

IN THE
Supreme Court of the United States

ST. MARY CATHOLIC PARISH,
LITTLETON, COLORADO, *et al.*,

Petitioners,

v.

LISA ROY, IN HER OFFICIAL CAPACITY AS
EXECUTIVE DIRECTOR OF THE COLORADO
DEPARTMENT OF EARLY CHILDHOOD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

**BRIEF OF *AMICI CURIAE* LEGAL
SCHOLARS IN SUPPORT OF EQUALITY
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICI CURIAE¹

Amici are law professors who focus on LGBTQ rights and antidiscrimination law in their scholarship and/or teaching. Kyle C. Velte is the author of several law review articles about the issues presented in this case, including an article on which this brief is based.²

SUMMARY OF ARGUMENT

For over a century, this country has confronted the tension between the Reconstruction Amendments' pledge to uphold the principle of antidiscrimination and the First Amendment's commitment to the free exercise of religion.³

1. Counsel for a party has not authored the brief in whole or in part; nor has such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief.

2. See Kyle C. Velte, *Recovering the Race Analogy in LGBTQ Religious Exemption Cases*, 42 CARDOZO L. REV. 67 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3549952; see also Kyle C. Velte, *Identity and Procedural Subordination in LGBTQ Religious Exemption Cases*, 31 WM. & MARY J. RACE, GENDER & SOC. JUSTICE, 117 (2025); Kyle C. Velte, *Debunking the Narrowness Narrative in LGBTQ Rights Cases*, 68 ST. LOUIS U.L.J. 885 (2024); Kyle C. Velte, *The Nineteenth Amendment as a Generative Tool for Defeating LGBTQ Religious Exemptions*, 105 MINN. L. REV. 2659 (2021); Kyle C. Velte, *Why the Religious Right Can't Have Its (Straight Wedding) Cake and Eat It Too: Breaking the Preservation-Through-Transformation Dynamic in Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 36 L. & INEQ. 67 (2018); Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenge to Anti-Discrimination Statutes*, 49 CONN. L. REV. 1 (2016).

3. See Carlos A. Ball, *Against LGBTQ Exceptionalism in Religious Exemptions from Antidiscrimination Obligations*, 31 J. C.R. & Econ. Dev. 233, 237–38 (2018); see also *Masterpiece*

This Court’s precedents are clear: there are no religious exemptions from racial antidiscrimination laws. Those cases resulted in “time-tested, reasonable, and workable”⁴ balances. The legal framework governing religious exemption requests seeking to discriminate based on sexual orientation and gender identity (“SOGI”) should be the same. This Court’s prior rejection of religious exemptions to discriminate based on race provides a workable and reasonable framework to manage (and reject) religious exemption requests to engage in SOGI discrimination.

As Respondents urge, *Employment Division v. Smith*⁵ resolves this case. Supporting that position, this brief explains how the Court’s rejection of race-based religious exemptions also resolves SOGI religious exemption cases. That framework properly averts normative assessments of who is supposedly honorable or prejudiced. Constitutional law has no business singling out and critiquing the normative or moral value of religious beliefs underlying requests for religious exemptions. Indeed, the Court does not make such assessments of other, non-religious objections to antidiscrimination law. The Court’s time-honored precedent rejecting religious exemption requests in the racial context should apply to SOGI discrimination. Doing so furthers the law’s important interest in legal coherence, stability, and consistency.

Cakeshop, Ltd. v. Colo. Civil Rights Comm’n, 584 U.S. 617, 625 (2018); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (per curiam).

4. Ball, *supra* note 3, at 238.

5. 494 U.S. 872, 879 (1990).

Because *Smith* dictates a rejection of race-based religious exemption in this case, so too does *Smith* dictate a rejection of the SOGI-based religious exemption sought in this case. In short, there is no legal or logical daylight between the treatment of religious objections based on SOGI and religious objections based on race.

Here, St. Mary Catholic Parish (“the Parish”) seeks a religious exemption from Colorado’s Universal Preschool Program equal-opportunity requirements (“UPK”). UPK prohibits publicly-funded preschools from turning away children and families based on membership in a protected class, including SOGI, religious affiliation, race, ethnicity, disability, income level, and lack of housing.⁶ UPK’s equal-opportunity requirements are akin to the requirements of the Colorado Anti-Discrimination Act (“CADA”), Colorado’s antidiscrimination and public accommodations law. Like UPK, CADA prohibits discrimination based on race, creed, sexual orientation, and disability, among other protected classes.⁷

UPK and public accommodation law have similar equal opportunity requirements, so this Court’s recent holdings in public accommodations religious exemption cases—*Masterpiece Cakeshop, Ltd. v. Colorado Civil*

6. See COLO. REV. STAT. § 26.5-4-205(2)(b) (requiring that publicly funded providers ensure all eligible children receive “an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child’s family.”).

7. COLO. REV. STAT. § 24-34-601 (2020).

*Rights Commission*⁸ and *Fulton v. City of Philadelphia*⁹—provide a useful analytic starting point for this case. In *Masterpiece*¹⁰ and *Fulton*,¹¹ this Court left open whether an analogy to race is appropriate in religious exemption cases involving SOGI. Many agree that courts should, and would, reject a religious exemption request to turn away an African American or interracial family from preschools based on a religious belief that races should not mix.¹² Following that logic, courts should likewise reject the Parish’s religious exemption request to turn away same-sex couples or LGBTQ children from its preschools based on its religious beliefs about marriage and sexuality.

Masterpiece Cakeshop cited this Court’s 1968 decision in *Newman v. Piggie Park Enters., Inc.*,¹³ thus introducing the race analogy in SOGI cases.¹⁴ *Piggie Park* affirmed the lower courts’ rejection of a religious exemption request to allow race discrimination in determining the appropriate standard for an award of attorneys’ fees under the Civil

8. 584 U.S. 617 (2018).

