 that the parallel state proceeding is ongoing. They don't
6 seriously contest that it implicates important state interests
7 of the highest order that have been recognized by federal
8 courts in CADA's goal of preventing discrimination in the
9 marketplace.

10 And so *Burford* is simply a recognition that federal
11 courts should stand down and give state courts the opportunity
12 to make those decisions. And one of the decisions, I think,
13 that would be integral here is whether a violation of CADA
14 occurred and, if so, whether Mr. Phillips' objection or
15 defense, which is not based in federal law, but it's based in
16 his view of how the State officials must interpret their own
17 statute to allow him to object to making the same cake for
18 customer 2 that he would make for customer 1. And that is an
19 issue of state law that states should be given the first
20 opportunity to decide.

21 THE COURT: Just for the record, when you are saying
22 CADA, you are referring to the Colorado Anti-Discrimination
23 Act.

24 MS. MORRILL: That's correct, Your Honor.

25 THE COURT: Okay. So let me just push you a little

1 bit more on this. I see a different analysis, I'm talking
2 about *Burford* again, applying to the equal protection and due
3 process arguments as opposed to the free exercise or free
4 speech claims. Do you see any different analysis that applies
5 to those claims?

6 MS. MORRILL: No, I think all of the abstention
7 doctrines, Your Honor, to my understanding, entail a component
8 of adequacy of the state court proceeding, meaning that
9 they -- the state court forum provides an opportunity for
10 plaintiffs to fully and fairly litigate their claims, and we
11 don't see, again, any distinction for the reasons that we
12 largely discussed under the *Younger* argument but as it relates
13 to the Tenth Circuit decision in *Amanatullah*. Because the
14 Commission and the Division's process incorporates the
15 Colorado Administrative Procedure Act, this Court is to
16 presume that at the time plaintiffs filed this lawsuit they
17 had not yet attempted to raise all of their federal claims,
18 including the equal protection and due process claims, in the
19 state court proceeding. This Court must assume, under
20 *Amanatullah*, that they will be able to do so and that the
21 state court, whether through the administrative process or
22 upon judicial review in the Court of Appeals or the State
23 Supreme Court and then over to the U.S. Supreme Court, will
24 provide an adequate forum for plaintiffs to raise all of their
25 claims.

1 THE COURT: All right. Fair enough.

2 All right. So let me have the plaintiffs respond to
3 what Ms. Morrill has said regarding everything but *Younger*.
4 And I want you to make it brief, please, as brief as you can
5 make it.

6 MR. CAMPBELL: Yes, Your Honor. I'm glad to do that.
7 So specifically on *Burford* is what the Court is
8 looking for a response on?

9 THE COURT: Well, yeah, if you want. And she also
10 touched on *Pullman* and the fourth one. I didn't want to hear
11 anything on *Pullman*, but she mentioned *Pullman* briefly and
12 then *Burford*, and then finally we have the *Colorado River*.
13 She didn't say much on that. I don't really need you to talk
14 about *Colorado River* unless you feel compelled.

15 MR. CAMPBELL: Your Honor, I'll focus on *Burford*
16 then.

17 THE COURT: All right. Good.

18 MR. CAMPBELL: What the Supreme Court said in the
19 *NOPSI* case, that's *New Orleans Public Services, Incorporated*,
20 case, they said that the motivating force behind *Burford*
21 abstention is a reluctance to intrude into state proceedings
22 where there exists a complex state regulatory system. In
23 *Burford* itself, the complex regulatory system was Texas's
24 complex oil and gas regulatory regime. What we have here is a
25 question of straightforward nondiscrimination law. State and

1 federal courts decide those questions all the time. There's
2 no particular expertise and no need for *Burford* under these
3 circumstances.

4 Also, the Supreme Court recognized in that *NOPSI* case
5 that there are two factors that -- one of which must be
6 satisfied in order for *Burford* to apply. The first factor is
7 that there must be a difficult state law question that
8 transcends the case. And I think this brings us to an
9 important point. So the important state law question that the
10 State wants to point to which it says is unclear is whether
11 Mr. Phillips violated the state nondiscrimination law by
12 declining to create the requested gender-transition cake, but
13 that's not the type of question that warrants abstention
14 because what you have there is a settled principle. And the
15 State has said time and time again that it believes it has a
16 settled principle. The only question is how do we apply it in
17 this new case. So the State's supposedly settled principle is
18 that cake artists or cake shops can decline to create cakes
19 with messages that they won't express for anyone. The
20 question is how do we apply that in Mr. Phillips's case. And
21 that is not the sort of unclear question of state law that
22 requires abstention under *Pullman* or *Burford* or *Colorado*
23 *River*. And I would point the Court specifically to the Tenth
24 Circuit's decision in *Vinyard versus King*, which is cited in
25 the briefing. In that case, the Tenth Circuit made this

1 very -- very point.

2 The other point that I would make, Your Honor, is the
3 second *Burford* factor, which requires that the exercise of
4 federal review would be disruptive of state efforts to
5 establish a coherent policy. There are no -- there is no
6 threat here, Your Honor, that this Court intervening and
7 ruling in this case will upset a coherent state policy, and
8 here's why. Mr. Phillips just asks to be treated the same as
9 the other cake artists. He wants the same rule, that cake
10 artists can decline messages that they won't communicate for
11 anyone, he wants that same rule applied to him. So whether
12 this Court applies it in his case is not going to upset a
13 coherent state policy.

14 Your Honor, that's all I have on *Burford*, unless you
15 want to hear anything on --

16 THE COURT: No, I don't want to hear any more about
17 *Burford*.

18 So we're going to switch gears here. Here's what we
19 are going to do now. I want to transition now to the issues
20 involving the State officials. In fact, let me tee this up
21 correctly. Hold on a second.

22 All right. So we have a request now for -- by the
23 defendants for a finding of absolute immunity as to the claims
24 asserted against Director Elenis and the other seven
25 Commissioners. What is your view as to whether or not

1 absolute immunity is appropriate? Do you agree or disagree
2 with that?

3 MR. CAMPBELL: Your Honor, we disagree with that. We
4 don't believe --

5 THE COURT: All right. Then I want to hear from the
6 defendant first, because I have a leaning here that perhaps
7 absolute immunity is appropriate, so I want to hear some
8 arguments. Now, only if I give a clear indication that I'm
9 equivocal about that, even though, again, I am not going to
10 decide anything until I write it, do I want to hear anything
11 about qualified immunity. So let me hear arguments about why
12 you think absolute immunity is appropriate for both the
13 Director and the other seven Commissioners.

14 MS. MORRILL: Yes. Thank you, Your Honor. Again, we
15 turn to what we like to call bedrock constitutional law on
16 administrative and quasi-judicial and quasi-prosecutorial
17 officials like the Division Director and the Commissioners in
18 this case. This goes to the *Butz v Economou*, U.S. Supreme
19 Court case decided in 1978, where the court announced for the
20 first time that it was extending absolute quasi-prosecutorial
21 and quasi-judicial immunity to federal administrative
22 officials who were tasked with doing the same things that the
23 State officials or, in particular, the officials who are not
24 the Attorney General and the Governor, are tasked with doing
25 here. And, again, plaintiffs make no serious effort to

1 overcome either the holding in *Butz* or the Tenth Circuit's
2 application of the holding in *Horwitz v Colorado Board of*
3 *Medical Examiners*, which specifically extended that absolute
4 quasi-prosecutorial immunity and quasi-judicial immunity to
5 Colorado's medical board members who again followed the
6 Colorado Administrative Procedure Act in their decisions
7 whether or not to initiate charges, file complaints, include
8 certain facts in a complaint versus others, and then, you
9 know, at a later point take off that hat and wear the hat of
10 an adjudicator when the case makes its way back before them at
11 a later date. No discussion of that in plaintiffs' response
12 to the motion to dismiss.

