Case No. 17-1344

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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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

APPELLANTS' SUPPLEMENTAL BRIEF ON *MASTERPIECE*, *NIFLA*, AND *JANUS*

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Introduction

As Colorado interprets it, the Colorado Anti-Discrimination Act ("CADA") forces web designer Lorie Smith[1] to create websites she opposes, bans a statement Lorie wants to post on her website indicating what she can and cannot create, and treats her differently than secular business owners who decline to create speech they oppose.[2] When Lorie challenged this, the district court dismissed Lorie's compelled-speech claims based on standing, and it denied her motions for a preliminary injunction and summary judgment. The court then stayed her challenge to the provision banning her website statement until the Supreme Court decided *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,* 138 S. Ct. 1719 (2018). This appeal followed.

The Supreme Court's recent opinions in *Masterpiece* and two other compelled-speech cases have strengthened Lorie's arguments. This Court should consider Lorie's preliminary-injunction appeal and rule in her favor for four reasons.

First, this Court has jurisdiction to decide the preliminary-injunction appeal because the district court denied Lorie's request for a preliminary injunction and has not issued a final judgment. Although the

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[1] In this brief, "Lorie Smith" and "Lorie" refer to both plaintiffs.

[2] According to Colorado, if Lorie creates websites celebrating opposite-sex marriage, she must also create websites celebrating same-sex marriage even though the latter violates her religious beliefs about marriage. *See* Appellants' Opening Br. 30-42, Doc. No. 01019917829.

district court has begun to move toward a final ruling since *Masterpiece*, no one knows when that ruling will come, and Lorie is suffering ongoing and irreparable harm in the meantime.

Second, this Court should grant Lorie a preliminary injunction because Colorado is compelling her speech based on its content and viewpoint. By forcing Lorie to create and publish websites with content to which she objects, Colorado necessarily "alter[s] the content of [her desired] speech," triggering strict scrutiny. *Nat'l Inst. of Family & Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2371 (2018) (citation omitted). Nor can Colorado create exceptions to this rule—that it can compel speech either through a generally applicable law or if it does not force speakers to "endorse" any particular message. Appellees' Br. 37-42, Doc. No. 01019939442. *NIFLA* criticized creating new speech exceptions, and it prohibited the government from compelling pro-life speakers to convey messages about abortion no one would think they endorsed. This Court should not endorse Colorado's new exceptions as excuses for government-compelled speech. *See Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (noting that compelled speech violations always cause "damage").

Third, this Court should rule for Lorie because Colorado is restricting her speech based on its content and viewpoint. By banning Lorie's website statement because of what it "tells potential customers," Appellees' Br. 42, Colorado restricts that statement based on its

"communicative content," triggering strict scrutiny. *NIFLA*, 138 S. Ct. at 2371 (citation omitted). To be sure, Colorado views this statement as mere "conduct." Appellee's Br. 17, 42. But choosing what website content to create is not simply conduct; it's protected speech—Lorie's editorial judgment to choose what she can and cannot say. Because Lorie can decline to create websites, Colorado cannot ban speech from saying so.

Fourth, this Court should rule for Lorie because Colorado is treating her speech and beliefs differently than those of secular business owners. As *Masterpiece* teaches, the government cannot act with "hostil[ity] to the religious beliefs of [its] citizens." 138 S. Ct. at 1731. But here, the same state is applying the same law to target a person holding the same religious beliefs and is reciting the same rhetoric *Masterpiece* condemns—calling Lorie's beliefs "offensive" and "discriminat[ory]," Appellee's Br. 16, 42, 45-46. Yet Colorado does not condemn secular views and allows secular speakers (the three bakers mentioned in *Masterpiece*) to escape punishment when they decline to speak certain messages. This inconsistency proves the disparate treatment that the Equal Protection Clause forbids.

In sum, Colorado is not protecting the right of its citizens to express and live according to "the principles that are so fulfilling and so central to their lives and faith." *Masterpiece*, 138 S. Ct. at 1727 (citation omitted). This Court should ensure that Lorie is free to express and live consistently with her beliefs while this case proceeds.

Argument

I. This Court has jurisdiction to hear Lorie's preliminary-injunction appeal.

When Lorie filed this appeal, she stood in limbo. Colorado was continuously violating her First Amendment rights, but she had no recourse for at that time 13 months and counting. After dismissing some of her claims and denying her preliminary-injunction and summary-judgment motions, the district court stayed Lorie's case until the Supreme Court decided *Masterpiece*. Lorie has now suffered 22 months with no relief.

