No. 24-1267
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ST. MARY CATHOLIC PARISH IN LITTLETON;
ST. BERNADETTE CATHOLIC PARISH IN LAKEWOOD;
DANIEL SHELEY; LISA SHELEY;
THE ARCHDIOCESE OF DENVER,
Plaintiffs-Appellants,

v.

LISA ROY, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE COLORADO DEPARTMENT OF EARLY CHILDHOOD;
DAWN ODEAN, IN HER OFFICIAL CAPACITY AS DIRECTOR OF COLORADO'S UNIVERSAL PRESCHOOL PROGRAM,
Defendants-Appellees.

On Appeal from the United States District Court, District of Colorado
The Honorable John L. Kane
Senior District Judge
District Court Case No. 1:23-cv-02079-JLK

BRIEF OF *AMICI CURIAE* SCHOLARS FOR THE ADVANCEMENT OF CHILDREN'S CONSTITUTIONAL RIGHTS IN SUPPORT OF DEFENDANTS-APPELLEES

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INTERESTS OF *AMICI CURIAE*[1]

Amici are scholars of children and the law, education law, family law, and anti-discrimination law. *Amici* draw this Court's attention to the harms that four-year-olds in the LGBT community – LGBT children and children with LGBT parents – would bear should state-funded religious schools be granted a license to discriminate against them. An exemption to Colorado's Universal Preschool Program's equal-opportunity requirement would allow plaintiffs to discriminate against these children and plant unfair barriers in their paths to a high-quality education and inflict dignitary, psychological, and familial harms upon an entire class of young people solely because of their or their parents' LGBT identities. The exemption would also force Colorado to give legal effect to private beliefs in violation of state statutory protections and federal constitutional mandates.

[1] This brief was not authored, in whole or in part, by counsel for either party, and no person other than Amici and their academic institutions contributed monetarily to the preparation or submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

"There is no better gift a society can give children than the opportunity to grow up safe and free—the chance to pursue whatever dreams they may have. Our Constitution guarantees that freedom."[2]

This case is about the serious, life-long, and cumulative injuries to LGBT children or children in LGBT families ("children in the LGBT community") from intentional discrimination should state-funded religious private schools prevail – injuries that state and federal law are designed to prevent.

Amici advance three arguments. First, Colorado has a compelling interest in protecting children's access to educational opportunities under the Universal Preschool Program ("UPK" or "UPK Program") unencumbered by discriminatory barriers.

Second, consistent with Colorado's national leadership and child-centered approach to equality, the state has a compelling interest in liberating children from the dignitary, psychological, and familial harms that result from discrimination.

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[2] *Celebrating the Constitution: Chief Justice John G. Roberts tells Scholastic News why kids should care about the U.S. Constitution,* SCHOLASTIC NEWS, Sept. 11, 2006, at 4-5.

Third, allowing state-funded religious service providers to engage in LGBT[3] discrimination against preschoolers will force Colorado to "directly or indirectly" give legal effect to private beliefs that violate state and federal anti-discrimination laws.[4] While Plaintiffs-Appellants ("Preschool Providers") have the right to exercise their religious beliefs, neither the majority nor a "fraction of the body politic" is permitted to "use the power of the State to enforce [its private] views on the whole of society through operation of . . . law," let alone to flout hallowed Fourteenth Amendment tenets.[5]

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[3] *Amici* will use the term "LGBT" to reflect the scope of protections against sexual orientation and gender identity discrimination defined in the Colorado Anti-Discrimination Act. COLO. REV. STAT. §§ 24-34-301 - 804 (2022).

[4] *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

[5] *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (explaining that the condemnation of same-sex relationships "has been shaped by religious beliefs, conceptions of rights and acceptable behavior, and respect for the traditional family," however, "[t]he issue is whether the majority may use the power of the State to enforce these views on the whole of society through operation of the criminal law."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("[T]he City may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic. 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'") (quoting *Palmore*, 466 U.S. at 433).

ARGUMENT

As children's rights scholars have observed, even when children are at the heart of a controversy, adults' rights and interests often get top billing.[6] Consistent with this framing, Preschool Providers invoke their First Amendment rights to exclude an entire class of children from state-funded educational services solely because these children are LGBT or have LGBT parents. But here, because of Colorado's forward-thinking, child-centered focus, the children targeted for discrimination by Preschool Providers must take center stage.

