



June 25, 2021

VIA CM/ECF

Christopher Wolpert
Clerk of Court
U.S. Court of Appeals for the Tenth Circuit
Byron White United States Courthouse
1823 Stout Street
Denver, CO 80257

Re: Response to Supplemental Authority about *California v. Texas* for *303 Creative, et al. v. Elenis, et al.*, No. 19-1413

Dear Mr. Wolpert:

Appellants (collectively Lorie) file this response to Appellees' (Colorado) notice of supplemental authority about *Texas v. California*, 2021 WL 2459255 (U.S. June 17, 2021) where the Supreme Court denied standing for plaintiffs to challenge the Affordable Care Act's (ACA) individual mandate. This opinion supports Lorie's standing in two respects.

1. *Texas* denied standing because Congress amended the ACA and set the penalty at "\$0" for not complying with the individual mandate. *Id.* at *3. "With the penalty zeroed out," the plaintiffs could not show "that any kind of Government action or conduct has caused or will cause the injury they attribute to" the mandate. *Id.* at *4. In contrast, Lorie challenges a law with penalties that continue to be enforced. For example, just last week, a court fined Jack Phillips for violating the same law Lorie challenges. *See Scardina v. Masterpiece Cakeshop Inc.*, No. 19CV32214 (Denver Dist. Ct. June 17, 2021). This continued enforcement

in turn produces an ongoing chill injury caused by a credible threat of investigation and other penalties. And this is particularly true here because Colorado has never disavowed enforcement but affirmed it will apply its law against Lorie's expression. Appellants' Opening Br. 18-28; Reply Br. 3-11.

2. While the *Texas* majority did not consider it because of waiver, 2021 WL 2459255, at *7, three justices indicated that plaintiff's "standing-through-inseverability argument" would or might well justify standing. *Id.* at *11 (Thomas, J., concurring); *19-21 (Alito, J., dissenting). Under this argument, plaintiffs can challenge two provisions the legislature intends to be inseverable so long as just one provision injures them. *Id.* But here, Lorie does not merely challenge two inseverable provisions; she challenges two provisions statutorily, conceptually, and *necessarily* dependent on each other; they are intertwined. Appellants' Opening Br. 18-23; Reply Br. 6-7. If three justices found standing based on a weaker relationship between related provisions in the ACA, then Lorie has standing to challenge two provisions with a much stronger conceptual relationship here.

In sum, the *Texas* opinion does not undermine Lorie's standing but underscores why she has standing to challenge Colorado's law.

Sincerely,

s/ Jonathan A. Scruggs
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CERTIFICATE OF COMPLIANCE

I certify that the body of this letter contains 346 words and complies with Federal Rule of Appellate Procedure 28(j).

s/ Jonathan A. Scruggs
Jonathan A. Scruggs
Attorney for Appellants

Certificate of Service

I hereby certify that on June 25, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by 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.

s/ Jonathan A. Scruggs

Jonathan A. Scruggs

Attorney for Appellants