No. 16-111

IN THE

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD. AND
JACK C. PHILLIPS,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION,
CHARLIE CRAIG, AND DAVID MULLINS,

Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit civil rights legal organization that, for over 75 years, has fought to enforce the guarantee of equal protection and due process in the United States Constitution on behalf of victims of discrimination.

LDF has been involved in this case since it first reached Colorado's intermediate appellate court, *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015), and has participated as *amicus curiae* in cases across the nation about the rights of lesbian, gay, bisexual, transgender and queer (LGBTQ) individuals. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Romer v. Evans*, 517 U.S. 620 (1996); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Jackson v. Abercrombie*, 585 F. App'x 413 (9th Cir. 2014); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010); *Ingersoll v. Arlene's Flowers*, *Inc.,* 389 P.3d 543 (Wash. 2017); *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Gifford v. McCarthy*, 137 A.D.3d 30 (N.Y. App. Div. 2016).

LDF also has a long record on issues of religion and civil rights. While fighting for integration in public

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

accommodations, LDF has challenged religious justifications for discrimination. *See, e.g.*, *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968). At the same time, LDF has fought to vindicate the rights of victims of religious discrimination at work, *see Reid v. Memphis Publ'g Co.*, 468 F.2d 346 (6th Cir. 1972), the rights of religiously-motivated conscientious objectors, *see Clay v. United States*, 403 U.S. 698 (1971), and the rights of prisoners practicing their religion, *see O'Malley v. Brierley*, 477 F.2d 785 (3d Cir. 1973). LDF has also filed numerous briefs as *amicus curiae* in religious discrimination cases. *See, e.g.*, *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002), *cert. denied* 537 U.S. 835 (2002); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 246 (1991), *superseded on other grounds*, *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006); *Sostre v. McGinnis*, 442 F.2d 178, 181 (2d Cir. 1971), *overruled on other grounds*, *Davidson v. Scully*, 114 F.3d 12 (2d Cir. 1997).

Consistent with its opposition to all forms of discrimination, LDF has a strong interest in the fair application of public accommodations laws, including the Colorado law at issue here.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a familiar story: Three customers walk into a small business that sells specialty foods. The owner is said to be an "artist" for his unique culinary skills and believes his religious convictions imbue his work. The owner turns the customers away entirely or denies them access to the full range of his products because these religious beliefs forbid him from serving a particular group of persons. When the owner is challenged in court regarding his refusal to serve the customers, he claims that the First

Amendment should abrogate public accommodations laws and immunize his refusal to provide service.

This portrays what occurred in 2012 to Mr. Mullins, Mr. Craig, and Ms. Munn in the instant case—but it also describes what transpired in 1964 to three African-American customers at a barbeque restaurant in South Carolina, which led to this Court's seminal case addressing racial discrimination in public accommodations, *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968).

That restaurant, Piggie Park, was owned by Maurice Bessinger, who was deeply religious and believed that serving Black customers or contributing to racial intermixing in any way "contravene[d] the will of God." When a Black Baptist minister sought to enter the restaurant, Mr. Bessinger stood in the doorway to block him. On another occasion, when two other African Americans tried to patronize Piggie Park, Mr. Bessinger refused them access to a drive-in and would only allow them to purchase food if they abstained from consuming it on the premises. The customers sued, alleging that Mr. Bessinger's refusal to serve them violated Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a ("Title II"), which bars discrimination in public accommodations. *Newman v. Piggie Park Enters., Inc.,* 256 F. Supp. 941, 943 (D.S.C. 1966). When the case reached this Court, it unanimously held that Mr. Bessinger's conduct violated Title II because, as the district court had explained, "free exercise of one's beliefs, however, as distinguished from the absolute right to a belief, is subject to regulation when religious acts require accommodation to society." *Id.* at 945; *Piggie Park*, 390 U.S. at 402-03.

Piggie Park controls the outcome of this case and is an important reminder that the crossroads of religious

liberty and civil rights are historically complex and contested, with both defenders and opponents of equality invoking theological principles. During the Civil Rights Movement, religious leaders from numerous faiths—from Reverend Martin Luther King to Rabbi Abraham Joshua Heschel to Archbishop Patrick O'Boyle—were at the forefront of this nation's march towards equality. At the same time, theological arguments were regularly offered to sustain blatant forms of racial discrimination. In light of the claims before it today, this Court should be especially mindful of how religion has been used and abused to validate discrimination. *Infra* § I.

The logic of *Piggie Park* and other precedents overwhelmingly rejecting religious justifications for racial discrimination apply squarely to the context of LGBTQ discrimination. Religious beliefs, no matter how sincerely felt or perhaps well-intentioned, simply cannot justify differential treatment of LGBTQ individuals or couples in places of public accommodation. This Court should decline Petitioners' invitation to carve wide new exceptions into public accommodations law. *Infra* § II.