Colorado has bucked federal anti-discrimination law's historically adult-focused lens to become a national leader in prioritizing and protecting young people — including children experiencing LGBT

[6] *See* Catherine Smith, Robin Walker Sterling, and Tanya Washington, *The Absence of a Unified Theory in Children's Fourteenth Amendment Jurisprudence in* THE INTERNATIONAL SURVEY OF FAMILY LAW (Robin Fretwell Wilson and June Carbone, eds., forthcoming 2024) ("The failure of the [Supreme] Court to curate a comprehensive framework for children's constitutional protections leads to outcomes in cases that are about, and which affect, children, but do not center or enforce their rights."); Catherine Smith, *"Children's Equality Law" in the Age of Parents' Rights*, 71 KAN. L. REV. 539, 539 (May 2023) (arguing that constitutional law "begs for a creative, critical, and intersectional vision that centers young people in a framework that has far too long prioritized adults").

discrimination.[7] Pursuant to these child-forward initiatives, Colorado has compelling interests in ensuring children's unencumbered access to equal educational opportunities and in protecting them from discriminatory harms.

I. Allowing LGBT Discrimination Will Deny Preschoolers Equal Educational Opportunities Under State and Federal Law

Preschool Providers seek to receive state funds as UPK participants while they discriminate against four-year-olds in the LGBT community. Their petition would erect unequal barriers to educational opportunities for these preschoolers in direct contravention of Colorado's compelling legislative priorities.

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[7] *See* Emily Tate Sullivan, *How Colorado Went from Laggard to Leader in Early Childhood Education*, EDSURGE (June 27, 2023), https://www.edsurge.com/news/2023-06-27-how-colorado-went-from-laggard-to-leader-in-early-childhood-education; Jennifer Stedron and Ginger Maloney, *Looking at the Past to Shape Colorado's Future: Thirty Years of Progress For Young Children and Families*, EARLY MILESTONES COLORADO, https://earlymilestones.org/wp-content/uploads/2019/12/EarlyChildhood_FINAL.pdf; *See also* Ellie Sullum, *The Current Pulse on LGBT Rights in Colorado*, 303 MAGAZINE (June 23, 2022), https://303magazine.com/2022/06/lgbtq-rights-colorado/ (stating that "Colorado is also seen as a leader among other states for having passed some of the most comprehensive LGBTQ+ protections in the country," listing protections including "non-discrimination laws, policies for LGBTQ+ youth, a ban on panic defense, gender-affirming ID laws and bans on conversion therapy").

A. A Religious Exemption Would Deprive Preschoolers of Equal Education Under Colorado's UPK Law

Consistent with Colorado's child-forward approach to children's rights and protections, education experts and Colorado voters endorsed the UPK Program in recognition of the belief that quality preschool education is so beneficial that it should be a floor, not a ceiling. Preschool "is a key element for children to be able to succeed, and an equalizer for many children [who] don't have the opportunity to be in a place where they can acquire those skills."[8] "Children who attend preschool 'are less likely to repeat a grade,' 'more likely to graduate,' and 'more likely to access college or higher education.'"[9] "In contrast, not having access to quality early childhood education, 'impacts the children's readiness to succeed,'" leaving them more likely to be held back and "'less likely to succeed academically and socially and emotionally as well.'"[10] To advance young people's academic readiness and social and emotional well-being,

[8] *St. Mary Catholic Parish v. Roy*, No. 23-cv-02079, __ F.Supp.3d __, 2024 WL 3160324, at *15 (D. Colo. Jun. 4, 2024).
[9] *Id.* (quoting Trial Tr. (Holguin) 430:4-10).
[10] *St. Mary's Catholic Parish*, 2024 WL 3160324, at *15 (quoting Trial Tr. (Holguin) 430:22-23, 430:25-431:5).

every child must have "access to publicly funded, quality preschool programs *of their choosing* and that best fit their needs."[11]

To achieve these objectives, all schools receiving state funding – whether public or private, secular or religious – must accord "eligible children an *equal opportunity* to enroll and receive services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics or circumstances apply to the child or the child's family."[12]

The religious exemption Preschool Providers seek to this comprehensive law would deprive children and families the equal opportunity to choose the preschool that provides the best fit for their educational needs and especially disadvantage children living in rural or sparsely populated areas.

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[11] *St. Mary's Catholic Parish*, 2024 WL 3160324, at *36 (emphasis added). The Colorado Department of Early Childhood Department designed the UPK program to "provide high-quality, voluntary, affordable early childhood opportunities for all children in Colorado." COLO. REV. STAT. § 26.5-1-102(1)(a).

[12] COLO. REV. STAT. § 26.5-4-205(2)(b) (emphasis added). The plain language of the UPK Program declares its intent to be as broadly applicable as possible.

1. The Proposed Exemption Would Deny Families of Preschoolers in the LGBT Community the Equal Opportunity to Choose a School that Best Meets Their Needs.

