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BRIEF OF *AMICI CURIAE* SCHOLARS OF THE CONSTITUTIONAL RIGHTS AND INTERESTS OF CHILDREN IN SUPPORT OF RESPONDENTS IN *MASTERPIECE CAKESHOP LTD., ET AL. V. COLORADO CIVIL RIGHTS COMMISSION*

Catherine E. Smith, Lauren Fontana, Angela Onwuachi-Willig, Tanya M. Washington, & Barbara Bennett Woodhouse

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Brief of Amici Curiae Scholars of The Constitutional Rights and Interests Of Children in Support of Respondents in *Masterpiece Cakeshop LTD, et al v. Colorado Civil Rights Commission*

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No. 16-111

In The Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., et al.,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, et al.,

Respondents.

On Writ Of Certiorari To The Colorado Court Of Appeals

BRIEF OF *AMICI CURIAE* SCHOLARS OF THE CONSTITUTIONAL RIGHTS AND INTERESTS OF CHILDREN IN SUPPORT OF RESPONDENTS

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ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: RHINELANDER V. RHINELANDER AND THE LAW OF THE MULTIRACIAL FAMILY 182-83 (2013) 3, 14

Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 Harv. C.R.-C.L. 231 (2009) 17

Barbara Bennett Woodhouse, *Children's Rights in* HANDBOOK OF YOUTH AND JUSTICE 379 (2001) 8

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 (2010) 2, 7

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Corina Curry, *Lesbian Couple's Son Denied Enrollment in Rockford Catholic School*, ROCKFORD REGISTER STAR, Apr. 21, 2017, *available at* http://www.rrstar.com/news/20170421/lesbian-couples-son-denied-enrollment-in-rockford-catholic-school 4

Gary J. Gates, *LGBT Parenting in the United States*, THE WILLIAMS INST., Feb. 2013, *available at* https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf 7, 12

Joey Garrison, *Private School Rejects Children Because Parents Are Gay*, USA TODAY, Jan. 22, 2015, *available at* https://www.usatoday.com/story/news/nation/2015/01/22/private-school-children-parents-gay/22197625/ 4

Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996) 14

Kyle C. Velte, Obergefell*'s Expressive Promise*, 6 HLRe 157 (2015) 16

Kyle C. Velte, *Why the Religious Right Can't Have Its (Straight Wedding) Cake and Eat It Too: Breaking the Preservation-Through-Transformation Dynamic in* Masterpiece Cakeshop v. Colorado Civil Rights Commission, 36 LAW & INEQ. ___ (forthcoming 2018), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3041377 10

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LGBT Adoption Statistics, LIFELONG ADOPTIONS, *available at* https://www.lifelongadoptions.com/lgbt-adoption/lgbt-adoption-statistics 7

LGBT Families, Movement Advancement Project, *available at* http://www.lgbtmap.org/policy-and-issue-analysis/lgbt-families 7

Luke A. Boso, *Urban Bias, Rural Sexual Minorities, and the Courts*, 60 UCLA L. REV. 562 (2013).....12

Michelle Ma, *Early Intervention Improves Long-Term Outcomes for Children with Autism*, UNIVERSITY OF WASHINGTON NEWS, June 9, 2015, *available at* http://www.washington.edu/news/2015/06/09/early-intervention-improves-long-term-outcomes-for-children-with-autism/ 13

Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591 (2001).....3

Overview of Lesbian and Gay Parenting and Foster Care, ACLU, *available at* https://www.aclu.org/fact-sheet/overview-lesbian-and-gay-parenting-adoption-and-foster-care 7

Samantha Schmidt, *As 'a Matter of Conscience,' a Kentucky Judge Refuses to Hear Adoption Cases Involving Gay Parents*, WASH. POST, May 15, 2017, *available at* https://www.washingtonpost.com/news/morning-mix/wp/2017/05/01/as-a-matter-of-conscience-a-kentucky-judge-refuses-to-hear-adoption-cases-involving-gay-parents/?utm_term=.bc7f1876fa12.....4

