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Religious Exemptions and Antidiscrimination Law in *Masterpiece Cakeshop*

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ABSTRACT. Conversation about *Masterpiece Cakeshop v. Colorado Civil Rights Commission* has revolved around the Court's holding that decisionmakers must treat those seeking religious exemptions with respect. But this focus misses important aspects of the Court's decision. In *Masterpiece Cakeshop*, the Court addresses the relationship between religious exemptions and antidiscrimination law in cases of sexual orientation as well as race. As we show in this Essay, the decision supplies more guidance on free exercise exemptions under public accommodations laws than most have acknowledged.

The Court affirms an approach to public accommodations law that limits religious accommodation to prevent harm to other citizens who do not share the objector's beliefs, in the process repudiating longstanding arguments for expansive exemptions. We situate the Court's concerns about the third-party harms of accommodation in *Masterpiece Cakeshop* in prior caselaw on antidiscrimination law and religious liberty. Finally, we relate the majority's requirement of government neutrality in the adjudication of religious exemption claims to the majority's instruction to limit religious exemptions in public accommodations. In particular, we demonstrate that the requirement that the government treat religious claimants evenhandedly and with respect does not translate into a requirement that the government grant religious claimants exemptions from public accommodations laws.

INTRODUCTION

Conversation about *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[1] has largely revolved around the Court's holding that decisionmakers

1. 138 S. Ct. 1719 (2018).

must treat those seeking religious exemptions with respect.[2] But the decision also supplies important guidance on the relationship between religious exemptions and antidiscrimination law in cases of sexual orientation as well as race—themes that we examine in this Essay.

Jack Phillips, the owner of Masterpiece Cakeshop, refused to provide wedding cakes for same-sex couples and sought an exemption, on both free exercise and free speech grounds, from the state public accommodations law that prohibited businesses from discriminating based on sexual orientation.[3] The Supreme Court held that the state civil rights commission had violated Phillips's free exercise rights—not by refusing to exempt his bakery from obligations imposed by antidiscrimination law, but instead by failing to consider his claim in a neutral and respectful way.[4]

Scholars and commentators have emphasized that the Court's opinion is narrowly concerned with neutrality in the adjudication of religious exemption claims.[5] But, as we show in this Essay, *Masterpiece Cakeshop* is not narrow. The Court supplied more guidance on the relationship between religious exemptions and antidiscrimination law than most have acknowledged. Passages of the majority opinion repudiate longstanding arguments advanced by exemption advocates and instead affirm an approach to public accommodations law that limits religious accommodation to prevent harm to other citizens who do not share the objector's beliefs.

These portions of the majority opinion were necessary for the Court's decision. Given the commitments of the diverse array of Justices who signed on to

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2. *See, e.g.*, Elizabeth Clark, *And the Winner Is . . . Pluralism?*, SCOTUSBLOG (June 6, 2018, 11:36 AM), http://www.scotusblog.com/2018/06/symposium-and-the-winner-is-pluralism [https://perma.cc/552X-B6QT]; Robert W. Tuttle & Ira C. Lupu, Masterpiece Cakeshop—*A Troublesome Application of Free Exercise Principles by a Court Determined to Avoid Hard Questions*, TAKE CARE (June 7, 2018), https://takecareblog.com/blog/masterpiece-cakeshop-a-troublesome-application-of-free-exercise-principles-by-a-court-determined-to-avoid-hard-questions [https://perma.cc/T8TQ-3PG6].

3. *Masterpiece Cakeshop*, 138 S. Ct. at 1724, 1726.

4. *Id.* at 1732.

5. *See, e.g.*, Richard A. Epstein, *The Worst Form of Judicial Minimalism—Masterpiece Cakeshop Deserved a Full Vindication for Its Claims of Religious Liberty and Free Speech*, SCOTUSBLOG (June 4, 2018, 8:29 PM), http://www.scotusblog.com/2018/06/symposium-the-worst-form-of-judicial-minimalism-masterpiece-cakeshop-deserved-a-full-vindication-for-its-claims-of-religious-liberty-and-free-speech [https://perma.cc/M8J3-LCRR]; Adam Liptak, *In Narrow Decision, Supreme Court Sides with Baker Who Turned Away Gay Couple*, N.Y. TIMES (June 4, 2018), https://www.nytimes.com/2018/06/04/us/politics/supreme-court-sides-with-baker-who-turned-away-gay-couple.html [https://perma.cc/E5FX-EDHG].

the majority opinion, it seems clear that the opinion's guidance on the relationship between antidiscrimination law and religious exemptions was crucial to achieving that majority. Aspects of the opinion that we highlight plainly resonate with Justice Kennedy's reasoning in *Burwell v. Hobby Lobby Stores*[6] and the gay rights cases.[7]

Justice Kennedy announced his retirement a few weeks after the Court issued its decision in *Masterpiece Cakeshop*. This Essay, like the *Masterpiece Cakeshop* opinion itself, is rooted in a world in which Justice Kennedy shaped the law. Yet it anticipates a world in which he no longer plays that role. For that reason, we have made a point to locate the opinion's concern about the third-party harms of accommodation in relation to the Court's recent opinions on religious liberty—opinions that current conservative members of the Court have either authored or joined.[8]

For years to come, federal and state courts, administrative agencies, and legislative bodies at every level will debate the relationship between religious exemptions and antidiscrimination protections. We expect the law enunciated in *Masterpiece Cakeshop* to change, but it is by no means clear how fast or in what ways or in which fora. Surely there are conservatives who will use their newfound power to strike the balance between equality and religious liberty very differently than the Court in *Masterpiece Cakeshop* has. Yet our purpose in this Essay is to show that *Masterpiece Cakeshop* is not a narrow opinion that avoids fundamental questions on the relationship between antidiscrimination law and religious liberty; rather, the opinion offers a resounding answer to a full-bore challenge to public accommodations law.

Fueling the recent wedding-cake litigation is a deep challenge to public accommodations laws that date back to the civil rights era.[9] In *Masterpiece Cakeshop*, eight members of the Court responded by reaffirming the public accommodations settlement forged over a half-century ago.[10] The majority recognizes that the government's interest in securing equal opportunity is as important as the government's responsibility to ensure neutrality in adjudication. The majority closes its opinion with the instruction that "these disputes must be

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6. 134 S. Ct. 2751, 2786 (2014) (Kennedy, J., concurring).

7. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); United States v. Windsor, 133 S. Ct. 2675 (2013); Lawrence v. Texas, 539 U.S. 558 (2003).

8. *See infra* Section II.D.

9. *See infra* notes 52, 81 and accompanying text.

10. *See* Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1748 (Ginsburg, J., dissenting); *infra* Sections II.A.-C.

resolved . . . without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[11]

Part I of this Essay begins by discussing two prominent arguments for expansive religious exemptions that *Masterpiece Cakeshop* plainly rejects. Conservative advocates have long argued that courts and legislators should treat race and sexual orientation differently, denying religious exemptions from race nondiscrimination mandates but authorizing religious exemptions from sexual orientation nondiscrimination mandates. These advocates argue that religious exemptions from sexual orientation nondiscrimination mandates should instead be modeled on the law governing abortion, and draw on a growing body of statutes – largely unreviewed by courts[12] – that authorize healthcare providers to refuse to provide certain reproductive healthcare services on religious grounds. In *Masterpiece Cakeshop*, the Court rejects these arguments for expansive exemptions, instead assimilating sexual orientation into the antidiscrimination framework and affirming the importance of public accommodations laws.