The central importance of *Piggie Park* to this case is unaltered by the fact that the Petitioners and the United States now argue that requiring a bakery to make a wedding cake for a same-sex couple is "compelled speech" that violates the First Amendment. There is no limiting principle that would permit exemptions for "artistic" or "custom" products without eviscerating public accommodations law, particularly when Colorado's statute is materially similar to Title II. Mr. Bessinger was also later described as an "artist" and his restaurant continues to offer "custom" wedding catering. *Infra* § 3.

All told, cases like *Piggie Park* are also a story of progress that should guide this Court as to how rulings about religion, expression, and anti-discrimination are publicly received and practically applied. The Court's 1968 ruling did not induce a major backlash or give rise to some new wave of religious disputes in the courts or in public life. It did not impede religious institutions from their important and constitutionally protected activities. It did not impinge upon the commercial success or culinary artistry of barbeque specialists or other caterers. Rather, people for the most part embraced the wisdom of this Court's ruling. Piggie Park continues to operate a vibrant chain of stores and the current owner—Mr. Bessinger's son—now speaks openly about rising above his father's legacy on race.

In the context of LGBTQ protections, the courts, the commercial sector, and the country are entirely capable of operating under generally applicable neutral laws while ensuring due respect to the personal religious views of individuals. Anti-discrimination laws, bolstered by this Court's rulings, have undergirded the extraordinary advancements that this country can make, and we urge the Court to reaffirm those protections and precedents once more.

ARGUMENT

While justifying racial discrimination on the basis of religion might seem outlandish or offensive today, the unfortunate truth is that those sorts of arguments were once common. In order for this Court to calibrate a careful balance between anti-discrimination principles and religious liberty, it should be especially mindful of how theology has previously been invoked to justify discrimination, *infra* § I, how jurists have handled those arguments, *infra* § II, and why

Petitioners' arguments under the Free Speech Clause must be rejected, *infra* § III.

I. RELIGIOUS BELIEFS HAVE HISTORICALLY BEEN USED TO JUSTIFY RACIAL DISCRIMINATION.

The relationship between theology and civil rights has long been complex and mixed. Religious figures and institutions undeniably played a critical and constructive role in the movement to end racial segregation and advance equality. But theological arguments were also frequently used to justify segregation and subordination in law and society.

Clergy from multiple faith traditions were deeply involved throughout the civil rights movement. When President John F. Kennedy sought to make progress on eliminating segregation and discrimination in voting, he convened religious leaders in the White House.[2] Catholic clergy actively supported the passage of Civil Rights Act of 1964,[3] and Archbishop Patrick A. O'Boyle delivered the invocation to the March on Washington.[4]

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[2] Civil Rights: Meeting with Religious Leaders, June 17, 1963, John F. Kennedy Presidential Library and Museum, https://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-097-011.aspx (last visited Oct. 25, 2017).

[3] Carol Zimmermann, *U.S. bishops backed Civil Rights Act, urged people to make it work*, Catholic News Service (June 27, 2014), http://www.catholicnews.com/services/englishnews/2014/u-s-bishops-backed-civil-rights-act-urged-people-to-make-it-work.cfm.

[4] Mark Zimmermann, *A prayer, and a life, for justice*, Catholic Standard (Aug. 14, 2013), http://www.cathstan.org/Content/News/Archdiocese/Article/A-prayer-and-a-life-for-justice/2/27/5770.

The most striking example of the intersection of religion and civil rights is embodied by Dr. Martin Luther King, Jr., who was called to the ministry at a young age and ordained at the Ebenezer Baptist Church in Atlanta, Georgia.[5] Dr. King's dedication to his faith infused many aspects of his thinking, speaking, and writing.[6] In the wake of the "Bloody Sunday" attack at the Edmund Pettus Bridge, Dr. King called "on religious leaders from all over the nation" to join a peaceful march.[7] A group of nuns traveled hundreds of miles to Selma, marched to the courthouse, and "knelt on the street to recite the Our Father [prayer] . . . before agreeing to turn around."[8]

Rabbi Abraham Joshua Heschel locked arms with Dr. King at the head of the Selma procession, symbolic of a deeper relationship the two shared dating back years. When Dr. King was assassinated, Mrs. King

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[5] *See* Russel Moldovan, *Martin Luther King, Jr.*, Christianity Today, Issue 65 (2000), http://www.christianitytoday.com/history/issues/issue-65/martin-luther-king-jr.html.

[6] *See, e.g.*, Martin Luther King, Jr., Res. & Educ. Inst., *Three Essays on Religion*, Stanford Univ. (1948-1951), https://kinginstitute.stanford.edu/king-papers/documents/three-essays-religion.

[7] Martin Luther King, Jr., Res. & Educ. Inst., King Encyclopedia, *Selma to Montgomery March (1965)*, Stanford Univ., http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_selma_to_montgomery_march/.

