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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

MASTERPIECE CAKESHOP INCORPORATED, et al.,

Plaintiffs,

v.

AUBREY ELENIS, et al.,

Defendants.

Proceedings before SCOTT T. VARHOLAK, United States
Magistrate Judge, United States District Court for the
District of Colorado, commencing at 1:29 p.m., February 28,
2019, in the United States Courthouse, Denver, Colorado.

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

APPEARANCES

RYAN TUCKER, DAVE CORTMAN and JACOB WARNER,
Attorneys at Law, appearing for the Plaintiffs.

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

DISCOVERY HEARING

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. TUCKER: Ryan Tucker, Dave Cortman, Jake Warner
8 for the plaintiffs.

9 THE COURT: Good afternoon.

10 MS. RICH FREDERICKS: Good afternoon, Your Honor.
11 Jacqueline Rich Fredericks and Grant Sullivan for the state
12 officials.

13 THE COURT: Good afternoon.

14 MS. RICH FREDERICKS: Good afternoon.

15 THE COURT: So we are here with regard to a
16 discovery dispute, some of which is at least partially mooted
17 by Judge Daniel's order that went out just moments ago. I
18 don't even know if the parties saw it.

19 The -- before we get to the discovery disputes, I
20 want to have a discussion with the parties about this case
21 moving forward. This case is only six months old and we're
22 already on ECF Number 138 as well as I think this is now the
23 third discovery dispute that I've held with the parties.

24 The parties are going to have to try to figure out
25 a way amongst you all to work together to move this case

1 forward. If you can't, I'm going to refer this to a special
2 master for discovery disputes, which what the practicality of
3 that means is that you all are going to be paying for the
4 discovery disputes.

5 I've yet to do that in a case. I've had a few
6 where I have considered it. I don't like doing it because
7 it's -- I recognize that it's my obligation to work things
8 out, but my colleagues who have done it have recognized that
9 when parties are paying for their own discovery disputes they
10 tend to get along better and don't have as many of them. So
11 I'm going to raise that now. I'm hoping that the parties can
12 work together.

13 Again, I recognize, for example, the deposing of
14 the commissioners, that was a legitimate area of law with
15 very little law on it and I recognize that the parties
16 couldn't reach agreement on that. I'm not faulting the
17 parties on that, but nonetheless, there has been a lot of
18 filings in this case and a lot of acrimony and I don't want
19 that going forward.

20 So with that said, let's turn to the discovery
21 disputes here. The first issue is with respect to the timing
22 of the notice of depositions. I recognize that our local
23 rules generally require 14 days for notice for depositions.
24 This case, however, is unique in that Judge Daniel has
25 scheduled the -- the preliminary injunction hearing and as a

1 result has ordered this sort of expedited discovery process.
2 Whether he ordered it or I ordered it, I don't remember
3 which, but whoever did were in a unique timeframe that we're
4 trying to expedite a bunch of discovery in a very short
5 timeframe here.

6 And so given that, I find that the fact that the
7 depositions were noticed two days before, with only 12 days'
8 notice instead of 14 days' notice, I don't find that
9 sufficient to cancel the depositions, and so as a result, I'm
10 going to allow the depositions to go forward.

11 Obviously one of the issues that was raised in I
12 think it was the objection -- it was one of the motions that
13 was filed that Judge Daniel just ruled on earlier today was
14 whether the preliminary injunction should be continued. He
15 denied that without prejudice to filing a motion to continue.

16 If the preliminary injunction gets continued and
17 the parties want to then reschedule these depositions, you
18 all are free to do so, but as of right now we still have this
19 very short timeframe in order to get prepared for this
20 preliminary injunction, and so I'm going to allow the
21 depositions to go forward.

22 The next issue is with respect to the Rule 30(b)(6)
23 depositions, and here I want to be clear that my prior
24 ruling -- I wasn't trying to set forth all of the potential
25 grounds for all of the potential areas in which a 30(b)(6)

1 was appropriate. What I was trying to do is set forth the
2 general parameters of how I want this discovery to proceed,
3 which is, one, the 30(b)(6) to get into the rationale for the
4 decisions that were made in this case and as well as any
5 communications that may have occurred between the
6 commissioners -- between the commissioners, the defendants
7 and themselves about the rationale for the decisions that
8 were made.

9 To the extent a 30(b)(6) witness can answer the
10 questions as to why a particular commissioner made their vote
11 or decided to agree to the probable cause hearing, I'm going
12 to allow that 30(b)(6) witness to testify on that. As I
13 indicated at the last hearing -- I think my recollection is
14 what I indicated was that I recognize that a 30(b)(6) witness
15 may not be able to answer some of those questions. To the
16 extent that the 30(b)(6) witness cannot answer a particular
17 question, then that may lead me to allow the depositions of
18 the individual commissioners, because if a 30(b)(6) witness
19 cannot say why the probable cause decision was made, then I
20 may have no choice but to allow the deposition of the
21 commissioners because they may be the only person who can
22 answer that question.

23 What I'm not allowing in either the 30(b)(6) or the
24 depositions of the commissioners is their personal beliefs
25 with respect to issues of religion. Now, I do want to hear

1 brief argument, and we'll do it after we go through some of
2 these other issues, as to whether or not this issue has been
3 opened up as a result of the affidavit that was filed in this
4 case and how that affidavit plays into that issue, because
5 what I don't want to have happen is the defendants to
6 essentially use their personal beliefs as both a sword and a
7 shield to say, no, we don't have any animus whatsoever and
8 then not be permitted to be questioned as to whether they
9 have any animus. And I have some concerns that the affidavit
10 that was entered is attempting to be used as both a sword and
11 a shield and so I'll hear argument on that.

12 With respect to the location of the Rule 30(b)(6)
13 deposition, I'm not going to have the deposition in the
14 courthouse here. We don't have the facilities for -- in very
15 rare cases, I've never done it, there have been some judges
16 who have allowed 30(b)(6) depositions to occur -- or not
17 30(b)(6), but depositions in general to occur at the
18 courthouse. The rationale for that is largely in cases where
19 you have a litigant who there is some security concerns
20 about. Generally occurs with a pro se litigant where there
21 is some concerns that they are going to not behave
22 appropriately, perhaps violently. That's not this case.
23 This is simply a request to have it be conducted here because
24 the parties are worried that there is going to be too many
25 arguments during the deposition.

1 First, I'm hopeful with my comments earlier today
2 that the parties can work that out. Second, to the extent
3 you can't -- when is the date of the deposition? When is it
4 scheduled for?

5 MR. TUCKER: Well, we have noticed it for next
6 Wednesday or Thursday.

7 THE COURT: You are going to be completely out of
8 luck getting any help from me on Thursday because I am going
9 to be flying to Arizona for a baseball tournament for my son,
10 so I'm not going to be able to answer any discovery disputes
11 on the phone.

12 If it's Wednesday, I am going to be in Chambers,
13 and so to the extent that something can't be worked out, we
14 will attempt to accommodate and have -- you know, and rule on
15 it and the parties can call in telephonically and I can
16 address it.

17 My general rule is to the extent there is an
18 objection to relevance, you state the objection and then the
19 witness answers the question. If we get into privilege
20 issues, that's where I recognize that we made need judicial
21 guidance. And again, if it's Wednesday, I'm happy to
22 accommodate the parties and we'll get the date -- get a court
23 hearing set and, you know, I can rule on the issues.

24 So then I think that brings us to -- and I
25 recognize there may be issues with the 30(b)(6) deposition

1 that still need to be addressed and we can talk about that,
2 but I think that brings us to Director Elenis's deposition
3 and this issue of whether or not the affidavit or declaration
4 that was submitted has opened the door on the issues of bias
5 and question him on that.

6 So why don't I hear from plaintiff first and then
7 I'll hear from defendant on that issue.

8 MR. TUCKER: Sure, thank you, Your Honor. Again,
9 Ryan Tucker for the plaintiffs.

10 I think Your Honor is keyed in directly on the very
11 issue that we're concerned about. If you look at Director
12 Elenis's declaration that was filed on February 8, 2019,
13 that's Document 116-1, and in particular, I think Your Honor
14 was alluding to paragraph 24, the last sentence there says:
15 The Division has not exercised bad faith, bias, animus or
16 hostility in handling the discovery and the charge.