Part II identifies principles animating the Court's approach to religious exemptions and relates them to the Court's other religious liberties decisions. We show how *Masterpiece Cakeshop* reaffirms public accommodations law and authorizes limits on religious exemptions to prevent harm to other citizens who do not share the objector's beliefs. The Court emphasizes that religious exemptions from public accommodations laws must be constrained to avoid restricting access to the market, as well as to avoid stigmatizing third parties. As we discuss, the Court's attention to limiting the third-party harms of religious exemptions aligns the Free Exercise Clause guidance in *Masterpiece Cakeshop* with the discussion of third-party harm in the Court's recent Religious Freedom Restoration Act (RFRA) decisions in *Hobby Lobby*[13] and *Zubik v. Burwell*.[14] Finally, we address the relationship between *Masterpiece Cakeshop*'s requirement that government actors adjudicate religious exemption claims evenhandedly and the Court's instruction to limit religious exemptions to avoid harm to gays and lesbians. We explain why the requirement of evenhandedness does not translate into a mandate for exemptions.

Last, Part III shows that the Court's decision bears on legislative drafting as well as litigation. Going forward, the Court's concern about restraining religious exemptions so that they do not inflict material and dignitary harm on those who

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11. 138 S. Ct. at 1732.

12. *See* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2535 n.77 (2015).

13. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

14. 136 S. Ct. 1557 (2016).

do not share the objector's beliefs should guide not only adjudication, but also the drafting of legislation concerning LGBT equality and reproductive healthcare.

I. REFUSALS TO SERVE: THE RACE AND ABORTION ANALOGIES, AND THE COURT'S RESPONSE

Those who characterize the Court's opinion in *Masterpiece Cakeshop* as narrow do not appreciate how the majority rejects certain familiar arguments for expansive religious exemptions from LGBT-protective laws. This Part identifies two of these arguments and examines the Court's response to them.

In the decade before *Masterpiece Cakeshop*, and in the litigation itself, advocates asserted that courts and legislatures should treat sexual orientation differently than race for purposes of exemptions from antidiscrimination law. They argued that, whereas courts have rightly resisted religious exemptions from laws prohibiting race discrimination, courts should adopt a two-tiered framework and grant religious exemptions from laws prohibiting sexual orientation discrimination. Phillips's lawyers from the Alliance Defending Freedom opposed the "race analogy [as] mere hyperbole,"[15] arguing in Colorado courts that "those who cited religion as an excuse for racism" differ from those who "just cannot celebrate same-sex marriages."[16] Similarly, as the Ethics and Religious Liberty Commission of the Southern Baptist Convention contended in its amicus brief, "[c]omparisons between Petitioner's measured objection to celebrating same-sex marriage and someone else's racist beliefs or opposition to interracial marriage should be discarded as unfair and offensive."[17] Accordingly, as the Heritage Foundation's Ryan Anderson, one of the most prominent spokespersons for broad religious exemptions, urged in his amicus brief, the "Court could rule in favor of Phillips but not in favor of a racist baker."[18]

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15. Appellants' Reply Brief at 13, Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015) (No. 2014CA1351), 2015 WL 13622552, at *13.

16. *Id.*

17. Brief of Amici Curiae Ethics & Religious Liberty Comm'n of the Southern Baptist Convention et al. in Support of Petitioners at 26, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4005657, at *26.

18. Amicus Curiae Brief of Ryan T. Anderson, Ph.D., and African-American & Civil Rights Leaders in Support of Petitioners at 22, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4004529, at *22; *see also* Brief for the United States as Amicus Curiae Supporting Petitioners at 32, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4004530, at *32 ("A State's 'fundamental, overriding interest' in eliminating private racial discrimination—conduct that

Phillips's supporters and other advocates for broad religious exemptions urge courts and legislatures to think about accommodating conscience claims in the LGBT context on the model of abortion rather than race. Consider the amicus brief filed by the U.S. Conference of Catholic Bishops in support of Masterpiece Cakeshop. That brief detailed "individual and organizational conscience rights in the context of abortion."[19] It presented the abortion regime as a model for same-sex marriage, asserting that "[t]he government should never penalize individuals like Phillips, or organizations like Catholic Charities, for their long-held beliefs about God's teachings regarding marriage."[20] Ryan Anderson's amicus brief also connected abortion to LGBT rights in the same passage that distinguished race from sexual orientation. For Anderson,

> pro-life conscience protections do not undermine *Roe v. Wade* or women's equality. Neither do conscience protections for conjugal mar-

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'violates deeply and widely accepted views of elementary justice'—may justify even those applications of a public accommodations law that infringe on First Amendment freedoms. The same cannot be said for opposition to same-sex marriage." (quoting Bob Jones Univ. v. United States, 461 U.S. 574, 592, 604 (1983))); Brief for the Restoring Religious Freedom Project as Amici Curiae in Support of Petitioners at 14, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4023110, at *14 ("This Court should clarify the constitutional issue regarding sincerity and the distinction between discrimination based on identity (as exemplified in cases dealing with, e.g., race or gender) and that based on ideological disagreements.").

19. Brief of Amici Curiae U.S. Conference of Catholic Bishops et al. in Support of Reversal at 31, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4131333, at *31.

20. *Id.*; *see also* Brief of Amici Curiae Center for Constitutional Jurisprudence and National Organization for Marriage in Support of Petitioners at 12, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4005665 , at *12 (comparing "[s]mall business owners specializing in services associated with weddings" to pharmacists who "do not stock . . . emergency contraceptive drugs because they are devout Christians who believe that life begins at conception."); Amicus Brief for Rev. Patrick Mahoney and Free Speech Advocates in Support of Petitioners at 2, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 3913764, at *2 ("Just as people can strive for decent and honorable reasons not to participate or be complicit in abortion, people can similarly desire for decent and honorable reasons not to participate or be complicit in same-sex marriage. Thus, there is a crucial difference between recognizing something as a right (abortion or same-sex marriage) and compelling participation in acts (abortion or same-sex ceremonies) that violate a person's conscience."); Brief of Amici Curiae Indiana Family Institute and The American Family Association of Indiana, Inc. Supporting Petitioners at 26, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) 2017 WL 3913765, at *26 ("It is constitutional to procure an abortion, a gun, a Bible, or pornography; to engage in all manner of religious and secular ceremonies . . . . Yet we generally do not force unwilling parties to participate in these legal and constitutionally protected or constitutionally permitted activities when it runs contrary to their deeply held moral or religious beliefs.") (quoting Mark L. Rienzi, *Substantive Due Process as a Two-Way Street: How the Court Can Reconcile Same-Sex Marriage and Religious Liberty*, 68 STAN. L. REV. ONLINE 18, 19 n.5 (2015) (citation omitted)).

