No. 17-1344

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

303 CREATIVE LLC, a limited liability company, et al.,

Plaintiffs - Appellants,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official capacity, 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. 16-cv-02372-MSK-CBS

APPELLEES' SUPPLEMENTAL BRIEF

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INTRODUCTION

The Supreme Court's decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), moots this appeal. Below, the district court postponed ruling on Appellants' preliminary injunction and summary judgment motions "due to the pendency of *Masterpiece* … before the United States Supreme Court." (Order at 12.) That Order was effectively a stay; a sensible one, given that Appellants challenged the same Colorado statutes at issue in *Masterpiece*, made similar arguments, and had not established any urgency that would counsel against awaiting a pending Supreme Court decision. But the district court expressly granted Appellants leave to renew their motions after a final decision was reached in *Masterpiece*. That final decision has now been issued, Appellants have renewed their motions in the district court, and the appeal of the stay is therefore moot. And because Appellants' only claimed basis for appellate jurisdiction was the district court's purported denial of injunctive relief, this entire appeal should be dismissed.

This Court therefore should not reach the merits. But even on the merits, *Masterpiece* undermines Appellants' claims. Like this case, *Masterpiece* addressed First Amendment challenges to Colorado's Anti-Discrimination Act (CADA). In that context, the Supreme Court made clear

that a State can enforce laws that require businesses to provide their products and services—including wedding-related products and services—to all members of the public on the same terms. *Masterpiece* also confirms that strict scrutiny should not apply in this case and that Appellants have not satisfied the standard for preliminary injunctive relief.

As for the recent 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), those cases are readily distinguishable and of no help to Appellants' case.

In sum, *Masterpiece*, *NIFLA*, and *Janus* only affirm what Colorado has argued all along: that this Court should dismiss the appeal or deny Appellants' requested relief.

ARGUMENT

I. *Masterpiece* moots this appeal.

Mootness is a "threshold inquiry, because the existence of a live case or controversy is a constitutional prerequisite to the jurisdiction of the federal courts." *Dais–Naid, Inc. v. Phoenix Res. Cos. (In re Texas Int'l Corp.)*, 974 F.2d 1246, 1247 (10th Cir. 1992) (quotation omitted). An interlocutory appeal can become moot "even though the underlying case still presents a live controversy." *Akina v. Hawaii*, 835 F.3d 1003, 1010 (9th Cir. 2016). For

example, if a district court vacates an interlocutory order, a pending appeal of that order is "rendered moot." *Primas v. City of Okla. City*, 958 F.2d 1506, 1513 (10th Cir. 1992). Likewise, "[a]n interlocutory appeal from a temporary stay no longer in effect … is the paradigm of a moot appeal." *Video Tutorial Servs., Inc. v. MCI Telecomms. Corp.*, 79 F.3d 3, 5 (2nd Cir. 1996) (collecting cases).

Applying that principle, where a district court enters a stay pending the Supreme Court's consideration of whether to grant certiorari in a similar case, an appeal of the stay becomes moot when "the Supreme Court … denie[s the] petition for a writ of certiorari and the case is ready to be resumed in the district court." *Camacho v. Snyder*, 79 F. App'x 114, 115 (6th Cir. 2003) (unpublished). Similarly, where a district court enters a stay pending consideration of a related case by a state court, an appeal from the stay becomes moot when the state court case becomes final. *Jacobs v. Rackauckas*, 205 F. App'x 498, 499 (9th Cir. 2006) (unpublished); *Morgan v. Cty. of Yolo*, 154 F. App'x 581, 582 (9th Cir. 2005) (unpublished).

Here, Appellants claim that appellate jurisdiction is proper under 28 U.S.C. § 1292(a)(1) because the district court's Order denied injunctive relief. Opening Br. at 2; *see also* Reply Br. at 2 ("This Court can review Lorie's appeal because she sought a preliminary injunction …."). Yet Appellants' motions were "**DENIED, WITH LEAVE TO RENEW** after a final ruling has

been issued by the United States Supreme Court in *Masterpiece Cakeshop*." Aplt. App. at 376 (emphasis in original). Although this was on its face a denial, *but see* Appellees' Br. at 20–23, Appellants concede that it should actually be treated as a stay. *E.g.*, Opening Br. at 26–29 (referring to the district court's "decision to stay"). And now, the Supreme Court has issued a final ruling in *Masterpiece*—eliminating the reason for the stay. Thus, "the Supreme Court [has decided the related case] and th[is] case is ready to be resumed in the district court." *Camacho*, 79 F. App'x at 115.