17 In addition to the language in paragraph 24, we
18 have a total of 34 different paragraphs where the director
19 has opined on various subject matters, and the defendants can
20 correct me if I'm wrong, but I think their position is that
21 we do not get an opportunity to depose her unless it is
22 curtailed in a very draconian fashion basically when we get a
23 chance to ask her about the very things that she's testified
24 to.

25 And so when a witness testifies as Director Elenis

1 has done here that the Division has not exercised that bad
2 faith, that bias, that animus or hostility, which is -- which
3 is our case, we should have the right to cross-examine, to
4 explore the rationale, the reasoning behind it. And as Your
5 Honor said, you can't -- you can't lay behind that and say
6 I'm going to use this as a sword and a shield. The argument
7 being that almost like an offensive use and the
8 attorney/client -- you know, or attorney/client privilege
9 context where you can't hide certain things and then use it
10 when you see fit, and I think that's exactly what's going on
11 here.

12 So our position is that as it relates to this
13 entire declaration every single paragraph that you see here
14 we should have the right to explore each and everyone of
15 those topics and that would include directly paragraph 24
16 among the other items.

17 There is not a whole lot more to add to that. That
18 is our point. We believe that we should get her deposition
19 with no strings attached and we have scheduled that for next
20 week and we believe that it should be awarded to go forward.

21 THE COURT: Let me hear from the defendants. And
22 before you begin, I state I am somewhat sympathetic to
23 plaintiff's argument here in that this is the one witness who
24 you intend to rely on for the hearing and it seems like she
25 should be -- she or he, I'm not --

1 MS. RICH FREDERICKS: She.

2 THE COURT: -- she should be deposed beforehand to
3 be given the opportunity to be questioned about the assertion
4 she's making in this.

5 MS. RICH FREDERICKS: Perhaps I can allay some of
6 the Court's concern. Plaintiffs indicated in their filing
7 that it is the defendant's position that they should not have
8 any discovery. That is an error.

9 On the 21st via both letter and e-mail Mr. Sullivan
10 communicated directly to plaintiffs and indicated that we
11 would actually reschedule and move one of our own depositions
12 to make room for them to have time next week to depose both
13 the director, Ms. Elenis, as well as the Commission pursuant
14 to 30(b)(6) and we did exactly that.

15 We are not arguing that they cannot depose
16 Ms. Elenis. We put her forward as a witness, we tendered an
17 affidavit on her behalf. We vehemently urge and assert that
18 the same protections of immunity that were awarded to the
19 commissioners apply to her. She's also quasi-prosecutorial
20 immune.

21 Notwithstanding, we are not offering her as both a
22 sword and a shield and that is why we have affirmatively
23 offered to make her available and that is why Mr. Sullivan
24 expressly indicated, Please let us know if we can set this
25 for this date.

1 THE COURT: So do you agree that you can be
2 questioned about all 34 assertions that she's made in her
3 declaration?

4 MS. RICH FREDERICKS: Your Honor, I believe that
5 she can be questioned about her declaration, about the
6 rationale that underlies the decision and about the
7 statements that she made there, but I want to make something
8 abundantly clear. I believe that plaintiffs are seeking to
9 make paragraph 24 some sort of an aberration and trying to
10 get by this Court's prior ruling with respect to the Bryce
11 (ph) case, which was the Tenth Circuit's case dealing with
12 Judge Brimmer and his Episcopalian faith and affiliations.
13 That is not the case and that is not appropriate.

14 THE COURT: I agree with you on that. I'm not --
15 let me tell the parties what I'm inclined to do and then I'll
16 give you each a chance to respond.

17 I'm inclined to permit questioning about bad faith,
18 bias, animus or hostility such that she can be asked do you
19 have any hostility towards religion, that type of question;
20 but to the extent that she's being asked what are your own
21 personal beliefs -- let me make that clear because I wasn't
22 very clear on that.

23 I believe that she can be asked as to whether or
24 not -- as to the basis of the decisions that were made and
25 whether the decisions that were made were based upon any

1 hostility towards religion. I don't believe it is
2 appropriate to ask her about her own personal religious
3 beliefs, religious affiliations, beliefs on gay rights, any
4 of those questions because, again, I don't believe her
5 personal beliefs are what is at issue. What is at issue is
6 the rationale for the decision that was made.

7 So let me ask defendant, one, was that clear
8 enough? And, two, to the extent it was clear enough, do you
9 agree with that approach?

10 MS. RICH FREDERICKS: I'll take it in parts, Your
11 Honor.

12 THE COURT: Okay.

13 MS. RICH FREDERICKS: I believe I understand what
14 you're saying. I would like to clarify, in part, one of the
15 areas that plaintiffs have articulated an interest in is
16 whether or not any of the state officials have a particular
17 belief regarding religious freedom. And I heard the Court
18 indicate that personal views, beliefs and characteristics
19 consistent with Bryce in this Court's prior ruling were off
20 the table, but I did not hear you list out Ms. Elenis's
21 personal beliefs with respect to religious freedom, and so I
22 just wanted to be clear that that was something that was also
23 set apart and not to be considered.

24 THE COURT: Yes, because what I'm -- yes, it's set
25 apart and not considered, because again, what is at issue in

1 this case is the rationale, is why the decision was made.
2 She can testify as to that. What's not at issue in this case
3 are her own personal beliefs, and I'm going to detour a bit
4 here to explain that.

5 Every single judge in this courthouse has certain
6 personal beliefs. We're not even permitted to discuss those
7 to the extent that they are political or we are in violation
8 of our judicial ethics. We make decisions all the time that
9 perhaps we -- if we were the Supreme Court or we were writing
10 on a clean slate we wouldn't make. We may disagree with
11 policy behind, but we're bound by the law to follow the law.
12 And so if we were sued, we could be asked what our rationale
13 was for making a decision. I don't believe it is appropriate
14 to ask what our own personal views are.

15 This is the same situation. I believe it is
16 appropriate to ask them what their decision was, why they
17 made that decision, why they believe that decision was the
18 lawful decision to make. Their personal views I don't
19 believe it is appropriate to get into, and so I hope that
20 that is clear. That is consistent with my ruling from a few
21 weeks ago that Judge Daniel just recent -- just affirmed
22 today and that is the approach I'm going to take here.

23 If during the course of these depositions we learn
24 that they didn't follow the law or they testified that their
25 personal beliefs were what drove the decision, then I may

1 reconsider that -- that decision, but from what I know right
2 now, what is before me right now, I have no reason to believe
3 that they allowed their own personal beliefs as opposed to
4 what they believe the law required to influence their
5 decision, okay.

6 MS. RICH FREDERICKS: Thank you, Your Honor. I
7 think that was very helpful --

8 THE COURT: Okay.

9 MS. RICH FREDERICKS: -- guidance for the parties
10 and that largely strikes the balance I believe that the state
11 officials were seeking with respect to the deposition of the
12 director.

13 May I have just a moment with Mr. Sullivan to make
14 sure that there is nothing he wants me to follow up on on
15 that point?

16 THE COURT: Sure.

17 MS. RICH FREDERICKS: Thank you.

18 (Pause.)

19 MS. RICH FREDERICKS: Just wanted to confirm that
20 the state officials are satisfied with that ruling with
21 respect to the deposition of Director Elenis and we are happy
22 to proceed next week with respect to that.

23 Would the Court at this time like to address the
24 30(b)(6) depositions or some of the other matters?

25 THE COURT: Let's -- let's finish up with Director

1 Elenis and then we can turn back to the 30(b)(6).

2 MS. RICH FREDERICKS: Thank you, Your Honor.

3 THE COURT: Okay, I'll hear from plaintiff.

4 MR. TUCKER: Yes, Your Honor. I think there is an
5 important distinction between the Division and the Commission
6 that may be lost in the grand scheme and that is the fact
7 that the Division acts as the investigator. So you don't
8 necessarily have the same exact concerns that you would have
9 normally in a judicial context and getting into the thoughts,
10 the processes, the biases, the feelings of that particular
11 individual.

12 THE COURT: Right, but they're acting in a
13 quasi-prosecutorial role and it's the same -- it might not be
14 identical concerns, but it's the same concerns in that if
15 absent some showing, something to cause me to believe that
16 the prosecutor is acting out of personal animus as opposed to
17 fulfilling her prosecutorial role, I don't believe it's
18 appropriate to get into her personal beliefs, and we don't
19 have that with respect to this prosecutor. I understand the
20 Supreme Court's ruling with respect to people who used to be
21 on this case, but with this we don't have it.