9. 593 U.S. 522 (2021).

10. 584 U.S. 617.

11. 593 U.S. 522 (2021).

12. See Transcript of Oral Argument at 21:16–22:9, *Masterpiece Cakeshop*, 584 U.S. 617 (No. 16-111) [hereinafter Transcript]. By citing *Piggie Park* in the majority decision, the Court suggests that the race analogy is proper in sexual orientation religious exemption cases. See *Masterpiece Cakeshop*, 584 U.S. at 631.

13. 390 U.S. 400 (1968).

14. 584 U.S. at 631.

Rights Act of 1964.¹⁵ Because today's exemption seekers make similar requests regarding SOGI discrimination, *Piggie Park* resolves the question of religious exemptions against *all* exemption seekers.

Yet today's exemption seekers dismiss the race analogy for at least two reasons. First, as a normative matter, shopkeepers of the 1960s who cited their religious beliefs to engage in racial discrimination were racists; in contrast, today's exemption seekers are honorable people of faith relying on sincere religious beliefs. Because contemporary exemption seekers are not bigots like the vendor in *Piggie Park*, they argue that the race analogy fails. Otherwise, they assert, today's exemption seekers will be unfairly branded as bigots.¹⁶ Second, today's exemption seekers argue the race analogy breaks down because strict scrutiny applies to race discrimination, whereas this Court has not applied that standard to SOGI discrimination.¹⁷ These criticisms of the race analogy fail as a matter of historical and contemporary fact, and as a matter of law.

The first objection fails because the race analogy and the virtuousness of today's exemption seekers are not mutually exclusive. Opposition to religious exemptions

15. 390 U.S. at 402 n.5.

16. See LINDA C. McCLAIN, WHO'S THE BIGOT?: LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW 3 (2020) [hereinafter McCLAIN, WHO'S THE BIGOT?].

17. The Court's decision in *Bostock v. Clayton County*, 590 U.S. 64 (2020), suggests that sexual orientation merits intermediate scrutiny, as does sex discrimination. See *infra* Part II.

need not rest on arguments that exemption seekers are acting dishonorably or with animus in ways that would fit within the framework of *Romer v. Evans*¹⁸ or *United States v. Windsor*,¹⁹ which struck down laws resting on anti-LGBTQ animus. To appreciate why the race analogy need not brand today's exemption seekers as immoral or bigots, the relevant legal and factual context is important. Below, *amici* argue (1) exemption seekers' First Amendment claims fail as a matter of well-established law, regardless of a normative assessment of the asserted religious beliefs; (2) the exemption seekers of the 1960s were viewed, at the time, as honorable and sincere by courts and the public alike; and (3) courts must not look behind the asserted religious belief to validate or assess it.

This context makes clear that the normative characterization of the asserted religious belief—whether characterized as animus-driven and prejudiced, or as virtuous and honorable—is irrelevant when evaluating the legitimacy of the race analogy in SOGI religious exemption cases. Instead, analysis starts with the presumption that religious exemption seekers act in good faith. Thus, the race analogy and *Piggie Park* are useful to the resolution of *all* exemption claims.

Similarly, the second objection—regarding strict scrutiny—fails because it is based on an erroneous conflation of the Equal Protection tiers of scrutiny and claims for religious exemptions from antidiscrimination law. Surfacing these conceptual missteps allows this Court to develop a doctrine of religious exemptions that is sound, coherent and consistent.

18. 517 U.S. 620 (1996).

19. 570 U.S. 744 (2013).

ARGUMENT

Supporters of today’s religious exemption seekers argue that race is different from SOGI, which distinguishes the race analogy and *Piggie Park*.²⁰ Their two central arguments against the race analogy fail.

I. *Piggie Park* Is Analogous: Honorable Opposition v. Explicit Bigotry

A. *Newman v. Piggie Park*

Piggie Park is at the center of the disagreement about the race analogy in SOGI religious exemption cases. In 1964, soon after the Civil Rights Act (“CRA”) became law, African Americans in South Carolina brought a class action alleging that the Piggie Park chain of BBQ restaurants refused them service on the same terms as white customers.²¹ The defendants argued for an exemption

20. See, e.g., Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL’Y 206, 235 (2010); Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 151–52 (1998); Robert H. Bork, *The Judge’s Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 26 (2003); David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201, 204 (1998); Dale M. Schowengerdt, Note, *Defending Marriage: A Litigation Strategy to Oppose Same-Sex “Marriage”*, 14 REGENT U.L. REV. 487, 491–92 (2002); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 75–82 (1996); see also Transcript, *supra* note 12, at 31:23–33:11.

21. *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 943–44 (D.S.C. 1966), *rev’d*, 377 F.2d 433 (4th Cir. 1967), *aff’d*, 390 U.S. 400 (1968) (per curiam).

from the CRA because it violated their First Amendment right to freedom of religion. In their view, the owner’s faith “compel[led] him to oppose any integration of the races.”²² This Court flatly rejected that position.²³ In a footnote, the Court noted that, on remand, an award of attorney fees to the plaintiffs would be proper: “Indeed, this is not . . . even a borderline case, for the respondents interposed defenses so patently frivolous that a denial of counsel fees to the petitioners would be manifestly inequitable.”²⁴ The Court highlighted the defendants’ contention that the CRA “‘was invalid because it ‘contravenes the will of God’ and constitutes an interference with the ‘free exercise of the Defendant’s religion’” as an example of a “patently frivolous” defense.²⁵

B. *Piggie Park* Applies to Today’s Religious Exemption Cases

Opponents of the race analogy contend that although the faith-based argument advanced in *Piggie Park* was characterized as “frivolous,”²⁶ contemporary exemption seekers’ requests are just the opposite—*sincerely held*.²⁷

22. *Id.* at 944.

23. *Piggie Park*, 390 U.S. at 401.