Because of this case's unusual procedural posture, Lorie appealed all three district-court rulings. Notice of Appeal, ECF No. 53. And at the time, there was no doubt this Court had jurisdiction over all three. *See* Pls.-Appellants' Resp. to Defs.-Appellees' Mot. to Dismiss for Lack of Appellate Jurisdiction Pursuant to 10th Cir. R. 27.3(A)(1)(a), Doc. No. 01019889796; Appellants' Opening Br. 17-29. But in the last two months, the Supreme Court decided *Masterpiece*, and the district court ordered supplemental briefing to decide the dispositive motions before it. Because the district court is now proceeding toward a final judgment, Lorie no longer appeals the denial of her summary judgment motion.

Yet Lorie still suffers irreparable harm because the district court expressly and effectively denied her preliminary-injunction motion. *See id.* And this Court still has jurisdiction over that appeal. *Flood v. ClearOne Commc'ns, Inc.*, 618 F.3d 1110, 1116 (10th Cir. 2010) (until "the

district court … enter[s] a[] permanent injunction into which the preliminary injunction … merge[s]," the interlocutory appeal of the preliminary injunction denial remains alive). This Court also has jurisdiction to review the motion-to-dismiss ruling in order to reach the issues raised in the preliminary-injunction appeal. *Petrella v. Brownback*, 787 F.3d 1242, 1255 (10th Cir. 2015) (hearing appeal of partial motion to dismiss with preliminary-injunction appeal because the two were "inextricably intertwined."). Such interlocutory appeals are common to stop irreparable harm; delay is not. Thus, Lorie urges this Court to rule on the preliminary-injunction appeal, which raises as-applied free-speech and equal-protection claims, to stop the ongoing irreparable harm she suffers.

II. As recent Supreme Court decisions affirm, Colorado violates the Free Speech Clause because it compels Lorie's speech based on content and viewpoint.

It is a "cardinal constitutional command" that the government may not "[c]ompel[] individuals to mouth support for views they find objectionable." *Janus*, 138 S. Ct. at 2463. When the government violates this command, its action is "presum[ed] unconstitutional," *NIFLA*, 138 S. Ct. at 2371 (citation omitted). This principle controls here because Colorado seeks to compel Lorie to create website content promoting a message about marriage to which she objects. This application triggers strict scrutiny for two reasons.

First, laws that compel speech deserve strict scrutiny because they "alter the content of [someone's] speech," and are therefore content based. *NIFLA*, 138 S. Ct. at 2371 (citation omitted). By compelling Lorie to create website content that promotes ideas about marriage she opposes, Colorado "plainly 'alters the content' of [her] speech." *NIFLA*, 138 S. Ct. at 2371.

This logic tracks *NIFLA,* where the Court criticized California for forcing pro-life centers to publish notices containing messages they opposed. The Court's analysis did not turn on the speakers' identity or what third parties might think; it focused solely on the law's effect. "By compelling individuals to speak," the laws "alter[ed] the content of [their] speech." *Id.* This "content-based" application triggered strict scrutiny in *NIFLA*, *id.*, and it does the same here, because CADA forces Lorie to create expression containing a message she opposes. Colorado concedes this compulsion of speech. Aplt. App. 263, 268 (¶¶46-47, 50, 81-82) (conceding that Lorie's websites are "expressive in nature," contain "modes of expression," and "communicate a particular message").

Second, laws that compel speech deserve strict scrutiny because they severely burden speakers, forcing them to "betray[ ] their convictions" and "endorse ideas they find objectionable," *Janus*, 138 S. Ct. at 2464. Colorado does exactly this to Lorie. By compelling her to create website content she opposes, Colorado severely burdens her speech and conscience rights. This not only erodes "democratic" ideals and

thwarts society's "search for truth," it "damage[s]" Lorie herself. *Id.* "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of [the Supreme Court's] landmark free speech cases said that a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more [justification]' than a law demanding silence." *Id.* (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943)). For this reason, strict scrutiny is the rule, not the exception, for compelled speech.