22 Now, as I said, if during the course of discovery
23 in this we learn of something where there is some suggestion
24 that the -- that Ms. Elenis is acting out of personal animus
25 as opposed to her belief that she's following the law, then

1 I'm willing to reconsider that area, but we don't have that
2 right now. So that's -- you know, that's where I am.

3 MR. TUCKER: My concern would be the practicality
4 of determining that. So if we're not able to explore that,
5 how would that come up in the future and that's my concern.
6 We're not able to ask these certain questions that would draw
7 out evidence of that so I think that precludes the very
8 nature of a good portion of our case.

9 THE COURT: What you are permitted to ask is why
10 they made -- why she made the prosecutorial decisions that
11 she made, and -- and she's going to answer that.

12 And if the answer is because I understand the law
13 to require -- I understand the law to be that what your
14 client did to be discriminatory, and therefore, I had to
15 present this, then she's acting under her understanding,
16 right or wrong. And, of course, this case is difficult
17 because there is two competing constitutional rights trying
18 to be bound, which is the equal protection clause and the
19 First Amendment, and that's for some other Court on some
20 other day to answer.

21 But if her answer is my understanding is this
22 statute requires me to do this, then she's testifying that
23 she's not acting because of any personal animus. If she were
24 to say, I did this because I don't like how your clients
25 are -- I don't think your clients have a legitimate First

1 Amendment right here or something demonstrating some
2 hostility towards religion and that's why she's acting, then
3 I'll reconsider in considering you allowing you to explore
4 that. But if what she testifies to is I did this because I
5 think this is the what the law requires me to do, you're
6 certainly allowed me to question why do you believe the law
7 allows you to do this, what is it in the law that causes you
8 to do this; but absent some showing that she's acting out of
9 some personal animus as opposed to her understanding of what
10 the law requires, I don't think it's an appropriate area to
11 explore her own personal beliefs on this.

12 MR. TUCKER: Okay. And then speaking of the areas,
13 just so I'm clear, other than the prohibition which the Court
14 has laid out, are there any other prohibitions that we need
15 to be concerned about?

16 THE COURT: I think I've articulated sort of the
17 line that I'm attempting to draw here. I recognize that as
18 this deposition moves forward that line may get somewhat
19 blurry. As I said, I will be here on -- is this
20 deposition -- when is this deposition? Is it Wednesday or
21 Thursday?

22 MR. TUCKER: We have the notice. I can -- I can
23 check, Your Honor.

24 THE COURT: Okay. If it's Wednesday, it's easy
25 because I'm here. If it's Thursday, it's trickier.

1 MR. TUCKER: My memory was that it was Wednesday,
2 but when I sit back down, I'll double-check before we leave
3 here.

4 THE COURT: If it's Wednesday, it's easy, I'm here,
5 I'm happy to resolve any disputes that occur. I only have
6 one thing scheduled that day at 10 a.m. and my guess is
7 you're not going to be in any dispute into this until later
8 in the afternoon once you get through sort of the background
9 portions of the deposition. So I'm available. I will set a
10 hearing if this line gets blurry.

11 MR. TUCKER: Well, our hope is that we don't place
12 any phone calls to you.

13 THE COURT: I'm hoping so too, but like I said,
14 Wednesday is easy, Thursday is trickier.

15 MR. TUCKER: Okay, so thank you for that. It's
16 March -- yeah, March 6 --

17 THE COURT: Okay.

18 MR. TUCKER: -- at 9 a.m.

19 THE COURT: Okay.

20 MR. TUCKER: And just for clarity, the reason that
21 there were seven notices sent -- I don't know if Your Honor
22 saw it or not, there was a letter that actually accompanied
23 those.

24 THE COURT: Okay.

25 MR. TUCKER: We're not trying to be disrespectful

1 at all to Your Honor to the process. We were on a two-tiered
2 track --

3 THE COURT: Okay.

4 MR. TUCKER: -- so we issued notices. One set that
5 if we won on the objection and another set if we lost on the
6 objection, so that's why there is probably two notices with
7 that.

8 THE COURT: I don't take any offense --

9 MR. TUCKER: Okay.

10 THE COURT: -- in you pursuing your objection.
11 You're entitled to do that.

12 MR. TUCKER: Thank you.

13 THE COURT: Okay. So let's turn then to the
14 30(b)(6). And taking the same principled line with the
15 30(b)(6) as I just did with Director Elenis, as I indicated,
16 is that sufficiently clear to allow the parties to conduct
17 the 30(b)(6) or is there some further clarification that
18 needs to occur with respect to that deposition?

19 MR. TUCKER: Well, Your Honor, we have noticed two
20 30(b)(6) depositions.

21 THE COURT: Okay.

22 MR. TUCKER: One as to the Division and one as to
23 the Commission.

24 THE COURT: Okay.

25 MR. TUCKER: And so our plan currently is to take

1 deposition -- those two depositions in addition to Director
2 Elenis, and I don't know whether the state still has concerns
3 with that or not. Based upon their filing, I see that they
4 had some concerns about the topics, but I wasn't sure what
5 their position was, so I guess I can let them answer that.

6 THE COURT: Okay. Sure, why don't we hear from the
7 State.

8 MS. RICH FREDERICKS: Thank you. We do have some
9 concerns with respect to the 30(b)(6) deposition notices,
10 Your Honor, and they come in a couple of different flavors.
11 I will take the notice of the division first.

12 With respect to the state officials reliance on
13 Rule 30 and local Rule 30.1, I want to make it abundantly
14 clear that we are not here to stand unnecessarily on
15 procedure. I have heard the Court's prior ruling, but I
16 would like to articulate that our concern with respect to the
17 timing of these notices comes from a concern -- a very
18 deep-seated concern with respect to prejudice.

19 Plaintiffs did not previously indicate that during
20 this expedited period they were going to be seeking two
21 30(b)(6) depositions. I understand that they did preserve,
22 that they might seek us to call as a witness individuals with
23 respect to both the Division and the Commission. I
24 understand in the scheduling order that they flagged that at
25 some point in discovery that would be something that they

1 might pursue, but something that they might pursue during the
2 course of general discovery is something vastly different
3 than seeking two 30(b)(6) notices with only six days left in
4 the original expedited discovery period.

5 Preparing for a 30(b)(6) deposition is an
6 exceptionally cumbersome task. A witness cannot simply come
7 and answer yes or no predicated upon their factual knowledge.
8 As the Court is no doubt aware, it is obliged to do their
9 homework, to be familiar with documents and to answer, and
10 they cannot answer I don't know to a duly noticed topic.

11 In this situation, asking our clients to prepare on
12 short notice for two 30(b)(6) depositions, not only places an
13 undue burden on our client, particularly with the scope of
14 the notices which were propounded, but it also places an
15 undue burden on counsel who are obliged to prepare for the
16 hearing.

17 THE COURT: Let me ask this, because they're
18 already deposing Director Elenis from the Division, can you
19 get a 30(b)(6) together for the Commission?

20 MS. RICH FREDERICKS: The 30(b)(6) for the
21 Commission we are planning to -- to have prepared and that
22 has been set for next week. We do have some issues that we
23 would like to raise with the Court with respect to the number
24 of topics and the Court's prior order regarding the scope of
25 that deposition. So the deposition of the Commission we plan

1 to proceed with with this Court's good guidance with respect
2 to the topics being inquired into, but the request to depose
3 the Division on a 30(b)(6) we oppose very strongly and I have
4 some case law I would be glad to provide the Court with.

5 THE COURT: That's okay. Let me ask the plaintiff.
6 Why do you need -- and you can talk -- rather you both
7 jumping up and down, I appreciate the decorum of the Court,
8 but since I'm going back and forth, I'm not going to require
9 you to both jump up and down.

10 Why do you need both the Commission and the
11 Division and Director Elenis? It seems like, especially
12 since we're -- we're not talking all discovery period. We're
13 talking discovery in order to prepare with this preliminary
14 injunction hearing. It seems that a 30(b)(6) of the
15 Commission, plus a deposition of the director of the Division
16 is going to give you enough to intelligently litigate a
17 preliminary injunction hearing.

18 MR. TUCKER: Well, Your Honor, there is many
19 different pieces within the Division itself, so I liken it to
20 a situation where you go and you may talk individually to
21 someone and with their individual hat on, they obviously have
22 a certain knowledge base, but when you have a corporate rep
23 deposition, that's the knowledge of the entity, which is much
24 broader. And so if it's a business of five people, there is
25 the expectation of what do those five people generally know

1 within the topics that are listed.