Not only is the case *ready* to resume in the district court, it *has* resumed. Following the *Masterpiece* decision, Appellants filed a notice in the district court "renew[ing] and ask[ing] this Court to rule on Plaintiffs' Motion for Preliminary Injunction … and Motion for Summary Judgment." Notice to the Court at 2, *303 Creative LLC v. Elenis*, No. 1:16-cv-02373 (D. Colo. July 3, 2018), ECF No. 62. The district court responded by ordering supplemental briefing addressing *Masterpiece*, *NIFLA*, and *Janus*—the same cases on which this Court has ordered briefing. *See* Order, No. 1:16-cv-02373 (July 12, 2018), ECF No. 63; Order, No. 1:16-cv-02373 (July 31, 2018), ECF No. 65. Because the district court is considering anew Appellants' motions, a decision by this Court in the appeal of the earlier denial/stay would have no "effect in the real world." *Fleming v. Gutierrez*, 785 F.3d 442, 444–45 (10th Cir. 2015) (quotation omitted). This is therefore "the paradigm of a moot appeal." *Video*

Tutorial Servs., 79 F.3d at 5. And because the denial of an injunction was Appellants' sole basis for asserting appellate jurisdiction under § 1292(a)(1), *see* Opening Br. at 2, the entire appeal should be dismissed.[1]

II. *Masterpiece* supports Colorado's position and undermines Appellants' claims.

Should this Court reach the issue, *Masterpiece* also undermines Appellants' claims on the merits. *Masterpiece* was decided on narrow, fact-specific grounds that are not present here. However, it emphasized important principles that support Colorado's position in this case.

A. *Masterpiece* approved the enforcement of "unexceptional" public accommodations laws like CADA.

As *Masterpiece* recognized, "[f]or most of its history, Colorado has prohibited discrimination in places of public accommodation." 138 S. Ct. at 1724–25. CADA is thus merely the latest enactment in a long Colorado "tradition of prohibiting discrimination in places of public accommodation." *Id.* at 1725. This tradition is grounded in "compelling state interests of the highest order," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984); namely, the eradication of discrimination on the basis of protected characteristics in places of public accommodation.

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[1] Separately, Colorado's argument that the requirements of § 1292(a)(1) are not met is unaffected by *Masterpiece*, *NIFLA*, or *Janus* and remains an independent basis for dismissal of the appeal. *See* Appellees' Br. at 19–29.

Masterpiece endorsed that interest, emphasizing the importance of "civil rights laws that ensure equal access to goods, services, and public accommodations." 138 S. Ct. at 1727. And although "[t]he First Amendment ensures that religious organizations and persons are given proper protection," *id.* (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015)), "[t]he Court's precedents [also] make clear that … the owner of a business serving the public[ ] might have his right to the free exercise of religion limited by generally applicable laws." *Id.* at 1723–24. CADA is such a law.

The Supreme Court further stated that it is "unexceptional" for CADA to "protect gay persons … 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 1728; *see also Hurley v. Irish–Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995) ("Provisions like these are well within the State's usual power to enact …."). The Court emphasized that these specific protections are justified by society's recognition that "gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Id.* at 1727. Thus, a State's laws "can, and in some instances must, protect them in the exercise of their civil rights." *Id.*

As to weddings specifically, *Masterpiece* "assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony." *Id.* However, the Court emphasized

that any such exception must be narrowly confined. Otherwise, "a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons," and the resulting stigma would be contrary to the "history and dynamics of civil rights laws." *Id.*; *see also id.* at 1728–29 ("[A] decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages … in effect be allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages' ….").

Masterpiece thus not only approved generally of public accommodations laws like CADA, but specifically endorsed its use of sexual orientation as a protected characteristic. And although the Court ultimately concluded that the now-former members of Colorado's Civil Rights Commission had failed to accord the baker a "neutral and respectful consideration" of his religious beliefs, *id.* at 1729, it left no doubt that objections to gay marriage, whatever their source, "do not allow business owners … to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Id.* at 1727.

B. *Masterpiece* undermines Appellants' as-applied challenge.

Appellants' case is a pre-enforcement lawsuit based on an alleged fear of punishment for a hypothetical refusal to create websites for same-sex

weddings.[2] Yet Appellants argued that CADA threatens their First Amendment rights "as-applied" because of two factors. First, a former[3] Commission member "acted and spoke[ ] in ways indicating animus against religious persons who disagree with same-sex marriage." Opening Br. at 47. Second, the Commission "punished [Masterpiece Cakeshop] for declining to create a cake promoting same-sex marriage but exonerated three other bakeries after they declined cakes criticizing same-sex marriage." *Id.* at 15, 45–49.