Many considerations inform which preschool best meets the needs of a child. For example, some children and families seek a preschool that offers specific extra-curricular offerings that serve the "whole child," while others prefer strong academic performance based on traditional metrics. Children in LGBT communities are entitled to equal access to the swim lessons, sports teams, camps, recreational facilities, before- and after-school enrichment programs, tutoring, art, music, STEM/STEAM classes, and dance classes that religious preschools may offer. These children should not be deprived of the opportunity to develop their talents and, as Chief Justice Roberts said, "pursue whatever dreams they may have,"[13] by being excluded from any school, much less schools like the Preschool Providers in this case. These schools receive "four out of five stars" in "Colorado's rating system for early childhood education providers."[14] National data ranking school performance reflects that

[13] Roberts, *supra* n. 2.
[14] *St. Mary's Catholic Parish*, 2024 WL 3160324, at *36.

Catholic schools in general boast the highest standardized test scores[15] and graduation rates.[16]

Still other children and families in the LGBT community might seek a preschool with a religious mission. As the district court observed, "[S]ome families may want to not be excluded from religious institutions because it 'could be a terrible loss of community and faith that's important to them.'"[17] The discriminatory exemption Preschool Providers seek would limit faith-based preschool options for LGBT children and families, depriving them of the opportunity to "draw on religion as a

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[15] *Catholic Schools Lead Nationwide Test Scores*, THE CATH. SCHS. FOUND. (Nov. 1, 2022), https://www.csfboston.org/our-work/student-family-stories?id=306425/catholic-schools-lead-nationwide-test-scores ("If Catholic schools were a state, they'd be the highest performing in the nation on all four [National Assessment of Educational Progress] tests.").

[16] Anayat Durrani, *Considering Catholic School? Here's What to Know*, U.S. NEWS (Apr. 18, 2023), https://www.usnews.com/education/k12/articles/considering-catholic-school-heres-what-to-know ("Catholic schools in general have a high graduation [rate] . . . . In the 2018-2019 school year, Catholic high schools had a graduation rate of 98% and a four-year college attendance rate of 85.2%, per the National Center for Education Statistics. The national graduation rate for public high school was 86%.").

[17] *St. Mary's Catholic Parish*, 2024 WL 3160324, at *16 (quoting Trial Tr. (Tishelman) 382:18-24).

source of solace and to help sustain them."[18] As one Catholic family explained:

> Because we both had safe, loving experiences in our Catholic schools, we have desired the same for our children. Steeped in Catholic values over the course of our lives, we know we have the ability to cultivate those values in our home and simultaneously we want support from the faith community in a Catholic educational setting.[19]

The discriminatory exemption is merely the proverbial camel's nose under the tent. As the district court observed, if the State "granted [Preschool Providers] an exemption, they would likely have to grant exemptions to many other religious providers . . . . If one exemption is granted, others would necessarily follow and the number of preschools denying equal access to LGBTQ+ children and families would quickly grow."[20] The discriminatory exemption Petitioners seek would undermine the state's compelling goal by limiting options for preschoolers in the LGBT community and depriving them of the equal

[18] *St. Mary's Catholic Parish*, 2024 WL 3160324, at *16.
[19] Beth Mueller Stewart, *Catholic Parents Ask Denver's Archbishop Aquila to Drop Anti-LGBTQ+ Lawsuit*, NEW WAYS MINISTRY (May 21, 2024), https://www.newwaysministry.org/2024/05/21/catholic-parents-ask-denvers-archbishop-aquila-to-drop-anti-lgbtq-lawsuit.
[20] *St. Mary's Catholic Parish*, 2024 WL 3160324, at *37

opportunity to choose the school that best meets their children's specific needs.

Because LGBT people are more likely live in poverty and raise kids with disabilities who need additional services, LGBT families may also be more severely impacted by the dearth of providers.[21] These particularly vulnerable children (and families) would be denied access to the crucial informal social network of childcare, family and other counseling, and financial support that enriches being part of a religious community.

2. The Proposed Exemption Would Disadvantage Preschoolers' Access to Education in Rural Areas.

Allowing discrimination against preschoolers in LGBT communities would present unique and adverse challenges to those living

[21] Child.'s Bureau, U.S. Dep't of Health & Human Servs., *Child Welfare Outcomes 2016: Report to Congress* (2019), https://www.acf.hhs.gov/sites/default/files/cb/cwo2016_exesum.pdf; Child.'s Bureau, U.S. Dep't of Health & Human Servs., *Trends in Foster Care and Adoption: FY 2009–FY 2018*, at 1 (2019), https://www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption_09thru18.pdf.; *St. Mary's Catholic Parish*, 2024 WL 3160324, at *15 ("'If there is a group that is more likely to live in poverty and more likely to have fewer options in terms of preschools and accessible early childhood education, . . . those families may be at risk for . . . inadequate . . . outcomes.'" (quoting Trial Tr. (Goldberg) 288:10-14)).

in rural areas. "A disproportionate number of LGBTQ parents" live in rural areas where "sometimes the only option available for early childhood education is a religious provider."[22] Because the population is less dense in rural areas, unsurprisingly, there are often fewer options for early childhood education, and the schools are more dispersed.[23] The UPK program was meant to "[i]mprove outcomes for children and families" by expanding preschool options.[24] Limiting LGBT families' preschool options, especially where they are scarce, does the opposite.