2 Here we have a division that includes several
3 different pieces. The entire investigative process, you
4 know, who was involved in it, what did they say, why did they
5 do it. The director is, as the name implies, somewhat at the
6 top and they are individuals that oversee some of this. In
7 many instances, Director Elenis assuredly was involved
8 directly with this.

9 THE COURT: I mean, I find it hard to believe given
10 the profile of this case that Director Elenis is not going to
11 know most of the answers to most of the questions that you're
12 going to have.

13 MR. TUCKER: No doubt, there is going to be some
14 that she does, but I think if you look at the notice, and I
15 think maybe this will alleviate some of the concern that Your
16 Honor has, the notices themselves, both with the Division and
17 the Commission, yes, there is 34, 35 topics, but if you
18 actually look at them, they're an oddity in the sense that
19 normally with a corporate rep notice, at least in private
20 practice what I would do is I would have a more general
21 subject or a general topic, and so my notices tended to be,
22 say, 10 to 12.

23 In this instance we took a different approach. We
24 wanted to be more specific really to in essence help the
25 other side to say, Look, we're going to talk about this

1 specifically. And if you -- actually, we may do this here in
2 a second. If you actually look at these, a lot of these are
3 grouped. So if there is a discussion of a determination --
4 there may be four or five different topics or lines that talk
5 about that in a myriad of ways, but I don't think that you
6 can -- I don't think it's fair to say that it would be
7 difficult to get -- whether it's Director Elenis that is
8 named as the corporate rep or any other individual to be
9 prepared on topics that we proposed.

10 THE COURT: Well, I'm not so sure about that
11 because it's -- for example, and again I didn't -- I didn't
12 print out the one to the Division. Unfortunately, I printed
13 the ones out to the Commission, but I think that the topics
14 are similar. Looking at Number 17, for example, any
15 communications between commissioners or between a
16 commissioner and third parties concerning religious freedom,
17 religious liberty or the free exercise of religion. That's a
18 very broad topic. You're asking for any communication any
19 commissioner has ever had with any third party concerning
20 religious freedom.

21 And to get a corporate rep prepared on something
22 like that, and not just one, but two, in a 12-day period,
23 when some of those days are being taken up, one with this
24 court hearing and then also with other depositions, that's an
25 awful lot to get a representative prepared on.

1 MR. TUCKER: Right. And respectfully, Your Honor,
2 I don't mean anything negative by this, but I think that was
3 really one of the main reasons why we wanted to talk to the
4 individual commissioners themselves, because they themselves
5 would have the knowledge.

6 THE COURT: I understand that, and as I said, there
7 may come a time where we have that, but we're not talking --
8 we're not getting ready for trial. We're getting ready for a
9 preliminary injunction hearing, and I've been attempting to
10 give pretty broad discovery to get ready for that hearing,
11 but it's not uncommon to have -- I mean, you had a
12 preliminary injunction hearing set without any discovery
13 taken and he felt prepared to go forward.

14 Now, Judge Daniel disagreed, but it seems to me
15 that we don't need to conduct all of the discovery out there
16 in this expedited discovery period.

17 MR. TUCKER: And I understand, I think that's a
18 fair point, and I think the case law bears that out. The
19 distinction here I believe is that between the two parties,
20 history or time will tell, but I think the loser of that
21 preliminary injunction hearing will most likely go up on
22 appeal. And so right now what we're looking at is this is
23 the record most likely that will be going up, so --

24 THE COURT: I understand that, but that could be
25 said in any preliminary injunction hearing, and nonetheless,

1 the law is clear that you don't need to have -- you don't
2 need to complete the case to have your preliminary
3 injunction.

4 Indeed, if it were true, that sort of defeats the
5 purpose of the preliminary injunction hearing because you
6 might as well just jump towards your trial and go straight to
7 trial rather than your preliminary injunction hearing.

8 So I am -- I am going to agree with the defendant
9 with respect to the Division. I think that what this
10 expedited discovery period was established for is to allow
11 both parties to gain sufficient discovery in order to conduct
12 a -- in order to conduct the preliminary injunction hearing.

13 It's not disputed that the 14 days that the rules
14 provide for was not complied with in this case, and
15 admittedly, it was only two days short, but when I look at
16 what needs to be done during this timeframe and when I look
17 at the scope of the Rule 30(b)(6) notice, I think that there
18 would be significant prejudice in requiring both a 30(b)(6)
19 of the Division and a 30(b)(6) of the Commission as well as a
20 deposition of the director to prepare all three of those
21 witnesses on the broad-based 30(b)(6) notices that have been
22 given in this case. And I don't think it's necessary in
23 order to complete the preliminary injunction hearing.

24 The -- the plaintiffs will have a 30(b)(6) of the
25 Commission as well as a deposition of the director of the

1 Division. I feel confident that the director is going to be
2 highly knowledgeable of this case. This case went to the
3 Supreme Court, this case has received a ton of press. I find
4 it hard to believe that the director is simply going to
5 delegate this case and not keep an eye on what has been
6 happening with it.

7 So I think to the extent we're getting into why
8 certain decisions were made, I think the director is going to
9 know those. In fact, she testified already on why the
10 decisions were made through her declaration. And so I think
11 that that is going to be sufficient for the preliminary
12 injunction hearing.

13 Now, if the preliminary injunction hearing gets
14 continued and we're now looking at that being held in May,
15 then you can re-notice the 30(b)(6) to the Division and we
16 can readdress it, but we're in a very tight timeframe here
17 and I'm sympathetic to the defendants' position that to
18 prepare on these topics is going to take quite some time, and
19 to get two 30(b)(6) reps, as well as the director, who is
20 maybe the most important witness who is going to testify at
21 this hearing, sufficiently prepared, they just don't have
22 enough time to do that.

23 MR. TUCKER: If Your Honor may. On that point, if
24 we are limited to Director Elenis and the 30(b)(6), one of
25 the other individuals that we noticed, Weslie Frye (ph), no

1 longer works for the Division. He has left the state.

2 THE COURT: Okay.

3 MR. TUCKER: So now we're down to just two
4 depositions. May we notice two individual depositions, not
5 30(b)(6)s, but individual depositions so that we can have an
6 equal playing field with the plaintiffs on the number of
7 depositions?

8 THE COURT: Who is it that you want to notice?

9 MR. TUCKER: We've got a couple -- one is the
10 deputy -- there is a Deputy Director McPherson, Jennifer
11 McPherson. There is also another individual -- I believe Sam
12 Anderson is one of the individuals we've -- I have not talked
13 with them about it. I'm just bringing this up in realtime,
14 and I haven't raised it because we weren't sure of the number
15 we would -- we would get.

16 THE COURT: Why don't you guys talk about it and
17 see if you can reach resolution. If not, when would those
18 depositions take place?

19 MR. TUCKER: Well, we would prefer that they take
20 place next week based upon a March 14 hearing.

21 THE COURT: But what day is open right now next
22 week?

23 MR. TUCKER: Well, if we have Wednesday for
24 Director Elenis, and then we have the 30(b)(6), it would have
25 to be Friday.

1 THE COURT: Okay, here is what I'm going to do.
2 Anticipating the concerns both in Director Elenis's
3 deposition as well as this potential issue, I am going to
4 tentatively set for 3 o'clock next Wednesday a telephonic
5 discovery dispute hearing.

6 If you have worked out this issue as to whether or
7 not there should be an additional deposition and 2:45 rolls
8 around and the depositions are either completed or going
9 perfectly smoothly, just call my Chambers and we'll vacate
10 it, but let's get something on the calendar just to make
11 sure.

12 So let's turn back then to the 30(b)(6) topics, and
13 the defendant said that they had some concerns about some of
14 the topics. Why don't I hear from you as to which topics you
15 have concerns about.

16 MS. RICH FREDERICKS: Yes, Your Honor. Give me
17 just one moment, please.

18 THE COURT: I think I can guess some of them, but .
19 . .

20 MS. RICH FREDERICKS: The state officials have
21 threefold concerns with respect to the 30(b)(6) deposition
22 notice of the Commission. The first one is impossibility,
23 the second one is relevance, the third one is
24 proportionality.