TABLE OF AUTHORITIES – Continued

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Same-sex Couple's Kids Denied Enrollment into Christian Preschool, NBC2, Jan. 6, 2016, *available at* http://www.nbc-2.com/story/30904823/same-sex-couples-kids-denied-enrollment-into-christian-preschool.....4

Sarah Netter, *Colorado Catholic School Boots Student with Lesbian Mothers*, ABC NEWS, Mar. 9, 2010, *available at* http://abcnews.go.com/WN/colorado-catholic-school-kicks-student-lesbian-mothers/story?id=10043528.....4

Stephanie Pappas, *Why Gay Parents May Be the Best Parents*, LIVESCIENCE, Jan. 15, 2012, *available at* https://www.livescience.com/17913-advantages-gay-parents.html.....13

Susannah Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012).....10

Tanya Washington, et al., *Children's Rights in the Midst of Marriage Equality: Amicus Brief in* Obergefell v. Hodges *by Scholars of the Constitutional Rights of Children*, 14 WHITTIER J. CHILD & FAM. ADVOC. 1 (2015).....8

Tanya Washington, *In* Windsor*'s Wake: Section 2 of DOMA's Defense of Marriage at the Expense of Children*, 48 IND. L. REV. 1 (2014).....17

INTERESTS OF *AMICI CURIAE*[1]

Amici are scholars of family law, equal protection law, anti-discrimination law, and children and the law. *Amici* submit this brief to draw the Court's attention to the harms that will be imposed on children of LGBT parents should an expressive or religious exemption to sexual orientation discrimination prohibitions be written into public accommodation law. *Amici* focus exclusively on the legal and social harms to children because of their relationship to or association with their lesbian, gay, bisexual and/or transgender ("LGBT") parents in the commercial and public spheres.

SUMMARY OF ARGUMENT

Both *United States v. Windsor* and *Obergefell v. Hodges* acknowledged a fundamental truth: discrimination against same-sex couples harms the children of same-sex couples.[2]

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[1] Petitioners and Respondent Colorado Civil Rights Commission have filed blanket consents to the filing of *amicus* briefs. *Amici* requested and received consent from individual Respondents Charlie Craig and David Mullins. 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.

[2] *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) ("DOMA . . . brings financial harms to children of same-sex couples."); *id.* at 2694 (DOMA's "differentiation [between same-sex and opposite-sex couples] . . . humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the

This case is about much more than a wedding cake. It is about the rightful place of LGBT[3] people *and their families* in the commercial and public sphere.[4] To permit business owners to engage in sexual orientation discrimination would ostracize and stigmatize children because of their relationship to or association with their LGBT parents[5] – an outcome inconsistent

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integrity and closeness of their own family and its concord with other families in their community and in their daily lives."); *id.* at 2696 ("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."); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015) (recognizing the conundrum marriage bans and non-recognition laws placed on same-sex families: "If an emergency were to arise, schools and hospitals may treat the . . . children as if they had only one parent. And, were tragedy to befall [either parent], the other would have no legal rights over the children she had not been permitted to adopt."); *id*. at 2600 ("Without the recognition, stability, and predictability marriage offers, . . . children [of same-sex couples] suffer the stigma of knowing their families are somehow lesser.").

[3] *Amici* will use the term "LGBT" to reflect the scope of protections defined in the Colorado Anti-Discrimination Act. COLO. REV. STAT. § 24-34-301 (defining "sexual orientation" to include "an individual's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another individual's perception thereof").

[4] *Amici* will use the term "public sphere" and "public marketplace" to connote the relevant public and commercial facilities, businesses, and services regulated by public accommodation laws.

[5] *Amici* are not aware of case law explicitly addressing a relational or associational discrimination claim by a child of LGBT parents under an anti-discrimination or public accommodation law. *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.

with the foundational understandings of legal and social equality in the United States.[6]

Children of LGBT parents have already begun to bear the brunt of such discrimination, both before and

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."). Cases and statutory provisions have recognized third-party associational claims in other contexts: *Patrick v. Miller*, 953 F.2d 1240, 1249-50 (10th Cir. 1992) (finding that a white person alleging discrimination because of his association with black people is actionable under 42 U.S.C. § 1981 consistent with decisions from the Second, Third, Fourth, Fifth, Sixth, and Eleventh Circuit Courts of Appeals); *Morales v. NYS Dep't of Labor*, 865 F. Supp. 2d 220, 243 (N.D.N.Y. 2012) (permitting national origin association discrimination claim under Title VII); The Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(4) (prohibiting "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.").

