FROM PIGGIE PARK V. NEWMAN TO MASTERPIECE CAKESHOP V. COLORADO CIVIL RIGHTS COMMISSION: APPLICATION OF THE OUTWARD FACING ACTIONS TEST TO LGBTQ NONDISCRIMINATION PROVISIONS

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I. INTRODUCTION

When Charlie Craig and David Mullins[1] walked into Masterpiece Cakeshop in Denver, Colorado in July 2012 they had a lot on their minds. They had a binder full of wedding cake ideas, and Charlie's mother travelled from Wyoming to join the pair.[2] Their wedding planner suggested Masterpiece Cakeshop for the wedding cake, and the group followed that advice.[3] However, Charlie and David had not even opened their binder discussed their plans when they were informed by Jack Phillips, the owner of the Masterpiece Cakeshop, that he would not make their cake because they were a same sex couple.[4] Craig and Mullins thought they had planned for everything, but blatant discrimination had not made it onto their list. After all, they lived in Colorado where this type of discrimination is illegal.[5] They knew they could rely on explicit state level statutory protection from discrimination on the basis of sexual orientation when accessing goods and services—like wedding cakes.[6] Despite these clear legal protections, Jack Phillips was firm and he would not bake a cake for a same-sex wedding because he believed marriage "is only between one man and one woman," and, therefore, the state's general nondiscrimination law did not apply.[7] Selling Charlie and David a wedding cake, he said, would be

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[*] Associate Legal Director, Human Rights Campaign. I would like to thank Nancy J. Knauer for her thoughtful edits to earlier drafts and Karin Goitman for her thorough research.

[1] Julie Compton, *Meet the Couple Behind the Masterpiece Cakeshop Supreme Court Case,* NBC NEWS (Dec. 6, 2017, 1:28 PM), https://www.nbcnews.com/feature/nbc-out/meet-couple-behind-masterpiece-cakeshop-supreme-court-case-n826976.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] COLO. REV. STAT. § 24-34-601 (2016).

[6] *Id.*

[7] *See Jack Phillips: Custom Cake Designer (Colorado)*, HERITAGE FOUND.: WHAT YOU NEED TO KNOW ABOUT RELIGIOUS FREEDOM (Dec. 1, 2018), https://www.heritage.org/what-you-need-know-about-religious-freedom/jack-phillips.

tantamount to celebrating their marriage and force him to violate his religious belief.[8]

Charlie and David filed a complaint with the Colorado Human Rights Commission.[9] The Commission found that the owner of Masterpiece Cakeshop had engaged in unlawful discrimination on the basis of sexual orientation.[10] Jack Phillips appealed this decision, which eventually arrived at the US Supreme Court.[11] This case, *Masterpiece Cakeshop v. Colorado Human Rights Commission*,[12] ended with a very narrow decision at the Supreme Court. The Court found that Phillips had a right to discriminate and that the Human Rights Commission had not provided him with a fair process.[13] The attorneys for Masterpiece Cakeshop raised a number of innovative legal arguments, but the Court's fact-dependent decision provided very few answers.[14] Fortunately, legal history and civil rights jurisprudence do.

The right to believe and practice one's faith are core American values. These rights are incorporated into our Constitution and have been diligently protected by our judiciary.[15] Courts have consistently held that actions of a religious order that only impact its members or internal operations are outside the realm of the judiciary. However, courts have also been very clear that when religious discrimination impacts nonmembers, it is not entitled to the same deference.[16] Over 50 years ago, the United States Supreme Court solidified a clear standard regarding religious-based discrimination and the intersection with laws of public accommodation. In the 1968 foundational civil rights case, *Piggie Park v. Newman,* the Court struck down segregation in public accommodations once and for all.[17] The Supreme Court's decision

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[8] *Id.*

[9] *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* ACLU: CASES, https://www.aclu.org/cases/masterpiece-cakeshop-v-colorado-civil-rights-commission (last updated June 4, 2018) [hereinafter *Masterpiece*].

[10] Craig v. Masterpiece Cakeshop, Inc., Case No. CR 2013-0008 (Colo. Civ. Rts. Comm'n May 30, 2014) (final agency order), ACLU, https://www.aclu.org/legal-document/craig-and-mullins-v-masterpiece-cakeshop-commissions-final-order (last visited Sept. 9, 2019).