24. *Id.* at 402 n.5.

25. *Id.* (quoting *Piggie Park*, 377 F.2d 433 at 437–38 (Winter, J., concurring)).

26. *Piggie Park*, 377 F.2d at 437 (Winter, J., concurring).

27. *See, e.g.*, Brief of Amicus Curiae Christian Business Owners Supporting Religious Freedom in Support of Petitioners at 30–31, *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*,

Chief Justice Roberts addressed this concern during the *Masterpiece Cakeshop* argument:

[T]he racial analogy obviously is very compelling, but when the Court upheld same-sex marriage in *Obergefell*, it went out of its way to talk about the decent and honorable people who may have opposing views.

And to immediately lump them in the same group as people who are opposed to equality in relations with respect to race, I’m not sure that takes full account of that—of that concept in the *Obergefell* decision.²⁸

Contemporary exemption seekers try to transform Justice Roberts’ concern into an analytic rule to avoid the race analogy. They wield what some call “*Obergefell*’s promise”²⁹: “Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.”³⁰ Today’s exemption seekers combine *Obergefell*’s promise with their

584 U.S. 617 (2018) (No. 16-111), 2017 WL 4005666, at *30–31; see also McCLAIN, WHO’S THE BIGOT?, *supra* note 16, at 196–98; Douglas NeJaime, *Bigotry in Time: Race, Sexual Orientation, and Gender*, 99 B.U. L. REV. 2651, 2655 (2019).

28. Transcript, *supra* note 12, 74:13–76:5.

29. See, e.g., Petition for Certiorari, *St. Mary Catholic Parish v. Roy*, No. 25-581, at 3. See also, e.g., Transcript of Oral Argument at 9:6–10, *303 Creative v. Elenis*, 600 U.S. 570 (2023) (No. 21-476).

30. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015); see also Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2558–66 (2015).

argument that *Piggie Park*’s “patently frivolous” holding would be offensive and unfair applied to them, as opposed to the racist vendors of the 1960s.³¹ They insist that race is different because “essentially all religious actors who believe it is proper to make racial distinctions always act in bad faith (*i.e.*, they are racists). On the other hand, it is argued, many of those who . . . believe it is proper to make distinctions on the basis of sexual orientation . . . act in good faith (*i.e.*, they are not homophobic).”³²

Exemption seekers recast *post hoc normative* assessments of subjective moral judgments as a *legal* principle defeating the race analogy. Deeper consideration of the bigoted versus honorable distinction, however, negates its persuasive value.

31. See, *e.g.*, Ryan T. Anderson, *Disagreement Is Not Always Discrimination: Masterpiece Cakeshop and the Analogy to Interracial Marriage*, 16 GEO. J. L. & PUB. POL’Y 123, 134 (2018); Linda C. McClain, *The Civil Rights Act of 1964 and “Legislating Morality”: On Conscience, Prejudice, and Whether “Stateways” can Change “Folkways,”* 95 B.U. L. REV. 891, 894–95 (2015) [hereinafter McClain, *Stateways*].

32. Ball, *supra* note 3, at 239–40. For example, Robin Wilson contends that “[t]he religious and moral convictions that motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination.” Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 101 (Douglas Laycock et al. eds., 2008)). Lynn Wardle and Lincoln Oliphant contend that accepting the race analogy “means that those who oppose same-sex marriage are, like those who opposed inter-racial marriage, simply bigots.” Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the “Loving Analogy” for Same-Sex Marriage*, 51 HOW. L.J. 117, 151 (2007).

Importantly, exemption seekers’ reliance on “*Obergefell*’s promise” cannot withstand scrutiny. The passage continues: “But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.”³³ The complete *Obergefell* passage reveals a meaningfully different takeaway than the cherry-picked “*Obergefell*’s promise” sentence—a promise of equality for LGBTQ people, not of widespread SOGI religious exemptions.

1. The Exemption Seekers of the 1960s Were Not Considered Fringe or Prejudiced

The distinction between “bigoted” racists and “honorable” citizens with deeply held religious beliefs distorts how American society (including courts) viewed these issues 60 years ago.³⁴ Opponents of the CRA made faith-based arguments like those made by contemporary exemption seekers. Importantly, their reliance on religion was, at the time, viewed as mainstream, not fringe.³⁵ Moreover, like today’s exemption seekers, religious objectors to the CRA bristled when described as bigots; they, too, considered their faith-based opposition to the CRA honorable, right, and just.³⁶ As one scholar notes:

33. *Obergefell*, 135 S. Ct. at 2602.

34. See Shannon Gilreath & Arley Ward, *Same-Sex Marriage, Religious Accommodation, and the Race Analogy*, 41 VT. L. REV. 237, 261, 278 (2016).

35. McCLAIN, WHO’S THE BIGOT?, *supra* note 16, at 105, 126.

36. McClain, *Stateways*, *supra* note 31, at 894–95; McCLAIN, WHO’S THE BIGOT?, *supra* note 16, at 8, 117; Randall Kennedy,

Slavery, racial discrimination and segregation, and opposition to women's rights were all supported by strong religious arguments bolstered by citations to the Bible. As scholarly work has shown, these religious views were deeply held by many people. That Professor [Robin Fretwell] Wilson finds it impossible to marshal religious arguments for segregation is, to a great degree, a tribute to the success of the Civil Rights Movement and civil rights laws, generally without exemptions for religious objectors.

Not only could religious arguments for segregation be marshaled, they *were* marshaled.³⁷

Prominent senators from both parties, such as Robert Byrd and Strom Thurmond, made such arguments on the Senate floor and their sentiments were shared by “educators, ‘housewives, sorority sisters, and Rotarians”³⁸ Indeed, in 1963, then-President Truman stated

Marriage and the Struggle for Gay, Lesbian, and Black Liberation, 2005 UTAH L. REV. 781, 791 (2005); James M. Oleske, Jr., *The Evolution of Accommodations: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 107–08 (2015).