[8] Lilly Fowler, *St. Louis nun who marched in Selma looks back*, St. Louis Post-Dispatch (Mar. 7, 2005), http://www.stltoday.com/lifestyles/faith-and-values/st-louis-nun-who-marched-in-selma-looks-back/article_b7987a92-4b25-5f8d-98b8-8325a32cba7a.html.

invited the Rabbi to speak at his funeral.[9] Dr. King also maintained relationships with and drew knowledge from the Hindu, Buddhist, Muslim, and Confucian traditions.[10]

But religion has also been abused to rationalize blatant forms of racial subordination. Many of these religious arguments date back to before the Civil War and featured prominently in court decisions[11] and in

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[9] Susannah Heschel, *Theological Affinities in the Writings of Abraham Joshua Heschel and Martin Luther King, Jr.*, 50 Conservative Judaism 126, 126-28 (1998), http://www.rabbinicalassembly.org/sites/default/files/public/resources-ideas/cj/classics/heschel/theological-affinities-in-the-writings-o.pdf.

[10] *See generally* Martin Luther King, Jr., Res. & Educ. Inst., King Encyclopedia, *India Trip (1959)*, Stanford Univ., http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_kings_trip_to_india/ (describing Mahatma Gandhi); The King Center, Letter to the Noble Institute (January 25, 1967), http://www.thekingcenter.org/archive/document/letter-mlk-nobel-institute (regarding Buddhist monk); Martin Luther King, Jr., Res. & Educ. Inst., "Beyond Vietnam," Speech in New York, New York, April 4, 1967, Stanford Univ., https://kinginstitute.stanford.edu/king-papers/documents/beyond-vietnam (describing "Hindu-Muslim-Christian-Jewish-Buddhist belief"); Martin Luther King, Jr., Res. & Educ. Inst., "Worship at Its Best," Sermon at Dexter Avenue Baptist Church, Sermon in Montgomery, Alabama, Dec. 14, 1958, Stanford Univ., https://kinginstitute.stanford.edu/king-papers/documents/worship-its-best-sermon-dexter-avenue-baptist-church (describing Confucian worship).

[11] *Scott v. Emerson*, 15 Mo. 576, 587 (1852) (rejecting Dred Scott's claim for freedom from slavery and explaining that "we are almost persuaded, that the introduction of slavery amongst us was, in the providence of God, . . . a means of placing that unhappy race within the pale of civilized nations."). *See also Heirn v. Bridault*, 37 Miss. 209, 232 (High Ct. of Err. & App. 1859)

the statements of governmental officials and religious leaders.[12] For example, religious arguments were repeatedly used to justify anti-miscegenation laws and enforce such prohibitions with the threat of criminal punishment. In 1878, the Virginia Supreme Court upheld the conviction of an interracial couple, opining that divine will required that the races "should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion." *Kinney v. Virginia*, 71 Va. (30 Gratt.) 858, 869 (1878). Likewise, the Georgia

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(citing "the Divine and natural law" in denying African-American woman's claim of freedom), *disapproved of by Berry v. Alsop*, 45 Miss. 1 (1871); *Vance v. Crawford*, 4 Ga. 445, 459 (1848) ("Neither humanity, nor religion, nor common justice, requires of us to sanction or favor domestic emancipation . . . . To set up a model empire for the world, God in His wisdom planted on this virgin soil, the best blood of the human family.").

[12] *See* R. Randall Kelso, *Modern Moral Reasoning & Emerging Trends in Constitutional and Other Rights Decision-Making Around the World*, 29 Quinnipiac L. Rev. 433, 437 (2011) (quoting Jefferson Davis, the President of the Confederate States of America, as stating that "[slavery] is sanctioned in the Bible, in both Testaments, from Genesis to Revelation"); Hathi Trust Digital Library, *An Address to Christians Throughout the World*, Conference of Ministers, Assembled at Richmond, Va., April 1863, at 7, http://bit.ly/1JINW0o ("[W]e testify in the sight of God, that the relation of master and slave among us, however we may deplore abuses in this. . . is not incompatible with our holy Christianity, and that the presence of the Africans in our land is an occasion of gratitude on their behalf, before God."); Alexander H. Stephens, "Corner Stone" Speech, Savannah, Georgia, Teaching American History (Mar. 21, 1861), http://bit.ly/1deFCoK (quoting the Vice President of the Confederate States of America, as stating that "Subordination is [the Negro's] place. He, by nature, or by the curse against Canaan, is fitted for that condition which he occupies in our system.").

Supreme Court upheld a criminal conviction of an African-American woman for cohabitating with a white man, reasoning that no laws create

> moral or social equality between the different races or citizens of the State. Such equality does not in fact exist, and never can. The God of nature made it otherwise, and no human law can produce it, and no human tribunal can enforce it.

Scott v. Georgia, 39 Ga. 321, 326 (1869). These sorts of justifications continued for years. *See, e.g., Naim v. Naim*, 87 S.E.2d 749, 752 (1955) (upholding anti-miscegenation law on the grounds that "states [have the right] to regulate and control, to guard, protect, and preserve this God-given, civilizing, and Christianizing institution [of marriage]"). And in the landmark case of *Loving v. Virginia*, the trial judge asserted the following when sentencing the interracial couple:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix.