> riage supporters undermine *Obergefell* or gay equality. By contrast, conscience protections for opponents of interracial marriage could undermine the purposes of *Loving v. Virginia*, *Brown v. Board of Education*, and the Civil Rights Act of 1964: racial equality.[21]

The comparison to abortion is not merely an analogy employed in courts; it is a call to activists to secure exemptions protecting a right to refuse to deal with same-sex couples in many settings. Emphasizing that opponents of abortion had secured expansive "religious liberty and conscience rights," Anderson has urged his fellow opponents of same-sex marriage "to do the same: Ensure that we have freedom from government coercion to lead our lives, rear our children, and operate our businesses and charities in accord with our beliefs—the truth—about marriage."[22] As we have elsewhere shown, in matters concerning abortion and contraception, a largely unadjudicated body of healthcare refusal laws allows individuals and organizations not only to refuse to directly perform the objected-to procedure, but also to refuse to indirectly facilitate the procedure.[23] Invoking this healthcare-refusals model, advocates like Anderson argue that expansive exemptions should apply to a range of individuals and organizations asserting objections to same-sex relationships in a wide variety of institutional contexts.[24]

These two arguments for broad religious exemptions—the two-tiered antidiscrimination model, and the unconstrained refusals model—work together. They point the nation away from an antidiscrimination regime that has tolerated relatively limited religious exemptions[25] and toward a healthcare-refusals regime with little court oversight that has authorized ever-expanding religious exemptions, seemingly without regard for their impact on those who do not share the objector's beliefs.[26]

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21. Amicus Curiae Brief of Ryan T. Anderson, Ph.D., and African-American & Civil Rights Leaders in Support of Petitioners, *supra* note 18, at 5.

22. Ryan T. Anderson, *Will Marriage Dissidents Be Treated as Bigots or Pro-Lifers?*, FEDERALIST (July 14, 2015), http://thefederalist.com/2015/07/14/will-marriage-dissidents-treated-bigots-pro-lifers [https://perma.cc/E57V-DQXH].

23. NeJaime & Siegel, *supra* note 12, at 2541.

24. *See, e.g.*, Anderson, *supra* note 22.

25. *See* Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 653-58 (2016).

26. *See* NeJaime & Siegel, *supra* note 12, at 2566-67, 2571, 2576-77 (discussing state laws that allow healthcare providers and institutions to refuse patient care without providing referrals or other protections such as access to alternative care); *see also Reproductive Rights & Health, Pharmacy Rules 101*, NAT'L WOMEN'S L. CTR. 2 (Dec. 2017), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/12/Pharmacy-Refusals-101.pdf [https://perma.cc

The majority opinion in *Masterpiece Cakeshop* rejects these two related arguments. Rather than carve out a special (and lesser) place for sexual orientation, *Masterpiece Cakeshop* treats lesbian and gay individuals as full members of the national community deserving of equal protection from discrimination. The Court accomplishes this by analyzing the case as presenting an ordinary question of public accommodations law. At the outset of its opinion, the Court invokes the "general rule" that religious 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."[27] In so doing, the Court cites the leading precedent rejecting a free exercise claim in the public accommodations context—*Newman v. Piggie Park Enterprises, Inc.*—which denied a business owner's claim for an exemption from the race nondiscrimination mandate of the 1964 Civil Rights Act.[28]

The Court, then, does not endorse a two-tiered system of antidiscrimination law in which some groups get full protection and others get less. Instead, it adopts one public accommodations framework in which government "can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."[29]

The antidiscrimination regime into which the Court assimilates sexual orientation stands in stark contrast to the healthcare refusal statutes regulating abortion and contraception that few courts have reviewed.[30] Whereas the antidiscrimination tradition limits religious accommodations to prevent material and dignitary harm to third parties, many healthcare refusal laws furnish ever-expanding accommodations to religious objectors without concern for the material and dignitary harms that are inflicted on women.[31] As we have shown, many of these laws allow providers—including hospitals and other practices—to refuse to provide women with referrals, counseling, and information relating to reproductive healthcare, on the logic that such provisioning would make the objector complicit in a woman's objected-to conduct.[32] Women exercising reproductive rights are deprived of the access and dignity that the Court values in

/E5MT-KMT7] (documenting state laws that permit pharmacists to refuse to fill prescriptions without any obligation to refer or transfer the prescription).

27. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018).

28. 390 U.S. 400, 402 n.5 (1968) (per curiam), *aff'g* 377 F.2d 433 (4th Cir. 1967).

29. *Masterpiece Cakeshop*, 138 S. Ct. at 1728.

30. *See* NeJaime & Siegel, *supra* note 12, at 2535 n.77.

31. *See id.* at 2566-67, 2571, 2576-77; *infra* note 35.

32. *See* NeJaime & Siegel, *supra* note 12, at 2538-42.

Masterpiece Cakeshop;[33] in the language of the Court's opinion, they are denied "equal access" and made subject to "community-wide stigma."[34]

Consider a recent example that arises at the intersection of Arizona's public accommodations law and the state's healthcare refusal law. Nine weeks into pregnancy, Nicole Arteaga's fetus lost its heartbeat, and her doctor prescribed her misoprostol to end the failed pregnancy.[35] Walgreens notified her that it had filled the prescription, yet when she arrived to pick up the medication, the pharmacist asked Arteaga if she was pregnant and then refused to give her the prescription, citing his ethical beliefs.[36] Arteaga left the pharmacy in tears, later saying she felt "ashamed and . . . humiliated" in front of the other customers and her 7-year-old child.[37] Reader comments to a *New York Times* article about the incident echo Arteaga's reaction that the pharmacist acted inappropriately in obstructing her access to needed medication and making a public example of her: "Pharmacists are not clergy . . . . Walgreens is not a church and thus random

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33. *See id.* at 2566-72, 2576-77.

34. *Masterpiece Cakeshop*, 138 S. Ct. at 1727; *see* Louise Melling, *Religious Refusals and Reproductive Rights: Claims of Conscience as Discrimination and Shaming*, *in* THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY 375 (Susanna Mancini & Michel Rosenfeld eds., 2018).

35. Louis Lucero II, *Walgreens Pharmacist Denies Woman with Unviable Pregnancy the Medication Needed to End It*, N.Y. TIMES (June 25, 2018), https://www.nytimes.com/2018/06/25/us/walgreens-pharmacist-pregnancy-miscarriage.html [https://perma.cc/S3PM-FGJE]. Walgreens is subject to the state's public accommodations law. The state bars discrimination on the basis of sex, *see* ARIZ. REV. STAT. ANN. § 41-1442 (2018), and covers stores and medical offices, *see Public Accommodation*, ARIZ. ATT'Y GEN., https://www.azag.gov/civil-rights/discrimination/public-accommodation [https://perma.cc/WB2N-6VVJ]. Accordingly, the public accommodations law would apply to a pharmacy. But Arizona's healthcare refusal law is relevant to the pharmacist's actions. Arizona is one of six states "that specifically allow[s] pharmacies or pharmacists to refuse for religious or moral reasons without critical protections for patients, such as requirements to refer or transfer prescriptions." *Reproductive Rights & Health, Pharmacy Rules 101*, *supra* note 26, at 2. For Arizona's law, see ARIZ. REV. STAT. ANN. § 36-2154(B) (2018) ("A pharmacy . . . or any employee of a pharmacy . . . who states in writing an objection to abortion, abortion medication, emergency contraception or any medication or device intended to inhibit or prevent implantation of a fertilized ovum on moral or religious grounds is not required to facilitate or participate in the provision of an abortion, abortion medication, emergency contraception or any medication or device intended to inhibit or prevent implantation of a fertilized ovum. The pharmacy . . . or an employee of the pharmacy . . . shall return to the patient the patient's written prescription order.").