[11] *Masterpiece*, *supra* note 9.

[12] 138 S. Ct. 1719 (2018).

[13] *Id.* at 1724.

[14] *Id.* at 1723.

[15] U.S. CONST. amend. I. *See also* RFRA cases.

[16] *See* Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 945 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968) [hereinafter *Piggie Park*].

[17] *See Piggie Park*, 390 U.S. at 400.

echoed the standard established by the District Court, which concluded that an individual has "a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens."[18]

This article argues that outward discrimination, including activities impacting non-members or members of secular society that do not choose to interface with the organization, by a religious organization, entity, or employer solely on the basis of sexual orientation and gender identity is clearly prohibited under *Piggie Park*.[19] The first section of this article discusses the dynamic relationship between the states and religious orders and the rights of religious orders to establish their own tenets and govern their own business. The second section of this article explores the divergence between inward activities that impact members and outward activities that impact nonmembers. Inward activities are those that involve a religious entity's self-government, membership requirements, and other decisions that affect the congregation. Outward activities are actions taken by the organization that impact non-members or the public-at-large. The third section applies this divergence framework to discrimination on the basis of LGBTQ status by businesses and organizations seeking a religious-based exemption from general nondiscrimination rules, as did Jack Phillips in *Masterpiece Cakeshop*.[20]

It is clear that a faithful application of Supreme Court precedent regarding outward actions that impact protected populations demand that provisions protecting LGBTQ people from discrimination must receive the same level of deference and protection from the government as other historically safeguarded classes.[21] Today, religious beliefs cannot be used as a means to bypass civil rights legislation protecting LGBTQ people, just as it clearly could not be used in 1968.[22]

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[18] *Piggie Park*, 256 F. Supp. at 945.
[19] *Id.*
[20] 138 S. Ct. at 1723.
[21] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2590-91 (2015).
[22] *See Piggie Park*, 390 U.S. at 400.

II. RIGHTS OF RELIGIOUS ORDERS REGARDING INWARD-FACING ACTIONS

The Supreme Court first affirmed the rights of religious organizations to conduct internal business free from government intrusion in the *Watson v. Jones*, which was decided in 1872.[23] This case arose from a property dispute within the church community following the schism between the General Assembly of the Presbyterian Church that supported the abolition of slavery on moral grounds and southern members of the church who argued that slavery was a "divine institution."[24] The General Assembly rejected all pro-slavery dissenters as members, including those who argued they owned Walnut Street Presbyterian Church, which was the property in question in *Watson*.[25] Although the issue before the Court involved property ownership, it was rooted in a theological disagreement.[26] While recognizing that there is a legitimate state interest in resolving property disputes, the Court held that it did not have jurisdiction to rule on the validity of religious belief.[27] The Court ruled that it must rely on the internal structure of the Church to resolve the property dispute.[28] The Court determined that, while the court could engage in civil matters regarding a church, "it is a very different thing where a subject-matter of dispute [is] strictly and purely ecclesiastical in character . . . a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them."[29] The Court concluded that if it were to assume jurisdiction over issues of doctrinal ideology, written laws, and fundamental organization, it would "deprive [religious organizations] of the right of construing their own church

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[23] 80 U.S. 679 (1872).
[24] *Id.* at 691.
[25] *Id.* at 692; Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 111-12 (1952) ("In June 1867 the Presbyterian General Assembly for the United States declared the Presbytery and Synod recognized by the proslavery party were 'in no sense a true and lawful Synod and Presbytery in connection with and under the care and authority of the General Assembly of the Presbyterian Church in the United States of America.' They were 'permanently excluded from connection with or representation in the Assembly.' By the same resolution the Synod and Presbytery adhered to by those whom [the proslavery party] opposed were declared to be the true and lawful Presbytery of Louisville, and Synod of Kentucky.") (citing *Watson*, 80 U.S. at 692).
[26] *Watson*, 80 U.S. at 733.
[27] *Id.* at 734-35.
[28] *Id.* at 733-34.
[29] *Id.* at 733.

laws."[30] Perhaps surprisingly, the Court did not reference the Religion clauses of the First Amendment.[31] Instead, the *Watson* Court relied solely on common law theories including a heavy reliance on principles developed by the Church of England and the Scotch Court of Session to reach its decision.[32]

