

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

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**303 CREATIVE LLC, et al.,**

Plaintiffs - Appellants,

v.

**AUBREY ELENIS, et al.,**

Defendants - Appellees.

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On Appeal from the United States District Court  
For the District of Colorado

The Honorable Chief Judge Marcia S. Krieger

D.C. No. 16-cv-02372-MSK-CBS

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**DEFENDANTS-APPELLEES' OPPOSITION TO PLAINTIFFS-  
APPELLANTS' MOTION FOR SUPPLEMENTAL BRIEFING  
UNDER FED. R. APP. P. 27 ON NIFLA AND JANUS**

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CYNTHIA H. COFFMAN  
Attorney General

GLENN E. ROPER\*  
Deputy Solicitor General  
VINCENT E. MORSCHER\*  
Senior Assistant Attorney  
General  
SKIPPERE S. SPEAR\*  
Senior Assistant Attorney  
General  
JACK D. PATTEN, III\*  
Assistant Attorney General  
\*Counsel of Record

Colorado Department of Law  
Ralph L. Carr Judicial Center  
1300 Broadway, 10th Floor  
Denver, Colorado 80203  
glenn.roper@coag.gov  
vincent.morscher@coag.gov  
skip.spear@coag.gov  
jack.patten@coag.gov  
(720) 508-6562

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Appellees submit this opposition to Appellants' request to address the effect of the Supreme Court decisions in *National Institute of Family Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361 (2018) and *Janus v. American Federation of State, County, & Municipal Employees, Counsel 31*, 138 S. Ct. 2448 (2018), in the supplemental memorandum briefs directed by this Court.

1. This Court has ordered supplemental briefing on the effect of the decision issued on June 4, 2018, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). Briefs are due on or before August 6, 2018.

2. *Masterpiece* involved the same state statutory scheme, similar factual issues, and one of the same parties as in the instant matter.<sup>1</sup> As a result, briefing on *Masterpiece* is relevant to this Court's analysis of the issues before it in the appeal.

3. While *NIFLA* and *Janus* also involve First Amendment issues, the legal framework and factual setting in those cases are much

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<sup>1</sup> The Colorado Civil Rights Commission was a Respondent in *Masterpiece*, and Plaintiffs here have named all the members of the Commission, in their official capacities, as Defendants.

different than this matter, and neither case addressed appellate jurisdictional issues. Thus, Appellees do not believe those decisions are sufficiently relevant to require their inclusion in supplemental briefing. The Court's existing briefing order is sufficient.

4. Specifically, *NIFLA* involved a challenge to a 2015 California law that required crisis pregnancy centers to disseminate a government-drafted notice regarding the existence of publicly funded family planning services, including contraception and abortion. 138 S. Ct. at 2365. The Supreme Court concluded that the law likely violates the First Amendment because the notice requirement was “wildly underinclusive” and because the law “targets speakers, not speech.” *Id.* at 2375, 2378. Although Plaintiffs here have asserted First Amendment claims, the “government-scripted, speaker-based disclosure requirement” in *NIFLA*, *id.* at 2377, bears little resemblance to the facially and viewpoint neutral language of the Colorado Anti-Discrimination Act.

5. Likewise, *Janus* was a challenge to an Illinois law which allowed unions representing public employees to collect “agency fees” from non-member employees on whose behalf the union negotiates. 138 S. Ct. 2455. The Supreme Court concluded that this arrangement

violated the non-members' free speech rights because it "compell[ed] them to subsidize private speech on matters of substantial public concern." *Id.* at 2460. The Colorado Anti-Discrimination Act has no requirement for non-consenting individuals to pay fees for the purpose of subsidizing speech.

6. That *NIFLA* and *Janus* involved the same Constitutional provision that is at issue here is insufficient reason to include them in supplemental briefing. Briefing those two cases would distract from the relevant issues in *Masterpiece*, which should be the sole focus of the supplemental briefing.

7. Even though Appellees oppose the motion, they respectfully request prompt direction from the Court if additional briefing is required.

Respectfully submitted July 12, 2018.

CYNTHIA H. COFFMAN  
Attorney General

/s/ Glenn E. Roper  
GLENN E. ROPER\*  
Deputy Solicitor General

VINCENT E. MORSCHER\*  
Senior Assistant Attorney General

SKIPPERE S. SPEAR\*  
Senior Assistant Attorney General

JACK D. PATTEN, III\*  
Assistant Attorney General

Colorado Department of Law  
Ralph L. Carr Judicial Center  
1300 Broadway, 10th Floor  
Denver, Colorado 80203  
glenn.roper@coag.gov  
vincent.morscher@coag.gov  
skip.spear@coag.gov  
jack.patten@coag.gov  
(720) 508-6562

Attorneys for Defendants-Appellees  
\*Counsel of Record

## CERTIFICATE OF SERVICE

I hereby certify that on this 12<sup>th</sup> day of July, 2018, I filed the foregoing **DEFENDANTS-APPELLEES' OPPOSITION TO PLAINTIFFS-APPELLANTS' MOTION FOR SUPPLEMENTAL BRIEFING UNDER FED. R. APP. P. 27 ON NIFLA AND JANUS** using the Court's CM/ECF system, which will cause notification to be sent to the following:

Attorneys for Plaintiff-Appellant:

Katherine Leone Anderson

David Andrew Cortman

Rory Thomas Gray

Samuel David Green

Jonathan Andrew Scruggs

Jeremy Tedesco

Kristen Waggoner

Alliance Defending Freedom

[kanderson@adflegal.org](mailto:kanderson@adflegal.org)

[dcortman@alliancedefendingfreedom.org](mailto:dcortman@alliancedefendingfreedom.org)

[rgray@alliancedefendingfreedom.org](mailto:rgray@alliancedefendingfreedom.org)

[rgray@alliancedefendingfreedom.org](mailto:rgray@alliancedefendingfreedom.org)

[rgray@alliancedefendingfreedom.org](mailto:rgray@alliancedefendingfreedom.org)

[rgray@alliancedefendingfreedom.org](mailto:rgray@alliancedefendingfreedom.org)

[rgray@alliancedefendingfreedom.org](mailto:rgray@alliancedefendingfreedom.org)

[jscruggs@alliancedefendingfreedom.org](mailto:jscruggs@alliancedefendingfreedom.org)

[jtedesco@alliancedefendingfreedom.org](mailto:jtedesco@alliancedefendingfreedom.org)

[kwaggoner@adflegal.org](mailto:kwaggoner@adflegal.org)

Michael Francisco

Statecraft

[Michael@statecraftlaw.com](mailto:Michael@statecraftlaw.com)

*/s/ Amy Holston*

Dated July 12, 2018

**CERTIFICATE OF DIGITAL SUBMISSION**

I hereby certify the following with respect to the foregoing motion.

1. All required privacy redactions have been made, as required by 10th Circuit Rule 25.5.
2. If required to file additional hard copies, the ECF submission is an exact copy of those documents;
3. The digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, CrowdStrike Falcon, antivirus definition version 4.7.7002.0, dated July 12, 2018. According to the program, this digital submission is free of viruses.

*/s/ Glenn E. Roper*  
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Dated July 12, 2018