These challenges can swell into an insurmountable barrier that may mean LGBT preschoolers do not attend school at all; an outcome that would be damaging to children, their families, and society. Research shows that preschool is a transformative intervention that accrues benefits. Like compounding interest in a retirement account, attending preschool "'has a multiplying effect, and . . . the children of the children [who] attend preschool are also benefiting.'"[25] It is no exaggeration to say

[22] *Id.* at *15 (citing Trial Tr. (Goldberg) 287:4-9, 325:9-14).
[23] *St. Mary's Catholic Parish*, 2024 WL 3160324, at *15 (citing Trial Tr. (Goldberg) 325:3-8).
[24] COLO. REV. STAT. § 26.5-1-102 (1)(h) (2022).
[25] *St. Mary's Catholic Parish*, 2024 WL 3160324, at *15 (quoting Trial Tr. (Holguin) 430:11-15 (alterations in original)).

that denying a child the opportunity for a quality preschool education could reverberate through generations of that child's family.

B. A Religious Exemption Would Contravene Fourteenth Amendment Equal Protection Principles.

Allowing discrimination against children in the LGBT community would also violate well-settled Fourteenth Amendment law prohibiting unequal treatment of similarly situated children and unfair punishment of children for matters beyond their control.

The UPK statute's "equal opportunity" requirement does not materialize out of thin air.[26] This idea is deeply rooted in our nation's civil rights struggles and the Supreme Court's landmark decision in *Brown v. Board of Education*, where the Court recognized children's constitutional rights.[27] "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone,"[28] and the Equal Protection Clause's mandate is "that

[26] COLO. REV. STAT. § 26.5-4-205(2)(b).
[27] 347 U.S. 483 (1954). *See also* Catherine Smith, *Brown's Children's Rights Jurisprudence and How It Was Lost*, 102 B.U. L. REV. 2297, 2304 (2022) (noting that "[*Brown*] recognized Black children's right to an "equal education that would allow them to access their futures unencumbered by psychological, social, and economic barriers that educational [segregation and] deprivation erects.").
[28] *Application of Gault*, 387 U.S. 1, 13 (1967).

all persons similarly situated should be treated alike."[29] Children in the LGBT community are *identically situated* to children outside of the LGBT community in their need for and entitlement to equal educational opportunities.[30] Yet, Preschool Providers seek to discriminate against four-year-olds and deprive them of access to state-funded preschool while providing it to others. This it cannot do.

In *Brown*, the Supreme Court held that racially segregated, discriminatory treatment erodes Black children's self-esteem and deprives them of equal access to education in violation of their Fourteenth Amendment rights.[31] One may argue that the discriminatory actions in the instant case are not on par with *de jure* racial segregation; however, the challenged action need not be the same for this Court to recognize that discrimination against children in the form of unequal educational access because of group membership causes irreparable and cognizable harms. The inherent flaw of a categorical LGBT exemption to state and federal anti-discrimination law, as the Supreme Court

[29] *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).
[30] *See Levy v. Louisiana*, 391 U.S. 68, 72.
[31] 347 U.S. at 495.

explained when it struck down Colorado's Amendment 2 almost thirty years ago, is that: "[i]t is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board."[32] Here, Preschool Providers seek to go even further by blanketly banning preschoolers from an educational opportunity based on their or their parents' identity.

To permit state-funded Preschool Providers to deny some children equal access to "a high-quality education that best fits their needs" while allowing identically-situated children outside the LGBT community unfettered access to thrive free from discriminatory barriers is contrary to the *Brown* Court's timeless pronouncement that where a State has undertaken to provide an opportunity for an education in its public schools, "[s]uch an opportunity . . . is a right which must be made available to all on equal terms."[33] This Court should not allow state-funded private actors, religious or secular, to subvert *Brown's* unequivocal equal education mandate.

[32] *Romer v. Evans*, 517 U.S. 620,633 (1996).
[33] *Brown*, 347 U.S. at 493.