37. Michael Kent Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173, 187–88 (2012) (citations omitted); see also McCLAIN, WHO'S THE BIGOT?, *supra* note 16, at 126, 203.

38. Gilreath & Ward, *supra* note 34, at 262 (alteration in original) (citations omitted).

that “he did not believe white persons should marry Negroes. . . . [and] that racial intermarriage ran counter to teachings of the Bible.”³⁹

The 1960s exemption seekers expressed then-“common” views, regrettably (and broadly) endorsed by political leaders and mainstream American society.⁴⁰ Thus, today’s “complete lack of . . . deference” to opponents of interracial marriage, compared to the relatively greater deference given to today’s objectors to same-sex marriage, “cannot be explained by the extent of contemporary societal support of the respective practices.”⁴¹ As a result, opponents of racial equality and integration in the 1960s “are entitled to the same presumption of sincerity as

39. Oleske, *supra* note 36, at 100 (quoting *Truman Opposes Biracial Marriage*, N.Y. TIMES, Sept. 12, 1963, at 30).

40. See McCLAIN, WHO’S THE BIGOT?, *supra* note 16, at 126 (noting that “religious beliefs about segregation were not ‘fringe’ in the mid-1960s and were sincerely and widely held”).

41. Oleske, *supra* note 36, at 102, 107 (“According to Gallup, public support of interracial marriage in the 1950s and 1960s was considerably *lower* than support for same-sex marriage in the 1990s and 2000s.”) (citing Jeffrey M. Jones, *Record-High 86% Approve of Black-White Marriages*, GALLUP (Sept. 12, 2011), <http://www.gallup.com/poll/149390/record-high-approve-black-white-marriages.aspx>, archived at <http://perma.cc/HN22-D5J2> (reporting that public approval of interracial marriage was at just 4% in 1958 and 20% in 1968), in comparison with Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP (May 20, 2011), <http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx>, archived at <http://perma.cc/Y533-7CNC> (reporting that support for same-sex marriage was 27% in 1996, 42% in 2004, and 53% in 2011)).

current opponents of gay equality. Many believed the religious argument against integration and interracial marriage, just as many people believe the religious arguments against gay equality and liberty.”⁴²

2. Courts Need Not Assess the Normative Character of Religious Beliefs

Opponents of the CRA and contemporary exemption seekers alike base their exemption requests on religion.⁴³ The normative characterizations of the underlying religious belief, whether described as prejudiced or honorable, are irrelevant. Courts often take at face value sincerely held religious beliefs and do so *without* assessing whether the asserted belief is “bigoted” or “honorable.”⁴⁴

This normative neutrality is appropriate on several levels. Practically, assessing the moral or normative strength of a religious belief is beyond judicial competence, making courts “ill-equipped” for such inquiries.⁴⁵ For that

42. Curtis, *supra* note 37, at 191–92; *see also* Ball, *supra* note 3, at 241–42; Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and “The Civil Rights Agenda”*, 1 AFR.-AM. L. & POL’Y REP. 33, 44 (1994); Mark Strasser, *Public Policy, Same-Sex Marriage, and Exemptions for Matters of Conscience*, 12 FLA. COASTAL L. REV. 135, 139–40 (2010).

43. *See* Curtis, *supra* note 37, at 178; Kennedy, *supra* note 36, at 783; McClain, *Stateways*, *supra* note 31, at 916–18.

44. *See* Paul Baker, Note, *Religious Exemptions and the Vocational Dimension of Work*, 119 COLUM. L. REV. 169, 171 (2019).

45. Samuel J. Levine, *Rethinking the Supreme Court’s Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L. J. 85, 86 (1997) (citation omitted).

very reason, courts decline to look behind a sincerely held religious belief.⁴⁶ As a result, “courts have been reluctant to interpret theologies . . . because [they] lack *competence* on such matters and because they must guarantee government *neutrality* with respect to religions.”⁴⁷ Simply put, “[c]ourts are not arbiters of scriptural interpretation.”⁴⁸ Courts have applied this principle in religious exemption cases involving both sexual orientation and race discrimination.⁴⁹

Courts should not attempt to “judge” the respective religious grounds for SOGI racial exemptions. Doing so requires “unavoidable assessments of the reasonableness of two sets of religious views.”⁵⁰ Those efforts “fail from the beginning because they are grounded in the notion that some religious views are more reasonable than others.”⁵¹

The hesitancy to second guess the religious beliefs of *any* exemption seeker supports analogizing to race

46. *Id.* at 86 n.3 (citing *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring) and *County of Allegheny v. ACLU*, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in part and dissenting in part) and *Lyng v. Nw. Indian Cemetery*, 485 U.S. 439, 457–58 (1987)).

47. Nelson Tebbe, *Reply: Conscience and Equality*, 31 J. C.R. & ECON. DEV. 1, 33 (2018).

48. *Thomas v. Review Bd. of the Indiana Emp’t Sec. Div.*, 450 U.S. 707, 716 (1981).

49. See McCLAIN, WHO’S THE BIGOT?, *supra* note 16, at 188.

50. Ball, *supra* note 3, at 240.

51. *Id.* at 241.

here. Following that approach protects exemption seekers' religious beliefs from normative characterization by courts as either "prejudiced" and "bigoted" or "honorable."⁵² The law is clear: courts must not look behind the "correctness" of sincerely held asserted religious beliefs. Similarly, courts must reject exemption seekers' suggestion that courts make an initial factual finding of the asserted religious belief as either "honorable" (today's SOGI exemption seekers) or "bigoted" (yesteryear's race exemption seekers). Today's exemption seekers seem to suggest that this threshold factual determination should dictate the substantive outcome of religious exemptions claims, notwithstanding that such an approach would be based on impermissible normative characterizations. In sum, contemporary exemption seekers seek to improperly "require[] the state to leave its perch of neutrality among religions because the position involves an assessment of which claims of conscience are correct."⁵³ As such, this Court should reject any suggestion that faith-based arguments are impermissible to exempt one type of discrimination (racial) but permissible to exempt one type of discrimination (SOGI).⁵⁴

Thus, we assume organizations like the Parish "who turn their backs on same sex marriage on religious grounds have no evil in their hearts, in the overwhelming majority of cases."⁵⁵ Courts still should not consider the

52. See McCLAIN, WHO'S THE BIGOT?, *supra* note 16, at 196 ("A court does not inquire into whether such sincere religious beliefs are reasonable or mistaken.").

