



Submission from Human Rights Watch to the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity

Freedom of Religion or Belief and Freedom from Violence and Discrimination Based on Sexual Orientation and Gender Identity

January 20, 2023

Human Rights Watch respectfully submits the following research findings and analysis in response to the call for inputs on the intersection of freedom of religion or belief (FoRB) and violence and discrimination based on sexual orientation and gender identity (SOGI).

Human Rights Watch has a long history of championing the freedom of religion and belief, including for religious minorities, as well as the human rights of all people regardless of their sexual orientation and gender identity. Protections from persecution on the basis of religion or belief are critically important, and must be safeguarded against erosion by the state or by religious or secular majorities.¹ At the same time, the freedom of religion or belief should not be used as a means to erode or violate the rights of others, and states should be mindful of their obligation to eradicate discrimination and ensure that all are equal in dignity and rights.

In many instances, religion has been explicitly or implicitly used as a justification for denying lesbian, gay, bisexual, and transgender (LGBT) people full equality under the law. Human Rights Watch has documented instances where law or practice reflects religious or moral convictions to

¹ Human Rights Watch, “India: Surge in Summary Punishments of Muslims,” October 7, 2022, <https://www.hrw.org/news/2022/10/07/india-surge-summary-punishments-muslims>; Human Rights Watch, “Afghanistan: ISIS Group Targets Religious Minorities,” September 6, 2022, <https://www.hrw.org/news/2022/09/06/afghanistan-isis-group-targets-religious-minorities>; Andreas Harsono, “Discrimination Holds Back Religious Minority Children,” *The Jakarta Post*, January 14, 2022, <https://www.thejakartapost.com/opinion/2022/01/13/discrimination-holds-back-religious-minority-children.html>; Human Rights Watch, “Prosecute them With Awesome Power”: China’s Crackdown on Tengdro Monastery and Restrictions on Communications in Tibet, July 6, 2021, <https://www.hrw.org/report/2021/07/06/prosecute-them-awesome-power/chinas-crackdown-tengdro-monastery-and-restrictions>.

deprive LGBT people of their human rights, including in Afghanistan,² Brazil,³ Indonesia,⁴ Malaysia,⁵ Poland,⁶ and Russia.⁷

At times, the freedom of religion and belief also has been misused as a sword rather than a shield, privileging the individual conscience and beliefs of some at the expense of the rights of others. Rather than maximizing the enjoyment of human rights for all, these exemptions often evince animus toward LGBT people or the exercise of sexual and reproductive rights,⁸ offer little or no protection for the rights of those who are affected by exemptions, and function primarily as a weapon to prevent others from exercising their rights rather than a safeguard to protect the rights of religious adherents.

The United States offers instructive examples of the misuse of freedom of religion and belief to curtail sexual and reproductive rights, including the rights of LGBT people. Currently, twelve U.S. states allow child welfare agencies licensed by the state to decline to work with LGBT people and their families if doing so would conflict with their asserted religious beliefs.⁹ Another seven U.S. states allow at least some healthcare providers to decline to serve LGBT people.¹⁰ Fewer states have enacted religious exemptions to public accommodation laws, but this is in part because only twenty-two U.S. states prohibit discrimination based on both sexual orientation and gender identity in public accommodations to begin with.¹¹ In recent years, lawmakers have attempted to enact additional restrictions that would exempt religious objectors from complying with neutral,

² Human Rights Watch, “*Even If You Go to the Skies, We’ll Find You*”: LGBT People in Afghanistan After the Taliban Takeover, January 26, 2022, <https://www.hrw.org/report/2022/01/26/even-if-you-go-skies-well-find-you/lgbt-people-afghanistan-after-taliban-takeover>.

³ Human Rights Watch, “*I Became Scared, This Was Their Goal*”: Efforts to Ban Gender and Sexuality Education in Brazil, May 12, 2022, <https://www.hrw.org/report/2022/05/12/i-became-scared-was-their-goal/efforts-ban-gender-and-sexuality-education-brazil>.

⁴ Human Rights Watch, “*These Political Games Ruin Our Lives*”: Indonesia’s LGBT Community Under Threat, August 10, 2016, <https://www.hrw.org/report/2016/08/10/these-political-games-ruin-our-lives/indonesias-lgbt-community-under-threat>.

⁵ Human Rights Watch, “*I Don’t Want to Change Myself*”: Anti-LGBT Conversion Practices, Discrimination, and Violence in Malaysia, August 10, 2022, <https://www.hrw.org/report/2022/08/10/i-dont-want-change-myself/anti-lgbt-conversion-practices-discrimination-and>.

⁶ Human Rights Watch, “Poland: Rule of Law Erosion Harms Women, LGBT People,” December 15, 2022, <https://www.hrw.org/news/2022/12/15/poland-rule-law-erosion-harms-women-lgbt-people>.

