IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Wiley Y. Daniel

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

MASTERPIECE CAKESHOP INCORPORATED, a Colorado corporation; and
JACK PHILLIPS,

Plaintiffs,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official and individual capacities;
ANTHONY ARAGON, as member of the Colorado Civil Rights Commission, in his official and individual capacities;
MIGUEL "MICHAEL" RENE ELIAS, as member of the Colorado Civil Rights Commission, in his official and individual capacities;
CAROL FABRIZIO, as member of the Colorado Civil Rights Commission, in her official and individual capacities;
CHARLES GARCIA, as member of the Colorado Civil Rights Commission, in his official and individual capacities;
RITA LEWIS, as member of the Colorado Civil Rights Commission, in her official and individual capacities;
JESSICA POCOCK, as member of the Colorado Civil Rights Commission, in her official and individual capacities;
AJAY MENON, as member of the Colorado Civil Rights Commission, in his official and individual capacities
CYNTHIA H. COFFMAN, Colorado Attorney General, in her official capacity; and
JOHN HICKENLOOPER, Colorado Governor, in his official capacity,

Defendants.

ORDER

I. INTRODUCTION

On June 4, 2018, the United States Supreme Court held the Colorado Civil Rights Division ("Division") and the Colorado Civil Rights Commission ("Commission") treated Jack Phillips, the owner of Masterpiece Cakeshop, Ltd., with hostility

"inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion" when the Division and the Commission found that Phillips[1] discriminated against a same-sex couple by refusing to make them a wedding cake. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n* (*Masterpiece I*), 138 S.Ct. 1719, 1732 (2018). The Division's and the Commission's "clear and impermissible hostility toward the sincere religious beliefs that motivated [Phillips'] objection" to creating the custom wedding cake manifested itself in two ways. *Id.* at 1729-30. First, Commission members made disparaging comments about Phillips' faith at public hearings. *Id.* at 1729. And second, the Division and the Commission treated Phillips differently from three other bakeries by allowed those bakeries to refuse a customer's request to make a cake that would have violated their secular values, while requiring Phillips to produce a cake that would have violated his sacred beliefs. *Id.* at 1730.

Weeks after the Supreme Court announced *Masterpiece I*, the Division issued a new probable cause determination against Phillips, alleging that he discriminated against a different customer because of the customer's transgender status. (ECF No. 51 ("Complaint"), ¶¶ 211, 216). The Commission also claimed Phillips discriminated against the customer and filed a formal complaint against him. (*Id.* at ¶ 230).

Tired of Colorado's "continuing efforts to target Phillips" and "unconstitutional bullying," Phillips filed this suit against Defendants. (*Id.* at ¶ 8). Phillips alleges that the new probable cause determination and formal complaint violate his First Amendment

[1] Unless the context dictates otherwise, "Phillips" refers to Phillips and Masterpiece Cakeshop, Ltd.("Masterpiece") collectively.

rights to free exercise of religion and free speech and his Fourteenth Amendment rights to due process and equal protection. Among other remedies, he asks for injunctive relief, declaratory judgment, and monetary compensation.

The Defendants are Aubrey Elenis, the Director of the Division, seven members of the Commission ("Defendant Commissioners"), Cynthia Coffman, the Attorney General of Colorado, and John Hickenlooper, the Governor of Colorado. Director Elenis and the Defendant Commissioners are sued in their official and individual capacities. The Attorney General and the Governor are sued only in their official capacities.

On November 6, 2018, Defendants filed a Motion to Dismiss ("Motion") pursuant to Federal Rule of Civil Procedure 12(b)(1). (ECF No. 64). The Motion argues that Phillips' suit should be dismissed in its entirety on four different abstention grounds. The Motion also argues that various claims should be dismissed because Defendants are immune from suit and Phillips lacks standing. Phillips filed a response and Defendants replied. (ECF Nos. 81, 86). I held a hearing on December 18, 2018 to address the arguments related to Defendants' Motion ("Motion Hearing"). Based on the allegations in the Complaint and the parties' oral and written arguments, the Motion is denied in part and granted in part.

II. FACTUAL BACKGROUND

In this recitation of the alleged facts, I accepted the well-pleaded allegations in the Complaint as true. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). I also drew from the Division's probable cause determination and the Commission's formal complaint because they were attached to the Complaint, incorporated into the Complaint by reference, and the parties do not dispute the authenticity of these

documents. *See Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006) ("Exhibits attached to a complaint are properly treated as part of the pleadings for purposes of ruling on a motion to dismiss."); *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002). And I relied on the relevant portions of the United States Supreme Court's decision in *Masterpiece I*.

A. How Phillips Operates his Business

Phillips is a cake artist. (Compl. ¶ 83). He started Masterpiece in 1993 as a bakery that designs and creates custom cakes and other baked goods. (*Id.* at ¶¶ 84-86). Masterpiece has fashioned all kinds of custom cakes, including those that resemble the Gutenberg Bible, a racecar, a guitar, and a crab boil. (*Id.* at ¶¶ 86).

Phillips reviews every custom cake order Masterpiece receives. (*Id.* at ¶ 130). When potential customers request a custom cake, the employee who answers the call asks about the cake's type, design, and message, and what event the cake is intended to celebrate. (*Id.* at ¶ 131). If Phillips agrees to make the custom cake, he sketches the design on paper, bakes the cake, and sculpts the baked cake into the desired form. (*Id.* at ¶¶ 89-92). Finally, Phillips decorates the cake using painting and sculpting techniques and inscribing words, numbers, or designs. (*Id.* at ¶ 93).

Phillips is not only a cake artist, but a Christian. (*Id.* at ¶ 95). His faith teaches him "whether you eat or drink or whatever you do, do it all for the glory of God." 1 *Corinthians* 10:31; (Compl. ¶ 97). According to this teaching, and other instructions from the New Testament, Phillips operates Masterpiece as an extension of his religious convictions. (Compl. ¶ 97). Phillips' faith informs what he will and will not do.

Some of the things that he will do through Masterpiece include hosting Bible

studies at the bakery, providing free baked goods to homeless men and women, and closing his business on Sundays to allow himself and his employees to attend religious services. (*Id.* at ¶¶ 100-02). Phillips sells custom cakes to anyone who requests them, regardless of the customer's race, faith, sexual orientation, or gender identity. (*See id.* at ¶¶ 103, 125, 129). Phillips also sells pre-made items, like brownies, cookies, and generic cakes to anyone. (*Id.* at ¶¶ 132-34).

But Phillips will not "create custom cakes that express messages or celebrate events in conflict with his religious beliefs" no matter who requests them. (*Id.* at ¶¶ 107, 124, 128). Phillips has declined to make cakes that "demean LGBT people," express racist views, celebrate Halloween, promote marijuana and alcohol, support Satan or satanic themes or beliefs, and, most famously, celebrate same-sex marriage. (*See id.* at ¶¶ 111-22). Relevant to this suit, Phillips will not create custom cakes "that express or celebrate messages in conflict with [his] religious beliefs about sex." (*Id.* at ¶ 127). These beliefs instruct "that sex—the status of being male or female—is given by God, is biologically determined, is not determined by perceptions or feelings, and cannot be chosen or changed." (*Id.* at ¶ 126).

B. <u>Other Colorado Bakeries Refuse to Create Custom Cakes</u>

At some point after 2013, a man named William Jack went to three different Colorado cake shops to request cakes that "conveyed disapproval of same-sex marriage, along with religious text." *Masterpiece I*, 138 S.Ct. at 1730. Specifically, Jack requested cakes "that looked like Bibles, that bore an image depicting two groomsmen covered with a red 'X,' and that included bible verses conveying the religious basis for his opposition to same-sex marriage." (Compl. ¶¶ 70, 73, 161). The owners of the

three bakeries declined to make these cakes because they "objected to those cakes' messages and would not create them for anyone." (*Id.* at ¶ 74); *see also Masterpiece I*, 138 S.Ct. at 1730 (explaining why the bakeries declined to make the cakes). Jack then filed discrimination charges against the bakeries, claiming that they discriminated against him based on his religion. (*Id.* at ¶ 75).

The Division investigated his claims, but found there was not probable cause for Jack's discrimination complaints. (*Id.* at ¶ 77). The Division reached this conclusion because the requested cakes included "wording and images [the baker] deemed derogatory, featured language and images [the baker] deemed hateful, and displayed a message the baker deemed as discriminatory." *Masterpiece I*, 138 S.Ct. at 1730 (internal citations and quotation marks omitted); (Compl. at ¶ 78). The Division also determined that the bakeries would not create the cakes expressing the same message for any other customer, but would create other cakes expressing different messages for people of faith. (Compl. at ¶¶ 79-80). The Commission affirmed these determinations in June 2015. (*Id.* at ¶ 81).

C. Colorado State Courts' Decisions Leading to *Masterpiece I*

Phillips' conflict with Colorado originally began in 2012 when he refused a couple's request to make them a custom wedding cake for their same-sex marriage. *Masterpiece I*, 138 S.Ct. at 1725-26. In 2013, the Division found probable cause to believe Phillips discriminated against the couple, and initiated an investigation into Phillips' conduct. (Compl. ¶ 141). Once the Division completed its 2013 investigation and issued its probable cause determination against Phillips, the Commission filed a formal complaint against Phillips alleging that he violated C.R.S. § 24-34-601(2)(a) and

assigned the case to an administrative law judge. (*Id.* at ¶ 141-42). The administrative law judge found Phillips violated C.R.S. § 24-34-601(2)(a) when Phillips refused to make a wedding cake for the couple's wedding. (*Id.* at ¶ 143). Phillips appealed this decision to the Commission.

During the Commission's public deliberations on the administrative law judge's decision, two former commissioners made comments, and one former commissioner agreed with comments, "'endors[ing] the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community.'" (*Id.* at ¶ 146 (quoting *Masterpiece I*, 138 S.Ct. at 1729)). One commissioner stated "'that Phillips can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state.'" (*Id.* at ¶ 147 (quoting *Masterpiece I*, 138 S.Ct. at 1729)). Later, the same commissioner said "'if a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise.'" (*Id.* at ¶ 151 (quoting *Masterpiece I*, 138 S.Ct. at 1729)). Another commissioner agreed. (*Id.* at ¶ 148). A third commissioner made the following disparaging comments about Phillips' beliefs:

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.
>
> (*Id.* at ¶ 152 (quoting *Masterpiece I*, 138 S.Ct. at 1729)).