53. *Id.*

54. *Id.*; see also Strasser, *supra* note 42, at 141.

55. Lawrence G. Sager & Nelson Tebbe, *The Reality Principle*, 34 CONST. COMMENT. 171, 189 (2019).

normative or religious “strength” of the beliefs held by today’s exemption seekers. Doing so diverts the Court’s attention from the merits of the central legal questions and distracts from meaningful consideration of the race analogy and the applicability of *Piggie Park*. After all, the plain language of Colorado’s UPK proscribes discriminatory conduct based on race or sexual orientation without any hierarchy.⁵⁶

Indeed, this Court’s obligation to accept the Parish’s religious beliefs without judging their truth, wisdom, or honorableness defeats any assertion that *Piggie Park* is inapposite. When the *Piggie Park* Court agreed the BBQ joint owner’s religion-based belief in racism was “patently frivolous,”⁵⁷ it was not making a normative judgment about the *content of that belief*.⁵⁸ The Court might well have been commenting that a religious objection *as a defense to the challenged nondiscrimination law* was patently frivolous. Or perhaps this Court was just commenting on the notion that a *business entity* could hold a religious belief, something foreign to 1960s Free Exercise jurisprudence.⁵⁹ But neither the Fourth Circuit nor this Court expressed a judgment about the *correctness* of the religious belief in *Piggie Park*. That type of moral and normative characterization of a litigant’s religious belief is outside the competence of judges and unconstitutional under the First Amendment. As such, *Piggie Park* cannot

56. McCLAIN, WHO’S THE BIGOT?, *supra* note 16, at 190. Notably, Colorado’s UPK regulates only conduct, not belief.

57. *Piggie Park*, 377 F.2d at 437 (Winter, J., concurring).

58. See Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1517 (2015) [hereinafter Sepper, *Lochnerism*].

59. See *id.*

be discarded simply because it rejected a religious belief many now find incorrect, improper, and morally wrong.

Accordingly, while today’s exemption seekers may “bristle at the notion that religiously-based resistance to racial integration is of any relevance to present-day controversies[,]”⁶⁰ comparing *religious beliefs* is legally irrelevant. The fact that both those seeking racial and SOGI exemptions base their claims on religious beliefs in the first instance is all that matters, making *Piggie Park* and the race analogy applicable here, as *Masterpiece Cakeshop* recognized.⁶¹ Critically, “the mere step of drawing analogies between past and present forms of

60. McClain, *Stateways*, *supra* note 31, at 925.

61. *Masterpiece Cakeshop*, 584 U.S. at 631; *see also id.* at 642, at n.* (Kagan, J., concurring) (“As this Court has long held, and reaffirms today, a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait.” (citing *Piggie Park*); McCLAIN, WHO’S THE BIGOT?, *supra* note 16, at 201 (“[O]ne can concede religious sincerity while upholding the legitimacy of state anti-discrimination laws.”). This Court’s *Bostock* decision further buttresses use of the race analogy. Under *Bostock*, if SOGI discrimination occurs, then “because of sex” discrimination under Title VII also occurs; a finding of SOGI discrimination under Justice Gorsuch’s interpretation of Title VII is not premised on whether the discriminatory actor showed any animus toward LGBTQ individuals or exhibited a moral objection to LGBTQ individuals. *See* 590 U.S. at 660-661. *Bostock* makes clear that moral characterizations of discriminatory actors are *not* relevant, even though the discriminating actor seeks to convince the Court that such moral characterization is relevant to strengthen the religious exemption claim. Both *Piggie Park* and *Bostock* ratchet down the discourse surrounding religious exemption requests to reveal what is actually occurring: discriminatory behavior that violates state antidiscrimination protections.

discrimination to point out how, over time, new insights and evolving understandings have led to recognition that such treatment is unjustified”—as is done when citing *Piggie Park* in this case—“is not a charge of bigotry.”⁶²

II. Equal Protection Tiers of Scrutiny are Irrelevant to the Question of Religious Exemptions from UPK’s Equal Opportunity Requirements

Although SOGI religious exemption cases involve statutory protections, exemption seekers invoke the constitutional tiers of scrutiny to convince courts to reject the race analogy. For example, in briefs and argument in *Masterpiece Cakeshop*, the baker and his *amici* supported their general argument that race differs from sexual orientation by asserting that race is subject to strict scrutiny while SOGI is subject to rational basis review.⁶³ Counsel for the baker made a similar claim at

62. McCLAIN, WHO’S THE BIGOT?, *supra* note 16, at 209; *see also id.* at 201 (“[O]ne can concede religious sincerity while upholding the legitimacy of state anti-discrimination laws.”). *See also Masterpiece Cakeshop*, 584 U.S. at 631 (“[W]hile . . . religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”).

