

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLORADO

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

4 MASTERPIECE CAKESHOP INCORPORATED, et al.,

5 Plaintiffs,

6 v.

7 AUBREY ELENIS, et al.,

8 Defendants.

9
10 Proceedings before SCOTT T. VARHOLAK, United States
11 Magistrate Judge, United States District Court for the
12 District of Colorado, commencing at 10:58 a.m., February 5,
13 2019, in the United States Courthouse, Denver, Colorado.

14
15 WHEREUPON, THE ELECTRONICALLY RECORDED PROCEEDINGS
16 ARE HEREIN TYPOGRAPHICALLY TRANSCRIBED...

17
18 APPEARANCES

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

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

24
25 DISCOVERY CONFERENCE

1 P R O C E E D I N G S

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

5 THE COURT: This is 18-cv-2074. Can I have entries
6 of appearance, please.

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

9 THE COURT: Good morning.

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

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

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

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

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

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

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

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

13 And the hypothetical that I pose is the following:
14 Assume a pro se plaintiff brings a case in front of me for a
15 1983 case alleging racial discrimination against an employer,
16 and I issue certain rulings that go against that pro se
17 plaintiff. The pro se plaintiff then brings a second case.
18 The first case is not completed yet. It's ongoing and I've
19 issued discovery decisions against that pro se plaintiff.
20 The pro se plaintiff then brings a second case alleging that
21 the reason I have -- 1983 case alleging that the reason that
22 I have ruled against him is because I have racial animus
23 against him. And let's say that the allegations -- and
24 again, in this case we're just beyond the 12(b)(6) stage,
25 let's assume the allegations in my hypothetical are

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

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

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

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

1 how that's distinguishable from the instant case.

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

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

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

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

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

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

18 I'll hear from plaintiff first.

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

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

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

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

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

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

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

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

12 THE COURT: So why can't you get that through the
13 30(b)(6) deposition? In other words, what you want to know
14 is why a certain decision was made. The -- and again, this
15 case is, you know, procedurally a unique position and what
16 you have remaining is the commissioners who are in their
17 official capacity, not in their individual capacity. So --
18 and a commissioner sued in their official capacity is the
19 same as suing the State, in -- which is essentially what --
20 why did the State make this decision.

21 If that's the case, why isn't the 30(b)(6) witness
22 sufficient to answer that? The 30(b)(6) witness must know as
23 required to be fully prepared on the 30(b)(6) deposition why
24 the State made the decision, and, therefore, I think the
25 30(b)(6) witness needs to speak to each commissioner and say

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

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

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

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

17 THE COURT: What does that mean exactly?

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

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

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

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

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

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

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

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

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

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

18 THE COURT: Okay.

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

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

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

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

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

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

1 matters.

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

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

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

1 believe are actually subject to discovery in this case.

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

13 THE COURT: Why are there limits on that witness's
14 knowledge? I mean, again, putting aside for a minute what
15 they want to limit because I'm not exactly sure what
16 practices and processes mean, but if I were to allow the
17 30(b)(6) to be deposed on the reasons for the decision in
18 this case to prosecute, why is that 30(b)(6) witness's
19 knowledge limited? They're required to be prepared on that
20 topic.

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

1 talked about with others concerning this case.

2 THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 them.

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

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

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

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

25 They file a felony complaint against an individual

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

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

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

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

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

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

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

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

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

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

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

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

25 In those instances, plaintiffs are not entitled to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 THE COURT: If you can remember them.

11 MS. FREDERICKS: Yes, absolutely.

12 THE COURT: This is the downside --

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

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

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

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

1 have not found a case that is directly on point.

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

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

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

21 MS. FREDERICKS: Surely.

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

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

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

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

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

1 not what we have here.