Since 1871 courts have relied on and developed this doctrine of deference to internal operations and inward-facing decisions of religious organizations.[33] Over eighty years later, the Court constitutionalized this doctrine in *Kedroff v. St. Nicholas Cathedral*.[34] This 1952 case relied on the *Watson* decision, proclaiming the freedom of religious organizations from state interference in internal matters relating to the Church.[35] In adopting a constitutional approach to disputes of church doctrine, the Court in *Kedroff* expanded the *Watson* analysis to recognize protection from government interference in internal affairs as a First Amendment right.[36] Further, the *Kedroff* court affirmed the *Watson* court's reasoning that individuals that join a religious organizations then submit themselves to it, stating, "All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it."[37] Therefore, the Court found that individuals who are impacted by inward facing decisions based on theology, either property rights or codes of conduct, have entered into the community voluntarily and are thus bound by those decisions.[38]

In the employment context, the Supreme Court has been clear that religious employers have strong Constitutional and statutory protections regarding inward-facing actions.[39] The First Amendment protects a religious organization's ability to hire ministerial positions without state interference.[40] Title VII of the Civil Rights Act of 1964 provides that religious organizations and

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[30] *Id.*
[31] *See Watson*, 80 U.S. at 679.
[32] *Id.*
[33] *See, e.g.*, *Kedroff*, 344 U.S. at 94.
[34] *Id.* at 116.
[35] *Id.* at 115-16.
[36] *Id.* at 118.
[37] *Id.* at 114.
[38] *Kedroff*, 344 U.S. at 115.
[39] *See, e.g.*, Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724 (1976) (concluding that the state cannot involve itself in the internal discipline and government of the Church when a bishop claimed to have wrongfully been removed from his role).
[40] *See* Civil Rights Act, 42 U.S.C. § 2000e (1964).

institutions may choose to hire only co-religionists.[41] In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*,[42] the Court again affirmed this principle and cemented a broad understanding of which positions could be considered to be "ministerial" and therefore exempt from Title VII enforcement.[43] In this case, the Court found that a teacher was serving in a ministerial position and, therefore, did not have a valid employment discrimination claim.[44]

The Supreme Court has identified a "ministerial exception" under the First Amendment that religious organizations are entitled to use in their employment practices.[45] As evident from *Hosanna-Tabor*, the "ministerial exception" applies to employees serving in roles beyond the traditional ministerial role.[46] Federal courts have found a variety of religious organization employees are not protected under nondiscrimination laws including:

- a cemetery employee who organized religious services,[47]
- a theology professor,[48] and
- a music director.[49]

However, courts have not extended the ministerial exception to employees serving in purely custodial or janitorial roles.[50] Similarly, an organist who had no control over order of service and no contact with parishioners fell outside of the scope of the exception.[51] This means that a religious organization cannot discriminate on the basis of religion against a custodian, janitor, or

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[41] *Id.*
[42] 565 U.S. 171 (2012).
[43] *Id.* at 188.
[44] *Id.* at 190.
[45] *See*, *e.g.*, *id.*; Fisher v. Archdiocese of Cincinnati, 6 N.E.3d 1254 (Ohio Ct. App. 2014) *appeal denied*, 12 N.E.3d. 1230 (Ohio 2014); Klouda v. S.W. Baptist Theological Seminary, 543 F. Supp. 2d 594 (N.D. Tex. 2008); Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999); E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795 (4th Cir. 2000).
[46] *Hosanna-Tabor*, 565 U.S. at 190.
[47] *Fisher*, 6 N.E.3d at 1256-57.
[48] *See, e.g.*, Killinger v. Samford Univ., 113 F.3d 196, 197-98 (11th Cir. 1997).
[49] *See* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1037, 1041 (7th Cir. 2006).
[50] *Id.* at 1040 (hypothesizing that a janitor at the same church as plaintiff, who had no religious duties, would fall outside of the scope of the exception); Grussgott v. Milwaukee Jewish Day Sch. Inc., 260 F. Supp. 3d 1052, 1059 (E.D. Wis. 2017) (citing cases indicating that ministerial exception does not apply to janitorial staff); Hope Int'l Univ. v. Superior Court, 119 Cal. App. 4th 719, 738 (Cal. Ct. App. 2004) (same).
[51] Archdiocese of Washington v. Moersen, 925 A.2d 659 (Md. 2007).

administrative staff member unless it is relying on the co-religionist exemption. In order to claim the co-religionist exemption a religious organization would have to always hire, or prefer to hire, members of its own faith.