63. *See* Reply Brief for Petitioner at 15, *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 584 U.S. 617 (2018) (No. 16-111), 2017 WL 5644420, at *15; Transcript, *supra* note 12, at 20:8–21:20, 22:1–23:6; *see also* Brief for Lawyers’ Committee for Civil Rights Under Law, Asian American Legal Defense and Education Fund, Center for Constitutional Rights, Color of Change, the Leadership Conference of Civil and Human Rights, National Action Network, National Association for the Advancement of Colored People, National Urban League and Southern Poverty Law Center

the *Masterpiece Cakeshop* oral argument.⁶⁴ Similarly, scholars supporting religious exemptions contend that

as Amici Curiae Supporting Respondents at 18, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5127306, at *18 [hereinafter Brief for Lawyers’ Committee for Civil Rights Under Law]. The United States, appearing as *amici* in support of the baker, argued that “laws targeting race-based discrimination may survive heightened First Amendment scrutiny” because “a State’s ‘fundamental, overriding interest’ in eliminating private racial discrimination . . . may justify even those applications of a public accommodations law that infringe on First Amendment freedoms.” Brief for the United States as Amicus Curiae Supporting Petitioners at 32, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 584 U.S. 617 (2018) (No. 16-111), 2017 WL 4004530, at *32 (citation omitted). The United States then argued that that same public accommodation law should face a different fate when sexual orientation discrimination is at issue: “The Court has not similarly held that classifications based on sexual orientation are subject to strict scrutiny or that eradicating private individuals’ opposition to same-sex marriage is a uniquely compelling interest.” *Id.*

64. In response to Justice Kagan’s question, “[s]ame case or not the same case, if your client instead objected to an interracial marriage?”, counsel for the baker responded: “I think race is different for two reasons: one, we know that that objection would be based to who the person is, rather than what the message is. And, second, even if that were not the case, the Court could find a compelling interest in the race inquiry” Transcript, *supra* note 12, at 22:1–23:6. In response to Justice Sotomayor’s question, “is your theory that . . . public accommodation laws cannot trump free speech or free-exercise claims in protecting against race discrimination?”, the baker’s attorney responded: “That is not my theory. That would be an objection to the person and the Court may find a compelling interest in that.” *Id.* at 21:12–20. These references to a compelling interest are, of course, references to the argument that race gets strict scrutiny and, according to the argument, sexual orientation does not.

the race analogy improperly compares “apples and oranges”—the notion that the racial civil rights movement, which arose from slavery, is simply not comparable to the LGBTQ-rights movement, as illustrated by what they contend are differing levels of equal protection scrutiny.⁶⁵

Exemption seekers’ tiers-of-scrutiny argument is twofold. First, because they contend SOGI should be subject to rational basis review,⁶⁶ there *cannot* be a compelling interest in protecting against SOGI discrimination in contexts such as the marketplace and programs like the UPK. In contrast, the argument goes, because race is subject to strict scrutiny, there *is* a compelling interest in protecting against racial discrimination in contexts such as the marketplace and the programs like UPK.⁶⁷ A second variation of this argument appears to be that the First Amendment claims being made by the exemption seekers require strict scrutiny.

The first argument form turns antidiscrimination law on its head and contradicts this Court’s precedent declaring that avoiding discrimination in public accommodations

65. Wardle & Oliphant, *supra* note 32, at 144–45.

66. *But see Bostock*, 590 U.S. at 662 (holding that sexual orientation discrimination is sex discrimination under Title VII). Moreover, many courts, including both the Ninth and Second Circuits, accord sexual orientation discrimination heightened scrutiny. *See Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019); *Latta v. Otter*, 771 F.3d 456, 468 (9th Cir. 2014); *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471, 480–81 (9th Cir. 2014); *Windsor v. United States*, 699 F.3d 169, 180–85 (2nd Cir. 2012), *aff’d*, 570 U.S. 744 (2013).

67. *See* Wardle & Oliphant, *supra* note 32, at 144–45.

is a compelling state interest, irrespective of the *type* of discrimination.⁶⁸ As a result, when a statute’s plain language declares that both race and SOGI are deserving of equal-opportunity protections, there is necessarily a compelling state interest in supporting *every* application of the antidiscrimination statute. That is true even if the (hypothetical) Equal Protection analysis might be different in some cases.⁶⁹

To start, the tiers of scrutiny are not implicated here because the Colorado statute at issue does not classify based on race, or on any protected classification. The UPK prohibits discrimination in preschool enrollment based on *all* protected classifications (race, religion, SOGI, etc.). In other words, Colorado’s UPK is a neutral law of general applicability that applies to all preschool providers in the UPK program. Moreover, the Parish does not challenge the UPK under the Equal Protection Clause, the constitutional provision with which the tiers of scrutiny are associated. Instead, it challenges the UPK under the First Amendment’s Free Exercise clause.

68. *See Jaycees*, 468 U.S. at 624 (noting that “eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order.”).

69. Significantly, this Court has not yet determined the level of equal protection scrutiny afforded to SOGI, although its decision in *Bostock v. Clayton County* suggests that SOGI, like sex, is subject to intermediate scrutiny. *See Bostock*, 590 U.S. at 733 (Alito, J., dissenting). Moreover, the Ninth Circuit and Second Circuit have held that sexual orientation is subject to heightened scrutiny. *See, e.g., Karnoski*, 926 F.3d at 1200–01; *Latta*, 771 F.3d at 468; *SmithKline Beecham Corp.*, 740 F.3d at 480–81; *Windsor*, 99 F.3d at 180–85.

In that context, *Masterpiece Cakeshop* suggests that exemption seekers’ argument concerning the level of scrutiny should not carry the day. The Court wrote that it was “unexceptional” that states can protect LGBTQ people through public accommodation law, as Colorado did there (and seeks to do here through the UPK).⁷⁰ The Court’s “matter-of-fact” assessment of state antidiscrimination laws “is an important implicit rejection of . . . the argument that . . . the state’s interest in prohibiting race discrimination is far more compelling than addressing other forms of discrimination[,]” such as SOGI discrimination.⁷¹

Moreover, *Bostock*’s holding that SOGI discrimination is *per se* sex discrimination under Title VII⁷² has “far-reaching consequences” that spill over into constitutional law.⁷³ Sex-based discrimination is subject to intermediate scrutiny under the Equal Protection Clause.⁷⁴ Thus, “[b]y equating discrimination because of [SOGI] with

70. 584 U.S. at 632.