The Commission affirmed the administrative law judge's decision finding that

Phillips had discriminated against the couple. (*Id.* at ¶ 145). The Commission ordered Phillips to (1) stop creating all wedding cakes unless he would create same-sex wedding cakes; (2) reeducate his staff about discrimination; and (3) provide reports to the Division detailing any refusal to make a cake and the reasons why. (*Id.* at ¶ 158).

Phillips appealed this decision to the Colorado Court of Appeals. (*Id.* at ¶ 160). A division of that court affirmed the Commission. (*Id.* at ¶ 162). The Court of Appeals distinguished the Division's decision to not pursue discrimination claims against the other three bakeries from its decision to commence discrimination proceedings against Phillips because "[t]he Division found that the bakeries did not refuse [William Jack's] request because of his creed, but rather because of the offensive nature of the requested message. . . . Conversely, Masterpiece [Cakeshop] admits that its decision to refuse [a] requested [same-sex] wedding cake was because of its opposition to same-sex marriage." *(Id*. at ¶ 163 (quoting *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 282 n.8 (Colo. App. 2015)). Phillips appealed that decision to the Colorado Supreme Court, which denied his petition for writ of certiorari. (*Id.* at ¶ 164). Phillips then appealed the Court of Appeals' decision to the United States Supreme Court. The Supreme Court granted review on June 26, 2017. (*Id.* at ¶ 165).

D. *Masterpiece I* Reverses the Colorado State Courts' Decisions

The United States Supreme Court announced *Masterpiece I* on June 4, 2018. (Compl. ¶ 171). The Court reversed the judgment of the Colorado Court of Appeals because "[t]he Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion." *Masterpiece I*, 138 S.Ct. at 1732.

The Supreme Court noted the hostility appeared in two ways. First, "[t]hat hostility surfaced at the Commission's formal, public hearings," where several Commission members made derogatory comments about Phillips' religion. *Id.* at 1729. Second, hostility was evident in "the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission." *Id.* at 1730.

The latter form of hostility appeared when "[t]he Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker" while "the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism." *Id.* The hostility also bubbled up when "the Division found no violation of [the Colorado Anti-Discrimination Act] in the other cases in part because each bakery was willing to sell other products, . . . , to the prospective customers" but the "Commission dismissed Phillips' willingness to sell birthday cakes, shower cakes, [and] cookies and brownies, to gay and lesbian customers as irrelevant." *Id.* (internal quotation marks and citations omitted).

The Supreme Court criticized the Colorado Court of Appeals for addressing Phillips' disparate treatment argument "only in passing and relegat[ing] its complete analysis of the issue to a footnote." *Id.* The Supreme Court was also critical of the Court of Appeals' attempt to distinguish the three other bakeries from Phillips based on the Divisions' finding that the bakeries refused the customer's request "'because of the offensive nature of the requested message.'" *Id.* at 1731 (quoting *Craig*, 370 P.3d at 282 n.8)). The Supreme Court said "[t]he Colorado court's attempt to account for the

difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs." *Id.*

E. The Background of Phillips' Complaint

On June 26, 2017, the same day the United States Supreme Court granted Phillips' writ of certiorari to review the Colorado Court of Appeals' decision in *Masterpiece I*, Autumn Scardina, an attorney, called Masterpiece to request a cake with a blue exterior and pink interior to celebrate her transition from male to female. (Compl. ¶¶ 184-86). Scardina planned to display the cake at a party for the anniversary of her gender transition. (*Id.* at ¶ 192). Masterpiece declined to make the cake because the cake conveyed a message that conflicted with Phillips' religious beliefs that gender cannot be changed or chosen. (*Id.* at ¶¶ 187-91).

Phillips alleges that Masterpiece "would not create a custom cake that expresses those messages for any customer, no matter the customer's protected characteristics." (*Id.* at ¶ 193). Masterpiece offered to create a different custom cake for Scardina or to sell her any of the pre-made items available for purchase. (*Id.* at ¶ 196). Scardina did not request a different custom cake and did not attempt to purchase any of the pre-made items. (*Id.* at ¶ 197).

About a month after Masterpiece refused to make the cake, the Division informed Phillips that Scardina filed a discrimination charge against him, alleging he violated C.R.S. § 24-34-601(2)(a)'s prohibition against discrimination because of sex and transgender status by declining to create the blue and pink cake. (*Id.* at ¶¶ 200-01). Scardina's charge alleged Masterpiece declined "an order for a cake with pink interior and blue exterior, which [she] disclosed was intended for the celebration of [her]

transition from male to female." (*Id.* at ¶ 202 (internal quotation marks omitted)). She further alleged that when she explained she is "a transsexual and that [she] wanted [the] birthday cake to celebrate [her] transition by having a blue exterior and a pink interior, [Masterpiece] told [her] they will not make the cake based on their religious beliefs." (*Id.* at ¶ 203 (internal quotation marks omitted)). Scardina believed Masterpiece declined to create the cake because she "requested that its color and theme celebrate [her] transition from male to female." (*Id.* at ¶ 204 (internal quotation marks omitted)).

Phillips responded to the discrimination charge. Phillips stated Masterpiece refused to make the blue and pink cake because the bakery "does not create artistic expression addressing the subject of gender transitions for any customer," and not because of Scardina's "sex or gender identity." (*Id.* at ¶ 206 (internal quotation marks and alterations omitted)). Phillips also claimed that a Masterpiece employee told Scardina that she was "welcome to purchase any of the cake shop's premade items or obtain a different custom cake," but Masterpiece "could not fulfill this particular custom cake request." (*Id.* at ¶ 208 (internal quotation marks omitted)).

On June 28, 2018, twenty-four days after the Supreme Court announced *Masterpiece I*, the Division issued a probable cause determination finding that there was probable cause to believe Phillips violated C.R.S. § 24-34-601(2)(a) by refusing to make Scardina's requested cake. (*Id.* at ¶ 211). The Division acknowledged Phillips' contention that Masterpiece "will not design custom cakes that express ideas or celebrate events at odds with its owner and staff's religious beliefs." (ECF No. 51-1 ("Exhibit A"), 1). The Division's recitation of the parties' factual allegations indicated Masterpiece refused to make the blue and pink cake only after learning of Scardina's

intention to display the cake at gender transition birthday party. (*Id.* at 2-3).

The Division noted Phillips will not create custom cakes that address "sex changes or gender transitions" or that "support a message that 'promote[s] the idea that a person's sex is anything other than an immutable God-given biological reality.'" (*Id.* at 3). The Division also acknowledged that Phillips "refuses to make custom cakes for other expressions that it deems to be objectionable." (*Id.*).

After reviewing the elements necessary to prove discrimination in violation of C.R.S. § 24-34-601(2)(a), the Division determined there was probable cause to believe Phillips discriminated against Scardina. (*Id.* at 3-4). The Division explained that after Masterpiece learned the blue and pink cake was intended to celebrate Scardina's gender transition, Masterpiece refused to produce the cake because "it will not provide the service of creating cakes that 'promote the idea that a person's sex is anything other than an immutable God-given biological reality.'" (*Id.* at 3). Based on this evidence, the Division found "the refusal to provide service to [Scardina] was based on [her] transgender status." (*Id.* at 3-4).

On October 2, 2018, the Commission voted to notice Scardina's claim for a hearing and to file a formal complaint against Phillips. (*Id.* at ¶ 228). The Commission could have declined to file a formal complaint, and if it had done so, Scardina could have filed a civil action on her own behalf. (*Id.* at ¶ 229 (citing C.R.S. § 24-34-306(11)). On October 9, 2018, the Commission issued its formal complaint. (ECF No. 51-2 ("Exhibit B")). The formal complaint stated Scardina told Masterpiece she wanted the cake's design to be "a reflection of the fact that she had transitioned from male to female and that she had come out as transgender on her birthday." (Exhibit B, ¶ 6; *see*

id. at ¶ 7). The Commission recognized that Phillips "cited his religious beliefs as the reason why the bakery would not [fulfill Scardina's order]." (*Id.* at ¶ 9). The Commission then alleged "that Masterpiece denied service to Scardina based on her sexual orientation (transgender status), . . . in violation of § 24-34-601(2)(a), C.R.S. (2018)." (*Id.* at ¶ 15). The formal complaint set an administrative hearing for February 4, 2019 to adjudicate Scardina's claims.[2]

Phillips filed his original complaint on August 14, 2018, after the Division issued its probable cause determination. (ECF No. 1). After Defendants filed a motion to dismiss, and after the Commission filed its formal complaint against Phillips, Phillips filed an amended complaint, which is the operative complaint, on October 23, 2018.

F. Phillips' Claims Against the Defendants

Phillips asserts four claims against Defendants. First, he alleges Defendants' interpretation and enforcement of C.R.S. § 24-34-601(2)(a) violates his First Amendment right to freely exercise his religion. (*See* Compl. ¶¶ 341, 344, 346, 348, 351, 354).

Second, he alleges Defendants' interpretation and enforcement of C.R.S. § 24-34-601(2)(a) and C.R.S. § 24-34-701 violates his First Amendment right to speak freely. (*Id.* at ¶¶ 363-69, 373-74, 377-78, 380-81, 388). He also alleges C.R.S. § 24-34-601(2)(a) and C.R.S. § 24-34-701, facially and as applied to him, are vague and overbroad. (*Id.* at ¶ 389).

Third, Phillips alleges that facially and as applied to him, the vague language in

[2] An administrative law judge converted this hearing into a commencement hearing on December 21, 2018. (ECF No. 92-1).

C.R.S. § 24-34-601(2)(a) and C.R.S. § 24-34-701 violates his Fourteenth Amendment right to due process. (*Id.* at ¶ 417). He also alleges that C.R.S. § 24-34-303 violates his due process rights by mandating non-neutral selection criteria for the Commission and C.R.S. § 24-34-306 violates his due process rights by vesting the Commission with significant prosecutorial discretion. (*Id.* at ¶¶ 403-04, 406-09, 415-16).

Finally, Phillips alleges Defendants' interpretation and enforcement of C.R.S. § 24-34-601(2)(a) violates his Fourteenth Amendment right to equal protection because Defendants treat Phillips' "decisions to create speech and their religious exercise differently from those similarly situated to [him]." (*Id.* at ¶¶ 420, 422, 427). Phillips also alleges that C.R.S. § 24-34-303 deprives him of equal protection because the statute requires the Commission to be composed of members chosen through a non-neutral selection criteria. (*Id.* at ¶¶ 424-25).