In addition to the Constitutional exception, Title VII contains a statutory exemption for religious organizations with regard to expressing a religious preference in employment.[52] Title VII's limited exemption allows religious corporations, associations, or societies to limit employment to members of their own faith, or co-religionists.[53] This narrow exemption extends to schools, colleges, and universities that are supported, owned, controlled or managed by a religious organization.[54] Federal courts have found that this exemption covers many types of religious entities and is not restricted to houses of worship alone.[55] These exempted religious entities include:

- A tax-exempt, non-profit organization associated with the LDS Church,[56]
- A retirement home operated by Presbyterian Ministries,[57]
- A newspaper published by the First Church of Christ, Scientist,[58]
- Christian elementary schools and universities,[59] and
- A non-profit medical center operated by the Seventh-Day Adventist Church.[60]

Neither the "ministerial exception" nor Title VII permits a secular employer to discriminate based on the employer's prejudices, morals, or religious-based beliefs.[61] This is true of all civil rights laws, including those that protect Christians, Jews and other religious individuals from discrimination.[62] A secular

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[52] 42 U.S.C. § 2000e-1(a).
[53] *Id.*
[54] *See Killinger,* 113 F.3d 196.
[55] *Id.*; *see also* Feldstein v. Christian Sci. Monitor, 555 F. Supp. 974 (D. Mass. 1983) (applying the Title VII religious exception to a church-controlled publication).
[56] *See, e.g.*, Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).
[57] E.E.O.C. v. Presbyterian Ministries, Inc., 788 F. Supp. 1154 (W.D. Wash. 1992).
[58] *Feldstein*, 555 F. Supp. at 974.
[59] Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991).
[60] Young v. Shawnee Mission Med. Ctr., Civil Action No. 88-2321-S, 1988 U.S. Dist. LEXIS 12248 (D. Kan. Oct. 21, 1988).
[61] 42 U.S.C. § 2000e.
[62] *Id.*

employer or a company that markets its goods and services to the general public cannot circumvent civil rights laws by asserting a religious belief. By the same token, civil rights laws cannot affect the ability of a person to hold contrary beliefs, based on religion or otherwise.

Congress also included a limited religious exemption in the 1968 Fair Housing Act in the context of the sale, rental, or occupancy of a dwelling owned by the organization for non-commercial purposes.[63] In addition, the law exempts single-family homes, sold or rented by the owner, as well as rooms or units for rent where there are no more than four units and the owner lives on the premises.[64] While the latter provision is not expressly a religious exemption, the Fair Housing Act allows people of faith to take into consideration the religious beliefs of individuals with whom they will be sharing close living quarters.[65]

In the context of public accommodations, Title II of the Civil Rights Act of 1964 requires that businesses open to the public must provide services on equal terms to all patrons.[66] Current law provides an exemption for private clubs and other establishments that are not actually open to the general public.[67] Churches and other places of worship providing spaces and services exclusively to their congregations, including meeting spaces or spaghetti dinners, are not considered to be places of public accommodation.[68] A common objection to marriage equality was that clergy would be compelled to perform a religious ceremony in conflict with their beliefs.[69] However, clergy operating in their ministerial capacity can

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[63] 42 U.S.C.S. § 3607 (LexisNexis, Lexis Advance through Public Law 116-56, approved August 23, 2019).

[64] *Id.*

[65] This is a privacy exemption that provides cover for religious discrimination, as well as any other sort of bias or prejudice.

[66] 42 U.S.C. § 2000a (2019).

[67] *Id.*

[68] *See* Traggis v. St. Barbara's Greek Orthodox Church, 851 F.2d 584, 586, 590 (2d Cir. 1988) (affirming lower court decision determining that church had not violated state civil rights law because church was not a public accommodation); Vargas-Santana v. Boy Scouts of Am., No. 05-2080, 2007 WL 995002, *6 (D.P.R. 2007) ("[A]s a matter of law, a church is not a place of public accommodation."); Saillant v. City of Greenwood, No. IPO1-1760 C-T/K, 2003 WL 24032987, *7 (S.D. Ind. Apr. 17, 2003) (finding that a church could exclude individuals at will because a "church is not a place of public accommodation").