[6] *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 293-94 (Colo. App. 2015) ("[CADA] prevents the economic and social balkanization prevalent when businesses decide to serve only their own 'kind,' and ensures that the goods and services provided by public accommodations are available to all of the state's citizens."); ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: RHINELANDER V. RHINELANDER AND THE LAW OF THE MULTIRACIAL FAMILY 182-83 (2013) (describing how mistreatment of a parent in a multiracial relationship can result in harm to a child of the parents, signaling to the child that "neither she nor her family was right" and that her family stands outside "the normative ideal"); *see generally* Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1618 (2001) ("Without losing its patina of neutrality, the enumeration component of public accommodations laws sub silentio regulated racial mixing.").

since this Court established marriage equality as the law of the land.[7] In Michigan, a pediatrician refused to treat an infant based solely on the fact that the child had lesbian mothers.[8] In Kentucky, a judge refused to hear adoption cases of children involving LGBT adoptive-parents-to-be.[9] In Tennessee, a non-denominational private school rejected enrollment for a pre-kindergartener and his 8-month-old sister after discovering that the children had two dads.[10]

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[7] *Amici* note that some of the harms to children described in this brief similarly apply to LGBT children.

[8] Abby Phillip, *Pediatrician Refuses to Treat Baby with Lesbian Parents and There's Nothing Illegal About It*, WASH. POST, Feb. 19, 2015, *available at* https://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-to-treat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it/?utm_term=.109ea83cb653.

[9] Samantha Schmidt, *As 'a Matter of Conscience,' A Kentucky Judge Refuses to Hear Adoption Cases Involving Gay Parents*, WASH. POST, May 15, 2017, *available at* https://www.washingtonpost.com/news/morning-mix/wp/2017/05/01/as-a-matter-of-conscience-a-kentucky-judge-refuses-to-hear-adoption-cases-involving-gay-parents/?utm_term=.bc7f1876fa12.

[10] Joey Garrison, *Private School Rejects Children Because Parents Are Gay*, USA TODAY, Jan. 22, 2015, *available at* https://www.usatoday.com/story/news/nation/2015/01/22/private-school-children-parents-gay/22197625/. The same thing has happened at religious schools throughout the country. *See* Corina Curry, *Lesbian Couple's Son Denied Enrollment in Rockford Catholic School*, ROCKFORD REGISTER STAR, Apr. 21, 2017, *available at* http://www.rrstar.com/news/20170421/lesbian-couples-son-denied-enrollment-in-rockford-catholic-school (Illinois); *Same-sex Couple's Kids Denied Enrollment into Christian Preschool*, NBC2, Jan. 6, 2016, *available at* http://www.nbc-2.com/story/30904823/same-sex-couples-kids-denied-enrollment-into-christian-preschool (Florida); Sarah Netter, *Colorado Catholic School Boots Student*

In sum, creating an expressive or religious exemption to sexual orientation discrimination prohibitions in public accommodation law will deny children of LGBT parents equal access to the public sphere, inflict upon them psychological harm, and interfere with the "integrity and closeness" of their families.