⁷ Human Rights Watch, *No Support: Russia’s “Gay Propaganda” Law Imperils LGBT Youth*, December 11, 2018, <https://www.hrw.org/report/2018/12/12/no-support/russias-gay-propaganda-law-imperils-lgbt-youth>.

⁸ While this submission focuses on sexual orientation and gender identity, these concerns are intrinsically bound up with the exercise of other sexual and reproductive rights, including the right to access abortion and contraception.

⁹ Movement Advancement Project, “Religious Exemption Laws,” <https://www.lgbtmap.org/equality-maps/religious-exemption-laws> (last accessed January 5, 2023); Human Rights Watch, “New Tennessee Law Deepens Discrimination Against LGBT People,” January 28, 2020, <https://www.hrw.org/news/2020/01/28/new-tennessee-law-deepens-discrimination-against-lgbt-people>; Human Rights Watch, “South Dakota Bill Would Justify Bigotry,” February 21, 2017, <https://www.hrw.org/news/2017/02/21/south-dakota-bill-would-justify-bigotry>.

¹⁰ Movement Advancement Project, “Religious Exemption Laws,” <https://www.lgbtmap.org/equality-maps/religious-exemption-laws> (last accessed January 5, 2023).

¹¹ Movement Advancement Project, “Nondiscrimination Laws,” <https://www.lgbtmap.org/equality-maps/non-discrimination-laws/public-accommodations> (last accessed January 5, 2023).

generally applicable laws.¹² The U.S. Supreme Court has so far declined to find that religious objectors have a constitutional right to discriminate in public accommodations and businesses that offer goods and services to the public,¹³ although they are currently considering a challenge brought by a web designer arguing that complying with nondiscrimination laws violates her freedom of expression.¹⁴

As Human Rights Watch has documented, these kinds of laws jeopardize a range of human rights. Our research has found that sweeping religious exemptions in U.S. states have had the effect of denying goods and services to LGBT people, discouraging them from seeking out goods and services for fear of discrimination, and impairing their dignity by giving others a license to discriminate against them.¹⁵ In practice, these laws seriously jeopardize the freedom from discrimination as well as substantive rights to expression, information, education, health, and work, among other rights.¹⁶ Importantly, they may also jeopardize the freedom of religion and belief for LGBT people and supporters of sexual and reproductive rights, who often are not afforded the same leeway by the state to live by their conscience or practice their faith.¹⁷

One particularly concerning feature is that many so-called exemptions for religious objectors have passed in the absence of meaningful nondiscrimination protections. The majority of U.S. states with sweeping religious exemptions have not actually enacted nondiscrimination laws for objectors to be exempted from.¹⁸ When enacted in this backward fashion, it is clear that these

¹² Human Rights Watch, “US Agency Could Pave Way for Anti-LGBT Discrimination,” December 19, 2019, <https://www.hrw.org/news/2019/12/19/us-agency-could-pave-way-anti-lgbt-discrimination>; Human Rights Watch, “Confronting Discrimination in Georgia,” March 5, 2019, <https://www.hrw.org/news/2019/03/05/confronting-discrimination-georgia>; Human Rights Watch, “US Congress Rejects Anti-LGBT Adoption Amendment,” September 28, 2018, <https://www.hrw.org/news/2018/09/28/us-congress-rejects-anti-lgbt-adoption-amendment>; Human Rights Watch, “Anti-LGBT Bills in US States Could Derail Adoptions,” April 30, 2018, <https://www.hrw.org/news/2018/04/30/anti-lgbt-bills-us-states-could-derail-adoptions>.

¹³ Human Rights Watch, “US Supreme Court Avoids Sweeping License to Discriminate,” June 17, 2021, <https://www.hrw.org/news/2021/06/17/us-supreme-court-avoids-sweeping-license-discriminate>; Ryan Thoreson, “Wedding Cake Ruling’s Silver Lining for LGBT Rights,” *The Hill*, June 5, 2018, <https://thehill.com/opinion/judiciary/390661-wedding-cake-rulings-silver-lining-for-lgbt-rights>.

¹⁴ SCOTUSBlog, “303 Creative LLC v. Elenis,” <https://www.scotusblog.com/case-files/cases/303-creative-llc-v-elenis/> (last accessed January 5, 2023).

¹⁵ Human Rights Watch, *“All We Want is Equality”: Religious Exemptions and Discrimination against LGBT People in the United States*, February 19, 2018, <https://www.hrw.org/report/2018/02/19/all-we-want-equality/religious-exemptions-and-discrimination-against-lgbt-people>.