[69] *See*, Fr. Mark Hodges, *States Could Force Catholic Priests to Perform Same-Sex 'Marriages' or Lose Legal Status: Justice Scalia*, LIFE SITE (Apr. 29, 2015, 5:45 PM), https://www.lifesitenews.com/news/states-could-force-catholic-priests-to-perform-same-sex-marriages-or-lose-l; *but see* Travis Weber, *Can Pastors and*

never be compelled to perform a religious ceremony under Title II because houses of worship are not public accommodations and any attempt to force clergy to perform a ceremony would be prohibited by the First Amendment.[70]

The key element of these cases is that the religious group's behavior specifically affects their internal matters and influences those who choose to identify as members of that religious community. The state does not interfere in these matters, even in cases of discrimination, because the religious group turns inward on itself as a community.[71] Such religious deference is founded on the common law principles enunciated in *Watson*[72] and commanded by the First Amendment.[73]

III. THE POWER TO REGULATE OUTWARD-FACING ACTIONS

In the case of religious organizations, the courts have clearly distinguished between inward-facing activities that affect members, and activities that are outward facing that impact non-members of a religious organization.[74] Courts have consistently affirmed the *Watson* decision that held that only individuals who voluntarily join a religious organization consent to be governed by it.[75] Non-members who have not united "to such a body" have not provided their implied consent to its government and, therefore, are not bound by its laws or decisions.

The federal government has placed clear limits of protections for outward-facing activities in the context of civil rights laws. Despite significant pressure from Southern Congressmen and religious leaders, Congress refused to incorporate a blanket religious exemption within the 1964 Civil Rights Act.[76] Opponents

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Churches Be Forced to Perform Same-Sex Marriage?, FAM. RES. COUNCIL, https://www.frc.org/clergyprotected.

[70] *See supra* notes 67-68.

[71] *See Hosanna-Tabor*, 565 U.S. at 184; *Milivojevich*, 426 U.S. at 709-11; *Kedroff,* 344 U.S. at 115-16; *Watson*, 80 U.S. at 737.

[72] *Watson*, 80 U.S. at 734-35.

[73] U.S. CONST. amend. I.

[74] Shelley K. Wessels, Note, *The Collision of Religious Exercise and Governmental Nondiscrimination Policies*, 41 STAN. L. REV. 1201, 1218-19 (1989).

[75] *Watson*, 80 U.S. at 729.

[76] *Civil Rights Commission: Hearing on S. 1117 and S. 1219 Before the Subcomm. On Constitutional Rights of the Comm. on the Judiciary*, 88th Cong. 41-43 (1963) (statement of Sen. Sam J. Ervin, North Carolina); *Civil Rights: Hearing on H.R. 7152 as Amended by Subcomm. No. 5 Before the H. Comm. on the Judiciary*, 88th

of integration argued that mandated integration in schools and in places of public accommodation violated their religious tenets and, therefore, could not be imposed upon them.[77] Mississippi Governor Ross Barnett described integration as the result of "Satanic propagandist," and many pastors argued that desegregation would result in the wrath of God.[78]

In 1964, there were still mainstream religions that approved of segregation because it was divinely ordained, but Congress still passed the 1964 Civil Rights Act without a religious exemption for businesses operating places of public accommodation.[79] Then Attorney General Robert Kennedy explained this eventuality as, "the need for this country to live up to its ideals" clearly outweighed "the right of privately owned public service enterprises to insult large sections of their public by refusing to serve them, for no reason than the arbitrary and immoral logic of bigotry." He concluded that recognizing that such a right was "plainly a right to commit wrong . . . [s]urely, in the balancing, there can be no question on which side the scales must fall."[80] It incorporated a narrow exemption for religious employers within Title VII, which was amended in 1972.[81]

In the 1950s and 1960s, business owners, schools, and judges argued that a religious belief in the divine command that the races should be forever separate justified the continuation of segregation and the denial of equal access to facilities and public life based on

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Cong. 2700 (1963) (statement of Robert F. Kennedy, Att'y Gen. of the United States).