Phillips requests preliminary and permanent injunctive relief forbidding Defendants from interpreting and enforcing C.R.S. § 24-34-601(2)(a) against him in a way that violates his rights to freedom of religion and free speech, from interpreting and enforcing C.R.S. § 24-34-701 against him in a way that violates his right to free speech, and from enforcing C.R.S. § 24-34-303(1)(b)(I)-(II) and C.R.S. § 24-34-306. (Compl., Prayer for Relief, ¶¶ 1-4).[3] Phillips requests a declaration that Defendants violate his First and Fourteenth Amendment rights by enforcing C.R.S. § 24-34-601(2)(a) and C.R.S. § 24-34-701 and his Fourteenth Amendment rights by enforcing C.R.S. § 24-34-303(1)(b)(I)-(II) and C.R.S. § 24-34-306. (*Id.* at ¶¶ 5-8). Phillips also seeks

[3] Phillips' Motion for Preliminary Injunction (ECF No. 57) was denied without prejudice at the Motion Hearing. (ECF No. 90).

compensatory, punitive, and nominal damages from Director Elenis and the Defendant Commissioners. (*Id.* at ¶¶ 9-11).

III. STANDARD OF REVIEW

When moving to dismiss a case for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the movant may mount either a facial or a factual attack on the complaint. *Holt*, 46 F.3d at 1002. A "facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint." *Id.* "A facial attack happens when a defendant files a Rule 12(b)(1) motion without accompanying evidence." *Shipula v. Tex. Dep't of Family Protective Servs.*, 2011 WL 1882521, at *3 (S.D. Tex. May 17, 2011). Defendants facially challenge Phillips' Complaint. (*See, e.g.*, ECF No. 93, ("Motion Hearing Transcript"), 67:9-12).

Courts must accept well-pleaded allegations in the complaint as true when reviewing a facial attack, but courts must disregard conclusory allegations. *See Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001); *Holt*, 46 F.3d at 1002. A court may also consider documents that are incorporated in the complaint by reference or that are referred to in the complaint, if the documents are central to the complaint and the parties do not dispute their authenticity. *See Deseret Book Co.*, 287 F.3d at 941-42; *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997); *MER, LLC v. Comerica Bank*, 2013 WL 539747, at *1 (D. Colo. Feb. 13, 2013) (reviewing document incorporated into the complaint by reference in Fed. R. Civ. P. 12(b)(1) motion to dismiss).

IV. ANALYSIS

Defendants raise four arguments in support of their Motion. First, Defendants argue I should abstain from exercising jurisdiction over Phillips' claims for equitable relief due to the Commission's ongoing civil enforcement proceeding against Phillips to adjudicate Scardina's 2017 discrimination charge. (ECF No. 64 at 10). Second, Director Elenis and the Defendant Commissioners contend they are protected from Phillips' claims for damages by absolute quasi-prosecutorial immunity, or, in the alternative, by qualified immunity. (*Id.*; *see also* Mot. Hr'g Trans. at 50:1-16). Third, Attorney General Coffman and Governor Hickenlooper argue Phillips' claims for equitable relief against them are barred by the Eleventh Amendment due to their non-participation in the ongoing civil enforcement action. (ECF No. 64 at 10). Finally, Defendants argue Phillips lacks standing to challenge C.R.S. § 24-34-701 because he failed to allege that he suffered an injury related to its enforcement. (*Id.*).

A. Abstention

Defendants assert that I should abstain from exercising jurisdiction over Phillips' claims for equitable relief based on four different abstention doctrines. (ECF No. 64 at 11-19). Defendants argue that mandatory abstention is compelled by *Younger v. Harris*, 401 U.S. 37 (1971). Defendants argue that discretionary abstention is counseled by *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941), *Burford v. Sun Oil Company*, 319 U.S. 315 (1943), and *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

1. *Younger v. Harris*

Defendants first argue that I must abstain from Phillips' claims for equitable relief under the abstention doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971). Alternatively, Defendants request a limited evidentiary hearing if I find that *Younger* does not apply. I conclude that *Younger* does not apply and deny Defendants' request for an evidentiary hearing.

a. The Bad Faith Exception to *Younger* Applies

Pursuant to the *Younger* abstention doctrine, "[e]ven when a federal court would otherwise have jurisdiction to hear a claim, the court may be obliged to abstain when a federal-court judgment on the claim would interfere with an ongoing state proceeding implicating important state interests." *D.L. v. Unified Sch. Dist. No. 497*, 392 F.3d 1223, 1227-28 (10th Cir. 2004). "*Younger* abstention remains an extraordinary and narrow exception to the general rule that federal courts have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cook v. Harding*, 879 F.3d 1035, 1038 (9th Cir. 2018) (internal quotation marks omitted). Nonetheless, a federal court must abstain from hearing a case pursuant to *Younger* where three conditions are satisfied:

> (1) "there must be ongoing state criminal, civil or administrative proceedings";
>
> (2) "the state court must offer an adequate forum to hear the federal plaintiff's claims from the federal lawsuit"; and
>
> (3) "the state proceeding must involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies."

Taylor v. Jaquez, 126 F.3d 1294, 1297 (10th Cir. 1997); *see also Weitzel v. Div. of Occupational and Prof'l Licensing,* 240 F.3d 871, 875 (10th Cir. 2001). When these conditions are met, *Younger* abstention is non-discretionary absent extraordinary circumstances. *See Amanatullah v. Colo. Bd. of Med. Exam'rs*, 187 F.3d 1160, 1163 (10th Cir. 1999). I assume without deciding that the three prerequisite factors to *Younger* are present and only analyze whether an extraordinary circumstance exists.

A party seeking to avoid *Younger* by relying on an extraordinary circumstance bears a "heavy burden." *Phelps I*, 59 F.3d at 1066. One extraordinary circumstance occurs when an administrative civil proceeding begins in bad faith or is meant to harass. *See Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435 (1982) ("[S]o long as there is no showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate, the federal courts should abstain."); *Phelps v. Hamilton* (*Phelps I*), 59 F.3d 1058, 1063-65 (10th Cir. 1995).

The Tenth Circuit considers three factors in determining whether a prosecution began in bad faith or is intended to harass the respondent:

> (1) whether it was frivolous or undertaken with no reasonably objective hope of success, . . . (2) whether it was motivated by the defendant's suspect class or in retaliation for the defendant's exercise of constitutional rights, . . . and (3) whether it was conducted in such a way as to constitute harassment and an abuse of prosecutorial discretion, typically through the unjustified and oppressive use of multiple prosecutions.

Phelps I, 59 F.3d at 1065 (internal citations and footnotes omitted).

The Supreme Court held in *Masterpiece I* that one element of Colorado's "clear and impermissible hostility" toward Phillips' religious beliefs was "the difference in treatment between Phillips' case and the cases of other bakers who objected to a

requested cake on the basis of conscience and prevailed before the Commission." *Masterpiece I*, 138 S.Ct. at 1729-30. Recall that the Commission permitted the other three bakeries to refuse to provide custom cakes to a customer because of the bakers' beliefs that the proposed cake messages were "derogatory," "hateful," and "discriminatory," while the Commission denied the same accommodation to Phillips when he refused to make the cake for a same-sex wedding because of his religious beliefs. *Id.* at 1730. Phillips believes this theme continues to run through this case.

Phillips claims that he refused to process Scardina's request for a blue and pink cake "because of the messages that the cake would have expressed," and not because of Scardina's transgender status. (Compl. ¶ 194). He also alleges that he would not have created this custom cake for anyone, "no matter the customer's protected characteristics." (*Id.* at ¶ 193).

Phillips explained these positions to the Division when he responded to Scardina's discrimination charge. (*Id.* at ¶¶ 206-08). The Division acknowledged Phillips' contention that Masterpiece "will not design custom cakes that express ideas or celebrate events at odds with its owner and staff's religious beliefs," and recognized that Phillips only declined to make the cake after learning about the purpose of the cake. (Exhibit A at 1-3). The Division also understood that Masterpiece does not create custom cakes that "address the topic of sex-changes or gender transitions" because of Phillips' religious beliefs. (*Id.* at 3). Nonetheless, the Division's probable cause determination "ignored Masterpiece Cakeshop's message-based reason for declining to create the cake." (Compl. ¶ 216). The Division instead used Phillips' assertion that Masterpiece will not create cakes "that promote the idea that a person's sex is anything

other than an immutable God-given biological reality," as evidence "that the refusal to provide service to [Scardina] was based on [her] transgender status." (Exhibit A at 3-4).

The Commission's formal complaint repeats that Scardina told Masterpiece she wanted the cake's design to reflect her transition "from male to female and that she had come out as transgender on her birthday." (Exhibit B, ¶ 6; *see id.* at ¶ 7). The complaint also states Masterpiece told Scardina it would not make the cake "because it does not make cakes to celebrate a sex-change" and cited Phillips' "religious beliefs as the reason why the bakery would not do so." (*Id.* at ¶¶ 6, 9).

Consistent with *Masterpiece I*, Phillips alleges Director Elenis and the Defendant Commissioners acted in bad faith and with "animus toward Phillips'[] religious beliefs" because they "disregarded Colorado's practice of allowing other cake artists to decline requests to create custom cakes that express messages they deem objectionable and would not express for anyone." (Compl. ¶¶ 223, 225, 242, 244). This allegation is supported by other allegations in Phillips' Complaint. Specifically, Phillips alleges that the Division and the Commission excused the three other bakeries from baking cakes with messages the bakers deemed offensive, while, in this case, Phillips was not provided with that same excuse even though the Division and the Commission recognized Phillips declined to create the blue and pink cake because of his religious objection to the cake's message.[4] As explained in *Masterpiece I*, this disparate treatment reveals Director Elenis' and the Defendant Commissioners' hostility towards

[4] Because I find these allegations to be well-pleaded, I reject Defendants' argument that Phillips' bad faith allegations are conclusory. (ECF No. 86 at 9 n.6).

Phillips, which is sufficient to establish they are pursuing the discrimination charges against Phillips in bad faith, motivated by Phillips' suspect class (his religion).