13 Instead, they focus on the decision in *Cleavinger v*
14 *Saxner* which is, frankly, an apposite on the facts because
15 there it was an internal prison process that was coming up for
16 review, and the prison officials were asking for
17 quasi-prosecutorial immunity to be extended to them, and the
18 court looked at the procedures which were not APA procedures,
19 they were not -- they did not have safeguards that, um, that
20 Colorado law, in particular the Anti-Discrimination Act,
21 afford here. And the court found that the actions of the
22 prison officials were not of the kind that were, frankly,
23 judicial in nature, whether it's prosecutorial in the
24 initiation of a judicial procedure or quasi-judicial in the
25 later adjudication of that initiated procedure.

1 Here I think it's important that we are not even
2 getting to the issue of quasi-judicial immunity because the
3 State officials -- it's not alleged in the Complaint that the
4 State officials have adjudicated the state charge against
5 Mr. Phillips and the bakery. Instead, we are focused solely
6 on their -- the prosecutorial actions they have taken to date,
7 as well as the Division Director's. And we think that this
8 Court is further bound by the Tenth Circuit's holding in
9 *Nieler v Board of County Commissioners of the County of*
10 *Republic, Kansas*, and that is 582 F.3d 1155, a 2009 Tenth
11 Circuit case. It says: Prosecutors are entitled to absolute
12 immunity for their decisions to prosecute, their investigatory
13 or evidence gathering actions, their evaluations of the
14 evidence, their determination of whether probable cause
15 exists, and their determination of what information to show
16 the court.

17 I think, importantly, it's also worthy of this Court
18 to note that absolute quasi-prosecutorial immunity is not
19 overcome by allegations of bad faith. As a result, we think
20 that their claims against the Division Director and
21 Commissioners for damages are foreclosed by these settled
22 precedents.

23 THE COURT: Okay. All right. What's the response
24 from the plaintiff? Or plaintiffs, I should say.

25 By the way, let me make it clear. What we are really

1 talking about, for those in the audience, is whether or not
2 absolute immunity applies to Director Elenis and the other
3 seven Commissioners related to any damage claims arising from
4 the Commission's decision to pursue a discrimination charge
5 against Phillips. That's what we are talking about. So
6 that's the context for absolute immunity.

7 Go ahead.

8 MR. CAMPBELL: Your Honor, courts have recognized
9 that absolute immunity does not apply when the actor in
10 question lacks independence. And that is something that the
11 Supreme Court talked about in *Butz*, and it's something that
12 the Tenth Circuit talked about in *Horwitz*. Here this case is
13 different from both *Butz* and *Horwitz* because the Commission
14 acts in the dual role as accuser and adjudicator, which I
15 referenced before, so I won't explain that any further. But
16 *Butz* specifically said that concerns arise about a lack of,
17 quote, independent judgment, quote, when an administrative
18 adjudicator is, quote, required to perform prosecutorial
19 functions as well as their judicial work. And that's exactly
20 what we have here, which is why both *Butz* and *Horwitz* are
21 distinguishable, and specifically *Horwitz* on that point, Your
22 Honor. *Horwitz* involved a setting where the agency was
23 constructed to have an inquiry panel and a hearings panel.
24 Well, that ensured that the same commissioners weren't both
25 acting as investigators and prosecutors and acting as

1 adjudicators. The Commission, however, does it differently.
2 The Commission brings all of the Commissioners in on the front
3 end to decide to file the formal complaint. And so for that
4 reason, those cases are different.

5 Your Honor, the only other point I would make, just
6 for brevity's sake, on absolute immunity is that judicial
7 immunity from damages -- it only goes to the question of
8 damages. Even if the Court thinks that absolute immunity
9 applies, all the equitable claims can move forward.

10 THE COURT: I don't think the State is asking for
11 anything other than that. I understand. That's why I want to
12 make it clear we are talking about damages, as opposed to
13 equitable relief. I think that distinction is appropriate.

14 All right. So let me indicate I think I've heard
15 enough on immunity, and I am going to decide this case based
16 on absolute immunity, and I'm not going -- I don't believe I
17 need to hear any argument on qualified immunity.

18 All right. So let's -- we are going to cover one
19 other area. Then we are going to take a short midmorning
20 break, and then we are going to come back and transition to
21 the plaintiffs' request for injunctive relief. So my goal is
22 to finish this hearing before we take a break for lunch, and I
23 want to see if we can make sure we do this by not later than
24 1 o'clock, because then my stomach will growl, and I will
25 become less than charitable in what I say and we need to take

1 a break. So we are going to finish this not later than
2 1 o'clock.

3 But I want to talk about this whole issue of the
4 Governor, the Attorney General, and the Eleventh Amendment.
5 As you know, the Eleventh Amendment generally bars suits by
6 individuals against State officials acting in their official
7 capacities. This bar, however, does not apply if the suit
8 seeks prospective relief with the officials' ongoing violation
9 of federal law. I think you are asking for prospective
10 relief, aren't you, against the State officials?

11 MR. CAMPBELL: Correct, against both the Governor
12 and --

13 THE COURT: I know, but I want to go back to what you
14 are alleging against Hickenlooper. So you alleged that
15 Governor Hickenlooper, quote, administers and enforces C.R.S.
16 Section 24-34-303 and 24-34-306, which is the process by which
17 Commission members are selected and adjudicate claims of
18 discrimination. That's noted in Complaint, paragraph 294.
19 Governor Hickenlooper has appointed every member of the
20 Commission for the past eight years.

21 So I want to stick with him for a minute because,
22 again, I'm concerned about what claims legitimately remain
23 against Hickenlooper in his official capacity once he is no
24 longer governor. And then that gets to the point is there
25 truly something that could be alleged against the governor

1 elect, meaning Governor Elect Polis, when he becomes governor
2 that is not personal to something Hickenlooper did in his
3 official capacity. Unless I can understand what that is, then
4 I am concerned about whether it's appropriate to allow a
5 substitution of parties, meaning Polis for Hickenlooper. And
6 I have a lesser concern in that regard with the Attorney
7 General.

8 So help me understand what you think remains against
9 Hickenlooper. Because to the extent he appointed the current
10 Commissioners and you allege there's some irregularity about
11 that given the statutes that exist for the appointment of
12 commissioners by the governor, how could that be transferred
13 to someone who didn't appoint them?

14 MR. CAMPBELL: Your Honor, we allege first and
15 foremost that those requirements, the what we call
16 discriminatory selection criteria, that those in and of
17 themselves when applied here violate the Constitution, that
18 you cannot construct an administrative body that prefers
19 people from certain classes over people from other classes.
20 And that's exactly what state law does, as we read it, Your
21 Honor. So --

22 THE COURT: But wait a minute. If you look at 24 --
23 which I did again this morning, because I haven't memorized
24 all these statutes. I might know a few things, but it's
25 impossible for me to memorize all the statutes that are in the

1 C.R.S. But on a more serious note, I want to go to 24-34-303.
2 Let me just pull it up here. Well, that statute talks about
3 the categories of persons who will be appointed to the
4 Commission; isn't that right?

5 MR. CAMPBELL: It does, Your Honor. I can read the
6 relevant provision if you would like.

7 THE COURT: Well, I've got it here.

8 MR. CAMPBELL: Okay.

9 THE COURT: It's just a thick book, and my fingers
10 aren't working as quick as they need to, but I've got it here,
11 24-34-303. And it says the following, and it's entitled Civil
12 Rights Commission Membership: "There is hereby created,
13 within the division, the Colorado civil rights commission."
14 And (b) (I) says, "The commission consists of seven members
15 appointed by the governor, with the consent of the senate as
16 specified in subsection (1) (b) (IV) of this section, for terms
17 of four years. The governor shall make appointments in such a
18 manner that there are at all times," and then (b) (I) (A) says,
19 "Two members of the commission representing the business
20 community, at least one of whom represents small business;
21 except that, upon the expiration of the terms of the members
22 appointed pursuant to this subsection (1) (b) (I) (A) before
23 July 1, 2018, or upon a vacancy in either position, whichever
24 occurs first, one member appointed pursuant to this subsection
25 must be a majority owner of a small business that employs at

1 least five but less than fifty employees" -- I'm going to skip
2 the rest of this subsection and go to (B), "Two members" --
3 that is, (b) (I) (B), "Two members of the commission
4 representing state or local government entities," and there's
5 an exception for that, and then (b) (I) (C) says, "Three members
6 of the commission from the community at large; except that,
7 upon" -- and then it has some exception. So, and then under,
8 what is it, (b) (I) (II) (A), "At least four members who are
9 members of groups of people who have been or who might be
10 discriminated against because of disability, race, creed,
11 color, sex, sexual orientation, national origin, ancestry,
12 marital status, religion, or age," and then (II) (B) says, "No
13 more than six members affiliated with a major political party
14 and no more than three members affiliated with the same
15 political party."