Colorado tries to create an exception, claiming CADA can compel Lorie's speech because it merely regulates her "business operation." Appellees' Br. 37. This argument should sound familiar; the respondents argued the same in *Masterpiece*. *See* Br. for Resp'ts Charlie Craig & David Mullins at 20, *Masterpiece*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4838415, at *20 (arguing "generally applicable regulations of commercial conduct … do not violate the First Amendment"). But no justice in *Masterpiece* embraced the theory that public-accommodation laws could transform for-profit speech into conduct. To the contrary, the majority said a facially neutral law could *not* force for-profit ministers to perform same-sex wedding ceremonies. *Masterpiece*, 138 S. Ct. at 1727. The same logic applies to other expression.[3] Just like wedding homilies,

[3] One concurrence made this point more explicitly: "Although public-accommodations laws generally regulate conduct, particular applications of them can burden protected speech. When a public-accommodations law 'has the effect of declaring … speech itself to be the public

websites do not stop speaking when created for profit. And that is Colorado's ultimate stumbling block—websites speak. Because they do, Colorado cannot compel Lorie to create them.

Nor is this conclusion altered because Colorado says that it does not compel Lorie to "endorse a third party's speech." Appellees' Br. 38. The Supreme Court has never required a speaker to prove endorsement to establish a compelled-speech claim. *NIFLA* confirms this, as it bypassed the same endorsement argument. *Compare NIFLA*, 138 S. Ct. at 2371-76 (not mentioning third-party perceptions in its compelled speech analysis) *with* Br. for Resp't at 43-44, *NIFLA*, 138 S. Ct. 2361 (2018) (No. 16-1140), 2018 WL 1027815, at *43-44 (defending compelled disclosures because speakers can "expressly disavow" them and no one would think the disclosures "represent[ ] [their] personal choice"). Such an endorsement requirement would "justify virtually *any* law that compels individuals to speak." *Masterpiece*, 138 S. Ct. at 1740 (Thomas, J., concurring) (emphasis added). Anytime the government compels someone to speak, observers could think the speaker is merely being compelled and thus not endorsing the message compelled.

Colorado's "endorsement" argument also assumes that CADA does not harm Lorie if no one thinks she is "endorsing" the website content

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accommodation,' the First Amendment applies with full force." *Masterpiece*, 138 S. Ct. at 1741 (Thomas, J., concurring) (citing *Hurley,* 515 U.S. at 573).

she is compelled to create. The Supreme Court just cut the legs out from under that very argument. As *Janus* explains, compelling speech is "*always* demeaning." *Janus*, 138 S. Ct. at 2464 (emphasis added). If the act of forcing people "to subsidize … speech" they oppose is "tyrannical"—an act no one would think signifies endorsement—then surely so is Colorado's act of compelling Lorie to create and publish websites she opposes. It should be "universally condemned." *Janus*, 138 S. Ct. at 2463-64.

III. As recent Supreme Court decisions also affirm, Colorado violates the Free Speech Clause because it bans Lorie's speech based on content and viewpoint.

The Free Speech Clause also supports Lorie's right to publish her views. Under this Clause, the government can neither compel nor ban speech because free speech "is essential to our democratic form of government" and "furthers the search for truth." *Janus*, 138 S. Ct. 2448, 2464 (2018). That is particularly true here, where Lorie wants to speak about what website content she can and cannot create. Her right to speak is intertwined with her right to choose what she will and will not say.

Colorado infringes Lorie's rights by banning her statement based on its content and view. If a statement explains why someone creates websites celebrating same-sex marriage, it is allowed. But Lorie's statement saying she *cannot* create those websites is banned. The restriction turns entirely on content and viewpoint. *NIFLA*, 138 S. Ct. at 2371 ("Content-based regulations 'target speech based on its

communicative content.'" (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015)). Accordingly, it triggers strict scrutiny. *Id.* at 2371.

Colorado tries to avoid this scrutiny by characterizing Lorie's statement as "discriminat[ory]" conduct and thus "illegal." Appellees' Br. 42. The Supreme Court has rejected that position too, holding that "the religious and philosophical objections to gay marriage are protected views." *Masterpiece*, 138 S. Ct. at 1727; *accord id.* at 1729 (condemning statement comparing beliefs in marriage like Lorie's to "all kinds of discrimination through history").