388 U.S. 1, 3 (1967) (internal quotation omitted).

Religious arguments were also commonly used to justify school segregation. *See, e.g.*, *Berea Coll. v. Kentucky*, 94 S.W. 623, 626 (1906), *aff'd,* 211 U.S. 45 (1908) (upholding a law prohibiting integrated schools, noting that "separation of the human family into races, distinguished . . . by color . . . is as certain as anything in nature" and is "divinely ordered."). In a concurring opinion one year after *Brown v. Board of Education*, justices of the Florida Supreme Court criticized school integration, asserting that "when God created man, he allotted each race to his own continent according to

color, Europe to the white man, Asia to the yellow man, Africa to the black man, and America to the red man." *Florida ex rel. Hawkins v. Bd. of Control*, 83 So. 2d 20, 28 (Fla. 1955) (Terrell, J., concurring). And, when addressing states' obligation to comply with *Brown*, these judges declared that "we are now advised that God's plan was in error and must be reversed." *Id.* Similarly, in his infamous 1963 "Segregation Now, Segregation Forever" inaugural address, Alabama Governor George Wallace declared that the federal government's effort to enforce desegregation "is a system that is the very opposite of Christ." Ala. Governor George Wallace, Inaugural Address (1963): The "Segregation Now, Segregation Forever" Speech (Jan. 14, 1963), http://bit.ly/1Nnp9cK.

Religion has also long been used to justify racial discrimination in public accommodations. For instance, in addressing a challenge to segregation on railroads, the Pennsylvania Supreme Court wrote that "the Creator" made two distinct races and that "He intends that they shall not overstep the natural boundaries He has assigned to them." *West Chester & Phila. R.R. v. Miles*, 55 Pa. 209, 209, 213 (1867). The court held that such segregation "is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of the races established by the Creator himself, and not to compel them to intermix contrary to their instincts." *Id.* at 214.

Even the Civil Rights Act of 1964 initially faced religion-based resistance. For example, West Virginia Senator Robert Byrd criticized the Act, citing multiple Bible passages, including "the Levitical rules against interbreeding cattle and sowing with 'mingled seed'" to conclude that "God's statutes, therefore, recognize the natural order of the separateness of things." William N. Eskridge Jr., *Noah's Curse: How Religion Often*

Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms, 45 Ga. L. Rev. 657, 675 (2011) (quoting 110 Cong. Rec. 13,206-07 (1964)).

Congress nonetheless refused to offer blanket exemptions to Title II for the religious beliefs of proprietors of public accommodations.[13] As explained below, steadfast efforts of the civil rights community eventually discredited religious defenses of discrimination and segregation.

II. THIS COURT'S PRECEDENTS REJECTING THEOLOGICAL EXEMPTIONS TO PUBLIC ACCOMMODATIONS LAWS IN THE CONTEXT OF RACIAL DISCRIMINATION ARE APPLICABLE TO THIS CASE INVOLVING SEXUAL ORIENTATION DISCRIMINATION.

By the middle of the twentieth century, courts generally stopped accepting religious motivations as acceptable rationales for racial discrimination. In 1967, the Supreme Court in *Loving* struck down Virginia's anti-miscegenation laws, explaining that they have "patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification." 388 U.S. at 11. Viewed in its proper historical context, *Loving* constituted a

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[13] *Compare* 42 U.S.C. § 2000a (prohibiting discrimination or segregation in places of accommodation) *with* 42 U.S.C § 12187 (providing limited exemptions to Title II for private clubs and religious organizations). Similarly, the Colorado law features limited exemptions for religious entities. Colo. Rev. Stat. Ann. § 24-34-601 (West 2014) ("'Place of public accommodation' shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes.").

major repudiation of nearly a century of lower court decisions that had repeatedly drawn upon religion to ban interracial marriage.[14]

Just a year later, this Court followed a similar path in *Piggie Park*. In that watershed case, which was litigated by LDF, three African-American customers challenged the owner's refusal to serve them under Title II. 256 F. Supp. at 942-43. The owner, Mr. Bessinger, asserted that his right to the free exercise of religion meant that Title II could not be applied against him. *Id.* at 944-45. The district court spurned his First Amendment argument, explaining that small business owners do "not have the absolute right to exercise [religious beliefs] . . . in utter disregard of" the rights of "other citizens." *Id.* at 945.

This Court unanimously affirmed the core holding that the Civil Rights Act applied with full force, notwithstanding Mr. Bessinger's First Amendment arguments, and held that he had plainly violated Title II. In a straightforward decision just eleven days after oral argument, the Court stressed that "this is not even a borderline case" and flatly rejected the owner's defenses "that the [Civil Rights] Act was invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion.'" 390 U.S. at 403 n.5 (internal citations omitted).