16 So tell me what Governor Hickenlooper did that, from
17 your perspective, violates what he was supposed to do under
18 the aegis of this statute.

19 MR. CAMPBELL: Your Honor, we are not arguing that
20 Governor Hickenlooper did anything violating this statute.

21 THE COURT: So what did he do that creates a claim
22 against him --

23 MR. CAMPBELL: Sure.

24 THE COURT: -- that extends beyond his official
25 status as governor?

1 MR. CAMPBELL: He enforces the provision found at
2 24-34-303(1)(b)(I)(C) -- well, no, I'm sorry, (1)(b)(II)(A),
3 which is the language you just read, "At least four members
4 who are members of groups of people who have been or might be
5 discriminated against," and then lists a number of categories.
6 Our argument is that that provision embeds bias into the
7 Commission because it requires the governor to select decision
8 makers of particular classes over and above people from other
9 classes. So that's why we think that the claim as to that
10 provision, seeking enforcement in the future, should carry
11 over to the new governor.

12 THE COURT: Is that the only claim you have against
13 Hickenlooper going forward?

14 MR. CAMPBELL: Your Honor, we do allege the facts
15 about who Governor Hickenlooper put on the Commission, and we
16 allege those to show how this provision works in practice. So
17 we do allege those facts, and I think we'll continue to rely
18 on them, but we don't believe that we have to have the
19 Governor in the lawsuit in order to -- Governor Hickenlooper
20 in the lawsuit in order to keep relying on those historical
21 facts. We think it's sufficient as long as Governor Elect
22 Polis continues as part of this lawsuit for us to maintain the
23 challenge to that provision.

24 THE COURT: Let's assume just for purposes of this
25 question that ultimately, even if I have reservations, I allow

1 Polis to be substituted for Hickenlooper and you win on that
2 claim. What would you be asking Polis to do in his capacity
3 as governor?

4 MR. CAMPBELL: To no longer enforce that provision.
5 To simply pick people equally without regard to preferring
6 some people over another.

7 THE COURT: So you are asking me to find this
8 provision of state law is, what, illegal, unconstitutional,
9 improper? What are you asking me to do?

10 MR. CAMPBELL: Sure. Your Honor, we believe that
11 that provision violates due process and equal protection
12 principles.

13 THE COURT: I don't understand why. Tell me why.

14 MR. CAMPBELL: Sure. Your Honor, the argument is
15 akin to a *Batson* argument. The court had a problem with
16 *Batson* because it said you cannot intentionally exclude people
17 from a decision-making body like a jury because of their
18 membership in a protected class. Well, this just flips it,
19 and now it's excluding, at least from a majority of the
20 position, people who are not in discriminated against groups.
21 So that's essentially the argument, Your Honor.

22 THE COURT: But your explanation of *Batson* isn't
23 consistent with my application of it. *Batson* says -- and it's
24 been extended now to other categories like gender and national
25 origin, et cetera. But if a *Batson* challenge is raised, which

1 has been raised in front of me, the other side or the person
2 who wants to exercise it can lift up a nondiscriminatory
3 reason for keeping that juror. And I always have those
4 arguments outside the presence of the jurors. And if I find
5 that there's a nondiscriminatory reason for keeping that
6 juror, then I will deny the *Batson* challenge, whether it be on
7 race, gender, or other prohibited factors. So I don't think
8 the *Batson* analogy is relevant.

9 All right. I understand what you are saying, and
10 whether I agree with it is a separate issue.

11 All right. Let me hear from the defendant on this
12 issue. And I want to now again just focus on Hickenlooper and
13 what you think should happen and why.

14 MS. MORRILL: Thank you, Your Honor. We do contend
15 that plaintiffs have not alleged an ongoing violation by
16 Governor Hickenlooper necessitating his continued involvement
17 in this case and sufficient to overcome the Eleventh
18 Amendment's requirement that there be an ongoing violation of
19 state law in order for a plaintiff to obtain injunctive relief
20 from something that that State official is currently doing
21 that is harming them constitutionally. Here all of the
22 allegations regarding Governor Hickenlooper are with respect
23 to his past conduct in appointing Commissioners who are
24 currently seated to their terms. There's nothing in the
25 Complaint, and even if there were it would be purely

1 speculative and hypothetical, that any one of those
2 Commissioners may not carry out their terms as required by
3 statute, thus triggering a vacancy that then gets reappointed.

4 Additionally, I think we make the point very clearly
5 that these selection criteria which plaintiffs are
6 challenging, meaning that they are asking this Court to
7 enjoin, are not discretionary criteria that the governor has
8 any control, whether it's Governor Hickenlooper or, you know,
9 future Governor Polis. They are established by the statute.
10 If they are unconstitutional in this Court's estimation, then
11 the existing Commissioners who are seated and who are not
12 subject to the Eleventh Amendment analysis, they are not, you
13 know -- we are not aiming that jurisdictional defense at them,
14 they represent those interests in the first instance, and they
15 can adequately defend that there is nothing. Indeed, the
16 Court is correct in its analysis of *Batson*. It does not cover
17 this issue. In our reply in support of the motion to dismiss
18 we point to decades old state laws from other states that have
19 similar diversity requirements for public boards and
20 commissions. None of those have been stricken as
21 unconstitutional, as offending the U.S. Constitution.
22 Similarly, Colorado's -- I did the session law research on
23 Colorado's diversity requirement for commissioners. That too
24 dates to 1981; never been stricken. If there is a challenge
25 that remains viable regarding the constitutionality, whether

1 under due process or equal protection, for that selection
2 criteria, the Commissioners who again represent those
3 particular diverse protected classes are able to defend. The
4 Governor is simply not necessary.

5 And I think this is a really important point for the
6 Court that you are keying in on because one of our
7 understandings of the reasons why plaintiffs so adamantly want
8 whether it's Governor Hickenlooper or Governor Polis to, um,
9 to be in the case and remain a defendant is because they have
10 a desire to depose him in discovery, whether the current
11 governor or the future governor. And we think that's highly
12 inappropriate especially where, as here, again the criteria
13 are not subject to the governor's discretion. The statute is
14 a shall. The Commission at all times must have at least four
15 that represent a wide array of protected classes, race,
16 gender, disability, religion, sexual orientation, marital
17 status, creed. Again, no explanation by plaintiffs on how
18 having this diverse panel violates their rights. And we think
19 this is a claim that's foreclosed by the Eleventh Amendment at
20 least with respect to Governor Hickenlooper. We also think it
21 with respect to the Attorney General, but I understand you
22 don't want that right now.

23 THE COURT: Well, let me explain. I see a difference
24 between the Attorney General. The claim against the Attorney
25 General is really predicated on whether or not the Attorney

1 General is immune from Phillips's claims regarding Section
2 24-34-601(2)(a), which is entitled "Discrimination in places
3 of public accommodation." And (2)(a) reads as follows: "It
4 is a discriminatory practice and unlawful for a person,
5 directly or indirectly, to refuse, withhold from, or deny to
6 any individual or group, because of disability, race, creed,
7 color, sexual orientation, marital status" and all the rest of
8 the things that are noted there, and it talks about "services,
9 facilities, privileges or advantages, or accommodations of a
10 place of public accommodation," et cetera, et cetera.