¹⁶ Human Rights Watch, *“You Don’t Want Second Best”: Anti-LGBT Discrimination in US Health Care*, July 23, 2018, <https://www.hrw.org/report/2018/07/23/you-dont-want-second-best/anti-lgbt-discrimination-us-health-care>.

¹⁷ Ryan Thoreson, “Recognizing Religious Freedom as an LGBT Issue,” *The Hill*, June 12, 2018, <https://thehill.com/opinion/civil-rights/390540-recognizing-religious-freedom-as-an-lgbt-issue>.

¹⁸ For a discussion of this dynamic in Alabama, Mississippi, South Dakota, and Texas, see Ryan Thoreson, “Finding Common Ground on Long-Overdue LGBT Laws after Masterpiece Cakeshop,” *The Hill*, January 25, 2018, <https://thehill.com/opinion/civil-rights/370547-finding-common-ground-on-long-overdue-lgbt-laws-after-masterpiece>.

laws are not designed to find a narrow compromise that maximizes the enjoyment of human rights, but to elevate the personal convictions of some objectors over the human rights of others.

In some instances, lawmakers have taken steps to craft religious exemptions that are narrow and targeted. One recent example is the Respect for Marriage Act, enacted by the US Congress in 2022, which ensures that the federal government and state governments will recognize legally performed interracial and same-sex marriages even if decisions recognizing a constitutional right to marry are overturned by the U.S. Supreme Court. The bipartisan legislation contained a provision that exempts nonprofit religious entities from being required to provide facilities or services for the performance and celebration of a marriage, but does not extend that exemption to for-profit entities or create sweeping exemptions in other areas of antidiscrimination law.¹⁹ Some state legislation creating a statutory right to marry prior to the U.S. Supreme Court's ruling in *Obergefell v. Hodges* contained similar provisions,²⁰ and the U.S. Supreme Court has reiterated that there are some areas of religious practice – like whether or not to religiously solemnize a marriage – that are squarely within the discretion of a religious faith and not subject to state control.²¹

When they are carefully crafted, religious exemptions can be critically important in safeguarding the human rights of members of minority faiths. Where laws protect or advance human rights – including the right to equality – any permissible exceptions should be narrowly crafted in a way that prevents meaningful infringements on those rights. While the specifics of individual accommodations may vary by context, approaches that are most protective of the rights of others have required that any religious objectors clearly identify objections in advance so alternative arrangements can be made, that accommodations are administered in such a way that nobody is denied goods or services or put at risk of dignitary harm, that the state assume responsibility for ensuring the seamless delivery of goods and services wherever it permits exemptions, and that exemptions are not permitted in emergency situations or when they would compromise a person's ability to obtain goods or services of similar cost, quality, or accessibility.²² Exemptions should

¹⁹ Human Rights Watch, "US Congress Protects Right to Marry," December 8, 2022, <https://www.hrw.org/news/2022/12/08/us-congress-protects-right-marry>.

²⁰ See, for example, New York Civil Liberties Union, *Know Your Rights: Frequently Asked Questions About New York's Marriage Equality Act*, 2014, <https://www.nyclu.org/en/publications/know-your-rights-frequently-asked-questions-about-new-yorks-marriage-equality-act> ("Under New York law, houses of worship and 'benevolent orders' such as the Knights of Columbus, may engage in some exclusionary practices that would be unlawful for most other organizations or businesses.").

²¹ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, June 4, 2018, https://www.supremecourt.gov/opinions/17pdf/16-111_i4el.pdf, slip op. at 10 ("When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth.").

²² The existence of alternative providers of a particular good or service does not itself excuse a discriminatory refusal. The state has an interest in eradicating discrimination and avoiding dignitary harm to those who are turned away, which may be compromised even

not be motivated by animus toward LGBT people or other groups, and should maximize the full enjoyment of human rights for all persons.

Annex:

Human Rights Watch, *“All We Want is Equality”: Religious Exemptions and Discrimination against LGBT People in the United States*, February 19, 2018, <https://www.hrw.org/report/2018/02/19/all-we-want-equality/religious-exemptions-and-discrimination-against-lgbt-people>.

Human Rights Watch, *“You Don’t Want Second Best”: Anti-LGBT Discrimination in US Health Care*, July 23, 2018, <https://www.hrw.org/report/2018/07/23/you-dont-want-second-best/anti-lgbt-discrimination-us-health-care>.

when alternative providers exist who would provide a good or service without objection. Nonetheless, harms to equality and dignity are often especially severe when those who are turned away must accept inferior goods or services or expend significant resources to meet their needs as a result of discriminatory refusals. Other substantive rights may also be compromised when alternatives are limited or nonexistent; for example, the right to the highest attainable standard of health may be jeopardized when local hospitals refuse to serve LGBT people, as other hospitals may be prohibitively far away or expensive, and the experience of being refused care often dissuades individuals from seeking out necessary services in the future.