[77] *Id.*

[78] *See Civil Rights—Public Accommodations: Hearing on S. 1732 Before the S. Comm. On Commerce*, 88th Cong. 394-96 (1963) (statement of Gov. Ross Barnett, Mississippi).

[79] E.W. Kenworthy, *President Signs Civil Rights Bill; Bids All Back It*, N.Y. TIMES (July 3, 1964), https://archive.nytimes.com/www.nytimes.com/library/national/race/070364race-ra.html.

[80] *Civil Rights—Public Accommodations: Hearing on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 22 (1963) (statement of Robert F. Kennedy, Att'y Gen. of the United States).

[81] Equal Opportunities Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103, ("This title shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.") (codified at 42 U.S.C. § 2000e-l (1972)) (amending 42 U.S.C. § 2000e-I (1970)).

race.[82] Even after passage of the 1964 Civil Rights Act, business owners still resisted compliance with the law arguing that they should be allowed to continue to discriminate based on religious beliefs in segregation.[83] In the 1968 case, *Newman v. Piggie Park Enterprises*, the Supreme Court disagreed.[84]

In this case, the owner of a chain of six popular barbecue restaurants in South Carolina, known as Piggie Park, refused to serve African-American patrons despite the passage of the Civil Rights Act of 1964.[85] The owner argued that he maintained his policy of not serving African-Americans because of his sincerely held religious beliefs.[86] The owner's attorneys responded that the owner believed "as a matter of faith that racial intermixing or any contribution thereto contravenes the will of God. As applied to this Defendant, the instant action and the Act under which it is brought constitute State interference with the free practice of his religion, which interference violates The First Amendment of the United States Constitution."[87]

This defense was rejected by the lower courts, as well as the Supreme Court, in a unanimous per curiam decision that characterized the religious argument as "patently frivolous.[88] The Court's decision held that religious beliefs cannot be used as a way to avoid obligations under the Civil Rights Act, and Piggie Park was therefore required to serve all customers equally regardless of race.[89] The Justices found this case to be so clear that they included a footnote stating "this is not even a borderline case" of discrimination.[90] The owner challenged Title II of the Civil Rights Act as unconstitutional "because it contravenes the will of God and constitutes an interference with the free exercise of the Defendant's

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[82] *Piggie Park*, 390 U.S. at 400 (1968); Brown v. Dade Christian Schs., Inc., 556 F.2d 310, 312 (1977); Judge Leon M. Bazile, *Primary Resource: Opinion of Judge Leon M. Bazile*, ENCYCLOPEDIA VIRGINIA (Apr. 25, 2014) https://www.encyclopediavirginia.org/Opinion_of_Judge_Leon_M_Bazile_January_22_1965.

[83] Not only business owners but also colleges and universities. *See, e.g.*, *supra* note 91.

[84] *Piggie Park*, 390 U.S. at 401-03.

[85] Note that some African Americans were able to place orders at the kitchen windows and were not permitted to eat on the premises. This is in the District Court decision.

[86] He also argued that his establishments were not covered by Title II.

[87] *Piggie Park*, 390 U.S at 401-03.

[88] *Id.*

[89] *Id.* at 401.

[90] *Id.* at n.5.

religion."[91] However, the Court rejected this defense. Ultimately, the Court agreed with the lower court decision that in the public accommodation context, the restaurant owner "has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens." [92] This decision has served as the frame for courts confronted with a so-called conflict of religious rights and civil rights.

The Supreme Court has also made clear that federal tax dollars cannot be used to discriminate regardless of an organization's underlying religious tenets.[93] In *Bob Jones Univ. v. United States*, the Supreme Court created the standard for denying tax-exempt status for organizations whose practices violated matters of public policy.[94] In this case, the IRS determined that Bob Jones University, a Christian school, violated public policy when creating and enforcing racially discriminatory policies including a ban on interracial dating, 16 years after *Loving v. Virginia*.[95] The Court's decision in *Bob Jones* is measured, providing an almost-clinical analysis to the development on the type of "fundamental public policy" that would warrant the denial of tax-exempted statuses.[96] Here, the Court provides, "[a]n unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals."[97]

Civil rights laws provide certainty and uniformity for both entities bound by them, as well as employees and customers. For protected classes, these provisions provide security and prevent the dignitary harms of being turned away from a business simply because of their identity. Congress and the courts recognize the importance of ensuring that civil rights laws can be relied upon by those that they are designed to protect. Religious exemptions dismantle this safety net. The incorporation of religious exemptions into civil rights provisions rob individuals of the true promise of civil rights laws – the ability to move through the world without fear of