Lorie's statement does not even describe conduct; it describes a constitutionally protected choice—the choice not to convey messages celebrating same-sex marriage. *Masterpiece* acknowledged this possibility, noting that "objections to gay marriage are … in some instances protected forms of expression." *Id.* at 1727.

Significantly, Lorie creates website content for clients no matter their sexual orientation; there is just some content she cannot create for anyone, such as content that disparages others, promotes violence, or celebrates same-sex marriage. Aplt. App. 266 (¶ 66). Her decision whether to create turns on the message, *not* the requestor—the what, not the who.[4] So when CADA compels Lorie to create website content, it does

[4] For example, Lorie will create website content celebrating opposite-sex marriage for a bride's homosexual father but will not create content celebrating same-sex marriage for a bride's heterosexual father. *See Masterpiece*, 138 S. Ct. at 1736 (Gorsuch, J., concurring) (noting this fact

not regulate a decision refusing to "serve customers based on their sexual orientation," Appellees' Br. 17; it regulates "the choice of a speaker not to propound a particular point of view." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572-75 (1995) (distinguishing an "intent to exclude homosexuals as such" from "disagreement" with a message promoting "unqualified social acceptance" of LGBT activities). That choice lies beyond the state's power to punish.

This also explains why Lorie's statement will not impose "a serious stigma on gay persons." *Masterpiece*, 138 S. Ct. at 1729. Lorie's statement does not flatly refuse to sell services because of someone's sexual orientation; it merely declines to create particular websites because of their content. The former is improper. The latter is constitutionally protected. The former objects to someone's status. The latter objects to a particular message. Thus, it is actually Lorie who suffers a "demeaning"

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proved that "it was the kind of cake, not the kind of customer, that mattered to" Phillips). In *Masterpiece*, Justices Kagan and Breyer concurred that it is not unlawful for business owners to decline a request for an expressive item that "they would not have made for any customer," because doing so treats the requester "the same way they would have treated anyone else—just as [public accommodation law] requires." 138 S. Ct. at 1733 (Kagan, J., concurring). In other words, business owners do "not engage in unlawful discrimination" when they "would not sell [a] requested [item] to anyone.") *Id.* at 1733 n*. Because Lorie declines websites with different content that are not "suitable for use at same-sex and opposite-sex weddings alike," her decisions do not turn on her clients' sexual orientation but on the content of their requested websites. *Id.* at 1733 n*.

stigma, as her views are disparaged and her speech is banned and compelled. *Janus*, 138 S. Ct. at 2464. That violates the First Amendment.

IV. As recent Supreme Court decisions further affirm, Colorado violates the Equal Protection Clause because it targets Lorie's religious views.

In addition to violating the First Amendment, Colorado also violates Lorie's equal-protection rights. It has done so by treating Lorie differently because of her religious beliefs and views.

This disparate treatment is evident in two ways.[5] First, Colorado is condemning the religious beliefs Lorie holds but not conveying similar hostility toward other beliefs. For example, in *Masterpiece*, Colorado applied CADA against Jack Phillips (who holds the same beliefs about marriage as Lorie), and Colorado spoke against those beliefs, showing "clear and impermissible hostility toward th[os]e sincere religious beliefs." 138 S. Ct. at 1729. According to state officials, Phillips "can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state,'" and Phillips must "compromise" his religious beliefs if he wants to do business in Colorado. *Id.* ("Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery … the holocaust … we can list

[5] This disparate treatment that violates the Equal Protection Clause also violates the Free Exercise Clause. *See Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) (explaining how both Clauses require neutral treatment of religion).

hundreds of situations where freedom of religion has been used to justify discrimination."). State officials even described Phillip's faith as "one of the most despicable pieces of rhetoric that people can use." *Id.*

Colorado has never rectified those statements. It has not retrained enforcement officials or altered operating policies. At most, Colorado downplays those comments—that they primarily came from one official and were "general in nature." Appellees' Br. 44-45. *Masterpiece* rejected those arguments. 138 S. Ct. 1729-30 (the "statements cast doubt on the fairness and impartiality" because "no objection to these comments" was made by other officials and the comments were never "disavowed in the briefs"). If statements by a few officials criticizing religious beliefs reveal the system's mistreatment of Phillips, those statements also prove mistreatment of Lorie, *who holds the same beliefs*.