ARGUMENT

I. *Windsor* and *Obergefell* Recognize that the Interests of Children of LGBT Parents Should Be Considered in Sexual Orientation Discrimination Cases

In recognizing same-sex couples' fundamental right to marry, this Court explained that, when interpreting the Due Process and Equal Protection Clauses, "new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and

With Lesbian Mothers, ABC NEWS, Mar. 9, 2010, *available at* http://abcnews.go.com/WN/colorado-catholic-school-kicks-student-lesbian-mothers/story?id=10043528 (Colorado). *Amici* acknowledge that religious schools "principally used for religious purposes" are exempt from public accommodation laws. For example, the Colorado Anti-Discrimination Act provides: " 'Place of public accommodation' shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes." COLO. REV. STAT. § 24-34-601(1). The non-denominational school example offers a foreshadowing, however, of what is to come if this court permits religious business owners in the public sphere to pick and choose their customers based on their sexual orientation.

unchallenged."[11] Just as a more evolved understanding of the harms of racial and gender discrimination led to the eradication of anti-miscegenation and male coverture laws,[12] society's changing views regarding sexual orientation discrimination increased our understanding of the inequalities of same-sex marriage bans.[13] Importantly, these new insights included a greater solicitude for the children of same-sex couples and a greater appreciation of their stake in marriage equality.[14] In the public accommodation context, the impact of sexual orientation discrimination is not limited to children of same-sex couples; it poses a risk of injury to all children of LGBT parents, regardless of the marital status of their parent(s).[15]

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[11] *Obergefell*, 135 S. Ct. at 2603-04.

[12] *Id.* at 2595 ("Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned.") (internal citation omitted); *see also id.* at 2603-04.

[13] *Id.* at 2595-97.

[14] *Id*. at 2600 ("As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.") (citing Brief for Gary J. Gates as *Amicus Curiae* 4-5).

[15] A similar argument of relational or associational discrimination could be made on behalf of the parents of LGBT children. The facts of this case are illustrative. The Petitioner denied Charlie Craig and David Mullins service; he also refused to serve

A. Children of LGBT Parents Are a Sizable Segment of Society

Approximately six million American children have at least one LGBT parent.[16] Those children can be found in ninety-six percent of U.S. counties.[17] Forty-eight percent of lesbian and bisexual women, and twenty percent of gay and bisexual men, under the age of fifty are raising a child under age eighteen.[18] LGBT parents are four times more likely than heterosexual parents to raise adopted children.[19] A sizable segment of the population, these children, like most children,

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Deborah Munn, Craig's mom and David's future mother-in-law. *See also* Smith, *supra* note 5 at 309 n.11 ("Other areas within the realm of third party claims could include exploring the theories on behalf of parents or other family members who experience discrimination because of their familial connection to someone who is [LGBT]."). *But see Tovar v. Essentia Health*, 857 F.3d 771 (8th Cir. 2017) (denying Title VII standing to mother of child with gender dysphoria because the insurance company's refusal to cover medical procedure was not discrimination against the mother "on the basis of her own sex.").

[16] *See* Gary J. Gates, *LGBT Parenting in the United States*, THE WILLIAMS INST., Feb. 2013, *available at* https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf. Other estimates say up to 14 million children are being raised by at least one LGBT parent. *See Overview of Lesbian and Gay Parenting and Foster Care*, ACLU, *available at* https://www.aclu.org/fact-sheet/overview-lesbian-and-gay-parenting-adoption-and-foster-care.

[17] *See LGBT Families*, Movement Advancement Project, *available at* http://www.lgbtmap.org/policy-and-issue-analysis/lgbt-families.

[18] Gates, *supra* note 16 at 1.

[19] *LGBT Adoption Statistics*, LIFELONG ADOPTIONS, *available at* https://www.lifelongadoptions.com/lgbt-adoption/lgbt-adoption-statistics.

depend on their parents to access services in the public marketplace until they are old enough to do so on their own.[20] Creating an expressive or religious exemption to sexual orientation discrimination prohibitions would result in the harmful exclusion of the children of LGBT parents from the public sphere, and their interests matter.

B. *Windsor* and *Obergefell* Establish that the Harm to Children of LGBT Parents Is an Important Consideration

In *Windsor* and *Obergefell*, this Court left little doubt that the interests of children of LGBT parents matter. In both cases, children were important considerations in striking down DOMA, state marriage bans, and non-recognition laws.[21]

In *Windsor*, this Court expressed concerns about the economic harm to children that resulted from a refusal to recognize their parents' marriages:

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[20] Barbara Bennett Woodhouse, *Children's Rights in* HANDBOOK OF YOUTH AND JUSTICE 379 (2001) ("Children's special situation exposes the emptiness for children of any rights discourse that ignores the interdependency of individuals, families, and communities.").