In addition to denying children in the LGBT community an equal educational opportunity, Preschool Providers seek to penalize children for matters beyond their control, a form of discrimination on its own terms.[34] The Supreme Court has consistently expressed special concern with discrimination against children – protecting their right to self-determination and to flourish without being encumbered by circumstances they do not control, like their parents' marital, undocumented, or LGBT status.[35]

In *Levy v. Louisiana* and *Weber v. Aetna Casualty & Surety Company,* the Court rejected the historical exclusion of children of unmarried parents from legal and social benefits,[36] explaining in *Weber* that to condemn or penalize a child for the actions of his parents is "illogical and unjust."[37] In *Obergefell v. Hodges*, the majority decision acknowledged harms from LGBT discrimination to children with LGBT

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[34] Even if this Court agreed with arguments that discriminating against members of the LGBTQ+ community is not on par with race discrimination, such arguments do not address discrimination against children for matters beyond their control.
[35] See *Levy v. Louisiana*, 391 U.S. 68 (1968); *Weber v. Aetna Cas. & Surety*, 406 U.S. 164 (1972); *Plyler v. Doe*, 457 U.S. 202 (1982).
[36] *See* Catherine Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589, 1608 (2013).
[37] *Weber*, 406 U.S. at 175.

parents in the form of same-sex marriage bans "through no fault of their own."[38]

The Court has applied a similar child-protective justification in the education context as well. In *Plyler v. Doe*,[39] a state law withheld funds from local school districts that enrolled the children of undocumented Mexican immigrants. The Court held that denying children a public education because of their parents' undocumented status was unconstitutional.[40] In eschewing such treatment, the *Plyler* Court focused on "the lasting impact of [education's] deprivation [on the] life of the child," and the societal harms.[41] The *Plyler* Court, citing *Brown,* reiterated that "[E]ducation provides the basic tools by which individuals might lead economically productive lives to benefit us all."[42] The *Plyler* Court went on to emphasize that children "can affect neither their parents' conduct nor their own status" and to hold the child responsible for the parents' conduct "does not comport with fundamental conceptions

[38] 576 U.S. 644, 668 (2015).
[39] 457 U.S. 202 (1982).
[40] *Id.* at 230.
[41] *Id.* at 221.
[42] *Id.*

of justice."[43] Similarly, *Amici* submit children have no control over a segment of society's moral or religious beliefs about their or their parent's LGBT identity, and should not be subject to discriminatory treatment on that basis.

II. A Religious Carve Out Would Inflict a Range of Significant Discriminatory Harms on Children in the LGBT Community.

In addition to ensuring children in the LGBT community have equal educational opportunities, Colorado has a compelling interest in protecting them from dignitary, psychological and familial harms that would result from allowing religious preschool providers to discriminate. Notably, many of these harms overlap, compounding the total and adverse effect on children, making them more vulnerable to the negative consequences that impact education and well-being.

[43] *Id.* at 220. *Amici* do not endorse any argument that the adult relationships or conduct (whether same-sex or different-sex) advanced by plaintiffs to support an exclusion are, in fact, immoral, irresponsible, or a form of wrongdoing. *Amici* simply argue that the use of state funds to endorse such arguments cannot be deployed to deny children equal-educational opportunities.

A. The Discriminatory Exemption Would Impose Dignitary Harms.

In *Obergefell*, Justice Kennedy recognized a constitutional right to equal dignity.[44] The majority opinion forged this right from the "profound" connection between the substantive due process clause, which empowers courts to establish and protect fundamental rights or liberty interests, and the equal protection clause, which prohibits the government from treating similarly-situated groups differently. [45] As the *Obergefell* Court explained, the two clauses "converge in the identification and definition of [rights]"[46] to advance "our understanding of what freedom is and must become."[47]

Although it arises in an adult context, *Obergefell's* equal right to dignity should not be limited to adults. Children deserve a right to equal dignity, too. In fact, children especially deserve a right to equal dignity in light of how developmentally different they are from adults. In a line of cases spanning almost two decades,[48] the Court has recognized the

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[44] 576 U.S. at 681.
[45] *Id*. at 672-73.
[46] *Id.* at 672.
[47] *Id.*
[48] *See, e.g.,Roper v. Simmons*, 543 U.S. 551, 586 (2005) (holding that the federal Constitution categorically bars a death sentence for all juvenile

extensive body of adolescent brain development research that shows "that children are different from adults and that those developmental differences are of constitutional dimension."[49]

Preschool Providers' proposed carve out violates the dignitary interests of the children Colorado seeks to educate in many important ways. But in particular, this carve out violates their right to privacy.[50]

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offenders who commit capital crimes); *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (holding that the Constitution categorically bars a sentence of life in prison without the possibility of parole for juvenile offenders who commit nonhomicide offenses; *J.D.B. v. North Carolina*, 564 U.S. 261, 281 (2011) (holding that the *Miranda* custody analysis must take a child's age into account); *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (holding that the Constitution bars a mandatory sentence of life without the possibility of parole for juvenile offenders in homicide cases, because such a sentence denies juvenile offenders the opportunity to present mitigating evidence concerning youth development); *Jones v. Mississippi*, 593 U.S. 98, 118 (2021) (holding that the states need not make a specific finding about the incorrigibility of juvenile offenders facing life sentences without parole).