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[91] *Id.*
[92] *Piggie Park*, 256 F. Supp. at 945.
[93] Bob Jones Univ. v. United States, 461 U.S. 574, 605 (1983).
[94] *Id.*
[95] *Id.* at 574-75.
[96] *Id.* at 592.
[97] *Id.* at 593.

discrimination and to have equal access to recourse under the law. Religious exemptions alienate the most marginalized communities from the law and privilege the regulated entities over the individual. This is contrary to the goals of the Civil Rights Acts as passed by Congress and the landmark Supreme Court decisions that have given them life.

IV. DISCRIMINATION AGAINST LGBTQ PEOPLE

This section explores the divergent judicial and statutory treatment of religiously motivated actions in the context of LGBTQ discrimination. This behavior has most recently manifested as a request for an exemption from compliance with general nondiscrimination laws on the basis of religious belief – like that argued for by Jack Phillips. Despite the efforts of Phillips' attorneys to create an expansive precedential ruling that would grant exemptions for for-profit business owners, the Supreme Court's narrow decision declined to directly engage the legality of so-called blanket religious exemptions.[98]

Lower courts have directly ruled on the role of religious exemptions from civil rights provisions. The 6th Circuit held in *EEOC v. R.G. & G.R. Harris Funeral Homes* that the Religious Freedom Restoration Act (RFRA) could not be used as a defense for unlawful discrimination.[99] In this case, after successfully working at a Michigan funeral home for years, Aimee Stephens informed her employer that she would be transitioning and begin wearing the women's uniform to work.[100] She was fired within days.[101] The funeral home argued that Title VII should not apply to them, because requiring the funeral home to continue to employ Stephens, while she presented as a woman, would constitute an unjustified substantial burden on the owner's sincerely held religious belief under RFRA.[102]

The 6th Circuit disagreed. It cited to two lower federal courts opinions, holding that Title VII served as the least restrictive means for ending employment discrimination – a well-established compelling government interest.[103] To counter a claim under RFRA,

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[98] *Masterpiece Cakeshop*, 138 S. Ct. at 1723.
[99] 884 F.3d 560, 590 (6th Cir. 2018) [hereinafter *Harris Funeral Homes*].
[100] *Id.* at 593.
[101] *Id.*
[102] *Id.* at 594.
[103] See Redhead v. Conf. of Seventh-Day Adventists, 440 F. Supp. 2d 211, 221-22 (E.D.N.Y. 2006) (holding that "the Title VII framework is the least restrictive

the government would only need to prove that the government action in question is the least restrictive means for accomplishing a compelling government interest.[104] Through this analysis, the 6th Circuit concluded enforcement of Title VII is the least restrictive means for achieving the end, while stopping employment discrimination.[105] The Court further relied on the decisions of state courts that held that nondiscrimination provisions not only survive strict scrutiny, but also allow for fewer religious-based exemptions than other generally applicable laws.[106]

In the absence of a Court ruling distinguishing LGBTQ discrimination from other types of discrimination that violate fundamental public policy, it is clear that a faithful application of Supreme Court precedent requires that these protections receive the same level of deference as other traditionally protected classes. Therefore, we must analyze claims for exemptions from general nondiscrimination provisions through the *Piggie Park* lens.[107]

In 1964, African American patrons could purchase barbecue at Piggie Park restaurants, but they were required to get take out through a window in the kitchen. The owner argued that he was not denying them service, but rather refusing to allow integration in his restaurant. He testified that it was his "belief as a Christian," premised on "the infallible word of God," that taught him that integration of the races was anathema.[108] Similarly, Jack Phillips argues that he does not denying service to same-sex couples as a

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means of furthering" the government's interest in avoiding discrimination against non-ministerial employees of religious organization) *adhered to on reconsideration*, 566 F. Supp. 2d 125 (E.D.N.Y. 2008); EEOC v. Preferred Mgmt. Corp., 216 F. Supp. 2d 763, 810–11 (S.D. Ind. 2002) ("[I]n addition to finding that the EEOC's intrusion into [the defendant's] religious practices is pursuant to a compelling government interest,"—i.e., "the eradication of employment discrimination based on the criteria identified in Title VII [. . . . W]e also find that the intrusion is the least restrictive means that Congress could have used to effectuate its purpose.").