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[14] S*ee also* Phyl Newbeck, *Virginia Hasn't Always Been for Lovers: Interracial Marriage Bans and the Case of Richard and Mildred Loving* xii (2004) (considering *Loving* to be "one of the major landmarks of the civil rights movement"); John DeWitt Gregory & Joanna L. Grossman, *The Legacy of* Loving, 51 Howard L.J. 15, 52 (2007) ("Legalizing interracial marriage was an essential step toward racial equality.").

When viewed in historical context, *Piggie Park* was even more momentous than it might seem in the abstract today. At the time *Piggie Park* was decided, Mr. Bessinger's religious beliefs were relatively mainstream, making the Court's rejection of a religious-exemption to Title II even more significant.[15] Far from viewed as fringe or disingenuous at the time, Mr. Bessinger enjoyed considerable political traction and became a statewide political figure.[16]

Fifteen years after *Piggie Park*, this Court again held that religion cannot excuse compliance with antidiscrimination law. In 1983, Bob Jones University sought a religious exemption from tax law that would allow it to maintain its policy of prohibiting

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[15] Local news reports at the time treated Mr. Bessinger's claims as legitimate, if not downright sympathetic. *See, e.g.*, *Judge Simons Refuses to Dismiss Case*, Aiken Standard & Rev., Apr. 5, 1966, at 1. Contemporaneous accounts confirm that Mr. Bessinger's refusal to serve Black customers resulted from sincerely held religious beliefs, *Simons Hears Bessinger Case in Court*, Aiken Standard & Rev., Apr. 6, 1966, at 1, and he eventually even began a religious mission in the parking lot of his store, Debbie Bass, *Maurice Bessinger: This Little "Piggie" Cornered the Market*, Aiken Standard, Sept. 16, 1990, at 6; *see also* Rien Fertel, *The One True Barbecue: Fire, Smoke, and the Pitmasters Who Cook the Whole Hog* 159 (2016).

[16] *See, e.g.*, *Independents Ask State Sanction as Political Party*, Florence Morning News, Dec. 19, 1967, at 3-B (garnering thousands of signatures for a new political party of which he was chairman); Rob Wood, *Bessinger Seeks to Help Common Man in Campaign*, Aiken Standard, June 25, 1974, at 12 (entering the 1974 South Carolina gubernatorial race to some acclaim). To this day, "Bessinger occupies an outsized spot in S.C. lore." Kathleen Purvis, *Can a S.C. barbecue family rise above their father's history of racism?*, Charlotte Observer (Dec. 8, 2016), http://www.charlotteobserver.com/living/food-drink/article119660858.html.

prospective or current students from engaging in, or advocating for, interracial dating and marriage. *Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983).[17] An 8-1 majority of the Court held that the school's religious justification could not overcome Congress' interest in "a firm national policy to prohibit racial segregation and discrimination in . . . education." *Id.* at 592-93. Even the lone dissent expressed "no disagreement with the Court's finding that there is a strong national policy in this country opposed to racial discrimination" and expressly "agree[d] with the Court that [a] requirement [that tax-exempt organizations not practice discrimination] would not infringe on petitioners' First Amendment rights." *Id.* at 622, 622 n.3 (Rehnquist, C.J., dissenting).

The overarching lesson of *Piggie Park, Bob Jones*, and *Loving* is that this Court has repeatedly and unambiguously rejected religious-based justifications for differential treatment. And for good reason: the government has a compelling interest in combating discrimination in its various forms. This interest sustains public accommodations statutes and forecloses efforts to carve constitutional exemptions into statutes for merchants who raise religious concerns.

The Solicitor General attempts to limit these central precedents by appending a caveat in the final paragraphs of his brief: he states that applying "public

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[17] By contrast, the Solicitor General defended the constitutionality of the law there. Brief for United States at 42, 46, *Bob Jones Univ. v. United States,* No. 81-3 (Feb. 1982) (urging the Court to "not reach petitioner's claims under the First Amendment" but arguing that IRS "rulings do not place more than an indirect and limited burden upon any person's . . . right to free religious belief or exercise").

accommodations law to protected expression [may not] violate the Constitution" in the context of race-based discrimination because "'racial bias' is 'a familiar and recurring evil' that poses 'unique historical, constitutional, and institutional concerns.'" Br. for United States as *Amicus Curiae* at 32 (citation omitted); *see also id.* ("'eradicating racial discrimination' in the private sphere is the most 'compelling' of interests.") (quoting *Bob Jones,* 461 U.S. at 604). The Solicitor General further asserts that "[t]he same cannot be said" for LGBTQ discrimination because sexual orientation is not yet subject to strict scrutiny—and because some states have banned LGBTQ discrimination but not yet allowed same-sex marriages (pre-*Obergefell*). *Id.* at 32-33. The Solicitor General's attempt to avoid the obvious import of precedent is unpersuasive for several reasons.