[49] Robin Walker Sterling, *"Children Are Different": Implicit Bias, Rehabilitation, and the "New" Juvenile Jurisprudence*, 46 LOY. L.A. L. REV. 1019, 1022 (2013) (proposing several suggestions for extending the benefits of the Court's "children are different" philosophy to youths of color).

[50] Dignity's bundle of protections includes privacy. *See, e.g.,* Luciano Floridi, *On Human Dignity as a Foundation for the Right to Privacy*, PHILOS. TECHNOL. 29, 307, 308 (Apr. 26, 2016) (observing in the context of data privacy that, "[t]he protection of privacy should be based directly on the protection of human dignity, not indirectly, through other rights such as that to property or to freedom of expression. In other words,

Children do not surrender their rights at the schoolhouse doors.[51] Federal law requires schools to safeguard information like a student's sexual orientation and gender identity, and it prohibits schools from divulging that information without a youth's consent.[52] It strains credulity, then, that a state-funded education program might allow schools to force students to reveal that exact information before they can even be admitted.

B. The Discriminatory Exemption Would Inflict Psychological Harms.

In addition to dignitary harms, a religious exemption would inflict psychological harms. To permit state-funded religious preschools to exclude children in LGBT families from enrollment would humiliate and embarrass them; such rejection would also be confusing and painful. The Supreme Court has repeatedly acknowledged that discrimination causes psychic harm to children.[53] In *U.S. v. Windsor*, the United States

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privacy should be grafted as a first-order branch to the trunk of human dignity, not to some of its branches, as if it were a second-order right.").

[51] *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 505 (1969).

[52] 20 U.S.C. § 1232g (2013).

[53] *Obergefell*, 576 U.S. at 646; *See also*. *Brown*, 347 U.S. at 494; *Plyler v. Doe*, 457 U.S 202, 222 (1982) (listing psychological harms to children excluded from school enrollment because of their parents' undocumented status); *see also* Tanya Washington, *In* Windsor*'s Wake:*

Supreme Court highlighted how the "differentiation" of families based on the sex of the parents "humiliates tens of thousands of children now being raised by same sex couples."[54]

The testimony in this case of Dr. Tishelman, a clinical and research psychologist and research associate professor at Boston College, highlighted the harm children experience from adverse childhood experiences ("ACEs"). Dr. Tishelman's testimony emphasized the link between ACEs and a child's healthy development, explaining that gender-diverse and transgender children can experience significant "'anxiety and low self-esteem'" from ACEs, like discrimination.[55]

In addition, in *Obergefell*, the Supreme Court drew attention to the uncertainty that marriage bans interjected into the lives of LGBT people and families.[56] A religious exemption in this case would also interject

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Section 2 of DOMA's Defense of Marriage at the Expense of Children, 48 IND. L. REV. 1,64 (2014) ("Children in same-sex families . . . deserve to be protected from, not victimized by, harmful and discriminatory governmental action.").

[54] 570 U.S. 744, 772 (2013); *see also Obergefell*, 576 U.S. at 646 ("The marriage laws at issue here thus harm and humiliate the children of same-sex couples."); Washington, *supra* n. 53 at 2.

[55] *St. Mary's Catholic Parish*, 2024 WL 3160324, at *16 (quoting Trial Tr. (Tishelman) 348:10-13).

[56] *Obergefell,* 576 U.S. at 678 ("April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them certainty and stability

significant anxiety and uncertainty into the already fraught terrain of familial decision-making and school selection. Dr. Tishelman's testimony emphasized that extreme and chronic stress can affect a child's neurodevelopment and ability to learn and to engage with others, and that "'transgender youth who have been exposed to stressors have a higher likelihood of anxiety, depression, and suicidality.'"[57]

A religious carve out to the UPK's equal opportunity requirement would also cause preschoolers and their families significant anxiety and uncertainty as they experience the challenge of identifying schools where their children would be welcome and free from bullying and other forms of discriminatory treatment. Many exclusionary spaces would only be discoverable through trial and error, leading to painful, humiliating, and embarrassing private and public encounters for preschoolers and their families. This treatment exacts "the inestimable toll" that the *Plyler* Court described as the "social, economic, intellectual, and *psychological* well-being of the individual," from exclusion from public education for

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that all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon.").