25 With respect to impossibility, plaintiffs have

1 propounded a 34-point notice. While plaintiffs point to an
2 out-of-state and out-of-circuit case, *Tambury* (ph), which is
3 from the Northern District of California, the proposition
4 that that's not an overly large number, it is indeed an
5 overly large number. If we look at some of the topics with
6 particularity, we see that we're actually much closer to 60
7 or more topics.

8 The Commission, for example, Question 10 has three
9 subparts, 21 has eight subparts, 26 has four subparts, 33 has
10 at least 14 subparts. And so at this point we're not just
11 looking at a mere 34 topics. And even if we were looking at
12 a, quote, mere 34 topics, I think there is authority in this
13 district that stands for the proposition that that would
14 exceed the federal time limit for one day's deposition, which
15 is seven hours on-the-record time, many times over.

16 And I would point the Court to *EEOC vs. the Vail*
17 *Corp*, which is 2008 Westlaw 5104811, and that's the District
18 of Colorado, December 3, 2008. In that case the Court
19 ultimately directed the plaintiff to restate a 30(b)(6)
20 notice which covered 30 different topics and which would
21 exceed the federal time limit for deposition many times over.

22 *Crocs, Inc. vs. Effervescent, Inc.*, 2017 Westlaw
23 1325344, which is the District of Colorado, January 3, 2017,
24 the Court addressed an overbroad 30(b)(6) notice that
25 subjected a party to a, quote, impossible task and indicated

1 that the same would not be allowed.

2 Preparing for a deposition of this magnitude on all
3 of these topics which go well beyond topics discussed between
4 the parties and the Court three must weeks a ago when we were
5 here on the 5th, again on short notice, is simply unduly --
6 unduly cumbersome and it reaches the level of impossibility
7 such that it would be prejudicial to my client.

8 I want to make clear to the Court that since we
9 were here on the 5th and the Court gave us its good guidance
10 with respect to its expectations regarding the 30(b)(6)
11 notice of the Commission, that we have been working
12 diligently with our clients to prepare on the three topics
13 that were expressly addressed by the Court, and I believe
14 those are found at Docket 120-2, pages 56 through 58, if
15 memory serves.

16 And so we have been dutifully preparing our witness
17 for that, but when we are -- when we received this late last
18 Friday, we were somewhat flummoxed and certainly at this
19 point we -- we simply feared that it is not going to be
20 possible.

21 In EEOC vs. Vail Corp., 2008, Westlaw 5104811, the
22 Court ultimately reduced a list of 33 proposed topics to 20
23 and further required the requesting party to submit a
24 priority list for the deposition and to follow the same.

25 If the Court is inclined to allow plaintiff's

1 deposition of the Commission to go beyond its prior order set
2 forth on the 5th of February, it would be our request to this
3 Court that the Court require the list to be called, organized
4 in a manner -- and the plaintiffs to proceed with through
5 that deposition with respect to those topics in that order
6 such that when we reach the seven-hour limit, they are out of
7 time.

8 In Lenox MacLaren Surgical Corp. vs. Medtronic,
9 Inc., which is 2015 Westlaw 3635422, District of Colorado,
10 June 11, 2015, the Court reduced a list of 46 topics to ten
11 topics.

12 I want to address plaintiff's reliance on Tambury,
13 which is a Northern District of California case. The case is
14 out of circuit, unpublished, and as of (inaudible) on
15 Wednesday had not been followed by any other Court.
16 Furthermore, in that matter in ruling that the 34-topic
17 notice was not overly broad, the Court specifically noted,
18 quote: At first blush, the number of topics raises the
19 question of whether the notices are unduly burdensome. Upon
20 closer examination, a large number of topics results from the
21 fact that plaintiff was quite specific. Plaintiff could have
22 grouped them in smaller numbers while still meeting her duty.
23 The notices are thus not unduly burdensome, oppressive or
24 harassing based merely on number. That is distinguishable
25 from the instant matter, whereas I previously noted, we don't

1 have merely 34 topics, we have more than 60.

2 In addition, Tambury was addressing general
3 discovery. This again is a narrow subset of discovery. It's
4 expedited discovery directed towards the parties' upcoming
5 hearing. And as the Court previously recognized, it's well
6 established that a full panoply of discovery need not apply.

7 In addition to these concerns, there are also
8 number of topics which we believe are -- are not irrelevant
9 and do not address the matters to be addressed at the
10 upcoming hearing. When discovery is directed at irrelevant
11 matters, it, quote, imposes a per se undue burden, end quote.
12 That's *Fonshua (ph) vs. AAA Fire and Casualty Insurance*
13 *Company*, 2015 -- and I'm sorry, it's probably corporation.
14 2015 Westlaw 1840123. That's District of Colorado, April 21,
15 2015.

16 I would also point the Court to *Polhemus*, which is
17 *P-O-L-H-E-M-U-S, vs. Great Western Life*. That is 2009
18 Westlaw 2134362, which is District of Colorado, July 15,
19 2009. In that case, the Court found that the volumes of
20 information requested were not even remotely relevant to the
21 case and thus would not be heard.

22 The specific topics within this notice that we feel
23 are beyond the Court's prior order would be topics 4 through
24 6, 8 and 9, 17, 19 through 22, 24 through 26 and 28 through
25 33.

1 In addition, I would like to address some of the
2 specific topics. Plaintiff's Commission topics 13 and 30
3 seek broadly, quote, all facts, end quote. It is well
4 established that such a blockbuster discovery request seeking
5 all facts is improper. Brunett (ph) vs. Quiznos Franchise,
6 LLC. That's 2008 Westlaw 5378140. That is the District of
7 Colorado, December 23, 2008, as well Grynberg, and it's
8 G-R-Y-N-B-E-R-G, vs. Total, 2006 Westlaw 1186836. That's
9 District of Colorado, May 3, 2006. And in that case, they
10 rejected a blockbuster discovery request seeking all facts.
11 For these reasons, these particular topics should be
12 stricken.

13 Plaintiff's Commission topics 22 and 24 through 29
14 is, as well as 31 and 33, as drafted, may intrude upon
15 attorney/client privilege communications where 30(b)(6)
16 deposition notice includes topics that its frame suggests the
17 parties privileged communications. The Court may within its
18 discretion enter protective order limiting the scope limiting
19 the scope of such topics or precluding inquiry into them
20 altogether.

21 And I will not butcher this. I will spell it.
22 It's G-E-B-R-E-M-E-D-H-I-N vs. American Family Mutual
23 Insurance, and that is 2015 Westlaw 4272716. That is the
24 District of Colorado, July 15, 2015. Accordingly, the state
25 officials asked that the Court would strike these topics or

1 enter a protective order prohibiting inquiry into them so far
2 as they would touch upon attorney/client privilege
3 communications.

4 THE COURT: Repeat those numbers again that you
5 think go into those.

6 MS. RICH FREDERICKS: Yes, Your Honor. 22, 24
7 through 29, 31 and 33.

8 THE COURT: Okay.

9 MS. RICH FREDERICKS: Plaintiff's Commission topics
10 31 and 33 each seek information regarding how discovery
11 responses were aggregated. That information is also subject
12 to attorney/client privilege and attorney work product. I
13 would point the Court to SmithKline Beechum Corp. vs. Apotex
14 Corp, 2000 Westlaw 116082. In that case the Court found that
15 a 30(b)(6) notice, which requested a witness to testify
16 regarding the efforts to compile responses to interrogatories
17 and requests for production and the subjects identified
18 therein was improper and that, quote, wielding the discovery
19 process as a club by propounding requests that compel the
20 recipient to assume an excessive burden is overly broad and
21 duly burdensome and an inefficient means by which to obtain
22 otherwise discoverable information.

23 In this district, there is Stransky vs. HealthONE
24 of Denver, Incorporated, which is 2013, Westlaw 140632, and
25 that is January 11, 2013. In that case the Court struck a

1 topic seeking, quote, all efforts made by HealthONE to fully
2 and accurately respond to plaintiff's written discovery
3 requests and requests for production, end quote, as protected
4 by the attorney/client and work product privileges.

5 Accordingly, we ask that the Court would strike
6 these topics or enter a protective order prohibiting inquiry
7 into them.

8 Finally, Commission topics 33(i) and 22, each seek
9 information regarding the 303 Creative litigation which is
10 currently pending before Judge Krieger. Plaintiffs are not a
11 party to that case, and although plaintiff's counsels are
12 counsel of records in that matter, under Crocs, Incorporated
13 vs. Effervescent, Westlaw -- 2017 Westlaw 1325344, which is
14 District of Colorado, January 3, 2017, the Court found that
15 it is an improper attempt to obtain discovery about a
16 different case. Accordingly, we ask that the Court would
17 either strike --

18 THE COURT: But I don't think that's what they're
19 doing in this. I think that what they're trying to determine
20 is why the Commission is making certain decisions with
21 respect to -- and I don't know what 303 Creative is, but
22 assuming it's a bakery or some sort of -- go ahead.