Worse, Colorado has used the same disparaging rhetoric that *Masterpiece* condemned against Lorie throughout this litigation. Colorado has argued that Lorie must compromise her beliefs to do business in Colorado. Defs.' Resp. to Pls.' Mot. for Prelim. Inj. 15-16, ECF No. 38 ("MPI Resp."). It has accused Lorie of "assert[ing] her religious beliefs as a reason to discriminate," MPI Resp. 2, 6, and "using religion to perpetuate discrimination," MPI Resp. 22; Appellees' Br. 57. It has described the belief in one man/one woman marriage as "derogatory" and "offensive." MPI Resp. 18; Appellees' Br. 46. And it has compared Lorie's beliefs to invidious race discrimination. MPI Resp. 16-17; Appellee's Br.

57-58. These statements all indicate that Colorado will enforce its law against Lorie just as it did against Phillips and that it will do so with the same anti-religious hostility.

Colorado's hostility toward Lorie's beliefs are confirmed in other ways. Mere weeks after Phillips prevailed in the Supreme Court, Colorado issued another probable-cause determination against him for allegedly violating CADA *again* when he declined to create a custom cake that expressed a message that violated his religious beliefs. Determination in *Autumn Scardina v. Masterpiece Cakeshop Inc.*, Charge No. CP2018011310, June 28, 2018.[6] Far from rectifying its unfair and unequal treatment of people of faith, Colorado has signaled that it will continue to persecute them. Lorie has no hope to receive "the neutral and respectful consideration of [her] claims" that she is due, *Masterpiece*, 138 S. Ct. at 1729, absent this Court's immediate intervention.

Colorado also shows its unequal treatment by allowing speakers to decline to speak for secular reasons while prohibiting Lorie from declining for religious reasons. Once again, this contradicts *Masterpiece*. There, Colorado punished Phillips for not creating cakes conveying

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[6] Colorado found probable cause of discrimination even though Phillips declined to create the requested cake because of its message, has never created the requested cake for anyone, and was targeted by the complainant, an attorney who—on the day the news broke that the Supreme Court would hear *Masterpiece*—asked Masterpiece Cakeshop for a custom cake with a "blue exterior and a pink interior" to "reflect[] … the fact that [he] transitioned from male-to-female." *See* Exhibit 1.

objectionable messages but allowed three other bakeries to refuse to create cakes that they and the Commission found to convey "offensive" messages. 138 S. Ct. at 1730-31. As the Supreme Court observed, "[a] principled rationale for the difference in treatment… cannot be based on the government's own assessment of offensiveness." *Id.* at 1731.

Colorado has not changed this inconsistent treatment. It has not disavowed the free pass given to the three other bakeries, or changed its law to prescribe a different path. As a result, those bakeries and other speakers may continue to decline expression they deem offensive and may also erect statements declining to create those offensive messages. Yet Lorie can do neither. This inconsistent treatment shows that Colorado is treating Lorie just as unfairly as it treated Phillips.

Conclusion

Masterpiece, *NIFLA*, and *Janus* instruct courts to balance the rights of both LGBT citizens and those whose faith teaches them that marriage is an opposite-sex union. Lorie's legal position does precisely that. It allows Colorado to stop status discrimination and ban statements announcing discriminatory conduct. But it forbids Colorado from compelling speech, censoring content, or unequally targeting religion. As for Colorado, it has done the exact opposite, singling out and punishing Lorie's speech based on its content, compelling Lorie to speak the government's message, and forbidding her from speaking her own. *Masterpiece*, *NIFLA*, and *Janus* forbid that result.

Dated: August 6, 2018

Respectfully submitted,

s/ Jonathan A. Scruggs

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Certificate of Compliance with Length Limitation, Typeface Requirements, and Type Style Requirements

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

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a 14-point proportionally spaced Century Schoolbook typeface using Microsoft Word 2013.

Date: August 6, 2018

s/ Jonathan A. Scruggs
Jonathan A. Scruggs

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1. I hereby certify that all required privacy redactions have been made.

2. I hereby certify that hard copies of the foregoing Appellants' Supplemental Brief on *Masterpiece*, *NIFLA*, and *Janus* will be submitted to the Court pursuant to 10th Cir. R. 31.5 and will be exact copies of the version submitted electronically via the court's ECF system.

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Date: August 6, 2018

s/ Jonathan A. Scruggs
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Certificate of Service

I hereby certify that on August 6, 2018, a true and accurate copy of this brief 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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