Defendants dispute this conclusion for two primary reasons. First, Defendants contend Phillips has not alleged unequal treatment because he has failed "to allege that Plaintiffs would not bake a blue and pink cake for *anyone*," while the three other bakeries "responded that [they] would not bake the cake requested by Mr. Jack for *anyone*." (ECF No. 86 at 12). But, Phillips does claim he would have declined the specific cake Scardina requested—a cake designed to celebrate the anniversary of a gender transition—no matter who requested it. (Compl. ¶¶ 191-93; *see id.* ¶¶ 127-28). Defendants' argument to the contrary defines the type of cake requested too generally. *Compare*, *Masterpiece I*, 138 S. Ct. at 1738-39 (Gorsuch, J., concurring) (explaining the suggestion "that this case is only about 'wedding cakes'—and not a wedding cake celebrating a same-sex wedding—actually points up the problem"), *with id.* at 1733 n.* (Kagan, J., concurring) (noting the requested cake "was simply a wedding cake").

Scardina did not request just a blue and pink cake. She requested a blue and pink birthday cake that was intended to celebrate her gender transition birthday. (Compl. ¶ 186). Scardina told Masterpiece that the design of the cake was supposed to symbolize the anniversary of her transition from male to female. (*Id.*). Scardina reiterated the intent of the cake's design before the Division by stating she told Masterpiece that she is "a transsexual and that [she] wanted [her] birthday cake to celebrate [her] transition by having a blue exterior and a pink interior." (*Id.* at ¶ 203). Thus, Scardina explicitly, and repeatedly, requested a blue and pink birthday cake to

celebrate her transition, and Phillips would have declined to make such a cake for anyone, regardless of the "customer's protected characteristics." (*Id.* at ¶ 193).

This argument fails for an additional reason: neither the Division, in its probable cause determination, nor the Commission, in its formal complaint, made the distinction urged now by Defendants. This omission is especially glaring because *Masterpiece I* denounced the Division's and the Commission's unequal treatment of Phillips just before the Division and the Commission began new proceedings against Phillips. *See Nobby Lobby, Inc. v. City of Dallas*, 767 F. Supp. 801, 807 (N.D. Tex. 1991) ("The most significant fact demonstrating the City's bad faith is that all of the seizures at issue in this case were made after the Fifth Circuit's ruling" condemning the seizures in another case.), *aff'd* 970 F.2d 82 (5th Cir. 1992).

Second, Defendants argue Director Elenis and the Defendant Commissioners "assumed jurisdiction over Ms. Scardina's charge nearly a year before *Masterpiece I* . . . so Plaintiffs' allegation that the second prosecution was in retaliation for their having successfully challenged the first is wholly conclusory." (ECF No. 86 at 12). While it is true the Division obtained jurisdiction sometime in July 2017, after Scardina filed her discrimination charge, Phillips is not alleging the Division investigated him in bad faith. How could he? Once a discrimination charge is filed, the Division has no choice but to promptly investigate the charge. C.R.S. § 24-34-306(2)(a). Rather, he is alleging the Division and the Commission acted in bad faith when they exercised their discretion to formalize the discrimination charge. After investigating the charge, Director Elenis could have determined there was not probable cause for crediting the allegations of the charge. C.R.S. § 24-34-306(2)(a); 3 C.C.R. 708-1:10.5(C)(1). If the Commission and

Director Elenis agreed that no probable cause existed, their jurisdiction over the charge would have ended and Scardina could have filed her own civil complaint against Phillips. C.R.S. § 24-34-306(11). The decision to pursue the discrimination charge occurred after *Masterpiece I*, and this decision by Director Elenis and the Defendant Commissioners supports the existence of bad faith.

Accordingly, I find abstention is not required by *Younger*.

b. Defendants are not Entitled to an Evidentiary Hearing

Defendants' Motion requested a limited evidentiary hearing on Philips' bad faith allegations if I found Phillips "establish[ed] a prima facie case of bad faith." (ECF No. 64 at 15). Defendants cited *Holt v. United States*, 46 F.3d 1000 (10th Cir. 1995) to support their contention that I have discretion to allow such a hearing "to resolve disputed jurisdiction facts under Rule 12(b)(1)." (ECF No. 64 at 15). But, in *Holt*, the Tenth Circuit discussed the discretion of a trial court to conduct an evidentiary hearing when the moving party brought a factual challenge to the complaint. 46 F.3d at 1003 ("In the instant case, Defendant's Rule 12(b)(1) motion did not mount a mere facial challenge to the complaint, but instead raised a factual challenge to the existence of subject matter jurisdiction."). The cases *Holt* relies on for this proposition also refer to the trial court's discretion to conduct an evidentiary hearing in the context of a factual attack. *See id.* (citing *Ohio v. Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990) and *Wheeler v. Hurdman*, 825 F.2d 257, 259 n.5 (10th Cir. 1987)). Defendants challenged Phillips' Complaint on its face, and I therefore deny Defendants' request for an evidentiary hearing. *Mapoy v. Wash. Mut. Bank, FA*, 2011 WL 2580655, at *4 (N.D. Cal. June 29, 2011) (denying the plaintiff's "request for an evidentiary hearing to

determine whether jurisdiction is proper" when the defendant's Rule 12(b)(1) motion was a facial attack).[5]

2. *Railroad Commission of Texas v. Pullman Company*

Defendants next argue that I should abstain based on *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941).

In *Pullman*, the United States Supreme Court wrote that "federal courts . . . restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the federal judiciary." 312 U.S. at 501 (internal quotation marks omitted). Under the *Pullman* abstention doctrine, a district court should abstain if

> (1) an uncertain issue of state law underlies the federal constitutional claim; (2) the state issues are amenable to interpretation and such an interpretation obviates the need for or substantially narrows the scope of the constitutional claim; and (3) an incorrect decision of state law by the district court would hinder important state law policies.

Lehman v. City of Louisville, 967 F.2d 1474, 1478 (10th Cir. 1992) (citing *Vinyard v. King*, 655 F.2d 1016, 1018 (10th Cir. 1981)). If one of these requirements is not met, a district court should not abstain from adjudicating the matter. *See, e.g.*, *Porter v. Jones*, 319 F.3d 483, 491 (9th Cir. 2003) ("Abstaining under *Pullman* constitutes an abuse of discretion when the requirements for *Pullman* abstention are not met."); *Biegenwald v. Fauver*, 882 F.2d 748, 751-54 (3d Cir. 1989) (reversing district court's decision to abstain when only two of the three abstention factors were present);

[5] For this same reason, I denied Defendants' request to offer a declaration of Director Elenis at the Motion Hearing and sustained Phillips' objection to Defendants' offer of proof. (Mot. Hr'g Trans. 88:14-89:9); *Johnson v. Multi-Solutions, Inc.*, 2010 WL 988727, at *2 (D.N.J. Mar. 15, 2010) (finding that motion to dismiss was a facial challenge and denying the defendant's proffered evidence).

Vinyard, 655 F.2d at 1019-20 (noting abstention is inappropriate when state law "is not so unclear as to permit abstention"). Such abstention is "a narrow exception" to the duty of federal courts to adjudicate cases properly before them and "is used only in exceptional circumstances." *Kan. Judicial Review v. Stout*, 519 F.3d 1107, 1119 (10th Cir. 2008) (internal quotation marks omitted); *City of Moore v. Atchison, Topeka, & Sante Fe Ry. Co.*, 699 F.2d 507, 510 (10th Cir. 1983) ("[A]bstention is an extraordinary exception to a district court's general duty to decide a controversy properly before it.").

"Courts have been particularly reluctant to abstain in cases involving facial challenges on First Amendment grounds, . . . in part because the delay caused by declining to adjudicate the issues could prolong the chilling effect on speech." *Stout*, 519 F.3d at 1119 (internal citation omitted). "In cases involving a facial challenge to a statute," the threshold question is "whether the statute is 'fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question.'" *City of Houston v. Hill*, 482 U.S. 451, 468 (1987) (quoting *Harman v. Forssenius*, 380 U.S. 528, 534-35 (1965)). "If the statute has no limiting construction, then abstention is improper, even if the statue has never been interpreted by a state tribunal." *Jones v. Coleman*, 848 F.3d 744, 751 (6th Cir. 2017) (citing *Hill*, 482 U.S. at 469 and *Harman*, 380 U.S. at 535).

Defendants argue Phillips' federal claims present the following uncertain issue of state law: "whether [the Colorado Anti-Discrimination Act's] prohibition of discrimination in places of public accommodation must be interpreted and enforced in a manner that exempts objections based on religious beliefs." (ECF No. 64 at 16). Construing this argument to be specifically aimed at Phillips' as-applied and facial challenges to C.R.S.

§ 24-34-601(2)(a) and C.R.S. § 24-34-701, I disagree that these sections pose uncertain questions of state law for three reasons.

First, the Colorado Court of Appeals in *Masterpiece I* stated the "[Colorado's Anti-Discrimination Act] forbids all discrimination based on sexual orientation regardless of its motivation." *Craig*, 370 P.3d at 291. So Colorado has already interpreted C.R.S. § 24-34-601(2)(a) and C.R.S. § 24-34-701 as not providing an exemption based on religious beliefs. This interpretation forecloses Defendants' suggestion that these statutes present uncertain issues of state law.

Second, Defendants' "proposition defies one of the traditional principles of statutory interpretation" which is that "courts must first look at the plain meaning of a statute's language." *La. Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1491 (5th Cir. 1995). The language of these sections refutes Defendants' uncertainty argument because the language is "plain" and the "meaning unambiguous." *Hill*, 482 U.S. at 468. Both as applied and on their face, there is nothing in C.R.S. § 24-34-601(2)(a) or C.R.S. § 24-34-701 that could plausibly be interpreted to exempt places of public accommodation based on religious beliefs. In fact, C.R.S. § 24-34-601(1) already exempts "church[es], synagogue[s], mosque[s], or other place[s] that [are] principally used for religious purposes" from the definition of "place of public accommodation." The Colorado legislature's decision to exempt these places from the mandates of C.R.S. § 24-34-601(2)(a) indicates that businesses that qualify as places of public accommodation, like Masterpiece, cannot be exempt for religious reasons. *See, e.g.*, *Allstate Life Ins. Co. v. Miller*, 424 F.3d 1113, 1116 n.3 (11th Cir. 2005) ("[W]here the legislature has included certain exceptions . . . the doctrine of *expression*

unis est exclusion alterius counsels against judicial recognition of additional exceptions.").