11 It seems to me, and I am not making a ruling on
12 whether or not the claim itself is meritorious, but I don't
13 see any reason why Attorney General Elect Weiser cannot be
14 substituted for Coffman. Do you agree with that? And I'm not
15 talking about whether or not there is merit to the claim, but
16 I think I don't have any problem with substituting or asking
17 you to substitute or asking the plaintiff or somebody to
18 substitute Weiser for Coffman once he becomes the Attorney
19 General. Do you have any disagreement with that?

20 MS. MORRILL: Your Honor, respectfully, we do. We
21 think the same analysis under the Eleventh Amendment, the
22 requirement that there be an ongoing violation of federal law
23 by every State official that plaintiffs seek to enjoin from
24 acting in this case. We understand that the Court might be
25 inclined to allow their claims for equitable relief to go

1 forward against the Division Director and the Commissioners,
2 but here on the facts of this Complaint there is no allegation
3 that Attorney General Coffman has taken any action to enforce
4 601(2)(a) of CADA against plaintiffs. They don't allege it in
5 the original Complaint or in the Amended Complaint. They
6 allege that it's possible, she has the discretionary
7 authority, she is among the people listed under CADA as those
8 who can file a charge of discrimination, but that is not, in
9 fact, what the facts before this Court demonstrate. Instead,
10 it's a third party charge of discrimination.

11 We think her participation is unnecessary, and it's,
12 again, intended at getting, whether it's her or future
13 Attorney General Elect Phil Weiser, it's intended to get a
14 high-ranking state official, statewide elected official,
15 subject to discovery on a matter in which they have no
16 personal involvement and --

17 THE COURT: Let me stop you there. Let me have
18 plaintiffs' counsel tell me in simple words -- this is
19 Mr. Campbell -- why you think there's an ongoing claim against
20 the Attorney General Elect such that he should be substituted
21 for Coffman rather than the Court also dismissing Coffman, if
22 I'm inclined to think that's appropriate.

23 MR. CAMPBELL: Sure, Your Honor. Just three reasons.
24 The first is that the Attorney General has the authority to
25 enforce the nondiscrimination law. And I could give you the

1 provision, but it's there in 24-34-306(1)(b).

2 The second reason is that the regulations
3 specifically charge the Attorney General with the duty to
4 represent the Commission in state administrative proceedings
5 involving CADA violations. And that's in 3 Colorado Code of
6 Regulations 708-1:10.8(A)(3). I know that was a lot. That
7 duty to prosecute also implicates the Attorney General here.

8 And then the third point I'd want to make is that the
9 Attorney General's Office is directly involved in prosecuting
10 the pending case -- the pending state proceeding. That is the
11 opposing counsel that we are dealing with in that case.

12 So for all those reasons it's clear that the Attorney
13 General has both the authority and the duty to enforce the
14 nondiscrimination law and, therefore, is a proper party here.

15 And I have to also add that we have made it clear in
16 prior filings that we are not inclined to depose the Attorney
17 General. So for the State to attribute to us motives about
18 wanting to harass, through deposition, high-ranking officials,
19 Your Honor, I just want to say that that's not true.

20 THE COURT: So let me ask Miss Morrill a question.
21 Just stay there; keep your voice up. Does the Attorney
22 General represent the Commission with regards to any hearings
23 before the administrative law judge?

24 MS. MORRILL: Your Honor, the Commission is not a
25 party to the proceedings before the administrative law judge.

1 There are attorneys in our office who counsel and advise the
2 Commission as a matter of course in the conduct of their
3 adjudicative and prosecutorial functions. We are litigation
4 counsel here; we are not those counsel. There is a separate
5 attorney in our office who provides sort of what I will call
6 general counsel to the Commission. We are litigation counsel
7 with respect to this federal case. There is separate counsel
8 within the Attorney General's Office. Once the Commission
9 decided to set the charge for a hearing and file the formal
10 complaint in the Office of Administrative Courts, the statute
11 requires there to be counsel for the complaint, and that is
12 the Attorney General's Office.

13 THE COURT: Okay. So the Attorney General's Office,
14 obviously headed by the Attorney General, has a responsibility
15 to provide legal advice to the ALJ as part of any hearing or
16 not?

17 MS. MORRILL: No, Your Honor. Again, the ALJ is as
18 neutral as this Court.

19 THE COURT: Okay.

20 MS. MORRILL: It has, to my understanding, no legal
21 counsel from our office in its adjudicative functions. And,
22 again, the Commission has separate general counsel. We are
23 its litigation counsel in this federal case, and then there
24 is -- there are other Attorneys General who are counsel for
25 the complaint.

1 THE COURT: Okay. All right.

2 All right. Here's what I'm going to do. I'm going
3 to take that under -- well, I'm taking everything under
4 advisement, but that issue I am going to take under
5 advisement. But I have a leaning here that most likely,
6 unless I see a reason not to, I may very well do the
7 following: Dismiss Hickenlooper because I don't believe
8 there's merit to this weak argument I've heard from the
9 plaintiff about why he should -- why Polis should be
10 substituted for him. But, on the other hand, I think the
11 Attorney General has some official responsibilities for some
12 of the statutes that are being challenged, and it may be, at
13 least for now, having Attorney -- new Attorney General Weiser
14 be substituted for Coffman does make some sense at least for
15 now. But we'll finally decide all that when I write my order.

16 All right. We are going to take a 20-minute break,
17 and when we come back, we are going to have a hearing on the
18 motion for preliminary injunction. And we will stop no later
19 than 1 o'clock. And I have read all these things, so I want
20 to get to the heart of the matter. And the first thing I want
21 you to talk about when we get back is what kind of injunction
22 is the plaintiff seeking. Is it a prohibitory injunction? Is
23 it a mandatory injunction? Because the test that the Court
24 applies is different depending on whether it's a status quo
25 injunction or if you are asking me to mandate something in an

1 affirmative way. And I want to hear your best arguments as to
2 what type of an injunction we are talking about.

3 MS. MORRILL: Your Honor, before we go off the record
4 on the motion to dismiss, may I make a record of one point?

5 THE COURT: Go ahead.

6 MS. MORRILL: Thank you.

7 THE COURT: Go to the big microphone, please.

8 MS. MORRILL: Thank you.

9 Your Honor, we have mounted a facial attack under
10 12(b)(1) on the sufficiency of the Complaint, including
11 plaintiffs' allegations of bad faith directed at the State
12 officials. Under *Phelps vI* [sic] we think it's clear that if
13 this Court finds that plaintiffs have satisfied their burden
14 and carried through the facial allegations in the Complaint
15 proof of bad faith against the State officials, that the --
16 then the burden shifts to our clients to rebut that finding of
17 bad faith. And we believe that we have done so on the face of
18 our, um -- basically using the same allegations in the First
19 Amended Verified Complaint to show that we have a third party
20 charge of discrimination alleging a credible violation of CADA
21 that is sufficient to justify the second prosecution of
22 Mr. Phillips and that firmly rebuts their allegations of bad
23 faith, even if the Court wants to accept them all as true.

24 Although, that being said, we do think it is part of
25 the *Phelps vI* [sic] analysis as well as the *Holt* case cited by

1 plaintiffs that if this Court disagrees, then we should be
2 allowed to make a limited evidentiary record in support of our
3 position that there is no bad faith. In support of that, we
4 have the declaration of Aubrey Elenis, who is the Division
5 Director for the Colorado Civil Rights Division, and we would
6 be happy to tender that to the Court and plaintiffs for
7 inclusion in the record.

8 THE COURT: Well, I don't want to have an evidentiary
9 hearing. This is not an evidentiary hearing. And I will let
10 you make your record, but I want to stop it right there. I'm
11 going to make a ruling.

12 Let's assume, just for purposes of this comment, that
13 I deny the motion to dismiss. I want the defendants who
14 remain to file an Answer, and I'm going to be talking to
15 Magistrate Judge Varholak, and I want to make sure that we
16 move this case along. And so we've got to have an Answer
17 filed, and we've got to -- the Magistrate Judge will set --
18 have you done your initial statement -- no, you haven't. Your
19 case plan and all that, has that been done at this point?