71. McCLAIN, WHO’S THE BIGOT?, *supra* note 16, at 207; *see also Romer*, 517 U.S. at 627–28 (noting with approval “modern anti-discrimination laws” that “go[] well beyond the entities covered by the common law” by “enumerating the groups or persons within their ambit of protection”—such as LGBT people—“to make the duty not to discriminate concrete and to provide guidance for those who must comply.”).

72. *Bostock*, 590 U.S. at 662.

73. *Id.* at 724 (Alito, J., dissenting). *See also Griffith v. El Paso County, Colorado*, 129 F.4th 790, 811-812 (10th Cir. 2025) (relying on *Bostock* to find that heightened scrutiny applied to an Equal Protection Claim by a transgender woman).

74. *See, e.g., U.S. v. Virginia*, 518 U.S. 515, 532–34 (1996).

discrimination because of sex, the Court’s decision will be cited as a ground for subjecting all three forms of discrimination to the same exacting standard of review.”⁷⁵ The consequence of having the same Equal Protection standard for SOGI and sex defeats exemption seekers’ argument that race is inapposite because race gets strict scrutiny while sexual orientation only gets rational basis review.

In fact, in *Roberts v. United States Jaycees*, the Court held that a public accommodation law that protected against sex discrimination served a compelling state interest, even though sex-based classifications received only intermediate constitutional scrutiny.⁷⁶ Particularly after *Bostock*, that same conclusion should follow with regard to public accommodation laws that protect against SOGI discrimination. Moreover, the Court has suggested that state legislatures have the authority to serve their interest in prohibiting SOGI discrimination in antidiscrimination law,⁷⁷ even if SOGI received only rational basis. Thus, to accept exemption seekers’ argument—that courts should analyze religious exemption claims differently depending on the individual against whom the religious belief “discriminates”—is to defy the Court’s declaration that nondiscrimination laws like the UPK serve compelling government interests. That must be true even where the law protects classifications that do not receive strict scrutiny.⁷⁸

75. *Bostock*, 590 U.S. at 733 (Alito, J., dissenting).

76. *See Jaycees*, 468 U.S. at 623.

77. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 572 (1995).

78. *See generally* Brief for Lawyers’ Committee for Civil Rights Under Law, *supra* note 63, at *18–19.

The second variation of this argument is no more persuasive. Proponents appear to contend First Amendment claims made by exemption seekers require strict scrutiny. Advocates raise that fact, coupled with the strict scrutiny attaching to racial classification, to insist that “race is just different.”⁷⁹ The argument seems to be that because the free exercise and race discrimination claims are individually subject to strict scrutiny, the antidiscrimination law is not narrowly tailored in a way to survive the double strict scrutiny inquiry.⁸⁰ However, because antidiscrimination laws like the UPK are neutral laws of general applicability, courts consider them using rational basis rather than the strict scrutiny when challenged under the First Amendment.⁸¹ Indeed, when the 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.”⁸²

In sum, these arguments conflate a government’s compelling interest to combat discrimination in public

79. See Brief for Freedom of Speech Scholars as Amici Curiae Supporting Respondents at 16 *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 584 U.S. 617 (2018) (No. 16-111), 2017 WL 4876116, *16.

80. See *id.*

81. See *Employment Division v. Smith*, 494 U.S. 872, 879 (1990); see Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Respondents, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 584 U.S. 617 (2018) (No. 16-111), 2017 WL 5127302 [hereinafter Brief of NAACP Legal Defense & Educational Fund].

82. Brief of NAACP Legal Defense & Educational Fund, *supra* note 81, at 16.

accommodations with the level of scrutiny that applies in an equal protection claim.⁸³ It is therefore “irrelevant whether government-sponsored sexual orientation discrimination receives the same scrutiny as government-sponsored racial discrimination.”⁸⁴ That is because the state interest in preventing discrimination is the appropriate interest to consider in evaluating any constitutional challenge to *a public accommodations law* itself. The constitutional scrutiny afforded to governmental classification of a specific group—race, sex, etc.—just has no role.⁸⁵

III. The Race Analogy Resolves This Case

This Court can and should rely on the race analogy to resolve this case. There is no reason to consider whether a religious belief is “honorable” (as modern exemption seekers maintain) or grounded in “animus” (like the exemption seekers of the past) because courts do not normatively interrogate religious beliefs before determining the applicability of antidiscrimination statutes. From that point of departure, the plain language of the UPK make the analogy to race and to *Piggie Park* appropriate, as this Court recognized in *Masterpiece Cakeshop*. This Court’s decision in *Bostock* adds force to the race analogy—*Bostock* gave clear interpretive

83. See *id.* at 19; accord David B. Cruz, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. REV. 1176, 1186-89 & n.63 (1994).

84. Brief for Lawyers’ Committee for Civil Rights Under Law, *supra* note 63, at 19.

85. Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, *supra* note 81, at *16-*19 and n.18.

direction to privilege the plain language of a statute: “[W]hen the meaning of the statute’s terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.”⁸⁶ The plain language of the UPK unambiguously precludes schools from discriminating based on SOGI and race alike. The UPK prohibits schools from turning away a Black, heterosexual family just like it protects a white, same-sex one. Because the plain language sets forth a straightforward command not to discriminate and creates no hierarchy of protections, discriminating based on SOGI is “just as intolerable as discrimination directed toward race, national origin, or religion.”⁸⁷ “That intolerance of discrimination is not unreasonable and unwarranted.”⁸⁸ As in *Bostock*, because “the meaning of the statute’s terms is plain, [a court’s] job is at an end.”⁸⁹

Moreover, the principle behind antidiscrimination laws supports use of the race analogy in SOGI religious exemption cases. The goal of antidiscrimination law is to preclude the perpetuation of unequal status hierarchies through discrimination in public accommodations.⁹⁰

86. *Bostock*, 590 U.S. at 674.