Finally, Phillips alleges that "Defendants' interpretation and enforcement of Colo. Rev. Stat. § 24-34-601(2)(a) targets, shows hostility toward, and discriminates against Phillips and Masterpiece Cakeshop because of their religious beliefs and practices." (Compl. ¶ 344). He also alleges that Defendants treat him adversely because of his religion. (*Id.* at ¶¶ 420, 422). Accepting these allegations as true, any interpretation of these statutes by Colorado's state courts would be irrelevant. Even if Colorado eventually read C.R.S. § 24-34-601(2)(a) to exempt places of public accommodations for objections based on religious beliefs, that interpretation would not address Phillips' allegations that Defendants have already used the statute to target him for his religious beliefs.

Defendants do not contend that Phillips' due process and equal protection challenges to C.R.S. § 24-34-303 and C.R.S. § 24-24-306 present uncertain issues of state law. In any event, I also find these statutes do not present uncertain issues of state law because they are unambiguous.

In summary, the difficulty with Phillips' constitutional claims arises "not because of an unclear standard" set forth in the statutes, but because of the application of these standards to Phillips' factual allegations. *Vinyard*, 655 F.2d at 1020. "Under such circumstances the district court may not abdicate its duty to adjudicate the matter." *Id.* Accordingly, I find abstention to be inappropriate under *Pullman*.

3. *Burford v. Sun Oil Company*

Defendants next argue abstention under *Burford v. Sun Oil Company*, 319 U.S. 315 (1943) is appropriate because Phillips challenges "an administrative process that provides a uniform and comprehensive method of adjudicating alleged violations of [the Colorado Anti-Discrimination Act]." (ECF No. 64 at 18). *Burford* abstention "arises when a federal district court faces issues that involve complicated state regulatory schemes." *Lehman*, 967 F.2d at 1478; *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 704-05 (10th Cir. 1988) (*Burford* applies when "state procedures indicate a desire to create special state forums to regulate and adjudicate these issues"). Defendants acknowledged at the Motions Hearing that they believe *Burford* applies uniformly to Phillips' four constitutional claims. (Mot. Hr'g Trans. at 42:3-9). They do not make distinctions between how *Burford* might apply differently to Phillips' free exercise, free speech, due process, or equal protection claims. Absent such distinctions, I find that this case does not involve state law issues that are connected to a complicated state regularly scheme. Instead, Phillips' claims require a determination of whether Defendants' interpretation and enforcement of several Colorado statutes violate his federal constitutional rights. His "claim[s] therefore only ask[] the district court to act within its area of expertise, rather than to invade the province of the State." *Johnson v. Rodrigues (Orozco)*, 226 F.3d 1103, 1112 (10th Cir. 2000); *see also* 1 State and Local Government Civil Rights Liability § 1:28 n.7 (collecting cases noting *Burford* is distinguishable from federal constitutional cases because of the significant federal questions at stake). Accordingly, I find abstention to be inappropriate under *Burford*.

4. *Colorado River Water Conservation District v. United States*

Finally, Defendants argue abstention under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) is appropriate.

"Colorado River abstention is based on the policy of conserving judicial resources in situations involving the contemporaneous exercise of concurrent jurisdictions." *Grimes*, 857 F.2d at 707. To determine whether *Colorado River* applies, "a federal court must first determine whether the state and federal proceedings are parallel." *Fox v. Maulding*, 16 F.3d 1079, 1081 (10th Cir. 1994). "Suits are parallel if substantially the same parties litigate substantially the same issues in different forums." *Id.* (internal quotation marks omitted).

If the proceedings are parallel, courts consider the following "nonexclusive list of factors," *id.* at 1082, in deciding whether the federal court should defer to the state proceedings:

1. the possibility that one of the two courts has exercised jurisdiction over property

2. the inconvenience from litigating in the federal forum

3. the avoidance of piecemeal litigation

4. the sequence in which the courts obtained jurisdiction

5. the "vexatious or reactive nature" of either case

6. the applicability of federal law

7. the potential for the state-court action to provide an effective remedy for the federal plaintiff

8. the possibility of forum shopping.

Wakaya Perfection, LLC v. Youngevity Int'l, Inc., 910 F.3d 1118, at *2 (10th Cir. 2018) (citing *Fox*, 16 F.3d at 1082); *see also D.A. Osguthorpe Family P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1234-35 (10th Cir. 2013).

These factors should be balanced and no single factor is dispositive. *Fox*, 16 F.3d at 1082. Since "only the clearest justifications will warrant dismissal," *Colorado River*, 424 U.S. at 819, "any doubt should be resolved in favor of exercising federal jurisdiction," *Fox*, 16 F.3d at 1082. *See also Life-Link Int'l, Inc. v. Lalla*, 902 F.2d 1493, 1496 (10th Cir. 1990) ("[N]o factor clearly warrants dismissal, and several factors favor retention. Therefore, the district court should accept jurisdiction and hear this case on the merits.").

Considering the eight factors, I find that Defendants have not overcome the presumption against abstention. This case does not involve property, making the first factor inapplicable. The second factor does not weigh in favor of abstention because Colorado is a convenient forum for the federal suit.

The third factor does not heavily weigh in favor of abstention. Although it is possible that duplicative litigation may result if the Commission's enforcement proceedings continue alongside this litigation, Phillips has already filed a motion for preliminary injunction, which was denied without prejudice, and may be filing another, narrower, motion for preliminary injunction. (*See* ECF Nos. 57, 90; Mot. Hr'g Trans. at 81:14-22). If Phillips' federal case proceeds, the state case might be stayed, which has the potential to avoid piecemeal litigation.[6] *See Life-Link Int'l, Inc.*, 902 F.2d at 1496 ("In

[6] This should not be construed as a comment on the merits of any future motion for preliminary injunction. I simply note that it is possible that piecemeal litigation may be avoided in this case.

view of the fact that the state court action has been stayed, there could be no piecemeal litigation or inadequate forum problems if the federal suit is continued."*); Miller Brewing Co. v. ACE U.S. Holdings, Inc.*, 391 F. Supp. 2d 735, 742 (E.D. Wis. 2005) (noting piecemeal litigation factor did not "weigh heavily in the abstention calculus" because if the federal court proceeded the state court case "might be stayed").

The fourth factor does not weigh in favor of abstention. This factor "is to be applied in a pragmatic, flexible manner with a view to the realities of the case at hand," and "priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21 (1983). Although the Division issued its probable cause determination before Phillips filed his Complaint, Phillips only had reason to file his Complaint because the Division issued its probable cause determination. Phillips also filed his original complaint before the Commission voted to notice the discrimination charge for a hearing.

The fifth factor does not weigh in favor of abstention because Defendants do not contend Phillips' initiated his case in a vexatious or reactive manner. The sixth factor does not weigh in favor of abstention because federal law is preeminent. The seventh and eighth factors do not weigh in favor of abstention because of Phillips' allegations of bad faith.

Accordingly, I find abstention to be inappropriate under *Colorado River*.

B. <u>Absolute Immunity</u>

Director Elenis and the Defendant Commissioners contend they are protected from Phillips' claims for compensatory, punitive, and nominal damages by absolute

prosecutorial immunity.[7] (ECF No. 64 at 20-24; Mot. Hr'g Trans. 50:1-16). Phillips argues these officials exercise more power with less accountability than a state court prosecutor, which disqualifies them from absolute immunity. (ECF No. 81 at 23). He also argues that Colorado has waived absolute immunity for Commissioners who act in bad faith in performing their duties. (*Id.* at 31).

Absolute immunity is a complete bar to a suit for damages. *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976); *Guttman v. Khalsa*, 446 F.3d 1027, 1033 (10th Cir. 2006) ("Absolute immunity bars suits for money damages for acts made in the exercise of prosecutorial or judicial discretion."). Absolute immunity is a common-law defense, and the officials seek the shelter of immunity bear the burden of showing that it is justified. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 806, 812 (1982). "In determining whether particular actions of government officials fit within a common-law tradition of absolute immunity," courts apply a "functional approach, . . . which looks to the nature of the function performed, not the identity of the actor who performed it." *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (internal quotation marks and citations omitted).

It is well-established that prosecutors are "absolutely immune for activities which are 'intimately associated with the judicial process' such as initiating and pursuing a criminal prosecution." *Snell v. Tunnell*, 920 F.2d 673, 686 (10th Cir. 1990) (quoting

[7] At the Motion Hearing, Defendants clarified that they are claiming entitlement to prosecutorial immunity, and not "quasi-judicial immunity because the State officials -- it's not alleged in the Complaint that the State officials have adjudicated the state charge against Mr. Phillips and the bakery. Instead, we are focused solely on their – the prosecutorial actions they have taken to date, as well as the Division Director's." (Mot. Hr'g Trans. 50:1-7). Therefore, this Order focuses on the immunity of Director Elenis and the Defendant Commissioners as prosecutors.

Imbler, 424 U.S. at 430). "Prosecutors," in the context of absolute immunity, are not only criminal prosecutors, but equally "state attorneys and agency officials who perform functions analogous to those of a prosecutor in initiating and pursuing civil and administrative enforcement proceedings." *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1489 (10th Cir. 1991). For example, in *Butz v. Economou*, the Supreme Court observed that agency officials vested with the discretion to "initiate administrative proceedings against an individual or corporation" and to decide "whether a proceeding should be brought and what sanctions should be sought" perform functions analogous to a "prosecutor's decision to initiate or move forward with a criminal prosecution." 438 U.S. 478, 515 (1978). To protect this discretion, and to provide agency officials with "the latitude to perform their tasks absent the threat of" retaliation, "agency officials who initiate and prosecute enforcement proceedings subject to agency adjudication are entitled to absolute immunity." *Snell*, 920 F.2d at 686-87.

The Tenth Circuit has applied the *Butz* rationale and extended absolute immunity to state administrative or executive officials serving in adjudicative, judicial, or prosecutorial capacities. *See Saavedra v. City of Albuquerque,* 73 F.3d 1525, 1529 (10th Cir. 1996) (extending absolute immunity to municipal hearing officers); *Atiya v. Salt Lake Cnty.,* 988 F.2d 1013, 1017 (10th Cir. 1993) (extending absolute immunity to county administrative review boards); *Russ v. Uppah,* 972 F.2d 300, 303 (10th Cir. 1992) (extending absolute immunity to parole boards); *Horwitz v. Colo. Bd. of Med. Exam'rs*, 822 F.2d 1508, 1515 (10th Cir. 1987) (extending absolute immunity to the Colorado Board of Medical Examiners).