23 MS. RICH FREDERICKS: It's a website-building
24 company who is seeking relief and asking to be exempted from
25 CATA (ph) based on their closely held religious beliefs with

1 respect to not being compelled to design websites for LGBT
2 couples.

3 THE COURT: Okay. I think what they're attempting
4 to find out is why the Commission is making certain decisions
5 that these refusals to provide service are deemed
6 discriminatory whereas other refusals to provide service are
7 not, which was an issue that the Supreme Court in Masterpiece
8 One said went to discrimination.

9 So I think -- I think they should be entitled some
10 leeway into going into other cases. I don't think this is a
11 case where they are simply attempting to just obtain
12 discovery for another case of theirs as opposed to trying to
13 find out where this line -- where the Commission is drawing
14 the line between what they deem is discriminatory and what
15 they deem, if anything, is protected by the First Amendment.

16 MS. RICH FREDERICKS: Your Honor, I would agree
17 with you fully, but for this fact. 303 Creative brought suit
18 without ever having a complaint filed against them in front
19 of the Commission or Division. It is purely preemptive
20 litigation against my clients that is in another court, and
21 there is no Commission or Division file, except their defense
22 of the federal litigation.

23 THE COURT: Okay.

24 MS. RICH FREDERICKS: And so that's why I would
25 distinguish that. There has been no decision by my clients

1 with respect to 303 Creative, and so for that reason, I would
2 say that it is distinguishable from precisely what the Court
3 just articulated. And I want to make clear that if we were
4 dealing with situations the Court just identified, I agree
5 that under Masterpiece One that perhaps would be something
6 that might be inquired into.

7 THE COURT: Okay. Let me hear -- go ahead, go
8 ahead.

9 MS. RICH FREDERICKS: I apologize. I promise I'm
10 about done exhausting you with my citations.

11 With all of that in mind, Your Honor, faced with
12 what is on its face an overly broad set of topics in the
13 Commission's deposition, it goes well beyond the topics
14 discussed by the parties and the Court on the 5th of
15 February.

16 I would point the Court to a quote from Crocs,
17 Incorporated. I previously belabored you all with that
18 citation. And in that instance the Court wrote that it was,
19 quote, almost ludicrously overbroad and frankly does not
20 deserve the Court's thoughtful analysis to properly parse the
21 components if the party is unwilling to clarify. The Court
22 found that, as written, preparing a witness to fully respond
23 to the topics at hand would be utterly impossible. In this
24 instance, plaintiffs have propounded an overly broad and duly
25 burdensome notice which is not proportional to the needs in

1 this case, particularly not so to the imminent hearing for
2 which the parties are preparing next week. I apologize, week
3 after next.

4 For that reason, we would respectfully request that
5 consistent with Qwest Communications International vs. World
6 Quest Networks, 2000 -- I'm sorry, 213 F.R.D. 418, which is
7 District of Colorado 2003, this Court should exercise its
8 discretion, quote, in the interest of justice to prevent
9 excessive or burdensome discovery.

10 Thank you, Your Honor.

11 THE COURT: Thank you. I'll hear from defendant.

12 MS. RICH FREDERICKS: I'll cede the podium for you.

13 MR. TUCKER: Okay.

14 THE COURT: Or I'll hear from plaintiffs. And
15 again, what I want to focus on in this expedited discovery is
16 what is needed for this hearing. And there is aspects of
17 this, for example, I'm not going to allow Number 17 as
18 written, which is any communications between commissioners,
19 which is fine, or between a commissioner and third parties
20 concerning religious freedom, religious liberty or the free
21 exercise of religion.

22 There is no possible way that a 30(b)(6) witness
23 can be prepared to testify about any communication that a
24 commissioner has ever had concerning religious freedom. It's
25 just not feasibility, nor is it relevant I think to this

1 hearing that's coming up.

2 Whether or not some commissioner in college got
3 into a debate on religious freedom in their college course is
4 completely irrelevant to what's going on in this case. I
5 haven't read through each of these, and I may need to take a
6 recess to do so, but what do you really need for this
7 hearing? I'm assuming it's not all 34 topics.

8 Again, statistics from 2012 to the present about
9 the Commission decisions in cases involving charges, they're
10 not going to be able to compile that in the next couple days
11 to get ready for this hearing, they're just not.

12 So what is it that you really need in order to get
13 ready for this hearing? And if you need me to take a recess
14 for the parties to potentially cull this down to something,
15 I'm happy to do so, and then if, you know, you can't reach
16 agreement or there is some particular ones that you need me
17 to get involved in, I'm happy to, but this deposition is
18 taking place either Thursday or Friday next week, and I don't
19 see how they can get somebody ready for all of these topics
20 here.

21 MR. TUCKER: I'm always in favor of the parties
22 working issues out for taking to -- Your Honor, so I do think
23 we can do that.

24 THE COURT: Okay.

25 MR. TUCKER: I will say, though, at the outset, and

1 I think this may alleviate maybe the need to even do that.

2 So if Your Honor might, I would like to respond to just --

3 THE COURT: Sure.

4 MR. TUCKER: -- the litany of arguments that remain
5 and I'll do it briefly.

6 THE COURT: Sure.

7 MR. TUCKER: Most everything that counsel is
8 talking about works itself out in the general context of a
9 deposition. Depositions are limited to seven hours.

10 If I choose to go in and ask a witness, you know, a
11 litany of questions that -- that really lead to nowhere, I'm
12 going to be --

13 THE COURT: I get that, but my concern is because
14 it's a 30(b)(6) they have to have the representative prepared
15 answer all these.

16 MR. TUCKER: Right. And to that point, it's
17 something I alluded to earlier, if we had simply listed
18 out -- for example, we make references to the formal charge.
19 If I had just said we want a witness to be able to talk about
20 the October 9, 2018 formal complaint, then, you know, we may
21 not have elicited an objection. We actually went the other
22 way to try to assist counsel in being able to find someone
23 that can actually talk about the specifics. So I'm actually
24 being challenged by virtue of the fact that we were trying to
25 assist in the process.

1 THE COURT: No. I think that some of this -- I
2 agree with you to some extent. I'm less concerned about the
3 number than the breadth. For example, Number 19 is the 2013
4 tweets by Defendant Pocock identified in paragraph 59 of the
5 amended complaint. That is a very narrow and specific
6 request. My guess is it will take ten minutes to prepare
7 somebody on that.

8 20, same thing, it's a very specific request.
9 That -- even though those are in two requests, that is much
10 narrower than had you said all derogatory posts or tweets by
11 any member of the Commission, which could be done in one, but
12 is a much broader topic to be prepared on.

13 I'm a little bit more concerned about the -- some
14 of the earlier ones, which are, you know, the rules,
15 processes, policies, practices, criteria and procedures used
16 by the Commission to determine when the Commission is use the
17 right-to-sue letter. That's pretty broad. Now, I think it's
18 relevant to this case, I agree with you, but it is -- it is
19 broad and there is -- and there is a lot of these.

20 So I think what makes sense, why don't I -- I've
21 already given the parties a lot of guidance here today as to
22 what I think is at issue in this hearing that is coming up.
23 Why don't I give you all -- why don't I take a recess for,
24 you know, 15, 20 minutes, whatever time you need. Why don't
25 talk, see if there is any way to narrow this down and then --

1 as to what is really needed. And again, I say all of this to
2 give -- if this helps in the narrowing process to the
3 parties. What I'm focused on is getting everybody ready for
4 this hearing that's coming up, the injunction hearing.

5 I will entertain two things after this deposition.
6 One is reopening another 30(b)(6) to get broader topics for
7 the trial aspect of it. I know it's unusual to have two
8 30(b)(6), but we're in an unusual state in that we're trying
9 to get ready for one hearing.

10 The second is, as I previously indicated, if this
11 30(b)(6) witness really cannot answer questions of why each
12 commissioner made a decision or issues of animus that may
13 have led to this decision, I haven't ruled out the
14 possibility of reopening -- of allowing you to depose the
15 individual commissioners in this case.