36. Lucero, *supra* note 35.

37. Nicole Mone, FACEBOOK (June 22, 2018, 7:01 AM), https://www.facebook.com/nicole.arteaga1?lst=1188816819%3A1599340517%3A1529802886.

persons should not be able to sit in judgment and impact a customer's health";[38] "If you don't want to dispense those meds get a different job";[39] "Then I am going to get a job at Cabela's and refuse to sell guns based on my moral objections."[40]

II. EQUAL OPPORTUNITY AND THIRD-PARTY HARM

In *Masterpiece Cakeshop*, the Court emphasizes the importance of antidiscrimination protections in public accommodations and reaffirms precedent limiting religious exemptions from such laws. It stresses that exemptions must be limited in order to vindicate the government's interest in securing equal opportunity, to afford protected classes equal access to goods and services, and to shield them from stigma.

This Part explores the principle underlying that guidance and relates it to the Court's other public accommodations and religious liberties decisions. We begin by examining the caselaw through which the Court evaluates claims for religious exemptions under public accommodations statutes. We then show how the Court's attention to the harm that religious exemptions can inflict on other citizens echoes critical passages of recent religious liberties caselaw. We conclude by relating the Court's requirement of neutrality in government adjudication of religious exemption claims to its call for limits on religious exemptions from public accommodations laws. We demonstrate why neutrality in government adjudication does not translate into a mandate for religious exemptions from antidiscrimination law.

A. Coordinating Public Accommodations and Religious Liberties Law

We begin by observing the doctrinal framework in which the Court evaluates free exercise claims under public accommodations laws. The claimant in *Masterpiece Cakeshop* sought a religious exemption from a public accommodations law that required those providing services in the market to offer services on the same

38. Heather Corchado, FACEBOOK (June 25, 2018, 8:38 AM), https://www.facebook.com/nytimes/posts/10151620508244999?comment_tracking=%7B%22tn%22%3A%22O%22%7D (3,300 likes as of September 10, 2018).

39. Megan Montgomery, FACEBOOK (June 25, 2018, 8:27 AM), https://www.facebook.com/nytimes/posts/10151620508244999?comment_tracking=%7B%22tn%22%3A%22O%22%7D (2,100 likes as of September 10, 2018).

40. Jami Helm Slater, FACEBOOK (June 25, 2018, 8:53 AM), https://www.facebook.com/nytimes/posts/10151620508244999?comment_tracking=%7B%22tn%22%3A%22O%22%7D (1,200 likes as of September 10, 2018).

terms and conditions offered to all other members of the public. In its decision, the Court repeatedly refers to such public accommodations laws as "neutral" and "generally applicable"[41] within the meaning of its governing free exercise decision, *Employment Division v. Smith*.[42] *Smith* allows states to enact neutral and generally applicable laws, even if they burden religion.[43] As the *Masterpiece Cakeshop* Court's repeated reference emphasizes, public accommodations statutes generally respect the free exercise of religion; they do not single out or target persons on the basis of religious beliefs.

Masterpiece Cakeshop's description of public accommodations laws as neutral and generally applicable already establishes their constitutionality for Free Exercise Clause purposes under *Smith*. But the opinion's citation reaffirming *Piggie Park*[44] reminds us that the public accommodations provisions of the 1964 Civil Rights Act met the "compelling interest" standard that prevailed at the time of *Sherbert v. Verner*.[45] In subsequent years, the Court consistently characterized the government's interest in securing equal opportunities for the beneficiaries of antidiscrimination law as compelling—in the free exercise context with *Bob Jones*

41. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018) ("[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."); *id.* at 1723-24 ("The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws."); *id.* at 1728 (referring to "a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law"); *id.* at 1728 (referring to the state's "enforcement of its generally applicable state regulations of businesses that serve the public"); *see also id.* at 1748 (Ginsburg, J., dissenting) (agreeing with the majority's assertion that "'[I]t is a general rule that [religious and philosophical] 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'"); *cf.* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Bos., Inc., 515 U.S. 557, 572 (1995) ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.").

42. 494 U.S. 872, 881 (1990).

43. *See id.* at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment))).

44. *Masterpiece Cakeshop*, 138 S. Ct. at 1728.

45. 374 U.S. 398, 403 (1963).

University v. United States[46] and in the associational freedom context with *Roberts v. United States Jaycees*,[47] addressing race and sex discrimination, respectively.

Accordingly, in reaffirming the authority of *Piggie Park*, *Masterpiece Cakeshop* offers guidance about the analysis of exemptions from antidiscrimination law under RFRA as well as the Constitution. After the Court decided *Smith*, Congress passed RFRA, which sought to "restore" *Sherbert*'s "compelling interest" standard.[48] *Piggie Park* therefore supplies strong authority to support public accommodations laws against challenges under RFRA as well as the Free Exercise Clause.[49]

RFRA prohibits government from "substantially burden[ing] a person's exercise of religion" unless the government "demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[50] As we have elsewhere discussed at some length, if granting a religious exemption from a public accommodations law would frustrate the government's interest in enacting the law or harm the law's beneficiaries, then unencumbered enforcement of the law is likely the least restrictive means of furthering the government's compelling ends.[51]

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46. 461 U.S. 574, 602-04 (1983) (race).

47. 468 U.S. 609, 625-26 (1984) (gender).

48. 42 U.S.C. § 2000bb(b)(1) (2018) ("The purposes of this chapter are . . . to restore the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) . . . .").

49. In citing *Piggie Park*, the Court shows that compelling-interest justifications for antidiscrimination law apply in the contexts of sexual orientation as well as race, a point on which the majority in *Burwell v. Hobby Lobby Stores* was not as clear. *Compare* 134 S. Ct. 2751, 2783 (2014) ("The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction . . . . Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."), *with id.* at 2804-05 (Ginsburg, J., dissenting) (citing *Piggie Park* and a case on sexual orientation discrimination in public accommodations and asking, "Would RFRA require exemptions in cases of this ilk?").

50. 42 U.S.C. § 2000bb-1(a) to (b)(2) (2018).

51. NeJaime & Siegel, *supra* note 12, at 2580-81. The Court reasons similarly about free exercise (as well as speech) claims. *Cf. Masterpiece Cakeshop*, 138 S. Ct. at 1727; *infra* note 63 and accompanying text.

B. Reaffirming the Public Accommodations Concept

The Court's citation to *Piggie Park* provides more than doctrinal authority. It reaffirms the concept of public accommodations against conservative challenge. In recent years, some religious conservatives have criticized the concept of public accommodations and argued that business owners should be free to act on their religious convictions in the marketplace, as well as in the public square, by discriminating in their business dealings.[52] Indeed, one way to understand the wave of recent wedding-cake litigation is as an insurgent challenge to the public settlement, dating to the lunch-counter sit-ins of the Civil Rights Era, that limited the prerogatives of business owners on the understanding that equal citizenship includes a customer's equal right to participate in commerce.[53]

By invoking *Piggie Park*, *Masterpiece Cakeshop* asserts that public accommodations laws continue to serve important social ends. In the wake of the sit-ins of the mid-twentieth century, the nation no longer allows business owners to invoke property rights as a reason to refuse service to minorities, as they once commonly did.[54] After the searing debates that led to passage of Title II of the 1964 Civil Rights Act, the nation has come to judge such refusals of service as "humiliating."[55] It now enforces public accommodations laws on terms that require business owners, whatever their personal convictions, to run their business

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52. *See* Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 18-20 (2013) (using the concept of "'religious integralism'—that form of religion which sees 'religion not as one isolated aspect of human existence but rather as a comprehensive system more or less present in all domains of the individual's life'"—to explain "the reintroduction of religion in the workplace" and the rise of "the religiously expressive corporation" and the "religious entrepreneur"); *cf.* Paul Horwitz, *The* Hobby Lobby *Moment*, 128 HARV. L. REV. 154, 180 (2014).