The key factor for "absolute prosecutorial immunity 'involves a prosecutor's acts as an advocate before a neutral magistrate.'" *Snell*, 920 F.2d at 693 (quoting *Lerwill v. Joslin*, 712 F.2d 435, 437 (10th Cir. 1983)). Such acts include a prosecutor's "decisions to prosecute, their investigatory or evidence-gathering actions, their evaluation of evidence, their determination of whether probable cause exists, and their determination of what information to show the court." *Nielander v. Bd. of Cty. Comm'rs*, 582 F.3d 1155, 1164 (10th Cir. 2009). On the other hand, "[t]he more distant a function is from the judicial process, the less likely absolute immunity will attach." *Snell*, 920 F.2d at 687.

Once prosecutorial immunity attaches, it is absolute, and, therefore, applies to cases of malicious or bad faith prosecution, *Imbler*, 424 U.S. at 427, even if it is obvious "to the prosecutor that he is acting unconstitutionally and thus beyond his authority," *Lerwill*, 712 F.2d at 437-38. *See also Campbell v. Maine*, 787 F.2d 776, 778 (1st Cir. 1986) (stating that there is no bad faith exception to absolute immunity of a prosecutor "so long as the prosecutor is initiating a prosecution or presenting a state's case"); *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986) (same).

I first address whether Director Elenis is protected by absolute immunity, and then whether the Defendant Commissioners are protected by absolute immunity. I conclude that these defendants are entitled to absolute immunity, and I therefore do not address the parties' qualified immunity arguments. *See, e.g.*, *Welch v. Saunders*, 2017 WL 1953102, at *2 (D. Colo. May 11, 2017) ("Because the Court concludes that Defendants are entitled to absolute immunity, the Court does not address Defendants'

qualified immunity argument."). Lastly, I address Phillips' assertion that Colorado waived absolute immunity for commissioners who act in bad faith.

1. Director Elenis is Protected by Absolute Immunity

Director Elenis is entitled to absolute immunity from Phillips' damages claims. In *Wilhelm v. Continental Title Company*, the Tenth Circuit held that the director of the Division is entitled to absolute immunity because the director

> is required by statute to investigate charges of discrimination, make a finding of probable cause and report to the commission when conciliation efforts fail. Thus, she is in a position in the state administrative process that is similar to that of a judge, hearing officer or prosecutor. It is therefore logical that she should enjoy immunity in that regard.

720 F.2d 1173, 1178 (10th Cir. 1983); *see also Hamilton v. Boyd*, 2015 WL 7014405, at *9 (D. Colo. Nov. 12, 2015) (citing *Wilhelm* and holding interim director of the Division was entitled to absolute immunity).

Director Elenis has the same duties as the director did in *Wilhelm*. For example, Director Elenis and her staff "receive, investigate, and make determinations on charges alleging unfair or discriminatory practices." C.R.S. § 24-34-302(2). Once Director Elenis receives a charge alleging a discriminatory or unfair practice, she must promptly investigate the charge. C.R.S. § 24-34-306(2)(a). Additional responsibilities of Director Elenis initiate upon her determination that probable cause exists for crediting the discrimination charge. C.R.S. §§ 24-34-306(2)(b)(I)-(II), 24-34-306(4), 24-34-306(8) (describing the authority and duty of the director). These powers and responsibilities situate Director Elenis in a position analogous to that of a prosecutor.

Accordingly, I find that Director Elenis is absolutely immune from Phillips' damages claims.

2. The Defendant Commissioners are Protected by Absolute Immunity

The Defendant Commissioners are also protected by absolute immunity. The Defendant Commissioners rely heavily on *Horwitz v. Colorado Board of Medical Examiners*, 822 F.2d 1508 (10th Cir. 1987) to shoulder their burden to prove their entitlement to absolute immunity.

In *Horwitz*, a medical doctor who had been summarily suspended by the Colorado State Board of Medical Examiners ("Board") sued the Board members "alleging that he had been subjected to unfounded complaints, summarily suspended from the practice of podiatry in violation of his Fourteenth Amendment due process rights, and defamed and subjected to outrageous conduct." 822 F.2d at 1510. The Tenth Circuit upheld the trial court's dismissal of these claims based on the Board members' absolute immunity. *Id.* at 1515. In reaching this conclusion, the Tenth Circuit observed that the Board members functioned "in the prosecutorial role in that they, among other things, initiate complaints, start hearings, make investigations, take evidence, and issue subpoenas." *Id.*; *see id.* at 1511 (summarizing the judicial and prosecutorial powers of the Board).

The Defendant Commissioners file charges of discrimination, hold hearings, investigate discrimination charges, file complaints requiring the respondent to answer the charges, and issue subpoenas. C.R.S. §§ 24-34-305(1)(d)(I), 24-34-306(1)(b), 24-34-306(4), 24-34-306(8). Thus, like the Board members in *Horwitz*, the Defendant Commissioners act as the functional equivalent of a prosecutor and are entitled to immunity.

Phillips argues that the six factors identified in *Cleavinger v. Saxner*, 474 U.S. 193 (1985) to determine whether government officials are shielded by absolute immunity dictate that the Defendant Commissioners are not protected. In *Cleavinger*, the United States Supreme Court, recognized the following factors as relevant: (1) "the need to assure that the individual can perform his functions without harassment or intimidation;" (2) "the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct;" (3) "the adversary nature of the process;" (4) "the correctability of error on appeal[;]" (5) "insulation from political influence;" and (6) "the importance of precedent[.]" 474 U.S. at 202 (citing *Butz*, 438 U.S. at 512). "These factors serve as a lens through which we can examine the relationship between the challenged function and a benchmark function with an establish claim to absolute immunity." *Mee v. Ortega*, 967 F.2d 423, 426 (10th Cir. 1992).

I find that the of balance these factors weigh in favor of affording the Defendant Commissioners absolute immunity.[8] First, it is important to preserve the Defendant Commissioners' discretion to bring and maintain a charge of discrimination absent the

[8] Although Phillips only cites these factors as relevant to the Defendant Commissioners' immunity, to the extent that "[t]hese six factors are to be considered in determining whether to grant absolute immunity," *Moore v. Gunnison Valley Hosp.*, 310 F.3d 1315, 1317 (10th Cir. 2002), I find the factors weigh in favor of absolute immunity for Director Elenis for the same reasons they weigh in favor of the Defendant Commissioners. Director Elenis should be able to perform her functions without harassment or intimidation. Although the director's initial determination is not subject to the adversarial process, there are safeguards that reduce the need for private damages and errors can be corrected on appeal. See 3 C.C.R. 708-1:10.6 (appeals process from the director's determination). The director is insulated from political influence. *See, e.g.*, C.R.S. § 24-34-302(1) (allowing the executive director of the department of regulatory agencies to appoint the director). And the importance of precedent is a neutral factor.

threat of individual liability. As the Seventh Circuit stated, members of the Indiana Civil Rights Commission who "perform quasi-judicial functions are entitled to absolute immunity in order to protect their decision-making function from being impeded by fear of litigation or personal monetary liability." *Crenshaw v. Baynerd*, 180 F.3d 866, 868 (7th Cir. 1999). Although *Crenshaw* addressed the commissioner's judicial functions, I find this rationale applies with the same force to the Defendant Commissioners' prosecutorial functions.

Second, there are safeguards that reduce the need for private damages, the process is adversarial, and errors can be corrected on appeal. *See, e.g.*, C.R.S. § 24-34-306(8) (describing how the hearing is to be conducted); C.R.S. § 24-34-307 (outlining the appeals process from Commission decisions); 3 C.C.R. 708-1:10.8 (explaining hearing procedures); *see also Stanley v. Indiana Civil Rights Comm'n*, 557 F. Supp. 330, 334-35 (N.D. Ind. 1983) (holding Indiana's civil rights "administrative process has many of the safeguards that the judicial system affords litigants").

Phillips argues proceedings before the Commission lack the normal checks that constrain the typical judicial process. (ECF No. 81 at 23). For example, he claims that the Defendant Commissioners' role as "accuser and adjudicator" is problematic. (*Id.*). But in *Horwitz*, the Board members served "as both an inquiry panel and a hearing panel," in that they undertook investigations into charges of unprofessional conduct of physicians and then made final decisions on the fate of the physician's license. 822 F.2d 1509-11. This dual function had no impact on the Tenth Circuit's conclusion that the Board members were immune. *Id.* at 1515. In fact, the court noted the Board members were entitled to absolute immunity from damages liability because they

"performed statutory functions both adjudicatory and prosecutorial in nature." *Id.* Phillips also claims that the Defendant Commissioners could manipulate the factual record, a worry that is exacerbated because the "findings of the commission as to the facts shall be conclusive [on appeal] if supported by substantial evidence." C.R.S. § 24-34-307(6). Appellate review of factual findings based on substantial evidence is a common standard of review, and I fail to see how this statutorily prescribed standard eliminates the protections inherent in an appeal.

Although Phillips may claim the Defendant Commissioners have not followed these procedures in past practice, the focus "is not whether a plaintiff was in fact provided with procedural safeguards required by law; rather, it is whether sufficient procedural safeguards *existed* in the applicable regulatory framework so that a plaintiff can seek redress through regular channels if they are not complied with." *Devous v. Campbell*, 1994 WL 7111, at *1 (10th Cir. 1994) (unpublished table opinion) (citing *Horwitz*, 822 F.2d at 1514-15) (emphasis in original).

Third, the Defendant Commissioners are insulated from political influence. Phillips argues this is not the case because two Commission members must be selected to represent the interests of the business community, two must be selected to represent governmental entities, and three must be selected to represent the community at large and of these seven members, at least four must be "members of groups of people who have been or who might be discriminated against." C.R.S. § 24-34-303(1)(b)(I)-(1)(b)(II)(A). I disagree that the selection criteria for Commission members exposes them to political pressure. "[T]he insulation-from-political-influence factor does not refer to the independence of the government official from the political or

electoral process, but instead to the independence of the government official as a decision-maker." *Brown v. Griesenauer*, 970 F.2d 431, 439 (8th Cir. 1992).