First, as a threshold point, neutral laws of general applicability are generally not overridden by religious beliefs and need not be sustained by a compelling interest. *See, e.g.*, *United States v. Lee*, 455 U.S. 252, 260 (1982) (unanimously holding that "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."). When this Court has considered and rejected religious exemptions in the past, those precedents are not limited to the context of racial discrimination simply because they originally arose in that context. Indeed, state officials recently attempted to constrain the application of *Loving* in that manner, but this Court clearly rejected that attempt. *Compare* Brief for Respondent, *Obergefell v. Hodges*, No. 14-556, 2015 WL 1384100 at *37-38 (U.S. Mar. 27, 2015) (arguing it is "frivolous to assert that same-sex

marriage fell within the right protected by *Loving*") *with Obergefell*, 135 S. Ct. at 2602-03 ("*Loving* did not [narrowly] ask about a 'right to interracial marriage'," rather it "reflect[s] [the broader] dynamic" that the "Due Process Clause and the Equal Protection Clause are connected in a profound way."); *see also Obergefell*, 135 S. Ct. at 2584-2606 (invoking *Loving* nine times).

Second, the Solicitor General's cramped framing of the compelling interests at stake here ignores key decisions and filings. This Court has made clear that the government has a significant interest in "eliminating discrimination and assuring its citizens equal access to publicly available goods and services" which "plainly serves compelling state interests of the highest order." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). *See also R.A.V. v. City of St. Paul,* 505 U.S. 377, 395 (1992) (stating that there is "no[] doubt . . . [a] compelling" interest in "ensur[ing] the basic human rights of members of groups that have historically been subjected to discrimination"). Indeed, in past filings, the Solicitor General has long articulated a more comprehensive interest in anti-discrimination.[18]

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[18] *See, e.g.*, Brief for Respondents, *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-556, 2014 WL 546900 at *10 (U.S. Feb. 10, 2014) (recognizing the "compelling interest[] in . . . gender equality"); Brief for Federal Respondent, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, No. 10-553, 2011 WL 3319555 at *43 (U.S. Aug. 2, 2011) (recognizing the "compelling interest in eliminating discrimination in the workplace" under the ADA, Title III, and other statutes); Brief for Respondents, *Adarand Constructors, Inc. v. Mineta*, No. 00-730, 2001 WL 950868 at *35 (U.S. Aug. 10, 2001) ("the federal government has a compelling interest in . . . discrimination-based and discrimination-reinforcing [] distribution of federal funds"); *id.* at *17, 26 (defending the constitutionality of federal contracting program that sought to remedy discrimination

Similarly, Colorado has a compelling interest in countering discrimination against every category of persons protected by state law. That includes discrimination against gay and lesbian individuals, who have been subjected to blatant and pervasive forms of discrimination. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2596 (for most of the 20th century, homosexuality was treated as immoral, as an illness, and as a crime); *Baskin v. Bogan*, 766 F.3d 648, 658 (7th Cir. 2014) ("[H]omosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world."), *cert. denied*, 135 S. Ct. 316 (2014); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 486 (9th Cir. 2014) ("Empirical research has begun to show that discriminatory attitudes toward gays and lesbians persist."). As with race, discrimination on the basis of sexual orientation also turns on a person's immutable characteristics. *See Obergefell*, 135 S. Ct. at 2596 ("psychiatrists and others recognized that sexual orientation is . . . immutable").

Third, the Solicitor General's points about the timing of Colorado's legalization of same-sex marriage and the nascent application of strict scrutiny both boil down to the fact that the underlying rights at issue were recognized relatively recently. But that should not affect the outcome here and it has not been a factor for this Court in the past. For example, the litigation in *Piggie Park* began in December 1965, only five months after the enactment of Title II, and reached

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against "socially and economically disadvantaged" individuals, including women); Brief for the United States, *United States v. Johnson*, No. 94-929, 1995 WL 89331 at *39 (U.S. Feb. 23, 1995) ("A State may also have a compelling interest, independent of the Voting Rights Act, in eradicating the effects of past discrimination").

this Court approximately two years later (in October 1967). Yet this Court did not hesitate to employ the full strength of Civil Rights Act and refused to fashion a religious exemption to the statute. It has been two years since the recognition of marriage equality in *Obergefell* and there has already been rapidly growing support for LGBTQ equality among states and the public.[19] A new judicial recognition of an underlying right simply cannot be dispositive of the application of First Amendment principles.

Overall, the additional risk of Petitioners' expansive conception of religious exemptions is that it could apply to the hiring and firing of employees and have even more drastic implications for the country and federal law. Under their view, a bakery could presumably refuse to hire a sous-chef with different religious beliefs because that would compromise the bakery owner's message (cakes) or convey endorsement of the sous-chef's beliefs. Likewise, a bakery could refuse to hire female employees or pay them less because of the owner's religious beliefs about the sanctified role of women. This portends grave trouble for employment law and could even countenance sectarian tension.[20]

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[19] Already, twenty states and the District of Columbia explicitly prohibit discrimination on the basis of sexual orientation in public accommodations. ACLU, *Non-Discrimination Laws*, State by State Information – Map, https://www.aclu.org/files/pdfs/lgbt/discrim_map.pdf (last visited Oct. 25, 2017). *See also* Pew Research Center, *Changing Attitudes on Gay Marriage* (June 26, 2017), http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/.