53. Leading property scholar Joseph Singer situates current struggles over LGBT equality in this historical perspective. As Singer explains, "Public accommodation laws, including the 1964 Civil Rights Act, intend to create" a world in which those historically subject to discrimination "do not have to fear exclusion or rejection from the properties we need to enter during our daily lives." Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 946-47 (2015). Singer explains how in the Civil Rights Era courts and legislatures rejected arguments that businesses "had the right to exclude and to waive that right selectively and in line with their religious values," and asserts that these rejected arguments have "been revived by businesses seeking to deny services to LGBT customers." *Id.* at 931 (citation omitted); *see also* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1293 (1996) (explaining how the 1964 Civil Rights Act shifted understandings such that it became "no longer acceptable" "to argue that businesses had a right to exclude African-American customers").

54. *See* CHRISTOPHER W. SCHMIDT, THE SIT-INS: PROTEST & LEGAL CHANGE IN THE CIVIL RIGHTS ERA 171-73 (2018).

55. *See* 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 140 (2014).

in a nondiscriminatory fashion. A framework of this kind facilitates unimpeded access to the market for those who have long been subject to discrimination and who do not share the business owners' beliefs. That is a primary aim of public accommodations laws – an aim the Court has repeatedly recognized as "compelling."[56]

C. *Protecting Against Material and Dignitary Harm*

Masterpiece Cakeshop is especially concerned to emphasize that public accommodations laws protect against the dignitary as well as the material harms of refusals. In fact, the Court's analysis begins by affirming that "gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth."[57] The opinion's guidance on free exercise rejects a longstanding argument advanced by many advocates of broad religious exemptions.[58] These advocates conceded that those protected by public accommodations statutes might need access to goods and services, but they suggested they did not suffer legally cognizable harm so long as some merchants would sell to them.[59]

The argument that the Court should only consider material harms is at odds with the origins of our nation's public accommodations laws and our civil rights tradition. *Bob Jones University*[60] and *Roberts*[61] each hold that the government has compelling interests in enforcing antidiscrimination law. These interests include integrating marginalized groups and protecting them against stereotypes and stigma.[62]

Masterpiece Cakeshop recognizes these same government interests in protecting marginalized groups from the stigma of refusals. The Court emphasizes that the government's interest in securing equal access and preventing stigma offers

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56. *See supra* notes 46-47 and accompanying text.

57. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018).

58. *See* Elizabeth Sepper, *More at Stake Than Cake – Dignity in Substance and Process*, SCOTUSBLOG (June 5, 2018, 11:23 AM), http://www.scotusblog.com/2018/06/symposium-more-at-stake-than-cake-dignity-in-substance-and-process [https://perma.cc/HMX4-43JS].

59. *See, e.g.*, Brief of Christian Legal Society et al. as Amici Curiae in Support of Petitioners at 5, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4005662, at *5 ("Colorado has no compelling interest in making this small business serve same-sex weddings . . . . The customers' material interest in obtaining a cake is not at issue; there were ample willing providers. The insult or dignitary harm to same-sex couples cannot be considered in isolation.").

60. 461 U.S. 574, 604 (1983) (race).

61. 468 U.S. 609, 625-26 (1984) (gender).

62. *See* Robert Post, *RFRA and First Amendment Freedom of Expression*, 125 YALE L.J.F. 387, 394 (2016).

reason to "confine[]" exemptions, otherwise "a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations."[63]

With this passage, the Court makes two key moves. First, the Court makes clear that exemptions must be limited to protect gays and lesbians not only from material but also from dignitary harm. Second, the Court is concerned to limit exemptions with the potential to be asserted by "a long list of persons" who might inflict "community-wide stigma." Claims by those who object to facilitating a marriage have exactly that potential to expand in numbers. As we have described, complicity-based claims vastly expand the universe of objectors, and accommodating them makes it far more difficult to protect third parties from harm.[64] The potential numerosity and impact of such claims is relevant, depending on the legal context, to questions of whether and how exemption claims are recognized.

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63. 138 S. Ct. at 1727. The majority opinion is written so that this same analysis would also limit exemptions from antidiscrimination law based on freedom of speech. For an analysis of the opinion's discussion of free speech claims, see Robert Post, *What About the Free Speech Clause Issue in* Masterpiece*?*, TAKE CARE (June 13, 2018), https://takecareblog.com/blog/what-about-the-free-speech-clause-issue-in-masterpiece [https://perma.cc/EHX6-LY3G].

64. Douglas NeJaime & Reva Siegel, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, *in* THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY, *supra* note 34, at 187, 203. In this way, concerns about complicity-based conscience claims are closely connected to concerns about third-party harm. As we have argued:

> The structure of these religious exemption claims is relevant, not to the claims' sincerity or religious significance, but instead to the claims' potential to harm others. Because complicity claims single out other citizens as sinners, their accommodation has the potential to inflict material and dignitary harm on those the objector claims are sinning. Other aspects of the claims increase the likelihood of third-party harm. Complicity claims expand the universe of potential objectors, from those directly involved to those who consider themselves indirectly involved in the objected-to conduct. Where complicity claims become entangled in society-wide conflicts, the number of potential claimants multiplies. The universe of objectors is especially likely to expand in regions where majorities still oppose recently legalized conduct. Under these circumstances, barriers to access to goods and services may spread, and refusals may demean and stigmatize members of the community.
>
> Just as importantly, the logic of complicity offers objectors a ground on which to object to efforts to mediate the impact of their objection on third parties. For example, a health care provider with conscience objections to performing particular healthcare services (for example, abortion, sterilization, or assisted reproductive technologies) might refer patients to alternate providers. But if that objector raises

D. Masterpiece Cakeshop *and the Third-Party Harm Principle*

By addressing concerns about the third-party harms of religious accommodation, the *Masterpiece Cakeshop* Court reasons about religious accommodation in the tradition of earlier Free Exercise[65] and Establishment Clause[66] decisions. Concern with third-party harm[67] also has guided the Court's reasoning in two high-profile RFRA cases addressing exemptions from the contraceptive coverage requirements in the Affordable Care Act. While the body of healthcare refusal laws addressed above generally has escaped judicial review, the Court recently has considered the question of religious accommodation in disputes over contraception. In both *Burwell v. Hobby Lobby Stores*[68] and *Zubik v. Burwell*,[69] employers sought exemptions under RFRA from requirements that insurance coverage provided to employees include coverage for contraception. In both cases,

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> a complicity-based objection to referring the patient, she will deprive the patient of information about alternate services.

Id. (footnote omitted).

65. *See* United States v. Lee, 455 U.S. 252, 261 (1982) (rejecting a religious exemption claim by an employer who objected to participation in the Social Security system and explaining that such an accommodation would "impose the employer's religious faith on the employees").