Setting aside that CADA has not been "applied" to Appellants at all, *Masterpiece* directly addressed these two factors, and its discussion negates Appellants' as-applied argument. The Supreme Court relied on these factors in concluding that the now-former Commission members failed to conduct a "neutral and respectful" review. 138 S. Ct. at 1729. That is, (1) some Commission members made statements disparaging the religious beliefs of the baker, Jack Phillips, and the State did not "disavow" those statements;

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[2] As Colorado has already noted, there has been no complaint to, or review by, the Commission of any matter concerning Appellants. *See* Appellees' Br. at 6–8. There are thus many administrative procedures and protections in CADA that may never even be triggered as to Appellants. *See id.*

[3] The Commission members who reviewed complaints against Phillips and the three other bakeries discussed in *Masterpiece* have since been replaced. *See Civil Rights Commission*, Colo. Dep't of Regulatory Agencies, https://www.colorado.gov/pacific/dora/civil-rights/commission (last visited Aug. 6, 2018) (listing current Commission members, who serve four-year terms).

and (2) Commission members treated the discrimination complaint against Phillips differently from complaints against three other bakers who declined to make anti-LGBT cakes. *Id.* at 1729–31. These two factors, the Court held, evidenced "hostility" to Phillips' religious belief. *Id.* at 1732.

Although at first blush that holding seems to support Appellants' as-applied argument, given the pre-enforcement posture of this case, it actually undermines it. The current Commission members now have the benefit of the Supreme Court's discussion to guide their review of future CADA complaints, including any complaint against Appellants. And there is no basis for suggesting that in reviewing such a complaint, they would be anything other than neutral toward and respectful of religious belief. To the contrary, it should be presumed that the Commission will faithfully apply the law as expressed in *Masterpiece*. *Cf. F.C.C. v. Schreiber*, 381 U.S. 279, 296 (1965) (stating that administrative agencies are entitled to a presumption "that they will act properly and according to law"); *Blinder, Robinson & Co. v. U.S. S.E.C.*, 748 F.2d 1415, 1418 (10th Cir. 1984) ("It is presumed that administrative agencies … will act within the law.").

C. *Masterpiece* negates Appellants' compelled speech claims, and neither *NIFLA* nor *Janus* suggests otherwise.

Analysis of any free speech claim depends on the speech at issue. Although *Masterpiece* did not rule on Phillips' free speech claim, *see* 138 S.

Ct. at 1723, it confirmed the importance in the public accommodations context of analyzing the factual record to determine whether First Amendment rights are implicated and whether they are violated. For example, a baker's "refus[al] to design a special cake with words or images celebrating the marriage … might be different from a refusal to sell any cake at all." *Id.*; *see also id.* at 1733 n* (Kagan, J., concurring). In a speech case, "these details might make a difference." *Id.* at 1723.

Because this is a pre-enforcement case, it lacks the factual development that otherwise would assist in deciding Appellants' claims. Appellants have not been hired to create any wedding website, let alone one for a same-sex couple, and it is unknown what that hypothetical website might look like or say. Yet when determining whether CADA jeopardizes Appellants' speech rights, such "details" will undoubtedly "make a difference." In the abstract, there is no basis to conclude that Appellants' rights are at risk.

Appellants will likely cite *NIFLA* and *Janus* in support of their free-speech claims, but those cases are inapposite. *NIFLA* was a challenge to a California law requiring "crisis pregnancy centers" to post a government-drafted notice about publicly funded contraception and abortion services. 138 S. Ct. at 2365. The Supreme Court declined to decide what level of scrutiny applied to the challenge because it concluded that this notice requirement failed even intermediate scrutiny because it was "wildly underinclusive" and

because the law "targets speakers, not speech." *Id*. at 2375, 2378. But the "government-scripted, speaker-based disclosure requirement" in *NIFLA*, where the government prescribed the *content* of *government-mandated* speech, *id*. at 2377, bears little resemblance to the content- and viewpoint-neutral language of CADA. Moreover, *NIFLA* expressly reaffirmed that there can be no First Amendment violation when "restrictions directed at commerce or conduct"—such as CADA—"impos[e] incidental burdens on speech." *Id.* at 2373 (quotation omitted).

Nor is *Janus* of any help to Appellants. It involved a challenge to an Illinois law allowing public unions to collect fees from non-member public employees on whose behalf the union negotiates. 138 S. Ct. at 2455. The Supreme Court declined to decide what level of scrutiny applied to that challenge, *id.* at 2465, because regardless of the scrutiny applied, this arrangement violated the non-members' free speech rights. *Id.* at 2460 (concluding that the forced payment of agency fees "compell[ed the non-members] to subsidize private speech on matters of substantial public concern"). CADA has no requirement even remotely similar. And although Appellants will doubtless point to *Janus*'s statement that "[c]ompelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command," *id.* at 2463, CADA's prohibition on discrimination does not compel business owners to "mouth support" for

anything, either directly or by charging fees to subsidize others' private speech.