87. *Elane Photography v. Willock*, 309 P.3d 53, 79–80 (N.M. 2013) (Bosson, J., concurring) (rejecting a wedding photographer’s request for a religious exemption from the New Mexico public accommodation law that would allow the photographer to turn away same-sex couples).

88. McCLAIN, WHO’S THE BIGOT?, *supra* note 16, at 154.

89. *Bostock*, 590 U.S. at 674.

90. Sager & Tebbe, *supra* note 55, at 173 (“The central aim of civil rights law is to protect members of vulnerable groups

Although the historical, cultural, and political reasons for vulnerability to discrimination in public accommodations vary, the harms against which the UPK seek to protect are similar enough to support the analogy in this context.⁹¹

Because antidiscrimination law “does not take sides in a purported culture war”⁹² but instead “stipulates what citizens who are divided on questions of profound importance nonetheless owe to each other in order to live together as equals in our political community[,]”⁹³ the UPK’s unambiguous inclusion of both race and SOGI renders the analogy to race proper. The Court itself has declared that a state legislature’s decision to include LGBTQ people within its laws is a decision that the Court and the Constitution should recognize and uphold.⁹⁴

In fact, this Court has at least once before analogized to race when analyzing a sex discrimination claim under federal antidiscrimination law. In *City of Los Angeles v. Manhart*, the Court considered a challenge by female employees claiming a city’s requirement that women employees make larger contributions to its pension fund

from the harms of structural injustice; that vital project would be undermined by a broad carve out for religious dissent.”).

91. See Russell, *supra* note 42, at 44; *Roberts*, 468 U.S. at 625.

92. Sager & Tebbe, *supra* note 55, at 173.

93. *Id.* at 173–74.

94. See *Windsor*, 570 U.S. at 768 (emphasizing that New York’s recognition of same-sex marriages was a proper use of its “historic and essential authority to define the marital relation in this way” and that this legislative decision “enhanced the recognition, dignity, and protection of the class in their own community”).

than male employees violated Title VII.⁹⁵ While Title VII prohibits discrimination in employment and the UPK prohibits discrimination in Colorado’s UPK program, both antidiscrimination regimes similarly enumerate specific forms of discrimination addressed by their protections.⁹⁶ *Manhart* used the race analogy to support its decision that the city’s requirement was sex-based discrimination in violation of Title VII: “Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful.”⁹⁷ Because the Court found that the city’s pension rule would not be permissible as to race, it reasoned by analogy that it was not permissible as to sex.⁹⁸ The Court’s comfort finding what might be termed “statutory sameness” between race and sex should compel the same result in this case. The Parish in fact conceded this “statutory sameness” principle at the certiorari stage: “Here, all the protected characteristics are treated identically in the same statutory sentence, and Respondents conceded that their interest in all of them is the same.”⁹⁹ This concession provides further support for application of the race analogy in this case. Based on the Parish’s concession of statutory sameness, any request for a religious exemption from the UPK—whether it is a request to turn away an interracial family or it is a request

95. 435 U.S. 702, 704–05 (1978).

96. *See* 42 U.S.C. § 2000e-2(a)(1); COLO. REV. STAT. § 26.5-4-205(2)(b).

97. 435 U.S. at 709.

98. *Id.* (“But a statute that was designed to make race irrelevant in the employment market could not reasonably be construed to permit a take-home-pay differential based on a racial classification.”) (citation omitted).

99. Petition for Certiorari at 22.

to turn away a preschooler with same-sex parents—the result ought to be the same: the denial of a religious exemption.

This is particularly true after *Bostock*: Because bans on sex-based discrimination necessarily prohibit SOGI-based discrimination, and because the Court has analogized race to sex before, the Court should now analogize race to SOGI.¹⁰⁰ After *Bostock*, then, there is a clear through-line from the acceptance of the sex-race analogy in *Manhart* and *Jaycees*, to the subsuming of sexual orientation discrimination under sex discrimination in *Bostock*, to the sexual orientation-race analogy supporting the Respondents here.¹⁰¹

The race analogy is thus not only appropriate, but it should be controlling. To allow any other result would create incoherence in the law, disregard the plain language of the UPK, and send a normative message that discrimination against LGBTQ families and children is natural, normal, and acceptable.¹⁰² Because this Court would reject a preschool’s faith-based request to engage in race discrimination, it should similarly reject the religious exemption claim in this case.

CONCLUSION

Petitioner’s argument is not new. The country and the Court have considered and rejected claims for religious exemptions from antidiscrimination law before. We do not

100. See generally Velte, *Nineteenth Amendment*, *supra* note 2, at 2704-2705.

101. See *id.*

102. See Tebbe, *supra* note 47, at 61–62.

need “new and expansive accommodations that depart significantly from the ways in which the nation has in the past accommodated liberty considerations while seeking to attain equality objectives in the context of race and gender.”¹⁰³ The Court should look to what worked historically when similar challenges to antidiscrimination laws—in the context of race and sex—have been raised.¹⁰⁴ Analogizing to race in the present dispute requires no improper governmental assessment of religious beliefs, just as courts made no such assessment in the 1960s. The race analogy, including an analogy to *Piggie Park*, should be used today and would not require an inquiry into the Parish’s sincerely held religious beliefs.

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103. Ball, *supra* note 3, at 238.

104. *Id.* at 245 (“In other words, there is no need to reinvent the exemption wheel. The bottom line is this: we should be suspicious of the contention that the push for LGBT rights, in particular as it relates to marriage equality, constitutes a unique threat to religious liberty that requires significant departures from the ways in which American antidiscrimination law has accommodated religious liberty in the past.”).

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