[21] Tanya Washington, et al., *Children's Rights in the Midst of Marriage Equality: Amicus Brief in* Obergefell v. Hodges *by Scholars of the Constitutional Rights of Children*, 14 WHITTIER J. CHILD & FAM. ADVOC. 1, 6 (2015) ("this amicus brief informed the Court's consideration of marriage bans and the adverse impact on children in same-sex families . . . ").

> DOMA . . . brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are integral to family security.[22]

This Court also voiced a concern for the psychological and stigmatic injury to children and their families resulting from the same refusal:

> The differentiation [between same-sex and opposite-sex couples] . . . humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the 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.[23]

In *Obergefell*, this Court similarly noted that the psychological injury to children from marriage bans may be more profound than the "material" harms.[24]

Children of LGBT parents are a sizable segment of the population, and their interests are relevant as the contentious fight over LGBT equality moves from marriage bans to the public sphere. In fact, the more accurate description is "back" to the public sphere, as

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[22] *Windsor*, 133 S. Ct. at 2695 (internal citation omitted).

[23] *Id*. at 2694.

[24] *Obergefell*, 135 S. Ct. at 2600.

Petitioner attempts to achieve (via an expressive or religious exemption) what the constitutional amendment in *Romer v. Evans* could not – because this Court recognized it as driven by a "bare . . . desire to harm a politically unpopular group."[25] To create an expressive or religious exemption here would harm the children of LGBT parents, in ways that the *Windsor* and *Obergefell* cases highlighted, as explained more fully below.

II. An Expressive or Religious Exemption to Sexual Orientation Discrimination Prohibitions in the Public Sphere Will Harm Children Because of Their Relationship to or Association with Their LGBT Parents.

If this Court were to create an expressive or religious exemption to sexual orientation discrimination prohibitions in public accommodations law, the harm to children of LGBT parents would be immense. First,

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[25] *Romer v. Evans*, 517 U.S. 620, 634 (1996) (striking down Colorado's Amendment 2 as unconstitutional because it was not rationally related to any legitimate state interests and was impermissibly driven by animosity toward LGBT people). *See also* Kyle C. Velte, *Why the Religious Right Can't Have Its (Straight Wedding) Cake and Eat It Too: Breaking the Preservation-Through-Transformation Dynamic in* Masterpiece Cakeshop v. Colorado Civil Rights Commission, 36 LAW & INEQ. ___ (forthcoming 2018), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3041377 (arguing that Petitioners in *Masterpiece* attempt to resurrect the status-conduct argument rejected by this Court in *Romer*, *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010)); Susannah Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 926 (2012) (discussing goal of Equal Protection Clause to eliminate laws that create social castes).

the exemption would effectively exclude these children from the public sphere. Second, the exemption would impose psychological harm on these children. Third, the exemption would interfere with the family integrity of these children.

A. The Exemption Would Exclude Children from the Public Sphere

The Colorado Anti-Discrimination Act offers extensive protection against sexual orientation discrimination in any "place of public accommodation," which is defined as:

> [A]ny place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public; any place to eat, drink, sleep, or rest, or any combination thereof; any sporting or recreational area and facility, any public transportation facility; a barber shop, bathhouse, swimming pool, bath, steam or massage parlor, gymnasium, or other establishment conducted to serve health, appearance, or physical condition of a person; a campsite or trailer camp; a dispensary, clinic, hospital, convalescent home, or other institution for the sick, ailing, aged or infirm; a mortuary, undertaking parlor, or cemetery; an educational institution, or any public building, park, arena, theater, hall, auditorium,

> museum, library, exhibit, or public facility of any kind whether indoor or outdoor.[26]

This broad definition means that permitting an expressive or religious exemption from sexual orientation discrimination prohibitions would deny the children of LGBT parents "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[27]

Creating an expressive or religious exemption would also threaten access to critical services for children of LGBT parents, especially in small or rural communities where public accommodations are limited.[28] These services include access to health and dental care, childcare, educational facilities, grocery stores, and a myriad of day-to-day activities that most people "take[] for granted."[29]

In fact, the discrimination described above might be compounded for many children of LGBT parents because they are more economically disadvantaged as compared to children being raised by heterosexual parents or opposite-sex couples.[30] Forcing LGBT parents

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[26] COLO. REV. STAT. § 24-34-601(1).