There are several provisions that insulate the Commission members' decision-making from political influence. Commission members are appointed by the Governor and confirmed by the Colorado senate. C.R.S. § 24-34-303(1)(b)(I). Once appointed, they may only be removed by the Governor only for "misconduct, incompetence, or neglect of duty," and therefore do not serve at the pleasure of either the Governor or the senate. C.R.S. § 24-34-303(3). The Commission members must also be politically diverse with "[n]o more than six members affiliated with a major political party and no more than three members affiliated with the same political party." C.R.S. § 24-34-303(1)(b)(II)(B). Courts have consistently held that these procedures for selecting and removing members of a governmental body insulate its members from political influence. *See, e.g.*, *Dotzel v. Ashbridge*, 438 F.3d 320, 326 (3d Cir. 2006) (board members who were removable by governor only for "reasonable cause" were immune); *Mishler v. Clift*, 191 F.3d 998, 1007 (9th Cir. 1999) (board members selected to four-year term and removable by governor for good cause were immune); *O'Neal v. Miss. Bd. of Nursing*, 113 F.3d 62, 66 (5th Cir. 1997) (same).

Finally, the importance of precedent weighs neither for nor against absolute immunity. There are "two aspects of precedent relevant to this inquiry: internal and external precedent." *Gunnison Valley Hosp.*, 310 F.3d at 1318. Internal precedent refers to officials looking to their own prior decisions for guidance or that their present decision will be binding precedent for future action. *Id.* External precedent refers to officials looking for precedent from sources other than their own deliberations. *Id.*

Phillips argues the Defendant Commissioners ignore both kinds of precedent, evinced by the way he is allegedly being targeted. (*See* ECF No. 81 at 24 ("Colorado believes that it can continue to treat Phillips unequally"); *id.* ("Colorado disregards the Supreme Court—specifically, its finding that the state applies its offensiveness rule to discriminate against Phillips")).

While Phillips' argument that the Commission ignores precedent is supported by the allegations in his Complaint, statutory provisions indicate that precedent is, in theory if not in practice, important for the Commission's decisions. When the Commission files a formal complaint, the complaint must state "the time, place, and nature of the hearing, *the legal authority and jurisdiction under which it is to be held*, and the matters of fact and *law asserted*." C.R.S. § 24-34-306(4) (emphasis added). In other words, the Commission is statutorily required to consider its legal authority to pursue a charge of discrimination. If a party appeals a final order of the Commission, the Colorado Court of Appeals obtains jurisdiction and may "grant such temporary relief or restraining order as it deems just and proper," and may enter "an order enforcing, modifying, and enforcing as so modified or setting aside the order of the commission in whole or in part." C.R.S. § 24-34-307(3). The supervision by the Court of Appeals conceivably motivates the Commission to follow external precedent, although I appreciate Phillips' allegations that this motivation has been insufficient. Nonetheless, considering Phillips' allegations together with the statutory provisions, I find that this factor is neutral.

Accordingly, I find that the Defendant Commissioners are absolutely immune from Phillips' damages claims.

3. Colorado has not Waived the Commissioners' Immunity

Colorado has not waived the Defendant Commissioners' immunity through C.R.S. § 24-34-306(13). This section states that any Commission member "participating in good faith in the making of a complaint or a report or in any investigative or administrative proceeding . . . shall be immune from liability in any civil action brought against him" for actions taken while in his or her capacity as a commission member "if such individual was acting in good faith within the scope of his respective capacity." C.R.S. § 24-34-306(13). Phillips argues this section indicates the Colorado "legislature waived absolute immunity for commissioners and others who act in bad faith in performing their duties." (ECF No. 81 at 24). I reject Phillips' argument because the Tenth Circuit rejected a similar argument in *Horwitz*. There, board members were statutorily immune from suit for "'official acts performed in good faith as members of such board.'" 822 F.2d at 1516 (quoting the relevant statute). The Tenth Circuit held that the statute did not permit the plaintiff from pursuing damages claims against the board members because "the immunity claimed by the Board members here is based on common law immunity, . . . rather than on any statutory grant." *Id.*

C. <u>Sovereign Immunity</u>

Attorney General Coffman and Governor Hickenlooper argue Phillips' claims for prospective relief against them are barred by the Eleventh Amendment. (ECF No. 64 at 27). Phillips argues that the Eleventh Amendment does not bar these claims because Attorney General Coffman is charged with enforcing C.R.S. § 24-34-601(2)(a) and Governor Hickenlooper is responsible for selecting Commission members according to C.R.S. § 24-34-303(1)(b). (ECF No. 81 at 26-28).

The Eleventh Amendment "generally bars suits brought by individuals against state officials acting in their official capacities." *Harris v. Owens*, 264 F.3d 1282, 1289 (10th Cir. 2001). But Eleventh Amendment immunity is not absolute, and "under *Ex parte Young*, [209 U.S. 123 (1908)], a plaintiff may bring suit against individual state officers acting in their official capacities if the complaint alleges an ongoing violation of federal law and the plaintiff seeks prospective relief." *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1166 (10th Cir. 2012). To invoke *Ex parte Young*, a plaintiff must show that they are "(1) suing state officials rather than the state itself, (2) alleging an ongoing violation of federal law, and (3) seeking prospective relief." *Id.* at 1167. Attorney General Coffman and Governor Hickenlooper only quarrel with whether Phillips has alleged they are committing an ongoing violation of federal law.

Ex parte Young requires "the state officer against whom a suit is brought [to] have some connection with the enforcement of the act that is in continued violation of federal law." *Finstuen v. Crutcher*, 496 F.3d 1139, 1151 (10th Cir. 2007) (internal quotation marks omitted). Although a state official need not have a "'special connection'" to the allegedly unconstitutional conduct, he or she "must have a particular duty to 'enforce' the statute in question and a demonstrated willingness to exercise that duty." *Prairie Band Potawatomi Nation v. Wagnon,* 476 F.3d 818, 828 (10th Cir. 2007) (quoting *Ex parte Young*, 209 U.S. at 157); *see also Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013).

I address the sovereign immunity arguments of Attorney General Coffman and Governor Hickenlooper separately.

1. Attorney General Coffman Must Enforce C.R.S. § 24-34-601(2)(a)

Attorney General Coffman argues she is protected by the Eleventh Amendment because she is not involved with enforcing C.R.S. § 24-34-601(2)(a) and has not shown a demonstrated willingness to enforce the statute. (ECF No. 64 at 28). Phillips alleges that she does have authority to enforce this section and may file a discrimination charge herself. (Compl. ¶¶ 23, 46). Phillips also alleges that the enforcement of C.R.S. § 24-34-601(2)(a) is a continual violation of his First Amendment rights to free exercise of religion and free speech and his Fourteenth Amendment rights to due process and equal protection. (*See generally id.* at ¶¶ 340-89, 411, 414, 420-22).

I conclude that Attorney General Coffman has a duty to enforce C.R.S. § 24-34-601(2)(a) and has a demonstrated willingness to exercise that duty against Phillips. At an administrative hearing on a charge of discrimination, "[t]he case in support of the complaint shall be presented at the hearing by one of the commission's attorneys or agents." C.R.S. § 24-34-306(8). According to the Commission's Rules and Regulations, the Commission's "attorney" is the Attorney General's office. 3 C.C.R. 708-1:10.8(A)(3) ("The case in support of the complaint shall be presented at the hearing by the attorney general's office as counsel in support of the complaint, pursuant to § 24-34-306(8)."); 3 C.C.R. 708-1:10.8(B) ("The case in support of the complaint shall be presented at the hearing by the attorney general's office as counsel in support of the complaint."). Because the Attorney General must represent the Commission at a hearing in support of the complaint, and the Commission has set Phillips' case for a hearing (*see* Exhibit B), I conclude the Attorney General has a duty to enforce C.R.S. § 24-34-601(2)(a).

The Attorney General has also demonstrated a willingness to enforce the statute, which is evident from the current complaint against Phillips and *Masterpiece I.* (*See* Compl. ¶¶ 142-44; Exhibit B).

Because the Attorney General represents the Commission in proceedings to enforce C.R.S. § 24-34-601(2)(a), and Phillips claims this enforcement is currently violating his constitutional rights, Attorney General Coffman is a proper defendant.

2. Governor Hickenlooper Already Selected Commission Members According to C.R.S. § 24-34-303

Governor Hickenlooper argues that he is protected by the Eleventh Amendment because his "past seating of Commissioners according to statutory criteria over which he has no discretion" do not constitute an ongoing violation of constitutional law. (ECF No. 86 at 15). Phillips alleges "Governor Hickenlooper administers and enforces Colo. Rev. Stat. § 24-34-303 by appointing Commission members" and has appointed each Commission member for the past eight years. (Compl. ¶¶ 294-95).

I conclude that Phillips has failed to sufficiently allege that Governor Hickenlooper is committing an ongoing violation of Phillips' constitutional rights. I understand Phillips to be making two distinct claims under C.R.S. § 24-34-303. First, he claims this section violates his due-process and equal protection rights by mandating the Commission be composed based on "non-neutral selection criteria and non-neutral representational interests." (*See id.* at ¶¶ 415, 424). To the extent Governor Hickenlooper appointed Commissioners according to C.R.S. § 24-34-303, these appointments occurred in the past and are not ongoing. Second, Phillips contends the selection criteria is discriminatory and deprives him of due process and equal protection under the law because "the Commission has had—and currently has—members who

are hostile to Phillips and Masterpiece Cakeshop, their religious beliefs, and their religious practices." (*Id.* at ¶¶ 405, 425). The problem with this allegation is that the "ongoing violation of federal law" related to this claim is directed at the Commission members' alleged hostility towards Phillips. The Complaint does not allege that Governor Hickenlooper intentionally selected the Commission members because of their hostility towards Phillips.[9] Therefore, any claim by Phillips that the Commission members' hostility towards him violates his due process and equal protection rights in an ongoing manner is attributable to the individual Commission members and not Governor Hickenlooper.

Accordingly, I find that Governor Hickenlooper is not a proper defendant and should be dismissed from this suit.

D. Standing

Finally, Defendants argue Phillips does not have standing to challenge C.R.S. § 24-34-701 because he has not alleged an injury. (ECF No. 64 at 29-30).

Standing has three elements: (1) "an injury in fact . . . which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical;" (2) "a causal connection between the injury and the conduct complained of"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations and quotation marks omitted). The Tenth Circuit has explained that

[9] True, the Complaint alleges "Governor Hickenlooper has appointed many Commission members—including current members—who are openly hostile or opposed to Phillips, his religious beliefs, and his religious practices," (Compl. ¶ 298), but it cannot be inferred from this allegation, or from anywhere else in the Complaint, that Governor Hickenlooper appointed them because of that alleged hostility.