20 MS. MORRILL: No, Your Honor. The Magistrate agreed
21 with our request to stay disclosure --

22 THE COURT: So this case needs to get on a forward
23 track, and so that's why sooner rather than later I'm going to
24 make a ruling on the defendants' motion, and then I'll also
25 obviously rule on the motion for preliminary injunction. And

1 I may actually do them in separate orders. It may be that I
2 will rule on the motion to dismiss first, and obviously that
3 assumes that I deny it, because if I deny it then we have to
4 decide if we are going to grant injunctive relief. But it may
5 be that I may not necessarily rule at one time, because I
6 think I have a sense of what I want to do with the motion to
7 dismiss. Then I want to have the Magistrate Judge have you
8 come in so you can do everything you need to do, but in the
9 meantime an Answer needs to be filed, and this case needs to
10 move along. Since it's gotten my personal attention, I want
11 to make sure that we move this case along.

12 All right. We are going to be in recess now for 20
13 minutes.

14 (Proceedings recessed 11:42 a.m. to 12:05 p.m.)

15 THE COURT: All right, have a seat.

16 All right. So I want the plaintiff to tell me sort
17 of what injunctive relief you're -- yes.

18 MS. MORRILL: Your Honor, I am so sorry to interrupt,
19 and I respect the Court's prior statement that it does not
20 want an evidentiary hearing on the motion to dismiss, but I
21 would ask for just a very brief opportunity to make a record.
22 I believe the Court earlier acknowledged that one or both
23 sides may appeal its decision here today. We think this is
24 very important, not to do evidence, but just to make an offer
25 of proof as to what the declaration that I offered earlier

1 would say.

2 THE COURT: Okay. I'll let you do that at the very
3 end, but I want to switch to the injunction now, before we
4 conclude today. And figure out a way to make it as brief as
5 possible.

6 MS. MORRILL: It is, Your Honor. We have scripted
7 it, and it's ready to go. Thank you.

8 THE COURT: Okay. So just remind me. If I say I'm
9 about to quit, I will give you a chance to make your record.

10 MS. MORRILL: Thank you. Thank you very much.

11 THE COURT: All right. So back to you, Mr. Campbell.
12 Tell me what injunctive relief you are seeking in a more
13 particularized way and the type of injunction you are
14 requesting. And that is, is it a status quo, a prohibitory
15 injunction, or is it a mandatory injunction? And explain why
16 you think it's whatever you are about to say.

17 MR. CAMPBELL: Sure, Your Honor. We believe it is a
18 status quo injunction we are requesting, and we believe it is
19 a prohibitory injunction. And here's why. We are asking,
20 first and foremost, for an order that keeps the State from
21 enforcing its nondiscrimination laws against Mr. Phillips when
22 all he does is decline to create a cake expressing a message
23 that conflicts with his beliefs. And we believe that that
24 request simply to prevent the State from enforcing its law in
25 a certain set of circumstances, that that indeed is a

1 prohibitory injunction and not a mandatory one.

2 THE COURT: Why isn't that a final ruling on the
3 merits? I don't understand. Okay. Normally an injunction is
4 to stop something from happening. So if you were asking me to
5 enjoin the State from having this administrative law judge
6 hearing on February 4th, 2019, assuming there's merit to it,
7 that would make some sense, but if you are asking me to stop
8 the State from violating all the laws you are claiming it's
9 violating, why isn't that the end of the case? And if so, I
10 don't understand how that's an injunction.

11 MR. CAMPBELL: Your Honor, it's not the end of the
12 case because it would just be temporary during the pendency of
13 the proceeding. Ultimately the Court would have to decide at
14 the end of the case whether it thought we made the case in the
15 end, and then, thus, it would have to issue its final -- final
16 ruling.

17 But I will hasten to add, Your Honor, that while we
18 do request the injunction that we request on pages 2 and 3 of
19 our motion for preliminary injunction, and we do specifically
20 ask to keep the State from enforcing CADA when Mr. Phillips
21 declines to create a cake expressing a message that conflicts
22 with his faith, if the Court wanted to enter a more limited
23 injunction that simply stayed the pending state proceeding,
24 certainly we would be very happy with that, Your Honor. It
25 would not be all the relief that we are requesting, but we

1 would be very happy to receive it.

2 THE COURT: All right. I'm looking at your motion
3 for preliminary injunction. Where does it say exactly what
4 you are requesting? What page are you referring to?

5 MR. CAMPBELL: Your Honor, I believe it's pages -- it
6 spans pages 2 and 3 of our motion for preliminary injunction.

7 THE COURT: Okay. "Plaintiffs request a preliminary
8 injunction enjoining Defendants and their officers, agents,
9 servants, and employees and any other person in active concert
10 or participation with them from enforcing," then you've got a
11 whole bunch of statutes here, the ones that I alluded to in
12 your Verified Complaint. I'm not going to read this word for
13 word.

14 MR. CAMPBELL: Your Honor, there are essentially four
15 requests in there. The first one is the one that I already
16 indicated, which is to keep the State from enforcing CADA when
17 Mr. Phillips declines to create a cake with a message that
18 conflicts with his faith. The second one is a request to keep
19 the State from applying what we call CADA's publication bans
20 to prevent Mr. Phillips from announcing the messages that he
21 won't communicate through his cake art and expressing the
22 religious reasons why. The third request is the limited
23 facial claim that we bring, and so that's a request to
24 facially invalidate just the unwelcome clauses of CADA's
25 publication bans. And then the fourth request there is for

1 miscellaneous relief.

2 THE COURT: All right. So let me tell you what
3 normally happens, because nothing about this case is normal.
4 In cases where I have granted injunctions, and I'm not
5 criticizing you for not doing this, sometimes let's say if
6 there's a theft of trade secrets there can be a motion filed
7 by the party who is about to lose the trade secrets for an
8 emergency TRO. I probably would require a hearing on a motion
9 for preliminary injunction because at a hearing both sides
10 present evidence and the Court has enough information to
11 decide if, from both a law and factual standpoint, you meet
12 the requirements of an injunction, which includes irreparable
13 harm, a probability of success on the merits, and all the
14 things that are required by Rule 65 and the large number of
15 Tenth Circuit cases that interpret the meaning of Rule 65.
16 But then the preliminary injunction may or may not have a
17 duration, but it is not the same as a trial on the merits.

18 My reaction to this request is that it's too broad.
19 I mean, I have no -- I don't care who wins or loses this case
20 or any other case. And so it strikes me if I were to grant
21 the injunction that you are seeking, it would basically say
22 that even before we have had discovery and before I've had an
23 evidentiary hearing, I find that the plaintiffs should win,
24 and that's not appropriate. So I'm not so sure that the broad
25 request that you are making is appropriate.

1 Now -- so what I'm telling you is that perhaps maybe
2 what we need to do is you need to file -- I need to deny this
3 motion for preliminary injunction without prejudice, order you
4 to file a new one, and it needs to be tied to something more
5 specific, i.e., perhaps you want to seek an injunction that
6 stops the probable cause hearing that's set to begin or set to
7 occur on February 4th. I'm not telling you to do that, but
8 that would be a single act for which injunctive relief could
9 occur. But then we would have a hearing on the preliminary
10 injunction request where the Court could entertain evidence, I
11 could hear evidence, and it would be a fair hearing for the
12 defendants, because I'm just as interested in being fair to
13 them as I am being fair to your side.

14 So it seems to me that that makes more sense, and I
15 like to do things that make sense where I can. What's your
16 reaction to what I'm saying?

17 MR. CAMPBELL: Your Honor, we believe that we have
18 made the requisite showing to get the preliminary injunction
19 that we have requested. But, having said that, if the Court
20 wants to dismiss it without prejudice and allow us to refile
21 one that is more specific, certainly we would appreciate that
22 opportunity versus an outright denial that doesn't contemplate
23 a refile of a more narrow one.