16 So I say that to try to encourage the State to
17 allow a somewhat broader 30(b)(6), but again, I recognize
18 that this 30(b)(6) that is going to take place next week is
19 not the be all end all of all discovery that is going to take
20 place in this case or all depositions that are going to take
21 place in this case.

22 MR. TUCKER: But my only brief response to that is
23 the fact that it may very well be the end by the time you get
24 to the preliminary injunction hearing, and the reason that's
25 important is because the Division is separate from the

1 Commission and we didn't -- we were not the only ones that
2 made that distinction. You actually see that in their
3 potential witness list, and so that's the concern we have.
4 We're being limited not only on the 30(b)(6) or the ability
5 to even take commissioner depositions, we're also being
6 limited on the 30(b)(6) now. And so the more and more it is,
7 the more prejudicial it becomes.

8 THE COURT: Well, but again what we're talking
9 about is discovery for the preliminary injunction hearing and
10 that's not end of this case. I mean, that's the preliminary
11 injunction.

12 And so after the preliminary injunction hearing,
13 depending on what happens at that hearing, I may permit more
14 discovery to take place. All I'm talking about is what is
15 really needed to get us through the preliminary injunction
16 hearing, and if it's more narrow now -- again, I will
17 entertain after that injunction hearing particularly a
18 30(b)(6) deposition or potentially allowing the individual
19 depositions of the commissioners.

20 I'm just trying to get realistically their ability
21 to adequately prepare a 30(b)(6) witness for next week and
22 what you need in order to be able to fairly litigate that
23 hearing coming up.

24 MR. TUCKER: Understood, Your Honor. We'll try to
25 work with defendants.

1 THE COURT: Okay, sounds great. Then I'll take a
2 brief recess, and I can do this two ways. I can either give
3 you guys 20 minutes to use one of the back rooms back there
4 and I'll take the bench again at 10 to 3:00, or whenever
5 you're ready, you can, you know, let my courtroom deputy know
6 and I'll come back out. How would you prefer?

7 MR. TUCKER: I would say let the courtroom deputy
8 know.

9 THE COURT: Okay, that sounds great.

10 MR. TUCKER: Thank you.

11 THE COURT: Thank you, everybody, we'll be in
12 recess.

13 (Recess was taken.)

14 THE COURT: We're back on the record in 18-cv-2074.
15 Let me ask the parties, where do things stand as far as the
16 30(b)(6)?

17 MR. TUCKER: Well, Your Honor, we were successful
18 in narrowing --

19 THE COURT: Okay.

20 MR. TUCKER: -- several of them. We dropped
21 several and some we revised. There is still a handful that
22 we're still trying to work through.

23 THE COURT: Okay. As I -- my courtroom deputy I
24 believe indicated, I'm happy to give the parties as much time
25 as you need to work through that and then try to fit you all

1 in at least telephonically tomorrow. I have a fairly long,
2 fairly busy docket sheet -- docket tomorrow. The morning is
3 almost completely packed except I think I could squeeze you
4 in at (inaudible) 10:45. I have a 10:30 scheduling
5 conference, but you I could probably squeeze you in at 10:45.

6 MR. TUCKER: Your Honor, I would note -- I mean, we
7 would obviously adjourn it, but we have a deposition of a
8 nonparty witness tomorrow, so --

9 THE COURT: I could also do -- is that supposed to
10 go all day or do you think it will wrap up before --

11 MR. TUCKER: The nonparty witness's attorney has
12 mentioned that he may be asking the witness questions, so
13 we're unsure, but we're trying to split the day up.

14 THE COURT: Okay, because I could also do -- I have
15 a settlement conference in the afternoon, but I could break
16 from that. It might be wrapped up by 4:00, but even if it's
17 not, I could break from it to take the bench at 4:00 if that
18 would work for the parties to resolve these last issues. I
19 do have Monday, but I don't want you --

20 MR. TUCKER: Right.

21 THE COURT: -- having to go into the weekend
22 because now we're starting to really bump up against the time
23 that these decisions --

24 MR. TUCKER: I think that makes sense, if there is
25 anything outstanding by 4 o'clock we would call, and the hope

1 being that that answer would be none.

2 THE COURT: Okay.

3 MS. RICH FREDERICKS: I do think it would help the
4 parties, though, we are just, so that you know (inaudible),
5 to question or topic 28 and then the notice --

6 THE COURT: Okay.

7 MS. RICH FREDERICKS: -- so we've covered quite a
8 bit of ground. The parties have reached an impasse that I
9 don't see us resolving between now and 4 p.m. tomorrow with
10 respect to 6, 8, 9, 17, 21, 22. And so if the Court could
11 provide us any guidance at this point on those, that might be
12 helpful. It might also kind of steer us with respect to our
13 remaining conversations regarding 28 through 34.

14 THE COURT: Okay, let me take a look. Okay, 6, 8
15 and 9 seem to be very similar topics. Let me hear briefly
16 from each side as to the issues with respect to those. And
17 again, you don't need to take them individually you can just
18 take them as a group --

19 MR. TUCKER: Okay.

20 THE COURT: -- if they look nearly identical.

21 MR. TUCKER: And, Your Honor, would you like -- I
22 always prefer to stand, but I don't want to --

23 THE COURT: Either way, it's okay.

24 MR. TUCKER: Yeah, Your Honor, you're correct, 6, 8
25 and 9 are very similar. What this is getting at, the state

1 statute has other requirements that the commissioners
2 represent, you know, either certain groups of people or
3 certain segments of society, and there are some concerns as
4 to how the Commission is constituted and the bias that is
5 inherent within that, and so we are -- we want to ask
6 questions relative to who do they represent.

7 We know by looking at their website, you know, if
8 they say they're affiliated with this particular party or
9 they represent this segment of society, but what we're
10 concerned about is if that's accurate or not and so we want
11 to be able to ask questions relative to that.

12 THE COURT: And how does that relate to the claim
13 in this case?

14 MR. TUCKER: Well, we have a few claims, and I
15 recognize that this goes, of course, to due process and I
16 recognize Your Honor's response when people -- we're dealing
17 with a PI hearing. My concern, overarching concern, is
18 that -- and I hope this is clear -- I hope we're not limiting
19 ourselves in being able to go back even later on
20 post-preliminary injunction to talk about certain things.

21 THE COURT: No, I indicated already that I would
22 consider either reopening the 30(b)(6) or allowing
23 depositions of the commissioners. I mean, this process, as I
24 have outlined it, was intended to see what we can get in this
25 first round to see whether or not the commissioners need to

1 be deposed, so I am not ruling out at this point the
2 possibility of reopening either the 30(b)(6) or the -- or
3 allowing depositions of the commissioners.

4 So go ahead. So how does this -- how do these --
5 the selection of the commissioners --

6 MR. TUCKER: I think with Your Honor's caveat, I
7 think I'm less concerned about 6, 8 and 9.

8 THE COURT: Okay. Then why don't we -- why don't
9 we table 6, 8 and 9 for this deposition. Again, I want to be
10 clear to defendants, there is a possibility I will allow a
11 limited reopening of these 30(b)(6) down the road because
12 right now I'm focused on this first stage.

13 17, I've already indicated my -- what I intend to
14 do with this is to permit -- actually, with respect to 17,
15 let me hear briefly. I'm not going to allow communications
16 with third parties because I don't -- I think that's an
17 overly burdensome --

18 MR. TUCKER: Right, and that was what we had
19 suggested to defense counsel was to just take out or between
20 a commission -- commissioner and third parties and then leave
21 it as is.

22 THE COURT: Let me hear from the defendant on that.

23 MS. RICH FREDERICKS: Yeah, Your Honor, and our
24 concern remains that this is getting into the commissioner's
25 personal views and beliefs. If they're having some sort of

1 intellectual conversation regarding religious freedom as an
2 issue of our day at a dinner party that they're mutually
3 attending, we feel like that that is treading into the
4 Bryce -- Bryce territory.

5 THE COURT: Here -- here is my thought on this, and
6 I'll hear from each side, is to limit this to the following:
7 Any communications between commissioners concerning the
8 impact of religious freedom, religious liberty or the free
9 exercise of religion on their roles as commissioners. In
10 other words, to the extent that they believe that these
11 issues impact their decision-making ability, I think it's
12 relevant and I think it's not as -- it's not getting to the
13 concerns that I have.

14 To the extent, as defense counsel indicated, that
15 they're having a discussion of religious liberty over dinner
16 I don't think it's as relevant. Can both sides live with
17 that modification?