66. *See* Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) (explaining that in applying the Religious Land Use and Institutionalized Persons Act, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 709-10 (1985) (invalidating a state statute that required employers to organize work schedules in ways that accommodate employees' Sabbath observance and explaining that the statute made "no exception . . . when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers"). For scholarly arguments that the Establishment Clause imposes a limit on accommodation based on third-party harm, see, for example, Nelson Tebbe et al., *When Do Religious Accommodations Burden Others?*, *in* THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY, *supra* note 34, at 328; and Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014).

67. Throughout this Essay, we have characterized the Court's attention to third-party harm in its recent religious liberties decisions as a "concern," rather than a rule requiring "limits" on religious accommodation when third parties are injured. (Third-party harm may be a reason to deny an accommodation, it may be relevant in balancing competing interests, or it may guide the design of an accommodation.) The Justices have not all signed on to opinions recognizing third-party harm as a limit, but their recent decisions treat third-party harm as a significant factor.

68. 134 S. Ct. 2751 (2014).

69. 136 S. Ct. 1557 (2016).

the Court worried about the impact of religious accommodations on other citizens protected by the law who did not share the objector's beliefs.[70]

In *Hobby Lobby*, Justice Alito's opinion for the Court emphasized that the effect of the "accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero."[71] Justice Kennedy's concurring opinion in that case echoed this concern, reasoning that the accommodation may not "unduly restrict other persons, such as employees, in protecting their own interests."[72] Then, in *Zubik*, the Court issued a per curiam order remanding with instructions that the parties should have "an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'"[73]

Across its cases, the Court has reasoned about the validity of religious accommodation with attention to its impact on those who do not share the objector's beliefs. *Masterpiece Cakeshop* reasons in the tradition of these earlier cases. The Court affirms a public accommodations regime that has restricted exemptions to prevent harm to those protected by the law. Importantly, the Court emphasizes both material and dignitary harm. The public accommodations law seeks to promote not only equal access but also equal respect. The Court recognizes the government's interest in avoiding exemptions that would undermine these objectives.

Notice that the Court's reasoning across these cases contrasts sharply with the many healthcare refusal laws—which rarely have come before courts—that authorize providers to refuse care without consideration of the harm to third parties.[74] These healthcare refusal statutes bear little resemblance to the balance articulated in *Masterpiece Cakeshop*, where the Court insists on the importance of respecting religious liberty while repeatedly expressing concern that the accommodation of religious liberty is appropriately limited so that it does not inflict material and dignitary harm on other citizens. The healthcare refusal laws also look very different from the balance articulated when the Court itself has considered religious exemptions from laws and regulations that protect women's access to contraception. In considering RFRA exemption claims in *Hobby Lobby*

70. *See* NeJaime & Siegel, *supra* note 64, at 205-08.

71. 134 S. Ct. at 2760.

72. *Id.* at 2787 (Kennedy, J., concurring).

73. 136 S. Ct. at 1560 (quoting Supplemental Brief for the Respondents at 1, *Zubik*, 136 S. Ct. 1557 (No. 14-1418)).

74. *See* sources cited *supra* note 26.

and *Zubik*, the Court stressed the importance of accommodating religious objections without affecting women's contraceptive coverage under the Affordable Care Act.

E. Differentiating Roles: Government Respect in Adjudication and the Seller's Legal Obligations

How does the limit on religious exemptions in *Masterpiece Cakeshop* square with the protections the Court extends to religious objectors? The Court requires the government to address religious objectors evenhandedly and with respect when the government adjudicates religious exemption claims.[75] At the same time, as we have shown, the Court makes clear that the government can enforce public accommodations laws that protect gays and lesbians "in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public," *and* that the government may restrict religious exemptions from such laws in order to achieve that purpose.[76]

The requirement that the government give the religious claimant "neutral and respectful consideration"[77] does not translate into an obligation to provide the religious claimant an exemption from the public accommodations law, as some have begun to suggest.[78] The roles of distinct actors are at issue: the government in adjudicating a claim, the seller in abiding by public accommodations

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75. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1731 (2018). We join those who have questioned the Court's decision to reverse the lower court on the grounds that the state civil rights commission did not meet the requirement of respect and neutrality. *See id.* at 1751 (Ginsburg, J., dissenting) (challenging the majority's conclusion about evidence of bias, and further observing that there is "no reason why the comments of one or two Commissioners should be taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins" given that "[t]he proceedings involved several layers of independent decisionmaking, of which the Commission was but one"); *see also* Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. (forthcoming 2018) (manuscript at 4) (contending that "the Court improperly applied free exercise doctrine to the facts of the case, finding unconstitutional hostility and intolerance where there was none"); Michael Dorf, Masterpiece Cakeshop *Ruling Should (But Probably Won't) Doom the Travel Ban*, DORF ON LAW (June 4, 2018), http://www.dorfonlaw.org/2018/06/masterpiece-cakeshop-ruling-should-but.html [https://perma.cc/5H2F-4LL5] (describing *Masterpiece Cakeshop* as a "dubious decision" because of its conclusion that "the Colorado Civil Rights Commission's consideration of the case was infected with anti-religious bias").

76. *Masterpiece Cakeshop*, 138 S. Ct. at 1728.

77. *Id.* at 1729.

78. *See* Stephanie Barclay, *Supreme Court's Cakeshop Ruling Is Not Narrow—and That's a Good Thing*, HILL (June 6, 2018, 2:00 PM), http://thehill.com/opinion/judiciary/391004-supreme-courts-cakeshop-ruling-is-not-narrow-and-thats-a-good-thing [https://perma.cc

law, and the buyer in engaging in a transaction protected by the public accommodations law.

The Court imposes a requirement of respect on the government acting as an adjudicator; this role requirement does not alter the seller's legal obligation to transact in a nondiscriminatory manner. The seller's role is constrained by law: to provide "protected persons equal access to goods and services."[79] (The public

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/DHE5-4PUU]; David French, *In* Masterpiece Cakeshop, *Justice Kennedy Strikes a Blow for the Dignity of the Faithful*, NAT'L REV. (June 4, 2018 1:30 PM), https://www.nationalreview.com/2018/06/masterpiece-cakeshop-ruling-religious-liberty-victory [https://perma.cc/CRE9-PJVP]. As we discuss in text, these readings of *Masterpiece Cakeshop* mistakenly run together two distinct questions. They conflate the decision's requirement that the government adjudicate religious exemption claims evenhandedly with the question of whether sellers should be granted religious exemptions from public accommodations laws.

Other scholars have asserted claims that rest on this same misreading. Robin Fretwell Wilson sees in *Masterpiece Cakeshop* an equivalence between gay and lesbian individuals protected by public accommodations laws and religious objectors, suggesting that the Court's reasoning supports exemptions of the kind that Phillips sought. *See* Am. Constitution Soc'y, *Religious Freedom v. Anti-Discrimination Laws: Can Rights Be Reconciled?*, YOUTUBE, at 17:42 (June 8, 2018), https://www.youtube.com/watch?v=tnXFJdfWovg [https://perma.cc/85JC-XWR2] ("Kennedy tells you that if you want to write a new script for living together, we have to have no disparagement of either set of beliefs in the market. We can't have stigma allowed in these laws. We can't have full-on exclusion of people from the public sphere, and I think, reading this decision, that means religious people too . . . . All the decisions about bakers, and photographers, and florists, every single one was decided under a law that came before marriage equality was on the scene. And so those old scripts to a person like Phillips feels like there's no room for them, and if we're not careful about the way we apply them, they may have the effect of forcing these folks—who we might not agree with—out of the marketplace.").