24 THE COURT: Yeah, well, see here's the deal. I am --
25 you are not asking for a TRO, and I don't think a TRO makes

1 sense in this case, but if you are asking for a preliminary
2 injunction, I think by necessity there has to be an
3 evidentiary hearing. It's not the hearing we are having
4 today. And we can set it aside for two days; I don't care. I
5 mean, we just need to get it on the schedule. And the parties
6 need to be reasonable with each other in agreeing to stipulate
7 to certain documents and exhibits that might not otherwise
8 have been obtained through discovery, or perhaps you can do
9 some expedited discovery. I don't know what you want to do.
10 But it needs to be done in a fair way, and there needs to be
11 the ability, if the parties choose to, to call witnesses and
12 for there to be testimony presented. And the evidence has to
13 relate to whether or not the prongs and requirements of an
14 injunction have been met. I'm not interested in having the
15 State present evidence that it might otherwise present to the
16 administrative law judge. That's not what I'm talking about.
17 But whether or not there is a basis for me to determine, for
18 example, that plaintiff -- the plaintiffs are likely to
19 succeed on their First Amendment rights of free exercise of
20 religion and/or free speech and what is it about the
21 Fourteenth Amendment and equal protection claims that would
22 support and allow for the Court to make a finding of
23 probability of either success or lack of success on those
24 claims.

25 So that's what I think should happen because

1 otherwise I don't have enough information to engage in the
2 broad brush -- the broad scope of what you are requesting. So
3 I'm telling you, I'm ordering you that you need to narrow it
4 down to something that's more tangible, more immediate, and
5 you have got to explain to me why an injunction is critical
6 and why you believe that an injunction should be granted. And
7 then the government would respond. When I say the
8 "government," I mean -- well, it's still the government, but
9 the defendants. The state government, as opposed to the
10 federal government, would respond. And then we need to set
11 that down for a hearing.

12 So that's my thinking. That's the only thing that
13 makes sense to me in light of what you told me today. So let
14 me hear from the defendants on that issue. I'm about to make
15 your job easier today, Mr. Sullivan.

16 MR. SULLIVAN: Thank you, Your Honor. And thank you
17 for hearing from us today on the preliminary injunction piece
18 of today's hearing.

19 On the issues you raise regarding is this one of the
20 disfavored injunction categories that we are talking about, we
21 believe it is.

22 THE COURT: Well, no, I don't want to argue about
23 that. What I'm telling you is I don't think that this is ripe
24 for me to have an injunction hearing today. That's what I
25 want you to respond to. I don't want you to respond to the

1 type of injunction because I have a strong leaning here that
2 the request for preliminary injunction is too broad, and I
3 don't have any evidence. So I think that what I am inclined
4 to do is to deny this injunction request without prejudice and
5 then give the plaintiffs a deadline to file something new.
6 And when they file what's new, then I think it would be
7 appropriate for you to argue what it is, but I don't know what
8 it's going to be. So I want you to respond to what I'm
9 suggesting as an alternative to what's been presented thus
10 far.

11 MR. SULLIVAN: Understood, Your Honor. I'd say a
12 couple things. One, I'd say that we make arguments in our
13 papers that are 12(b)(6) type arguments. They are legal
14 arguments as to why plaintiffs' claims fail on their merits as
15 a matter of law. Those types of arguments do not require
16 evidence. We think you can rule as a matter of law that
17 plaintiffs are not likely to succeed on these claims.

18 THE COURT: But I'm not going to do that. You are
19 not listening to me. I am not going to entertain ruling on
20 the merits of an injunction on the present record. I think
21 it's unfair to the plaintiffs, and it's definitely unfair to
22 you. So I'm asking you if you understand what I'm now saying
23 and if it makes sense to you. If it doesn't make sense, I
24 still may do it, but that's okay.

25 MR. SULLIVAN: I certainly understand what you said,

1 Your Honor. I think we think -- I think that in the State
2 officials' opinion the delay that plaintiffs have engaged in
3 by not seeking a timely preliminary injunction, that causes
4 prejudice to the State officials. The State officials need
5 time to prepare for their February 2nd [sic] hearing in the
6 state administrative case. And plaintiffs' delay in seeking
7 that preliminary injunction, as we laid out in the forthwith
8 motion seeking a status conference, that constitutes prejudice
9 to the State officials. So waiting until January, literally
10 the eve of our state administrative hearing, that prejudices
11 the State officials, and we think it's an untimely request on
12 their part.

13 THE COURT: Well, but I'm -- that doesn't make any
14 sense either. I'm the one that is telling you I don't think
15 that I have enough information to fairly evaluate this broad
16 request for injunctive relief, but that doesn't mean that a
17 more narrow request cannot be presented. And if, in fact,
18 there's a basis to enjoin the February 4th hearing, it can be
19 rescheduled to another date. I mean -- I mean, I've -- I've
20 got the power to do that. So what I'm telling you is you are
21 wasting my time. I'm not inclined to rule that the plaintiff
22 can't file a more narrow request for preliminary injunction
23 because the one that's in front of me is too broad. So,
24 anyway, all right. Say what else you want to say in that --

25 MR. SULLIVAN: Well, I think if they do file

1 something requesting a more narrow relief, we will evaluate it
2 and respond to it, but we haven't seen what that relief is.

3 THE COURT: I understand. I'm going to give them a
4 deadline to file it. Listen to what I'm saying.

5 MR. SULLIVAN: Understood.

6 THE COURT: So I don't want to hear any arguments
7 today about something that's not in front of me.

8 MR. SULLIVAN: Understood.

9 THE COURT: Do you want me to grant the injunction
10 they have requested?

11 MR. SULLIVAN: No, Your Honor.

12 THE COURT: All right, then listen to what I'm
13 saying. Okay? I want to move this along. It doesn't have
14 anything to do with me wanting to go to lunch now. It's just
15 the breadth of this injunction troubles me because I don't
16 think I can fairly consider it without hearing evidence. And
17 when I hear evidence, it's evidence from both sides. And I
18 don't have any predisposition as to whether or not I should or
19 shouldn't grant an injunction until we have a hearing where
20 both sides present evidence and there are legal arguments that
21 are tailored to a more narrow request for injunctive relief.
22 Doesn't that make sense?

23 MR. SULLIVAN: That makes sense, Your Honor.

24 THE COURT: So you really don't object to that, do
25 you?

1 MR. SULLIVAN: Again, I have not -- I don't want to
2 waive any objections.

3 THE COURT: No, I'm just saying you don't object to
4 what I'm proposing because isn't it better than me granting an
5 injunction today?

6 MR. SULLIVAN: Your Honor, I do not want to waive any
7 objections. I have not seen their new request for a PI --

8 THE COURT: I understand.

9 MR. SULLIVAN: -- and certainly I don't want to
10 suggest that their delay is not a problem. We think it is a
11 problem.

12 THE COURT: Okay. Whenever -- if I allow them to
13 file something, you can file a response to it, but I'm going
14 to do it anyway, so I mean -- so make whatever record you want
15 to. You know what I'm inclined to do. So if you want to say
16 something that you think you need to say to protect your
17 interests and rights, say it, but say it briefly.

18 MR. SULLIVAN: Well, I want to be helpful to the
19 Court, Your Honor. So if Your Honor wants to hear argument on
20 the existing PI, I'm happy to do that --

21 THE COURT: I don't. I have already told you three
22 times that I think the request is too broad. I can't
23 entertain it without having an evidentiary hearing.

24 MR. SULLIVAN: Then I will sit down, Your Honor, if
25 Your Honor doesn't want to hear any legal argument on the

1 existing PI motion.

2 THE COURT: I do not want to hear anything on the
3 existing motion because I am going to deny it without
4 prejudice.

5 MR. SULLIVAN: All right. Thank you, Your Honor.

6 THE COURT: All right. Mr. Campbell, how much time
7 do you need to file something that's more narrow in scope?
8 Because I am going to give you a deadline. You don't have to
9 file it, but if you decide to file it, I am going to give you
10 a deadline, and I am going to give the defendants an
11 opportunity to respond, and then we're going to set an actual
12 date for a hearing today, with the understanding that that
13 only takes effect if you file something.