[57] *St. Mary's Catholic Parish*, 2024 WL 3160324, at *16 (quoting Trial Tr. (Tishelman) 368:3-6).

matters beyond the child's control.[58]

In addition to the psychological harm of exclusion at the door, children may suffer greater harm should they join the preschool community and then be expelled. Dr. Tishelman highlighted the specific harm that children could experience if they begin preschool at a religious school, *then* begin to identify as LGBT or become part of an LGBT family and are subsequently required to change schools. Describing this devastating harm, Dr. Tishelman stated,

> "[It] is hard to explain to a child that they need to leave a school because of who they are, including something that they can't change . . . . And even more, if a child has been schooled in a particular religion and taught faith, losing and not understanding why they're not able to be part of a community of faith that is important to their family."[59]

Finally, the hardship of the religious exemption may be even greater for LGBT children if "they're rejected for something that they can't change about themselves . . . because they [don't] have a way to be

[58] *Plyer,* 457 U.S. at 222 (emphasis added).
[59] *St. Mary's Catholic Parish*, 2024 WL 3160324, at *16 (quoting Trial Tr. (Tishelman) 391:5-12).

different."[60] The burden a religious exemption would place on preschoolers' shoulders simply because they are part of the LGBT community is not justifiable.

C. The Discriminatory Exemption Would Interfere with Familial Integrity.

In addition to inflicting dignitary and psychic harm, a religious exemption would invade the integrity of LGBT families by interfering with a child's relationship to or association with their parents and siblings. [61]

As the *Windsor* Court observed, this kind of discrimination "makes it even more difficult for [] children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[62] Children are most impacted by the environments where they spend significant time, especially in school

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[60] *St. Mary's Catholic Parish*, 2024 WL 3160324, at *16 (quoting Trial Tr. (Tishelman) 348:14-18).

[61] *See* Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion – Legitimacy, Dual-Gender Parenting, and Biology,* 28 LAW & INEQ. 307, 309 (2010) ("An underdeveloped area of sexual orientation and gender identity scholarship is the legal rights and remedies of those who face discrimination because of their relation to or association with gays and lesbians, including children [in] same-sex families.").

[62] 570 U.S. at 772.

where most children seek and receive affirmation from teachers and peers. Discriminatory exclusion of children in the LGBT community by a state-funded preschool would send a message to them – and to the world at large – that they and their families are suspect and inferior.[63] Moreover, these very young children may internalize a harmful message that they, as individuals, are "less worthy" than other people.[64] As Dr. Tishelman explained, a child "'being implicitly or explicitly being told that there is something wrong with them or their family, this can create negative self-views.'"[65] It can also introduce negative views about the child in the "hearts and minds" of the their siblings and friends.[66]

Excluding children from these opportunities creates the type of familial discord and social division that anti-discrimination laws, like Colorado's equal opportunity requirement, were designed to prevent.

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[63] *See generally* Kyle C. Velte, *Obergefell's Expressive Promise*, 6 HLRE 157 (2015) (illustrating how the Court's LGBT-rights opinions send an important and transformative message about the place of LGBT Americans in society).

[64] *Windsor*, 570 U.S. at 775 ("DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.").

[65] *St. Mary's Catholic Parish*, 2024 WL 3160324, at *15 (quoting Trial Tr. (Goldberg) 297:11-13).

[66] *Brown*, 347 U.S. at 494.

III. A Religious Carve Out Would Give Legal Effect to Private Beliefs at the Expense of Children in Contravention of Fourteenth Amendment Precedent.

Colorado has a compelling interest to refuse to give legal effect to unconstitutionally impermissible forms of discrimination. The Supreme Court has addressed this issue in several contexts, including LGBT cases.

In the seminal case, *Palmore v. Sidoti*,[67] the Supreme Court struck down a state family court's order transferring custody of a White couple's young child from the mother to father.[68] Within months of the divorce, the father sought custody of the child based on changed conditions: the mother's relationship with and marriage to a Black man.[69]

Despite finding no concern with either the mother's or the stepfather's parental fitness, the family court heeded a court counselor's recommendation about the "social consequences" for a child being raised in "an interracial marriage."[70] While the father's disapproval of the relationship was an insufficient basis for awarding him custody, the judge found that placement with the father was in the child's best

[67] 466 U.S. 429 (1984).
[68] *Id.* at 430.
[69] *Id.*
[70] *Id.*

interest, so that she did not "suffer from. . . social stigmatization" in a society that did not fully accept interracial relationships.[71]

The Supreme Court reversed because of the actual *function* of the lower court's reliance on a segment of society's views of interracial relationships.[72] The Court explained that, although "the Constitution cannot control such prejudices [] neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[73] *Palmore* recognized the eradication of racial discrimination by the State as a core purpose of the Fourteenth Amendment: the law must not give credence to views in direct contravention of the Amendment's objectives.