18 MR. TUCKER: Plaintiffs can live with that.

19 THE COURT: Defendants? Okay.

20 MS. RICH FREDERICKS: Yes, Your Honor.

21 THE COURT: Okay, great. 22 -- or 21 then give me
22 a moment.

23 MR. TUCKER: On 21, Your Honor, 21 and 26 we looked
24 at collectively, so we actually just struck 26 and took the
25 language from 26 that revolved around the communications and

1 we added the communications part to 21.

2 THE COURT: Okay.

3 MR. TUCKER: And we were focused on the material
4 facts, the rationale, communications between commissioners on
5 those cases that are listed.

6 THE COURT: Okay. Let me hear from defendant as to
7 why that's not a proper inquiry.

8 MS. RICH FREDERICKS: Yes, Your Honor, we had
9 number of concerns with respect to this one. The first one
10 is that I don't believe that I can have anyone up to speed in
11 the next six days to discuss ad nauseam these six additional
12 cases. We also have concerns that this is inquiring into the
13 heart of the judicial decision-making of the Commission and
14 how it acted in each of these other six cases, and I believe
15 we had discussion on the 5th of February with the Court
16 regarding the judicial role that the Commission plays and
17 their decision-making behind that being analogous to this
18 Court's decision-making. And, you know, certainly the
19 written decision is one thing, but inquiring into why and,
20 you know, what underlies that would be a bridge too far and
21 it would fine the face of their immunity.

22 THE COURT: But if we're only talking
23 communications -- if we've adapted 26 and 21 so that's had
24 the only thing that we're talking about -- go ahead.

25 MR. TUCKER: Your Honor, we did -- sorry.

1 THE COURT: Are we only talking about the
2 communications amongst the commissioners or are we talking
3 the rationale for the decision?

4 MR. TUCKER: We are including the facts and the
5 rationale as well. And really what we're getting is the --
6 we need to know whether there is equal treatment or not as it
7 relates to these cases.

8 THE COURT: But isn't the rationale going to be in
9 the written opinion?

10 MR. TUCKER: Is there a rationale going to be in
11 the written opinion?

12 THE COURT: Yes.

13 MR. TUCKER: I think there is going to be segments
14 of it there that we question the witness on, but some of them
15 don't have that.

16 THE COURT: What doesn't have a written opinion?

17 MR. TUCKER: Well, for example, A, we have seen one
18 unsigned document. We recognize like the facts of it and we
19 see the name of the bakery, but we don't know what happened
20 in that instance. We know it was from 2015.

21 MS. RICH FREDERICKS: If I may, Your Honor, I also
22 have a practicality concern and that is that a number of
23 these predate the current commissioners and so it would then
24 become incumbent upon our designee to reach out to prior
25 commissioners and that's simply not something that can be

1 accomplished between now and Thursday.

2 MR. TUCKER: And I think the point we're trying to
3 get to here is whether there was a reliance on precedence.
4 So to the extent that there are current commissioners that's
5 right have relied upon the precedent that's laid out here in
6 these particular cases, then I think we should be able to
7 inquire into it.

8 MS. RICH FREDERICKS: And our suggestion with
9 respect to that was that plaintiffs could inquire: Does the
10 Commission consider its prior rulings precedential and if so,
11 how do they rely upon those?

12 MR. TUCKER: But that general answer -- I mean,
13 they're either going to say yes or no and I don't know that
14 that moves the ball.

15 THE COURT: What about allowing questioning --
16 remind me procedurally, is it -- the probable cause
17 complaint, that was filed -- was that filed by the Commission
18 in this case?

19 MS. RICH FREDERICKS: No, it is not. Probable
20 cause decisions are made by the Division.

21 THE COURT: Okay.

22 MR. TUCKER: But then those are appealed up to the
23 Commission level.

24 THE COURT: Right, but the Commission hasn't acted
25 on that yet, have they?

1 MR. TUCKER: On A I don't know what the Commission
2 has done.

3 THE COURT: No, no, no, in this case, in
4 Masterpiece, in the instant case right now.

5 MR. TUCKER: Well, they decided to prosecute.

6 THE COURT: Okay. So it -- okay. That was -- so
7 then my thought is limiting -- since what we're getting at is
8 the decision to prosecute, what about the limiting
9 questioning to whether any of these former cases impacted the
10 decision -- the probable cause decision made by the
11 Commission in order to prosecute in this case?

12 In other words, you could ask did -- Mannarino v.
13 Azukar Bakery (ph), did you consider that decision when you
14 made your probable cause determination, yes or no? If the
15 answer is no, that's it. If the answer is yes, how did that
16 impact? Does anybody have a concern? That certainly takes
17 care of your burdensomeness because you don't have to ask
18 anybody, you just have to ask this commission.

19 I still have a little bit of concern that we're
20 getting into deliberative process, but it's about a past
21 decision that has already been made, which is, in part, what
22 this case is about. Let me ask you, does that alleviate at
23 least some of the concern of the defendants?

24 MS. RICH FREDERICKS: Yeah, I think that as you've
25 framed it that's something that we can live with and prepare

1 our designee to address.

2 THE COURT: Can plaintiffs live with that?

3 MR. TUCKER: I would just say, the only concern I
4 have is we're trying to compare how those particular cases
5 were handled relative to what we have in our set of facts and
6 so I'm not sure how those two are tied together.

7 THE COURT: Well, I mean, in part it -- for the
8 ones with a different commission making the decision, I'm not
9 sure how relevant the prior decisions are to this
10 Commission's decision unless they considered it. If they
11 didn't consider it -- if they considered and it and then
12 chose to either distinguish it or considered it precedential,
13 then it's relevant here. If it's -- if it's just an old
14 opinion of different commissioners not considered at all by
15 this Commission, I'm not sure how relevant it is to the
16 instant lawsuit.

17 MR. TUCKER: Well, I do know I've seen, for
18 example, a memo where all three of these, Bill Jack, the C, D
19 and E are, you know, mentioned in the memorandum, and so I'm
20 just -- I'm trying to prevent a scenario where we're
21 hamstrung in our ability to see that comparison between how
22 it was previously handled and our current scenario.

23 THE COURT: I mean, for those ones, if it was in a
24 memorandum in this case, then it's going to be considered --
25 then it would have been considered by them and then you can

1 inquire into, you know, what facts they deemed the same, what
2 facts they deemed different.

3 I don't know in those cases if they reached the
4 same outcome or a different outcome, but let's say they
5 reached a different outcome, you can then ask, okay, you
6 considered this, why do you think this is distinguishable,
7 and then they can answer that question and that gets you what
8 you need, okay.

9 MR. TUCKER: Okay.

10 THE COURT: 22 I know we talked about this before.
11 What's the relevance of this case if the Commission has not
12 made a decision to prosecute in that case?

13 MR. TUCKER: I think even though they are different
14 forms perhaps, the public positions that the Commission has
15 taken I think are -- and the papers that have been filed I
16 think are important for the comparison that I mentioned
17 earlier.

18 So we're not looking to ask them what their -- why
19 their counsel said X, Y and Z, but as it relates to the
20 underlying decision as to why they have decided this is okay
21 and this isn't, we wanted to get to that as it relates to the
22 303 Creative matter.

23 THE COURT: I'm going to do the same thing with
24 this, as to the extent that they considered 303 in reaching a
25 decision in this case, I'm going to allow it. To the extent

1 they didn't, then I'm not going to allow it. I don't want to
2 get too far down a rabbit hole of a case where they
3 apparently have not made a prosecutorial decision, but if
4 they did consider the facts of that case in reaching a
5 decision in this case, then I'll allow questioning into that.

6 And if you guys are on 28, maybe that gives me some
7 hope that we won't need tomorrow's hearing at 4 o'clock.
8 Maybe me setting it at Friday at 4 o'clock also will
9 encourage you all to talk. Maybe not, but we'll see.

10 So I will set tentatively a discovery dispute
11 hearing nor tomorrow at 4:00. Telephonically you all can
12 appear. And if you reach resolution before then, just call
13 my Chambers and we'll vacate it, okay. All right. Thank
14 you, everybody, I appreciate -- I know you've been talking
15 for quite some time and I appreciate it and I appreciate you
16 trying to reach resolutions of these. We'll be in recess.

17 (Whereupon, the within hearing was then in
18 conclusion at 4:17 p.m.)

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