

**No. 17-3352**  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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Telescope Media Group, Carl Larsen, and Angel Larson,  
Appellants,  
vs.  
Kevin Lindsey and Lori Swanson,  
Appellees.

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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**APPELLEES' OPPOSITION TO MOTION TO SUPPLEMENT BRIEFING**

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Appellees Kevin Lindsey and Lori Swanson submit this memorandum in opposition to Appellants' request for supplemental briefing. Appellants identify three cases on which they request supplemental briefing, two of which have not yet resulted in a final decision by the United States Supreme Court. None of the cases identified are material to the legal issues before the Court in this matter. Furthermore, any potential relevancy can be addressed through Rule 28(j) letters rather than additional briefing.

Appellants first seek briefing on *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, \_\_\_ S.Ct. \_\_\_, 2018 WL2465172 (June 4, 2018). *Masterpiece* involved a cake baker who declined to sell a wedding cake to a same-sex couple. The cake baker alleged that the enforcement action brought against him pursuant to Colorado's anti-discrimination law was unconstitutional.

As Appellees indicated in their Rule 28(j) letter submitted on June 8, 2018, the Supreme Court decision confirmed that "[i]t is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Id.* at \*8.

Nonetheless, the Supreme Court did not reach the constitutionality of Colorado's law because its decision turned solely on facts related to Colorado's actions during enforcement. *Id.* at \*9-\*13. For example, the Court considered

statements made by the Colorado Commissioners during a public hearing, as well as apparent discrepancies in the outcomes of other enforcement actions taken. *Id.*

By contrast, Appellants' case was brought as a pre-enforcement action. As a result, the holding of the *Masterpiece* decision is not precedential on this case. Furthermore, because the Supreme Court expressly declined to reach the legal issues presented by this case, the guidance the opinion offers can be readily addressed through a Rule 28(j) letter and oral argument. Supplemental briefing is therefore unnecessary.

Appellants also seek supplemental briefing on two cases for which no decision has yet issued from the United States Supreme Court: *Nat'l Inst. of Family Life Advocates v. Becerra*, No. 16-1140 and *Janus v. Am. Fed'n of State, City, & Municipal Employees, Council 31*, No. 16-1466. Absent a decision from the Court, it is premature to determine that supplemental briefing is appropriate. Further, once a decision is issued, the parties again have the option to submit a Rule 28(j) letter addressing the cases.

Appellees also note that both cases involve very different factual circumstances and appear unlikely to provide significant guidance in this case such that additional briefing would be required. First, *Nat'l Inst. Of Family Life Advocates v. Becerra*, No. 16-1140, commonly referred to as the *NIFLA* case, involves a California law that requires, among other things, licensed pregnancy-

related clinics to disseminate a specific notice regarding the existence of publicly-funded family planning services, including contraception and abortion. *See, e.g., NIFLA v. Harris*, 839 F.3d 823 (9th Cir. 2016) *cert. granted in part sub nom. Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 464 (2017). The content-based speech facially required by California's law in *NIFLA* bears little resemblance to the Minnesota Human Rights Act, which the United State Supreme Court has already determined to be facially content—and viewpoint—neutral. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623-24, 628 (1984). As such, *NIFLA* does not appear likely to bear significantly on this case.<sup>1</sup>

The connection between this case and *Janus v. Am. Fed'n of State, City, & Municipal Employees, Council 31*, No. 16-1466, is also attenuated. *Janus* involves a challenge to an Illinois law which allows a union representing public employees to collect “fair share” fees (fees related to collective bargaining and administration of the union) from non-member employees on whose behalf the union negotiates. *See Am. Fed'n of State, City, & Municipal Employees, Council 31*, 851 F.3d 746, 747 (7th Cir. 2017), *cert granted sub nom. Janus v. Am. Fed'n*, 138 S.Ct. 54

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<sup>1</sup> Appellants also include a passing reference to ripeness, but that issue also does not provide a compelling reason for additional briefing. *Compare* Appellees' Brief at fn 4, fn 7, and fn 35 with *NIFLA v. Harris*, 839 F.3d 823, 832-34 (9th Cir. 2016).

(2017). By contrast, the Minnesota Human Rights Act does not compel any financial payments or organizational membership.

Supplemental briefing on the cases identified by Appellants does not appear likely to assist the Court because (1) the *Masterpiece* decision can be readily addressed through other means, and (2) the *NIFLA* and *Janus* cases have not yet reached any decision and, in any event, can be addressed through letters submitted pursuant to Fed. R. App. P. 28(j).

Dated: June 15, 2018

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because this motion contains 1,165 words, excluding the parts exempted under Fed. R. App. P. 32(f).
  
2. This motion complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in a 14-point proportionally spaced Times New Roman typeface using Microsoft Word 2010.
  
3. All required privacy redactions have been made pursuant to 8th Cir. R. 25A(i).
  
4. Paper copies are not required for this motion.
  
5. This motion has been scanned and is free of viruses.

Date: June 15, 2018

s/Alethea M. Huyser  
ALETHEA M. HUYSER

## **CERTIFICATE OF SERVICE**

I hereby certify that on June 15, 2018, a true and accurate copy of the foregoing was electronically filed with the Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: June 15, 2018

s/Alethea M. Huyser  
ALETHEA M. HUYSER