[104] 42 U.S.C. § 2000bb (2000).

[105] *Harris Funeral Homes*, 884 F.3d at 560.

[106] *See* State v. Arlene's Flowers, Inc., 389 P.3d 543, 565–66 (2017), *cert. granted*, *judgement vacated*, 138 S. Ct. 2671 (2018).

[107] *Piggie Park*, 390 U.S. at 400 (1968).

[108] Newman v. Piggie Park Enterprises, Supreme Court Transcript of Record, Appendix at 9a, ¶2 (reproducing Bessinger's February 5, 1965, Answer to the Complaint). Bessinger reiterated his First Amendment defense in his First Amended Answer, filed August 23, 1965, and in a Second Amended Answer filed March 30, 1966. *See*, *id.*, Appendix at 12a, ¶2 (reproducing Bessinger's August 23, 1965, First Amended Answer); id at 12a, Sixth Defense (reproducing Second Amended Answer); *See also,* Christian Farias, *We've Already Litigated This,* SLATE (Dec. 4, 2017, 5:11 PM), https://slate.com/news-and-politics/2017/12/the-key-principle-in-the-masterpiece-cakeshop-case-was-litigated-in-1968.html.

class, but he will not sell them certain goods.[109] "Phillips gladly serves people from all walks of life, including individuals of all races, faiths, and sexual orientations, but he cannot design custom cakes that express ideas or celebrate events at odds with his religious beliefs."[110] The *Piggie Park* decision clearly provided that this type of discrimination undermines the uniformity and security of civil rights, especially those in which the laws were designed to protect.[111]

The 4th Circuit hearing the appeal in the *Piggie Park* case concluded that allowing this type of one-off discrimination or exemption from the generally applicable law would leave African American customers with "no idea whether or not they might be served and [they] would continue to occupy the intolerable position. . . in which they found themselves prior to passage of the [Civil Rights] Act."[112] Nondiscrimination provisions prohibiting discrimination on the basis of sexual orientation and gender identity must be fully enforced in order to accomplish the baseline goals of the government's interest in eradicating discrimination. Exempting businesses, like Masterpiece Cakeshop, to opt-out of these general laws leaves LGBTQ in the same "intolerable position" of potential discrimination that they were in prior to the protection's passage. The Supreme Court concluded that Piggie Park's argument that Title VII "contravened the will of God," and therefore should not be enforced, was "patently frivolous."[113]

Applying this framework to anti-LGBTQ outwardly-facing actions by religious organizations, courts should conclude that a religiously-affiliated child welfare agency serving nonmember children and prospective parents cannot turn LGBTQ individuals away, and a church-owned coffee shop cannot refuse to serve a transgender teenager based on their belief that to serve them would "contravene the will of God."[114] To do so would "utterly disregard" the clear rights of members of the general public who have not consented to be governed by the laws or standards of a religious entity that is not their own.[115]

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[109] Brief for Appellant at 6-7, Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (2015) (No. 14CA1351), 2015 Colo. App. LEXIS 1217.
[110] Brief for Petitioner at 8-9, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), 2018 U.S. LEXIS 3386.
[111] *Piggie Park,* 377 F.2d at 433.
[112] *Id.* at 435.
[113] *Id.* at n. 5.
[114] *Id.*
[115] *Watson*, 80 U.S. at 733.

V. CONCLUSION

For over a century, courts have embraced a framework distinguishing the behavior of religious organizations on the basis whether the actions are inward or outward facing. These standards safeguard the rights of organizations to develop and enforce their religious tenets among their members and engage in self-government without unconstitutional government intrusion. However, courts have also been clear that the rights of religious organizations to engage in actions that impact members of the general public and non-members are not unlimited. As Federal courts have affirmed, the right to believe is not "absolute" and cannot be practiced in "utter disregard of the clear constitutional rights of other citizens."[116] As the legal rights of LGBTQ people become more cemented, it is imperative that courts remain faithful to this well-established standard and recognize the rights of LGBTQ people in a way that is consistent with this nation's civil rights jurisprudence.

[116] *Piggie Park*, 256 F. Supp. at 945.