14 MR. CAMPBELL: That sounds good, Your Honor. One
15 point that I -- just for a point of clarification. If we do
16 go ahead and refile a motion for preliminary injunction, which
17 we are inclined to do, and the State takes a look at it, what
18 if all the parties agree that we don't need an evidentiary
19 hearing, in other words, there are no disputed issues of fact?
20 They submit their stuff through documents, we submit our
21 evidence through documents, and then we come back and have an
22 oral argument on it. Is that something the Court is open to?

23 THE COURT: Not really. An injunction is an
24 extraordinary remedy. I don't feel comfortable ruling on a
25 preliminary injunction just on affidavits. If you were asking

1 for a TRO, maybe affidavits would work. If you don't want to
2 have evidence, then I guess you don't want me to seriously
3 consider a preliminary injunction.

4 MR. CAMPBELL: Your Honor, that is -- that is not
5 what I'm saying. I just was wondering if the Court was open
6 to that opportunity.

7 THE COURT: No. The answer is no.

8 MR. CAMPBELL: Thank you.

9 THE COURT: I have been doing this now almost 24
10 years, and I have presided over scores of injunction hearings,
11 and I think I know what I'm doing. So follow my lead, please,
12 or else I won't let you do anything.

13 MR. CAMPBELL: We will, Your Honor.

14 So given that Christmas is coming up, we would
15 appreciate, you know, maybe -- we would like a couple weeks to
16 get something filed. If the Court is not open to that, we
17 will do whatever the Court requests.

18 THE COURT: All right. Do you have any sense of what
19 you are likely to request if you file a new motion for a
20 preliminary injunction?

21 MR. CAMPBELL: I think we'll likely request that the
22 pending state proceeding be enjoined.

23 THE COURT: Okay. And that's the February 4th --

24 MR. CAMPBELL: Correct.

25 THE COURT: Is it a probable cause hearing? What is

1 the hearing? The probable cause has already been initiated.

2 What's the hearing before the ALJ?

3 MS. MORRILL: It's a merits hearing, Your Honor.

4 THE COURT: Merits hearing. All right.

5 MR. CAMPBELL: Actually, Your Honor, just to bring
6 the Court up to speed on that, there was a motion filed either
7 yesterday or Friday by all the parties in that case asking for
8 that to be treated as what's called a commencement hearing and
9 then to push back the evidentiary hearing to an undetermined
10 date that will be decided at that February 4th commencement
11 hearing. And so all that to say I want the Court to know
12 exactly what the status is. That hasn't been ruled on yet,
13 but that's what the parties have asked in that proceeding.

14 So what would be helpful, the Court acknowledged that
15 it does have power to temporarily move that hearing, we think
16 it would be --

17 THE COURT: Well, I have power if I find there's
18 merit to the injunction request. I'm not going to move a
19 hearing just because I have the power to do it. What I'm
20 telling you is that if the February 4th hearing was a merits
21 hearing and I had an injunction request that I found
22 meritorious before that hearing, I would have the ability to
23 stop that hearing from occurring, but I'm not saying that's
24 what I'm going to do because I'm not sure that that's what I
25 should do.

1 So, Mr. Campbell, what is the hearing that's now set
2 for February 4th? You mentioned that the parties had jointly
3 filed something. What is your understanding of that? Or
4 Mr. Sullivan. Whoever knows the answer.

5 MR. CAMPBELL: Yeah, so essentially all the parties
6 filed something asking for that February 4th hearing to not be
7 a merits hearing but instead to be what the State calls a
8 commencement hearing, which is really just a scheduling
9 conference for the parties to get together to discuss the
10 status of the case and then to set out a timeline for
11 discovery, a timeline for other issues that need to be
12 decided.

13 THE COURT: Does counsel for the defendants agree
14 with what he's just said?

15 MS. MORRILL: Your Honor, as we indicated earlier, we
16 are not counsel in the State proceeding, so we actually don't
17 know what --

18 THE COURT: Oh, different lawyers are handling that.

19 MS. MORRILL: -- our counterparts in the Attorney
20 General's Office have agreed to or not. We will accept
21 Mr. Campbell's representations as an officer of the court.

22 THE COURT: All right. So do you think, then, that
23 the State is likely to agree with this request and that the
24 hearing on February 4th is not going to be a hearing on the
25 merits but instead will be a scheduling conference? Is that

1 going to happen?

2 MR. CAMPBELL: I think that's likely, Your Honor, but
3 there's --

4 THE COURT: When will you know with certainty whether
5 or not the hearing on February 4th is converted from a merits
6 hearing to just a commencement hearing?

7 MR. CAMPBELL: We'd be happy to reach out to the ALJ
8 today and to inquire when we might get a ruling on that, but
9 in terms of when that might come, I'm not sure. As I said, it
10 was filed either Friday or Monday.

11 THE COURT: Well, obviously if the February 4th
12 hearing is no longer a merits hearing, then we've got more
13 time.

14 And so here's what I'm going to do. I'm going to
15 order that the parties meet and confer, and when I say counsel
16 for the defendants I'm talking about counsel who are not here
17 but may have some knowledge about this. And if it turns out
18 that the February 4th hearing has been converted to what I'm
19 calling a scheduling or commencement hearing, it is not a
20 hearing on the merits, then that gives us more time. And if
21 there's more time, then what I want you to do is meet and
22 confer and propose a schedule for the filing of a more
23 narrowly drawn and focused hearing for preliminary injunction,
24 with a response from the defendants, and with a reply from the
25 plaintiffs. And then tell me how much time you need for an

1 evidentiary hearing. And then that would give us the
2 opportunity to perhaps go into February, mid to late February,
3 before we schedule a hearing, because I want it fully briefed,
4 and I want to have time to look at all this. And then I want
5 to have evidence presented, meaning in the form of exhibits
6 and witnesses who testify under oath, so I can truly
7 understand what is it about this that would require the Court
8 to exercise its extraordinary equitable powers to stop the
9 State from proceeding in any way that you believe is
10 appropriate.

11 And I'm not telling you what to request, but make
12 sure it's a narrow, focused request. And if it's a broad
13 request that's asking me to find that all of these statutes
14 should be enjoined forever and ever, it will be denied without
15 a hearing. So it's got to be a narrow -- narrower request.
16 And it won't be a permanent injunction. It will only be a
17 preliminary injunction. All right.

18 MR. CAMPBELL: That makes sense, Your Honor.

19 THE COURT: I know it makes sense. I usually say
20 things that make sense. All right.

21 All right. So is there anything else we need to do
22 today?

23 Yes, make your record.

24 MS. MORRILL: Thank you.

25 THE COURT: Go ahead and make your record.

1 MS. MORRILL: Thank you, Your Honor. LeeAnn Morrill
2 for the State officials. Again drawing on the Tenth Circuit's
3 decision in *Phelps II*, we believe that if this Court is
4 inclined to find that plaintiffs on the face of their
5 Complaint have met their burden of doing more than merely
6 alleging bad faith on behalf of the State officials, that the
7 burden shifts back to the defendant to rebut the presumption
8 of bad faith by offering what is referred to as a legitimate,
9 articulable, objective reason to justify the decision to
10 initiate the prosecution. And this is at *Phelps v Hamilton*,
11 122 F.3d 885 at 889-890, and that's the 1997 *Phelps v Hamilton*
12 case from the Tenth Circuit.