[27] *Romer*, 517 U.S. at 631.

[28] *See* Luke A. Boso, *Urban Bias, Rural Sexual Minorities, and the Courts*, 60 UCLA L. REV. 562, 562 (2013) (contesting the "urban presumption commonly applied to all sexual minorities, . . . who remain largely invisible in the public discourse about sexuality and equality").

[29] *Romer*, 517 U.S. at 631.

[30] Gates, *supra* note 16.

and their children, who are already struggling financially, to spend time and scarce resources navigating the marketplace to find a doctor or daycare provider willing to offer them services only compounds the direct and deleterious effect of sexual orientation discrimination. In addition, more than half of the children adopted by LGBT parents have special needs.[31] If health care specialists, enrichment programs, summer camps, and resource providers are permitted to engage in associational discrimination against the subpopulation of children of LGBT parents with special needs, the existing challenges of obtaining services to meet their needs will increase exponentially.[32]

Finally, an expressive or religious exemption with respect to children of LGBT parents goes to the essence of what it means to be a child – opportunities and experiences to learn, play, and make friends. From swim lessons, sports, clubs, camps, recreational facilities,

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[31] Stephanie Pappas, *Why Gay Parents May Be the Best Parents*, LIVESCIENCE, Jan. 15, 2012, *available at* https://www.livescience.com/17913-advantages-gay-parents.html. Thus, LGBT adoptive parents adopt children who otherwise would linger in the foster care system for years, or until they "age out" of the system when they turn eighteen years old. *Id.*

[32] In the context of education, these services are directly related to student outcomes, especially with respect to Early Intervention Services for students with disabilities. Such services are often delivered primarily through private providers because the child is not in school full-time. *See* Michelle Ma, *Early Intervention Improves Long-Term Outcomes for Children with Autism*, UNIVERSITY OF WASHINGTON NEWS, June 9, 2015, *available at* http://www.washington.edu/news/2015/06/09/early-intervention-improves-long-term-outcomes-for-children-with-autism/.

after-school programs, and tutoring to programs in the arts, music, and dance, children of LGBT parents could be stripped of equal access to the social and civic life of young people. This is the type of segregation or "social balkanization" that public accommodation laws were designed to prevent.[33] Further, preventing social balkanization and fostering a diversity of perspectives and interactions is especially critical with respect to *all* children in a diverse society.[34]

B. The Exemption Would Inflict Psychological Harm

To permit businesses to deny children of LGBT parents access to their services in the public marketplace would humiliate and embarrass them; such rejection would also be confusing and painful.[35] This

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[33] *Craig*, 370 P.3d at 293. For a comprehensive analysis of the role of racial discrimination in defining public accommodation law, *see* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996).

[34] *Grutter v. Bollinger*, 123 S. Ct. 2325, 2329 (2003) ("[D]iversity promotes learning outcomes and better prepares students for an increasingly diverse work force [and] for society. . . .").

[35] *Windsor*, 133 S. Ct. at 2694-96 (DOMA "humiliates tens of thousands of children now being raised by same-sex couples"). This Court has likewise recognized the psychological harm to children facing discrimination in other contexts. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) ("To separate [black children] from others of similar age and qualifications solely because of their race generates feelings of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."); ONWUACHI-WILLIG, *supra* note 6, at 182-83 (highlighting such harm to children in multiracial families); *see generally Heart of Atlanta Motel v. United States*, 379 U.S.