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

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

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

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

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

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

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

23 MS. FREDERICKS: Sure.

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

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

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

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

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

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

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

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

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

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

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

18 MS. FREDERICKS: Potentially.

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

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

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

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

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

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

25 THE COURT: Okay.

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

5 THE COURT: Sure.

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

8 THE COURT: Okay.

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

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

22 THE COURT: And is that verbal communications also?

23 MS. FREDERICKS: I'm sorry.

24 THE COURT: Is that verbal communications also?

25 MS. FREDERICKS: Correct, because in the state of

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

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

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

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

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

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

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

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

19 THE COURT: Okay.

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

22 THE COURT: Okay.

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

25 THE COURT: Okay.

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

4 THE COURT: Okay.

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

11 THE COURT: Okay.

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

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

22 MS. FREDERICKS: Correct.

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

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

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

4 THE COURT: Okay.

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

7 THE COURT: Okay.

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

10 THE COURT: Okay, and if --

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

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

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

21 THE COURT: Okay, sure.

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

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

19 Does that answer the Court's question?

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

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

4 MS. FREDERICKS: I think that's correct.

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

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

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

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

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

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

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

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

18 Under Convertino vs. U.S. Department of Justice,
19 674 F.Supp.2d at 105 and that's DDC 2009, what was required
20 was other than allegations, that there were facts that the
21 employee -- other than allegations alleging that the
22 employees disliked the plaintiffs, there was no evidence of
23 misconduct, and to find otherwise and to permit discovery
24 would render the privileges meaningless based on those mere
25 allegations.

1 A couple more cases that I would put forth for the
2 Court's consideration with respect to what is that standard
3 in order to overcome, in *Hinckley vs. U.S.*, 140 F.3d 277 at
4 285, which is DC Circuit 1998, there was a denial of the
5 request for documents because, quote, no colorable showing,
6 end quote, was made that the reviewing board in that instance
7 had acted with impropriety, so there the standard was a
8 colorable showing.

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

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

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

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

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

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

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

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

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

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

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

24 May I have a moment, Your Honor?

25 THE COURT: Sure.

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

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

7 (Recess was taken).

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

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

1 unchartered territory.

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

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

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

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

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

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

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

1 standards.

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

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

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

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

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

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

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

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

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

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

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

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

13 I don't know the answer to this, which is why I'm
14 not making a finding. It may be that there were no such
15 discussions or very limited such discussions such that a
16 30(b)(6) witness would be able to get up to speed on any such
17 discussions. If that's the case, and the 30(b)(6) witness is
18 capable of answering any questions about discussions that
19 commissioners -- and I'm talking current commissioners, the
20 defendant commissioners -- had about this case, then -- and
21 they're able to answer all of those, then I would be less
22 inclined to open back up the commissioners to depositions in
23 this case on those topics.

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

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

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

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

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

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

10 So that is ultimately how I am attempting to strike
11 the balance in this case. I recognize it may require us
12 going back to the deposition of the commissioners at some
13 point, but I think I need more information in order to
14 evaluate the need for that information because I don't know
15 what is going to be produced in the documents that are going
16 to be turned over and what is going to come out in the
17 30(b)(6), and I think I need to see that first before I can
18 properly balance that last component of this, which is the
19 need to actually depose the commissioners.

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

25 Any need for clarification of my order here today?

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

7 THE COURT: Correct, correct.

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

11 THE COURT: Right.

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

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

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

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

25 Any clarification from the defendants?

1 MR. SULLIVAN: Yes, Your Honor, thank you.
2 Grant -- this is Grant Sullivan, assistant solicitor general
3 for the state officials. Your Honor, you said that -- on the
4 30(b)(6) representative, I heard you to say that you're
5 allowing inquiry in two areas, one the rationale for the
6 decision. Do I understand Your Honor's ruling to be you're
7 only allowing inquiry into kind of the objective
8 manifestations of the rationale? So if there is a memo that
9 one of the commissioners prepared or that division staff
10 prepared or there is a transcript from one of their hearings,
11 inquiry into those topics is allowed, but I understood Your
12 Honor's ruling to disallow questions about their subjective
13 feelings about why they might have voted one way or another.

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

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

1 occurred.

2 MR. SULLIVAN: Sure.

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

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

13 THE COURT: Right.

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

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

20 MR. SULLIVAN: Right.

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

1 MR. SULLIVAN: Right.

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

11 MR. SULLIVAN: Right.

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

18 MR. SULLIVAN: Understood.

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

21 MR. SULLIVAN: Understood.

22 THE COURT: Okay.

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

24 THE COURT: Okay.

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

1 a couple housekeeping matters.

2 THE COURT: Okay.

3 MR. SULLIVAN: But --

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

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

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

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

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

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

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

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

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

10 MR. CAMPBELL: Okay.

11 THE COURT: Okay. All right.

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

14 THE COURT: Sure.

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

20 THE COURT: Sure, sure.

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

1 THE COURT: Okay.

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

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

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

8 THE COURT: Okay.

9 MR. CAMPBELL: Nothing else from me.

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

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

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

/s/ Dyann Labo February 8, 2019
Signature of Transcriber Date