

Case No. 17-1344
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

303 CREATIVE LLC and LORIE SMITH,
Plaintiffs-Appellants,

v.

AUBREY ELENIS, et al.,
Defendants-Appellees,

On appeal from the United States District Court
for the District of Colorado
The Honorable Chief Judge Marcia S. Krieger
Case No. 1:16-cv-02372-MSK-CBS

**PLAINTIFFS-APPELLANTS' MOTION FOR SUPPLEMENTAL
BRIEFING UNDER FED. R. APP. P. 27 ON *NIFLA* and *JANUS***

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On July 6, 2018, this Court directed the parties to file supplemental memorandum briefs addressing the effect of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), no later than August 6, 2018. Plaintiffs respectfully request that the parties be permitted to also address the effect of *National Institute of Family Life Advocates v. Becerra* (“NIFLA”), 138 S. Ct. 2361 (2018), and *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), in this supplemental memorandum brief. All three cases are pertinent to the decision in this appeal. Plaintiffs do not request any additional time or pages for this supplemental memorandum brief. This motion is opposed.

1. This Court ordered supplemental briefing on the U.S. Supreme Court’s June 4, 2018, decision in *Masterpiece*. The present appeal raises free exercise and free speech claims (among others). *Masterpiece* provides guidance on the present appeal because the majority opinion in *Masterpiece* addressed free exercise claims and several concurrences and a dissent addressed free speech claims.

2. In June 2018, the U.S. Supreme Court issued two more decisions, *NIFLA* and *Janus*, that address issues presented in this

appeal.

3. The U.S. Supreme Court's decision in *NIFLA* was released on June 26, 2018. The case involved a religiously-motivated organization's challenge to a state law that compels speech. The majority opinion and concurrence in *NIFLA* addressed the Petitioners' compelled speech claims.

4. The present case also involves compelled speech claims (among others). The U.S. Supreme Court's decision in *NIFLA* therefore provides guidance for this Court in dealing with the compelled-speech issues raised in this appeal.

5. On June 27, 2018, the U.S. Supreme Court released its decision in *Janus*. That case involved compelled speech and association claims made by a public employee who objected to subsidizing union speech that he did not support. The majority opinion resolved these First Amendment claims in the Petitioner's favor.

6. The present case involves compelled speech and association claims. Therefore, the U.S. Supreme Court's decision in *Janus* provides guidance to this Court in resolving the compelled speech and association issues raised in this appeal.

7. The interests of justice and judicial economy favor granting the parties an opportunity to provide supplemental briefing about all three of these First Amendment rulings at the same time.

8. In recognition of this fact, the Eighth Circuit recently granted a request for supplemental briefing on *NIFLA* and *Janus*, together with *Masterpiece*, in an appeal by creative professionals who challenged the application of a public accommodation law on free speech, expressive association, and free exercise grounds (among others). Order Granting Mot. for Suppl. Briefing, *Telescope Media Grp. v. Lindsey*, No. 17-3352 (8th Cir. June 29, 2018).

9. Counsel for Appellants and Appellees have conferred, and Appellees informed Appellants that they will oppose Appellants' request to provide supplemental briefing on *NIFLA* and *Janus*. Appellees will file a separate document stating their objections.

THEREFORE, Plaintiffs-Appellants respectfully request that this Court permit the parties to each submit on or before August 6, 2018, in the one supplemental brief (no longer than 15 pages in length) briefing on *Masterpiece*, *NIFLA*, and *Janus*, and their impact on this case.

Dated: July 11, 2018

Respectfully submitted,

s/ Jonathan A. Scruggs

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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 529 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 Century Schoolbook typeface using Microsoft Word 2013.

3. All required privacy redactions have been made pursuant to 10th Cir. R. 25.5.

4. Paper copies are not required for this motion.

5. This motion has been scanned for viruses with the most recent version of a commercial virus scanning program, Traps version 4.1, and is free of viruses according to this program.

Date: July 11, 2018

s/ Jonathan A. Scruggs

Jonathan A. Scruggs

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2018, a true and accurate copy of the foregoing document was electronically filed with the Court using the CM/ECF system, which will send notification of such filing to the following:

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