Court has acknowledged the psychic harm to children in other contexts. For example, in *Plyler v. Doe*, this Court described the "inestimable toll . . . on the social[,] economic, intellectual, and *psychological* well-being of the individual," from the exclusion of children from public education because their parents were undocumented.[36]

In *Windsor*, this Court highlighted how the "differentiation" of families based on the sex of the parents humiliates children being raised by same-sex couples. The discrimination codified in expressive or religious exemptions would similarly humiliate children of LGBT parents. In addition, in *Obergefell*, this Court drew attention to the uncertainty that marriage bans interjected into the lives of same-sex parents and their children.[37] An expressive or religious exemption to sexual orientation discrimination prohibitions would certainly create significant anxiety and uncertainty in the weekly activities of children as they navigated what would be fraught terrain in the public marketplace. A child's family would have to identify the businesses in their community where they were not welcome, but it

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241 (1964) (noting that one of the fundamental objectives of Title II of the Civil Rights Act was to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.").

[36] *Plyer v. Doe*, 457 U.S. 202, 222 (1982) (emphasis added).

[37] *Obergefell*, 135 S. Ct. at 2584 ("April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon.").

would not be possible to identify every inhospitable venue. Many exclusionary spaces could only be discovered through trial and error, leading to painful, humiliating, and embarrassing private and public encounters for parents and their children.

One can only imagine the anxiety of a young child – dressed in her uniform in the back seat of her parent's car headed to a basketball game, or holding a gift in hand en route to a birthday party at a local amusement park – worrying about whether she will be denied the opportunity to play with her friends. No child should have to fear whether she will be denied entry to a public facility because of her family structure. Moreover, if the child's worry came to pass, there would be devastating emotional and stigmatic harm to the child's perception of self and family.

C. The Exemption Would Interfere with Family Integrity

In addition to outright exclusion from public accommodations and psychological harm, an expressive or religious exemption allowing business owners to deny access to children of LGBT parents would send a message to these children – and to the world at large – that their families are inferior.[38] This stigmatization of children and their families was part of this Court's

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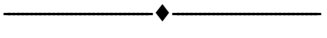
[38] *See generally* Kyle C. Velte, Obergefell*'s Expressive Promise*, 6 HLRe 157 (2015) (illustrating how the Court's LGBT-rights opinions send an important and transformative message about the place of LGBT Americans in society).

constitutional calculus and motivated this Court to strike down DOMA in *Windsor*.[39] Similarly, an exemption that results in the exclusion of children of LGBT parents would "make[ ] it even more difficult for [them] to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[40] Moreover, these children would internalize a message that their families are "less worthy" than other families, and, perhaps that *they themselves* are inferior.[41] This Court has rejected the sending of that message with respect to same-sex marriages, observing that recognizing a same-sex couple's relationship "allows children to 'understand the integrity and closeness of their own family.' "[42] This Court should do the same with respect to public accommodations.



[39] Tanya Washington, *In* Windsor*'s Wake: Section 2 of DOMA's Defense of Marriage at the Expense of Children*, 48 IND. L. REV. 1, 2-3 (2014) (highlighting how the Court's ruling acknowledges and describes the disabilities the law creates for children in same-sex families).

[40] *Windsor*, 133 S. Ct. at 2694.

[41] *Id*. at 2696 ("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.").

[42] *Obergefell*, 135 S. Ct. at 2600 (citing *Windsor*, 133 S. Ct. at 2694-95); *see also* Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 HARV. C.R.-C.L. 231, 252 (2009) (describing how discrimination based on one's belonging in a marginalized family, such as a multiracial family, is discrimination against the collective).

CONCLUSION

To permit business owners to engage in sexual orientation discrimination, cloaked in religious or expressive exemptions, will deny children of LGBT parents equal access to the public sphere, inflict psychological harm, and interfere with their family integrity because of their relationship to or association with their parents. In addition to harming LGBT citizens and their children, an exemption will harm communities by balkanizing and segregating people based on group membership in contravention of the aims of public accommodation and anti-discrimination laws. Such laws also violate the text and spirit of this Court's most recent acknowledgement of the equality of same-sex couples and their families in *Obergefell* and *Windsor*.

The judgment of the Colorado Court of Appeals should be affirmed.

Respectfully submitted,

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