Colorado has already explained that CADA neither compels speech nor is subject to strict scrutiny. Appellees' Br. at 36–47. Nothing in *NIFLA* or *Janus* is to the contrary. And given Colorado's long tradition of prohibiting discrimination, plus society's recognition that "gay persons and gay couples cannot be treated as social outcasts or as inferior," *Masterpiece*, 138 S. Ct. at 1724–25, 1727, CADA is a constitutional application of a permissible state interest in eradicating discrimination in places of public accommodation. *Id.* at 1727. Even if strict scrutiny applied, "eliminating discrimination constitutes a compelling interest." *Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d 426, 441 (Ariz. Ct. App. 2018) (applying *Masterpiece* in a case involving the owners of a wedding design business). The Supreme Court has repeatedly held as much. *See, e.g.*, *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987); *Roberts*, 468 U.S. at 624.

D. *Masterpiece* confirms that Appellants' free exercise challenge does not trigger strict scrutiny.

Although *Masterpiece* did not specify what level of scrutiny it applied to Phillips' free exercise claim, the Supreme Court repeatedly referred to public accommodations laws like CADA as "neutral and generally applicable." *See, e.g.*, 138 S. Ct. at 1727 (holding that although religious objections to gay

marriage are "protected views," they "do not allow business owners … to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law"). And even though the Court concluded that the former Commission members had failed to consider Phillips' claims with "the neutrality that the Free Exercise Clause requires," *id.* at 1731, it never intimated that *CADA itself* was anything other than neutral and generally applicable. As this Court has held, "[a] law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006). Thus, *Masterpiece* undermines Appellants' assertion that CADA is subject to strict scrutiny. *See* Opening Br. at 44–49.[4]

E. *Masterpiece* supports the denial of Appellants' request for preliminary injunctive relief.

Finally, should the Court reach Appellants' request for preliminary injunctive relief, it should deny the request. In *Masterpiece*, the Supreme Court held that the Commission had failed to neutrally and respectfully consider Phillips' claims *after* a CADA complaint had been filed and

[4] Regardless of the scrutiny applied, the Supreme Court "has long held, and reaffirms [in *Masterpiece*]," that "a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers." 138 S. Ct. at 1733 n* (Kagan, J., concurring).

investigated. 138 S. Ct. at 1724. Here, no one has filed a charge against Appellants and the Colorado Civil Rights Division has not conducted an investigation, made a determination of probable cause, or taken any other action requiring Commission involvement. In this setting, and in light of *Masterpiece*, Appellants cannot show that the Commission is likely to violate its duty under the First Amendment to give a neutral and respectful consideration to competing interests. *Id.* at 1731. Thus, Appellants cannot establish the elements of likelihood of success and irreparable harm, and preliminary injunctive relief is not justified.

Masterpiece also confirms that the balance of equities does not tip in Appellants' favor and that injunctive relief is not in the public's best interest. To the contrary, *Masterpiece* recognizes that gay persons and couples must not be "treated as social outcasts or as inferior in dignity and worth." *Id.* at 1727. This has long been the view in Colorado, such that years before the extension of marriage rights to same-sex couples, Colorado included sexual orientation in CADA as a protected characteristic. *Id.* at 1725 (noting that CADA was amended in 2007 and 2008 to include sexual orientation).[5]

[5] Because Colorado did not recognize same-sex marriages in 2012, Phillips' dilemma was "particularly understandable" and his position "not unreasonable." *Masterpiece*, 138 S. Ct. at 1728. Marriage rights have now been extended to same-sex couples nationwide, so the same cannot be said today.

Society has a strong interest in ensuring that all persons have equal access to goods and services in the economy, even—and perhaps especially—when religious or philosophical objections would otherwise lead a provider of public accommodations "to deny protected persons equal access to goods and services." *Id.* at 1727; *see also United States v. Lee*, 455 U.S. 252, 261 (1982) ("When followers of a particular [religious] sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes …."). There is no question that Appellants' religious views must be respected. Yet "[t]he exercise of [gay persons' and gay couples'] freedom on terms equal to others must be given great weight and respect by the courts." *Masterpiece*, 138 S. Ct. at 1727. The application of CADA, if a discrimination complaint is ever filed against Appellants, should be determined by the current Commission in the first instance, under the guidance provided by the Supreme Court in *Masterpiece*. Appellants should not now be granted a preliminary injunction.

CONCLUSION

Masterpiece moots Appellants' appeal and negates Appellants' claims. For the reasons stated above and in prior briefing, Colorado respectfully requests that the Court dismiss this appeal or otherwise find in their favor.

Respectfully submitted this 6th day of August, 2018.

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitation in this Court's July 6, 2018 Order because this brief is no longer than 15 pages in length, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of 10th Cir. R. 32(a) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13-point Century Schoolbook.

Dated August 6, 2018

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CERTIFICATE OF SERVICE

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