In a related but distinct vein, Sherif Girgis infers support, from the majority and concurrence's requirement that public officials treat religious dissenters respectfully, for the view that "traditionalism on marriage isn't the new Jim Crow. If Phillips deserved to be treated like a racist, after all, the majority would not have balked at Colorado officials' dismissiveness toward his religion. (There's nothing wrong with being dismissive of racism.)" Sherif Girgis, *Filling in the Blank Left in the* Masterpiece *Ruling: Why Gorsuch and Thomas Are Right*, PUB. DISCOURSE (June 14, 2018, 8:00 PM), http://www.thepublicdiscourse.com/2018/06/21831/ [https://perma.cc/EY62-QPLE]. It appears that Girgis is trying to find support for the two-tiered antidiscrimination framework that provides expansive religious exemptions in the majority's requirement that government treat religious believers respectfully.

Again, as we observe in text, the Court's requirement that the government treat claimants evenhandedly concerns obligations bearing on the government's role in deciding cases, rather than the role of a seller in markets governed by public accommodations law.

79. *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

has come to expect sellers to act on these terms and is startled when they do not, as reactions to the Walgreens pharmacist's refusal illustrate.[80])

As we observed, in recent years some religious conservatives have challenged the role imposed on market participants by public accommodations laws. In Paul Horwitz's description, they seek to "upend[]" the conventional "picture of the marketplace as a neutral space."[81] In *Masterpiece Cakeshop*, the Court rejected this challenge.[82] A public accommodations law can require a seller to act in the market in accordance with this role and provide "protected persons equal access to goods and services," while treating the seller's religious beliefs with respect.[83] Indeed, the concluding passage of *Masterpiece Cakeshop* directs the government to adjudicate disputes involving religious claimants evenhandedly even as it reaffirms the importance of limiting religious exemptions in public accommodations: "[D]isputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[84]

This balance, which the Court reaffirms in the concluding sentences of its opinion, is unexceptional and fully consistent with the Court's Free Exercise Clause precedents. *Smith* allows the government to enact neutral, generally applicable laws and makes clear that exemptions are not required if such laws incidentally burden religion. *Piggie Park* and *Bob Jones University* affirm the importance of enforcing antidiscrimination protections even when religious individuals and organizations assert sincere objections. And, as we explained above, the Court's religious liberties decisions have consistently featured concern about the third-party harms of religious accommodation. *Masterpiece Cakeshop* carries forward this concern—affirming the government's weighty interests in enforcing its public accommodations law as well as the government's reasons for restricting exemptions to avoid harm to gays and lesbians[85]—while continuing

80. *See supra* notes 38-40 and accompanying text.

81. Horwitz, *supra* note 52, at 180.

82. *See* 138 S. Ct. at 1727.

83. *Id.* By regulating the transaction, the law imposes role obligations on the seller and makes the interactions, in that respect, less personal. *Cf.* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 966 (1995) (explaining how antidiscrimination laws ambiguate the social meaning of serving protecting classes so that the regulated party's actions could be explained as motivated by her own beliefs or, alternately, simply by "concern to obey the law").

84. *Masterpiece Cakeshop*, 138 S. Ct. at 1732; *see also id.* ("[I]t must be concluded that the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality . . . .").

85. This is especially relevant in RFRA cases that raise questions of narrow tailoring. *See supra* notes 50-51 and accompanying text.

to insist that the government treat religious individuals and organizations with neutrality and respect.

III. IMPLICATIONS FOR LITIGATION AND DRAFTING LEGISLATION

As we have shown, the Court's reasoning in *Masterpiece Cakeshop* extends well beyond concern with the risk of bias in the adjudication of exemption claims. The Court's approach to religious exemptions in *Masterpiece Cakeshop* has important implications for litigation and disputes over legislation concerning LGBT and reproductive rights.

First, *Masterpiece Cakeshop* provides authoritative guidance in addressing exemption claims from laws prohibiting sexual orientation discrimination. It recently played a crucial part in a case brought by the Alliance Defending Freedom, in which a wedding vendor with religious objections to same-sex marriage challenged Phoenix's nondiscrimination ordinance.[86] In rejecting the exemption claim, the Arizona Court of Appeals invoked the Supreme Court's reasoning in *Masterpiece Cakeshop*, including its citation to *Piggie Park*.[87] *Masterpiece Cakeshop*'s reasoning will continue to shape disputes in litigation arising in the public accommodations setting and under other antidiscrimination laws.

Second, the Court's reasoning provides direction to those engaged in drafting new antidiscrimination legislation at the federal, state, and local levels. In these contexts, some advocates insist that legislation that would prohibit LGBT discrimination should be conditioned on the availability of expansive religious exemptions.[88] Often, advocates seek such broad exemptions when they have the political power to extract them.[89] But *Masterpiece Cakeshop* suggests that our

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86. Brush & Nib Studio, LC v. City of Phoenix, 418 P.3d 426, 432 (Ariz. Ct. App. 2018).

87. *Id.* at 434. The case raised state, not federal, religious liberty claims. *See id.* at 432-33.

88. *See, e.g.*, Laurie Goodstein, *Mormons Seek Golden Mean Between Gay Rights and Religious Beliefs*, N.Y. TIMES (Jan. 27, 2015), https://www.nytimes.com/2015/01/28/us/mormons-seek-golden-mean-between-gay-rights-and-religious-beliefs.html [https://perma.cc/A6BL-HMPR]; *GOP Bill on Indiana LGBT Rights Has Religious Exemptions*, CHI. TRIB. (Nov. 18, 2015, 11:17 AM), http://www.chicagotribune.com/suburbs/post-tribune/news/ct-indiana-religious-liberty-gay-rights-20151117-story.html [https://perma.cc/5XCV-76Q3].

89. Robin Fretwell Wilson, who has worked extensively on legislation concerning religious exemptions and LGBT nondiscrimination, sees a relationship between religious exemptions and political power. She asserts that advocates for antidiscrimination law covering sexual orientation will have to provide religious exemptions of the kind Phillips sought if they hope to pass antidiscrimination protections in Republican-dominated jurisdictions. *See* Am. Constitution Soc'y, *supra* note 78, at 19:09, 39:26 ("But if we're going to have SOGI [sexual orientation and gender identity] nondiscrimination laws in the rest of America, we're going to have to

Constitution does not require these broad exemptions and may provide reasons to limit them when they threaten to "result[] in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations."[90]

Concerns about third-party harm apply even more dramatically to the free-standing exemption statutes that some advocates have worked to enact. Such statutes simply authorize religious refusals, without providing any nondiscrimination protections for LGBT people. Some of these statutes aim broadly. For instance, Mississippi's law authorizes refusals by businesses and individuals who decline to provide "services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, celebration, or recognition of any marriage, based upon or in a manner consistent with a sincerely held religious belief or moral conviction . . . ."[91] Others target specific services. For example, Oklahoma recently enacted a law allowing licensed adoption and foster care agencies to refuse service to same-sex couples on religious grounds.[92] These laws allow providers, including those licensed by the state, to inflict material and dignitary harm on gays and lesbians.[93] As we have shown, legislation of this kind is deeply at odds with the understanding of religious accommodation that guides the Court's reasoning in *Masterpiece Cakeshop* and recent RFRA cases.