[20] Petitioners' position could also give license to inter-religious discrimination in business. For example, a restauranteur might refuse to hire or serve persons whose religious tenets materially

Ultimately, the journey out of Jim Crow, though onerous, has shown that part of the genius of the Constitution is that it enshrines both free exercise and equal protection. These two principles can live in harmony when neutral laws of general applicability, such as public accommodations statutes, are uniformly enforced and reasonably applied. In this nation, we rightly cherish religious liberty and go to great lengths to accommodate individuals in their beliefs and practices. But this liberty must yield to such neutral laws, especially when they are supported by the compelling interest in eliminating discrimination.

III. PETITIONERS' THEORY OF FREE SPEECH CANNOT CIRCUMVENT THIS COURT'S PRECEDENTS ON DISCRIMINATION.

Finally, Petitioners cannot distinguish *Piggie Park* by advancing a speech claim in addition to a free exercise claim. By Petitioners' own account, those claims are two sides of the same coin. Petitioners Merits Br. at 9 ("*Because* weddings and marriage have such religious significance to Phillips, he would consider it sacrilegious to express *through his* art an idea about marriage that conflicts with his religious beliefs.") (emphasis added). Nor does Petitioners' speech claim distinguish *Piggie Park*'s central holding,

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conflict with his own. This too harkens back to *Piggie Park* days, where one of the Black patrons was a Baptist minister who undoubtedly had a different Biblical view of integration than Mr. Bessinger. *See, e.g.*, John Monk, *Barbecue eatery owner, segregationist Maurice Bessinger dies at 83*, The State, Feb. 24, 2014, http://www.thestate.com/news/business/article 13839323.html (recounting how Mr. Bessinger "stood in the door of one of his stores to prevent a black minister from entering"); *see also* Fertel, *supra*, n.15, at 160 (describing encounter with Baptist minister in the doorway).

which is that the First Amendment does not create a constitutional right to discriminate. Indeed, under Petitioners' theory, Mr. Bessinger would have succeeded in *Piggie Park* had he simply relabeled his claims. Instead of arguing his religious beliefs forbade integration, Mr. Bessinger should have raised a compelled speech claim and argued that his religious beliefs meant "he consider[ed] it sacrilegious to express through his [culinary] art an idea about [integration] that conflicts with his religious beliefs," *Id.* at 9.

But it cannot be that *Piggie Park* would have reached the opposite conclusion if Mr. Bessinger had tacked on a theory of compelled speech. Nothing in the First Amendment suggests that identical discrimination, motivated by the very same beliefs, is exempt from public accommodations laws so long as it is framed as a free speech claim rather than a free exercise claim. Indeed, many religious acts feature public expressions of faith and communicative symbolism.

More fundamentally, this Court should be under no illusion that the compelled speech doctrine would be a narrower way to resolve this case or that the consequences for anti-discrimination laws would be any less sweeping. The Solicitor General suggests that this "case falls within the small set of applications of content-neutral laws that merit heightened scrutiny" and that public accommodations laws will be implicated "in only a narrow set of" circumstances. Br. for United States as *Amicus Curiae* at 21, 23. Those assertions ring hollow because there is no limiting principle for the Government's submission that the "artistic" or "custom" nature of cake-baking renders it constitutionally exempt from public accommodation laws.

Applying that same rationale to *Piggie Park* makes clear that the exception would quickly swallow the rule. Barbecue is commonly understood to be a form of art by federal entities, historians, culinary organizations, and trade organizations.[21] Mr. Bessinger himself was described as an "artist."[22] Moreover, barbeque is also often customized and featured in wedding ceremonies. To this day, Piggie Park's catering program offers a "custom menu" and "customizable" packages, including for "wedding[s]" as well as "church event[s]" and "rehearsal dinner[s]."[23]

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[21] *See* Visit The USA, *Barbecue: An American Culinary Art Form*, https://www.visittheusa.com/experience/barbecue-american-culinary-art-form (last visited Oct. 25, 2017) (chief tourism entity identifying barbecue as "[a]n American [c]ulinary [a]rt [f]orm"); Douglas H. Stutz, Face of Defense: Sailor-Chef Excels at Culinary Competition, U.S. Dep't of Defense News (May 24, 2017), https://www.defense.gov/News/Article/Article/1191801/face-of-defense-sailor-chef-excels-at-culinary-competition/ (Armed Forces hosting "culinary arts competition" with category dedicated to barbeque); Library of Congress, *Barbecue: A History of the World's Oldest Culinary Art*, Webcast (June 24, 2005), https://www.loc.gov/today/cyberlc/feature_wdesc.php?rec=3722 (lecture at Library of Congress); John T. Edge, *BBQ Nation: The Preservation of a Culinary Art Form*, Saveur, May 26, 2011, http://www.saveur.com/article/Travels/BBQ-Nation; Kansas City Barbecue Society, Board of Director's Meeting (August 8, 2012), https://www.kcbs.us/news.php?id=534 (describing barbecue as "art form").