13 So here we would make an offer of proof that the
14 Division Director Aubrey Elenis will declare under penalty of
15 perjury, we have a declaration here ready to offer the Court,
16 or live testimony, that the following has occurred:

17 That the Division and Commission have followed their
18 normal process in this case. They have not exercised bad
19 faith, animus, hostility, or bias towards plaintiffs in that
20 process. That the Division did not solicit this charge or
21 otherwise coordinate its filing with Miss Scardina. That the
22 Division provided notice to plaintiffs and an opportunity for
23 them to respond to the charge in writing. That the Division
24 enforces CADA neutrally without regard to the respondent's
25 creed or religion. The Division has actually sought to

1 enforce CADA to protect religious persons from discrimination.
2 That the Division enforces CADA neutrally without regard to
3 the respondent's history of successfully seeking judicial
4 review of prior orders, and that it abides by binding court
5 precedent when enforcing CADA's full and equal service
6 requirement. That Division -- that neither -- that no
7 Division staff have any financial interest or familial
8 relationship in any competing bakery with the Masterpiece
9 bakery.

10 THE COURT: All right. So here's what I think.

11 MR. CAMPBELL: Your Honor, can I just lodge a brief
12 objection to that?

13 THE COURT: Go ahead.

14 MR. CAMPBELL: Your Honor, just to preserve it for
15 the record, the State could have done this previously. It
16 made a decision to move forward on a 12(b)(1) motion, and a
17 facial attack at that, and it decided not to introduce any
18 evidence like this. And so to do it now is belated, and we
19 don't think the Court should consider it. Thank you.

20 THE COURT: Well, I'm not going to consider it.
21 Here's what I'm going to do. I think that this could have
22 been presented earlier, but it wasn't. I let you make your
23 record just because I like to let attorneys make a record, but
24 what I'm going to say is, I'm not going to consider what I
25 have just heard for purposes of ruling on the motion to

1 dismiss. However, if we end up having further proceedings,
2 whether they be on a motion for preliminary injunction or
3 other motions that are filed, then I'll let you file that.
4 Because it could have been filed earlier, and it wasn't. And
5 I didn't tell you not to file it. You chose to file what you
6 wanted to file. And I think Mr. Campbell's request is
7 reasonable. So while I let you say what you have said, I
8 don't want you to file anything. I'm not going to let you
9 file it.

10 So let's do something. Let me make some rulings
11 here, and then we can proceed.

12 First, on the motion to dismiss I will enter a
13 written order, but as I've indicated I'm inclined to deny the
14 motion to dismiss, but I'm going to write up the order so that
15 it says what it says with all of the legal embellishments that
16 the Court thinks it needs to put in that order.

17 Then regarding the motion for preliminary injunction
18 and memorandum of law in support, document number 57, I'm
19 going to deny it without prejudice because it's just too
20 broad, and it's impossible for me to entertain this in a way
21 that's fair to both parties without having evidence and
22 without it being narrowed.

23 So here's what I'm going to order regarding the
24 filing of any new motion. First, I'm going to order that the
25 parties file a joint status report within 10 days. So today

1 is, what, December the 18th. So by Friday, December 28th, I
2 want a status report filed that tells me whether or not the
3 February 4th hearing before the administrative law judge has
4 been converted from a merits hearing to a commencement or
5 scheduling hearing.

6 And if, in fact, it's been converted, and it sounds
7 like it might be because Mr. Campbell represented that the
8 lawyers who represent the State on that aspect of the matter
9 have joined in a request for that to occur, but I want you to
10 tell me by the 28th what the bottom line is on that. And
11 assuming that the hearing has been converted, then I'm going
12 to give you until -- the parties until after the holidays, how
13 about until Friday, January 11th, to do the following:

14 Propose in writing to the Court -- and you can call
15 my chambers, if you need to, to get some available dates on my
16 calendar -- the following: A date by which the plaintiff will
17 file a narrower motion for preliminary injunction only, not a
18 permanent injunction, preliminary injunction. A deadline for
19 the defendants to file a response. And then a deadline for
20 a -- a shorter deadline for a reply.

21 And then let's assume you think you need a two-day
22 hearing, evidentiary hearing. Call my chambers and find out
23 when I'm available in mid to late February at the earliest for
24 a two-to-three-day hearing. But I want to have at least a
25 two-week hiatus or gap between when the briefing is finished

1 and when we have the evidentiary hearing so I will have a
2 chance to read all that.

3 All right. Now, I'm going to talk to -- I'm going to
4 order this to happen, but I'm going to tell Magistrate Judge
5 Varholak to get going on this. I'm going to order that the
6 stay on discovery be dissolved, but I'm going to direct
7 Magistrate Judge Varholak to bring you in for a scheduling
8 conference right away and for the scheduling order that you
9 present to him to address everything that needs to happen
10 regarding discovery. And I'm going to go see him this
11 afternoon and tell him to bring you in immediately for a
12 scheduling conference and -- because I want to get this case
13 moving. Now, whether or not you need discovery on an
14 accelerated basis for purposes of getting ready for the
15 injunction hearing, I will leave that up to him.

16 Yes.

17 MS. MORRILL: Thank you, Your Honor. I have a
18 question regarding the last point of the Court's order
19 dissolving the scheduling order. We would ask for
20 clarification then at this time before we go in before the
21 Magistrate as to whether the Court is inclined to grant the
22 State officials' absolute immunity defenses from the damages
23 claims, as we believe that will have a significant impact on
24 what discovery is allowable in the event that --

25 THE COURT: Hold on. You just said something that I

1 think makes sense. All right.

2 MS. MORRILL: Thank you.

3 THE COURT: What I'm going to do is I'm going to
4 direct my staff to help me get out an order that rules on the
5 motion to dismiss. All right. So what I'm going to direct
6 the Magistrate Judge to do is to leave everything in place
7 until I have entered that order.

8 MS. MORRILL: Thank you.

9 THE COURT: But my plan is to enter that order within
10 the next week.

11 MS. MORRILL: Thank you.

12 THE COURT: And you should assume that I'm going to
13 deny the motion to dismiss or we wouldn't be doing all this.
14 And then, once that order is denied, it will say specifically
15 that I order the Magistrate Judge to bring you in for a
16 scheduling conference and to dissolve the stay on discovery,
17 but it needs to be moved forward consistent with a plan. And
18 then what I also will tell him is that the parties need to
19 decide if they want some sort of immediate discovery that has
20 some relationship to information you might need before we have
21 the hearing on the injunction, provided the plaintiffs seek a
22 preliminary injunction. All right.

23 And then let me just tell you this, Mr. Campbell,
24 because if you don't do this, then we are wasting our time.
25 In your more narrowly filed motion you need to explain to me

1 why there is irreparable injury, your likelihood of success on
2 the merits as it relates to each of your claims, because I'm
3 confused about why I should grant an injunction based on your
4 allegations of due process violations and of equal protection
5 violations under the Fourteenth Amendment, but I need to
6 understand why you think that should be included in your
7 moving papers. And you can have affidavits to support that if
8 you want, and the defendants can have affidavits, but, again,
9 I want to hear real witnesses at trial -- not trial -- at the
10 hearing on the preliminary injunction.

11 All right. Is there anything else we need to do
12 today?

13 MS. MORRILL: Not from the State officials, Your
14 Honor. Thank you.

15 THE COURT: What about for the plaintiffs?

16 MR. CAMPBELL: Not from the plaintiffs either, Your
17 Honor.

18 THE COURT: All right. So I think what we'll do is
19 the minutes will reflect the Court's ruling on the motion for
20 preliminary injunction and memorandum of law in support as it
21 relates to it being denied without prejudice, and all the
22 other deadlines I've set, and I will alert the Magistrate
23 Judge of what I have decided so he will be prepared to move as
24 soon as I enter my order.

25 MS. MORRILL: Thank you.

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THE COURT: All right. We'll be in recess.
(Proceedings concluded 12:39 p.m.,
December 18, 2018.)

REPORTER'S CERTIFICATE

I, JULIE H. THOMAS, Official Court Reporter for the United States District Court for the District of Colorado, a Registered Merit Reporter and Certified Realtime Reporter, CA CSR No. 9162, do hereby certify that I reported by machine shorthand the proceedings contained herein at the time and place aforementioned and that the foregoing pages constitute a full, true and correct transcript.

Dated this 26th day of December, 2018.

/s/ Julie H. Thomas
Official Court Reporter