> [i]n the First Amendment context, two types of injuries may confer Article III standing to seek prospective relief. First, a plaintiff generally has standing if he or she alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder. Plaintiffs may have standing even if they have never been prosecuted or actively threatened with prosecution. Second, although allegations of a subjective chill are not adequate, . . ., a First Amendment plaintiff who faces a credible threat of future prosecution suffers from an ongoing injury resulting from the statute's chilling effect on his desire to exercise his First Amendment.

Ward v. Utah, 321 F.3d 1263, 1267 (10th Cir. 2003) (some internal citations and quotation marks omitted); *see also Phelps v. Hamilton* (*Phelps II*), 122 F.3d 1309, 1326 (10th Cir. 1997) ("A plaintiff generally has standing only if he or she 'has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder'" (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

C.R.S. § 24-34-701 prohibits places of public accommodation, like Masterpiece, from publishing or displaying any message

- "that is intended or calculated to discriminate or actually discriminates against any . . . sexual orientation, . . . or against any of the members thereof in the matter of furnishing or neglecting or refusing to furnish to them or any one of them . . . any accommodation, right, privilege, advantage, or convenience offered to or enjoyed by the general public[;]" or

- "which states that any of the accommodations. . . shall or will be refused, withheld from, or denied to any person or class of persons on account of . . . sexual orientation, . . .[;]" or

- "that the patronage, custom, presence, . . . at such place by any person or class of persons belonging to or purporting to be of any particular . . . sexual orientation, . . . is unwelcome or objectionable or not acceptable, desired, or solicited."

Sexual orientation "means an individual's orientation toward . . . transgender status or another individual's perception thereof." C.R.S. § 24-34-301(7).

Phillips would like to post the following statement on Masterpiece's website:

> Masterpiece Cakeshop serves all people—no matter who they are or what protected characteristics they have. . . . But because our religious beliefs guide us in all parts of our lives, we cannot create custom cakes that express messages or celebrate events in conflict with our faith**.** *For example, because of our belief in the teachings of the Bible and our reliance on those teachings as the only source of ultimate truth, we cannot create custom cakes that through words, designs, symbols, themes, or images express messages that . . . celebrate gender transitions*, ... This list provides examples of some messages that we have declined to express in the past and will decline to express in the future. It is not intended to be exhaustive. Please understand that if we were to express messages that violate our beliefs, we'd be turning our backs on the faith that inspires our lives.

(Compl. ¶ 270 (emphasis added)). Phillips alleges that Defendants forbid him from publishing "any communication indicating that Phillips will not create custom cakes communicating that sex can be changed, that sex can be chosen, or that sex is determined by perceptions or feelings." (*Id.* at ¶ 278). He also claims that Defendants' interpretation of C.R.S. § 24-34-701 restricts his "freedom to communicate about the messages that he will not express through his custom cakes and the religious beliefs that compel him not express those messages" and has caused him "to chill his speech on his website and in the media about the messages that he will not express through his custom cakes and the religious beliefs that compel him not to express those messages." (*Id.* at ¶¶ 280-81).

I find that Phillips has alleged a sufficient injury to provide him with standing to challenge C.R.S. § 24-34-701. Phillips clearly intends to engage in conduct arguably affected with a constitutional interest, *Ward*, 321 F.3d at 1267, because he alleges that he "wants to communicate in written, electronic, and printed form" the statement "on his website and in the media." (Compl. ¶ 270).

Next, C.R.S. § 24-34-701 appears to prohibit Phillips from posting the statement on Masterpiece's website. C.R.S. § 24-34-701 prohibits publishing communications that state any accommodation "shall or will be refused, withheld from, or denied to any person or class of persons" because of sexual orientation and Phillips' statement announces he will not make custom cakes that celebrate gender transitions. Because transgender status is a form of sexual orientation, C.R.S. § 24-34-701 could be interpreted as prohibiting Phillips' statement.

Finally, the Division's probable cause determination and the Commission's filing of a formal complaint against Phillips establish a credible threat of prosecution under C.R.S. § 24-34-701 if Phillips were to post the statement. (Compl. ¶¶ 182, 211, 228). The Division used Phillips' declaration that Masterpiece will not create custom cakes "that promote the idea that a person's sex is anything other than an immutable God-given biological reality" to support the conclusion that Masterpiece refused to make the blue and pink cake because of Scardina's transgender status. (Exhibit A at 3-4). Similarly, the Commission found Phillips discriminated against Scardina based on her sexual orientation at the same time it recognized Masterpiece "stated that the bakery would not make the cake as requested by Scardina because it does not make cakes to celebrate a sex-change." (ECF No. 51-2 at ¶ 6). Because the Division and the Commission equate Phillips' actions in declining to make a blue and pink cake to celebrate a transgender birthday with Phillips declining a service because of the customer's sexual orientation in violation of C.R.S. § 24-34-601(2)(a), it is credible that the Division and the Commission will interpret Phillips' statement, which declares his intent to refuse to make cakes that celebrate gender transitions, as a violation of C.R.S.

§ 24-34-701's prohibition against communicating an intent to refuse a service on account of sexual orientation.

Once Phillips posts the statement on Masterpiece's website, he will arguably have violated C.R.S. § 24-34-701, and the only condition precedent to enforcing the statute is for an individual to file a complaint with the Division or for the Commission to file its own charge alleging discriminatory or unfair practice. C.R.S. § 24-34-306(1)(a)(b). If an individual or the Commission files a complaint, the Division must investigate the charge. C.R.S. § 24-303-306(2)(a). Given the public interest in this case, and Phillips' allegation that Scardina "googled Masterpiece Cakeshop's information and called the shop on the phone" the day the Supreme Court announced that it would hear *Masterpiece I* (Compl. ¶ 184), "it is not difficult to find it likely that a complaint will be filed if the [statement] is posted." *303 Creative LLC v. Elenis*, 2017 WL 4331065, at *5 (D. Colo. Sept. 1, 2017).

Defendants counter Phillips' standing argument by claiming the statement is anti-discriminatory and does not actually violate C.R.S. § 24-34-701. (ECF No. 64 at 30; ECF No. 86 at 15). When Defendants say the statement is "anti-discriminatory" they only cite to the first sentence of the statement, and therefore it is unclear whether Defendants really believe the entire statement is anti-discriminatory. (ECF No. 64 at 30). Regardless, I find this argument unpersuasive because of how the Division and the Commission have interpreted C.R.S. § 24-34-601(2)(a) and how they have enforced the statute against Phillips.

Defendants also highlight the caution currently on Masterpiece's website: "Jack [Phillips] cannot create all custom cakes. He cannot create custom cakes that express

messages or celebrate events that conflict with his religious beliefs." (ECF No. 64 at 8).[10] The difference between this statement and the statement Phillips wants to post on Masterpiece's website is obvious. The current statement says nothing specific about what kinds of messages Phillips will not convey, while Phillips proposed statement declares that he will not make custom cakes that "through words, designs, symbols, themes, or images express messages that . . . celebrate gender transitions." (Compl. ¶ 270). It is this last phrase that is prohibited by C.R.S. § 24-34-701.

Phillips also has standing to challenge C.R.S. § 24-34-701 because he has adequately alleged his speech is being chilled by the credible threat of prosecution. *Ward*, 321 F.3d at 1267. A plaintiff may establish that a statute objectively instills a chilling effect on speech by

> (1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so *because* of a credible threat that the statute will be enforced.
>
> *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006).

The first element is intended to "lend[] concreteness and specificity to the plaintiffs' claims, but it is not "indispensable" because "people have a right to speak for the first time." *Id.*

Phillips has alleged sufficient facts to meet each of these elements. Regarding the first element, there is no evidence Phillips has attempted to post a statement like his proposed statement on his website. But this deficiency is excusable because Phillips'

[10] I take judicial notice of the statement on Masterpiece's website. *See O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007) ("It is not uncommon for courts to take judicial notice of factual information found on the world wide web.").

desire to publish the statement is partly the product of recent events. For example, Phillips wants to post the statement because of "Colorado's continuing hostility toward his religious beliefs, *including but not limited to the recent probable-cause determination and formal complaint against him*." (Compl. ¶ 267 (emphasis added)). Regarding the second and third elements, Phillips has alleged a specific desire to post the statement, and there is a credible threat the statute will be enforced as previously discussed. (*Id.* ¶¶ 182, 211, 228, 270, 278, 280-81).

The conclusion that Phillips has standing to challenge C.R.S. § 24-34-701 is consistent with Chief Judge Krieger's opinion in *303 Creative LLC v. Elenis*. In *303 Creative LLC*, a Christian graphic designer challenged a provision of C.R.S. § 24-34-601(2)(a) similar to C.R.S. § 24-34-701. 2017 WL 43310654, at *1. The designer challenged this statute because she believed it prevented her from posting the following disclaimer on her website: "These same religious convictions . . . prevent me from creating websites promoting and celebrating ideas or messages that violate my beliefs. So I will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman." *Id.* at *3. Chief Judge Krieger concluded that the plaintiff had standing because the disclaimer would have violated C.R.S. § 24-34-601(2)(a), there was a credible threat of prosecution thereunder, and "the sole impediment to its posting [was] enforcement" of the statute. *Id.* at *5-6.

Accordingly, I find that Phillips has standing to challenge C.R.S. 24-34-701.

V. CONCLUSION

Defendants' Motion to Dismiss (ECF No. 64) is **DENIED IN PART AND GRANTED IN PART** as detailed in this Order. Accordingly, it is

ORDERED that Defendants' Motion to Dismiss based on the abstention doctrines under *Younger*, *Pullman*, *Burford*, and *Colorado River* is **DENIED**. It is

FURTHER ORDERED that Attorney General Coffman's Motion to Dismiss the claims against her based on the Eleventh Amendment is **DENIED**. It is

FURTHER ORDERED that Defendants' Motion to Dismiss Phillips' challenges to C.R.S. § 24-34-701 for lack of standing is **DENIED**. It is

FURTHER ORDERED that Director Elenis' and the Defendant Commissioners' Motion to Dismiss Phillips' claims against them for compensatory, punitive, and nominal damages is **GRANTED** and those claims are **DISMISSED**. It is

FURTHER ORDERED that Governor Hickenlooper's Motion to Dismiss Phillips' claims for prospective relief against him based on the Eleventh Amendment is **GRANTED** and he is **DISMISSED**.

Dated: January 4, 2019

BY THE COURT:

s/ Wiley Y. Daniel
Wiley Y. Daniel
Senior United States District Judge