[22] David Orr, *Poetic Injustice*, Slate.com (Feb. 28, 2003), http://www.slate.com/articles/arts/culturebox/2003/02/poetic_injustice.html.

[23] Maurice's Piggie Park BBQ, Catering, https://www.piggiepark.com/catering/ (last visited Oct. 25, 2017) (featuring "most popular wedding menu" and noting "wedding season fill[s] up fast."); Maurice's Piggie Park BBQ, *Party & Event Catering: A Taste of Carolina*, https://www.piggiepark.com/resources/CateringNEWFlyer2014sm.pdf.

Grilled meat can also contain expressive messages (both written and symbolic) and is customized and served at weddings in a variety of ways.[24]

This goes to show how far-reaching the implications of this case could be, even under Petitioners' faux-modest limiting principle. It certainly would not be limited to wedding cakes. Already, Petitioners' *amici* suggest the decision here will apply not only to "cake artists," but also to a wide array of "creative professionals" such as "Photographers; Videographers; . . . Florists; Website Designers; Singers and DJs; Calligraphers; and Painters." Br. of *Amici Curiae* Int'l Christian Photographers, *et al.* at 7-8. Other *amici* go even further, discussing how the legal issues here "can apply to *anyone* who is in the business of selling the products of their intellectual or artistic expression." Br. for *Amici Curiae* The Cato Institute, *et al.* at 12.

This would inevitably embroil the judiciary in adjudicating a flurry of questions at the nexus of expression, artistry, and religion: Is a custom-made barbecue menu for a wedding materially more or less artistic than a custom-made wedding cake? Does it depend on the scriptural connections to the type of food served, for example cooked meats? *See Matthew* 22:1-14 (English Standard Version) ("oxen and my fat calves have been slaughtered. . . . Come to the wedding feast."). Is a designer wedding dress expressively or religiously the same as a tailor-made garter belt? Would the same exceptions apply to other types of

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[24] BBQFans.com, *Branding Irons,* https://www.bbqfans.com/branding-irons/ (last visited Oct. 25, 2017); HomeWetBar.com, *Meat Mark-It Personalized Steak Branding Iron*, https://www.homewetbar.com/Meat-Mark-Personalized-Steak-Branding-Iron-p-526.html (last visited Oct. 25, 2017). *See also* Offbeat Bride, *This BBQ wedding featured a "first rib"* (Mar. 24, 2017), http://offbeatbride.com/la-bbq-wedding/.

expressive events, such as funerals, anniversaries, or birthday parties?

The net effect would be to seriously hobble anti-discrimination enforcement efforts across the board. This was the same threat that the Court in *Piggie Park* stared down and ultimately contained. Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. Cal. L. Rev. 619, 642, 659 n.116 (2015) (if the claim in *Piggie Park* had "succeeded there surely would have been others" and "the statute [Civil Rights Act of 1964] would have had little or no effect."). In order to ensure that the decision in *Piggie Park* is not upended, Petitioners' free speech argument must be soundly rejected.

CONCLUSION

Protecting the promise of equal protection and the free exercise of religion is a critical and delicate task of the highest order. Our nation has at times fallen short of upholding these dual principles: for decades, courts accepted theological arguments to justify racial discrimination, at great cost to our Constitution and our citizenry.

But this Court's decisions in *Loving, Piggie Park*, and *Bob Jones* turned the page away from this history, forcefully rejecting arguments that religious beliefs could justify legal discrimination. Those decisions did not result in a massive backlash or unnecessary intrusion of the judiciary into religious life. Bob Jones University apparently no longer doubts that *Bob Jones* was correctly decided: it has apologized for its discriminatory policies. Bob Jones Univ., *Statement about Race at BJU*, http://bit.ly/1Nnpc8s (last visited Oct. 25, 2017). Similarly, Mr. Bessinger's son, who now runs the Piggie Park chain of a dozen restaurants,

explains that his family "disagreed with [his father's] the message [of segregation]," and is "trying to move forward." Purvis, *supra*. All of this reflects the broader teaching that "what once was a 'natural' and 'self-evident' ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 466 (1985) (Marshall, J., concurring).

That same sort of progress is possible in the context of LGBTQ persons, as has already shone through in *Windsor*, *Obergefell*, and beyond. There has already been sweeping and swift acceptance of those rulings. But the advancement of equality is not inevitable: This Court can preserve the critical protections of public accommodations laws, which shield us all, while also duly guarding individual religious liberty. For the foregoing reasons, the Court should affirm the decision of the Colorado Court of Appeals.

Respectfully submitted,

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