Some people may view *Palmore* as a product of social views, not religious ones. Yet it was decided a mere twenty years after *Loving v. Virginia*,[74] in which the Supreme Court explicitly acknowledged the religious origins of anti-miscegenation laws and held that such laws were

[71] *Id.* at 431.
[72] *Id.* at 432.
[73] *Id.* at 433.
[74] 388 U.S. 1 (1967).

outweighed by the constitutional gravitas of the Fourteenth Amendment's right to marry.[75]

Colorado has a compelling interest in refusing to give legal effect to private beliefs that violate mandates prohibiting sex and sexual orientation discrimination.

A. Allowing the Exclusion Gives Impermissible Legal Effect to Sex Discrimination.

Allowing a preschool to discriminate against children in LGBT families would lend the government's imprimatur to impermissible sex classifications, a practice that this Court has long held carries a "strong presumption" of "invalid[ity]" under the Equal Protection guarantee.[76]

Since the 1970s, LGBT advocates have consistently argued LGBT discrimination is sex discrimination.[77] The Supreme Court recently

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[75] *Id.* at 12; *see also id.* at 3 (noting that the trial court judge had highlighted the religious underpinnings of the State of Virginia's anti-miscegenation law, "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.").

[76] *J.E.B. v. Alabama,* 511 U.S. 127, 152 (Kennedy, J., concurring).

[77] *See generally* Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL'Y 397 (2000).

agreed. In *Bostock v. Clayton County,*[78] the Court held that it is impossible to discriminate against LGBT people without engaging in sex discrimination under Title VII of the Civil Rights Act of 1964.

The *Bostock* Court held:

> An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undistinguishable role in the decision, exactly what Title VII forbids.[79]

In this case, the sole cause for excluding preschoolers would be because of their membership in the LGBT community.[80] *Bostock*'s pronouncement should apply with equal or greater force to equal protection and other anti-discrimination law provisions, like Colorado's.

Rejecting a child in a LGBT family based on religious precepts constitutes sex discrimination. State-funded Preschool Providers are certainly relying on protected religious beliefs to justify denying a child enrollment in their schools; however, were the state to exempt them from

[78] 590 U.S. 644 (2020).
[79] *Id.* at 649.
[80] *See id.* at 656 ("So long as the plaintiff's sex was *one* but for cause of [the challenged employment] decision, that is enough to trigger the law.").

Colorado law, it would be giving legal effect to the providers' private beliefs in violation of equal protection law mandates. The threshold inquiry is not about the source of the private belief; the issue is once that belief has been deemed violative of Fourteenth Amendment law, the government may not give it legal effect. This is particularly critical given LGBT discrimination's harm to children.

B. Allowing the Exclusion Gives Impermissible Legal Effect to Sexual Orientation Discrimination.

Permitting a categorical religious exemption in this context would give impermissible legal effect to private beliefs about children because of their or their parents' LGBT identities. *Amici* posit that this is a distinct argument from sex discrimination. The Supreme Court has expressly confirmed that "many same-sex couples provide loving and nurturing homes to children, whether biological or adopted."[81] It has also struck down state laws, including those supported by sincerely held moral and religious beliefs, that singled out or excluded LGBT people from the Fourteenth Amendment's strictures.[82] As explained in *Obergefell:*

> Many who deem same-sex marriage to be wrong reach that conclusion based on decent and

[81] *Obergefell*, 576 U.S. at 668.
[82] *Romer*, 517 U.S. at 635.

> honorable religious or philosophical premises . . . . 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. . . .[83]

In this case, allowing Preschool Providers to refuse to enroll a child and provide instruction would force the State to place its imprimatur on LGBT discrimination. The State of Colorado recognizes the potential harm of this exclusion, yet Preschool Providers nevertheless seek the State's legal blessing to receive state funds while acting upon their personal, religious beliefs. But the freedom to exercise one's religion is not absolute.[84] Giving impermissible legal effect to a private actor's personal beliefs in contravention of Fourteenth Amendment protections, whatever their source or rationale, undermines children's rights and

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[83] 576 U.S. at 672; *see also Latta v. Otter*, 771 F.3d 456, 470 (9th Cir. 2014) ("[T]he fear that an established institution will be undermined due to private opposition to its inclusive shift is not a legitimate basis for retaining the status quo."). Nor is it grounds for changing it.

[84] *See Prince v. Massachusetts*, 321 U.S. 128, 166 (1944) (upholding state law prohibiting a child's dissemination of religious pamphlets, the Court explained, "the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation." (citations omitted))

interests and contravenes Colorado's duty to provide preschoolers with equal access to education and to protect them from harm.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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