Third, the Court's reasoning in *Masterpiece Cakeshop* has implications for the largely unadjudicated body of healthcare refusal laws that, while commonly associated with abortion and contraception, also govern assisted reproductive

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leave room for religious people . . . . So we're going to have to find ways in these new laws to live together, and that means leaving room for people like Phillips. And I'm sorry that I don't have a map with me, but those thirty-two states that don't now have sexual-orientation gender-identity nondiscrimination laws are, not surprisingly, all Republican. Every single state house is controlled by Republicans. There are Republican governors in every single one of those states except two. And they rank among the most religious in America. So at some point there's going to have to be room left there for religious people in the public square, too . . . .").

90. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018).

91. MISS. CODE ANN. § 11-62-5(1)(a) (2013).

92. *See* 2018 Okla. Sess. Law Serv. Ch. 322 (West) (to be codified at OKLA. STAT. tit. 10A, § 1-8-112).

93. *See, e.g.*, Fulton v. City of Phila., No. 18-2075, slip op. at 8, 63-64 (E.D. Pa. July 13, 2018) (refusing to enjoin the enforcement of a nondiscrimination ordinance against a religious provider of child welfare services that maintained a "policy to refuse service to same-sex couples," and emphasizing third-party harm as it reasoned that the government has "an interest in avoiding likely Equal Protection Clause and Establishment Clause claims that would result if it allowed its government contractors to avoid compliance with . . . the Fair Practices Ordinance by discriminating against same-sex married couples").

technologies and other matters of LGBT concern.[94] As we have shown, these laws authorize refusals by an ever-expanding universe of individuals and organizations who object to being made complicit in conduct they deem sinful.[95] Typically, the laws authorize refusals without shielding those who seek care from material and dignitary harm. As a consequence, people are denied access to services to which they would otherwise be entitled and suffer stigma for their lawful reproductive choices.[96]

While advocates may have the political power to pass laws of this kind, the laws they enact do not conform to the principles that guide our religious liberties caselaw. When courts are involved, judges are concerned to structure religious accommodation in ways that prevent third-party harm—a tradition that is carried forward in *Zubik* as well as *Masterpiece Cakeshop*. In balancing religious liberty and other governmental interests, courts routinely approach accommodation in ways that are concerned about the impact on third parties.[97]

In stark contrast, lawmakers enacting healthcare refusal laws often make no provision for those the refusal may affect.[98] Lawmakers may be indifferent or, worse yet, hostile to the rights of those the refusal may affect. In some cases, they may employ exemptions to deter the exercise of rights the law has only recently and fragilely come to protect.[99]

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94. *See, e.g.*, N. Coast Women's Care Med. Grp., Inc. v. San Diego Cty. Superior Court, 189 P.3d 959, 963-64 (Cal. 2008) (addressing a religious exemption claim in the context of a refusal to provide assisted reproductive technology services to a lesbian patient); Emanuella Grinberg & Jessica Campisi, *CVS Apologizes After a Pharmacist Refused to Fill a Transgender Woman's Prescription*, CNN (July 22, 2018, 8:53 PM), https://www.cnn.com/2018/07/20/health/arizona-trans-woman-cvs-pharmacist-prescription-trnd [https://perma.cc/Y95W-X7L8] (addressing pharmacist's refusal to fill hormone therapy prescription for transgender customer); Katie Hafner, *As Catholic Hospitals Expand, So Do Limits on Some Procedures*, N.Y. TIMES (Aug. 10, 2018), https://www.nytimes.com/2018/08/10/health/catholic-hospitals-procedures.html [https://perma.cc/VCR3-2S6Z] (addressing healthcare provider's refusal to perform transition-related procedure for transgender patient).

95. *See* NeJaime & Siegel, *supra* note 12, at 2518-19.

96. *See supra* notes 31-37 and accompanying text.

97. *See supra* Section II.D.

98. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2154(B) (2018); ARK. CODE ANN. § 20-16-304 (2014); MISS. CODE ANN. § 41-107-1 to -13 (2013).

99. *See* NeJaime & Siegel, *supra* note 12, at 2555 (showing how, with healthcare refusal laws, "exemptions, like other forms of anti-abortion legislation, can obstruct and stigmatize abortion, functioning as part of a broader legislative strategy to make access to abortion—and contraception—increasingly difficult").

As we have discussed, we observe a striking difference between the treatment of religious exemptions in cases where courts have been involved and the approach to religious exemptions recently adopted by lawmakers acting without judicial oversight in the LGBT and healthcare contexts.[100] In our years of work with American conscience law, we have been repeatedly impressed by the difference between legislated conscience exemptions of this kind and the tenor of judicial opinions on religious accommodation.

Many of the exemption statutes adopted in the LGBT and healthcare contexts were supported by movements opposed to LGBT equality and reproductive rights.[101] These statutes were enacted to allow the expression of conscience, which for some was entangled with expressive objections to LGBT and reproductive rights.[102] When judges supervise the enforcement of exemption statutes, they often act on instincts – whether constitutional, statutory, or simple expressions of fundamental fairness – that lead them to limit and structure accommodation so that individuals are not authorized to impose their religious beliefs on others who do not share those beliefs.

In some of these cases, the Constitution may impose limits on religious accommodation in order to secure guarantees of religious freedom, of liberty, or of equality. In many other cases, the principle at stake may be pluralism itself.[103] As we have argued, an accommodation regime's pluralism is measured not only by its treatment of objectors, but also by its attention to protecting other citizens who do not share the objectors' beliefs.[104]

We can measure *Masterpiece Cakeshop*'s pluralism in the dual concerns of the opinion's closing passage: to resolve disputes "without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[105]

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100. We observe that the approach to legislated accommodations with respect to healthcare refusals and marriage exemptions in public accommodations statutes breaks from the approach to religious exemptions in the antidiscrimination context that prevailed in the 1960s and 1970s. *See* Sepper, *supra* note 25, at 653-61.

101. *See* NeJaime & Siegel, *supra* note 12, at 2542-65; NeJaime & Siegel, *supra* note 64, at 193-96.

102. For a remarkably frank discussion of the political aims of exemption claims, see Sherif Girgis, *Nervous Victors, Illiberal Measures: A Response to Douglas NeJaime and Reva Siegel*, 125 YALE L.J.F. 399, 407 (2016) (explaining that, with exemption claims in the LGBT and reproductive healthcare contexts, "political potency and moral stigma are *part of the point*").

103. *See* NeJaime & Siegel, *supra* note 64, at 218-19; *see also* Douglas NeJaime & Reva Siegel, *Religious Accommodation, and Its Limits, in a Pluralist Society*, *in* RELIGIOUS FREEDOM AND LGBT RIGHTS: POSSIBILITIES AND CHALLENGES FOR FINDING COMMON GROUND (Robin Fretwell Wilson & William N. Eskridge, Jr. eds., forthcoming 2018) (manuscript at 2), https://ssrn.com/abstract=3078002.

104. NeJaime & Siegel, *supra* note 64, at 218.

105. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018).

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