No. 25-1187
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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-Appellants,

v.

DARREN PATTERSON CHRISTIAN ACADEMY,
Plaintiff-Appellee.

On Appeal from the United States District Court, District of Colorado
The Honorable Daniel D. Domenico
District Judge
District Court Case No. 1:23-cv-01557-DDD-STV

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

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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 the Colorado Universal Preschool Program's equal-opportunity requirement would allow plaintiffs to discriminate against these children and raise unfair barriers in their paths to a high-quality education. An exemption would also inflict dignitary, psychological, and familial harms upon an entire class of young people – in their formative years – solely because of their or their parents' LGBT identities. The exemption would also force Colorado to give legal effect to private moral or philosophical viewpoints 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, their counsel of record, 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]

Constitutional freedom includes the right to be free from impermissible discrimination in the educational process. Yet, this is another case about the serious, life-long, and cumulative injuries to LGBT children and children in LGBT families if a state-funded religious private school is permitted to intentionally discriminate against young people in the LGBT community – injuries that state and federal law are designed to prevent.

The district court "d[id] not doubt"[3] the harm that may be suffered by preschoolers and their families if Plaintiff-Appellee Darren Patterson Christian Academy ("DPCA") is granted a license and the imprimatur of state authority to discriminate through the state-funded program Universal Preschool Program ("UPK" or "UPK Program"). The district

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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.

[3] *Darren Patterson Christian Acad. v. Roy*, 765 F. Supp. 3d 1194, 1203 (D. Colo. 2025).

court then summarily dismissed those harms, erroneously making credibility determinations about the weight and sufficiency of the harm (violating well-established summary judgment rules) to children. The district court decision and its factual conclusions are problematic for at least four reasons.

First, the district court erroneously made its own credibility determinations about Colorado's compelling interest, which Fed. R. Civ. P. 56 precludes.

Second, Colorado has a compelling interest in protecting children's equal access to educational opportunities under the UPK Program without any discriminatory barriers.

Third, 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.

Fourth, allowing state-funded religious service providers to engage in LGBT[4] discrimination against preschoolers will force Colorado to

[4] "LGBT" refers to the scope of protections against sexual orientation and gender identity discrimination defined in and provided by the Colorado Anti-Discrimination Act. COLO. REV. STAT. §§ 24-34-301 - 804 (2022).

"directly or indirectly" give legal effect to private beliefs that violate state and federal anti-discrimination laws.[5] While religiously affiliated schools certainly have the right to exercise their religious beliefs, that right is not and never has been absolute.[6]

ARGUMENT

Even when children are at the heart of a controversy, adults' rights and interests often get top billing, sometimes without any consideration for the rights and interests of children.[7] That trend persists, even at the highest levels of the federal judicial system.[8] Consistent with this adult-

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[5] *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.").

[6] *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) ("[E]ven when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.").

[7] *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.").

[8] *See generally Taylor v. Mahmoud*, 145 S. Ct. 2332, (2025) (discussing free exercise claim in public school setting only through the lens of parents' rights); Catherine Smith, The Adult Rights-Bearing Archetype and How it Stifles Young People's Equal Protection, 19 DUKE J. OF CONST.

centered framing, DPCA invokes its First Amendment rights to discriminate against and exclude an entire class of children from state-funded educational services solely because these children are LGBT and/or in LGBT families. But here, Colorado has prioritized progressive strategies placing students at the heart of education and learning; therefore, the children targeted for discrimination by DPCA 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-based discrimination.[9] Pursuant to these child-forward and -centered

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LAW AND PUB. POL'Y 1, (2024) ("The nation's founding documents have mostly envisioned the adult as the model rights-bearer. '[T]here is nothing in the Constitution about children, minors, or infants' because American young people have been treated as 'objects and not subjects of the law.'" (citations omitted)).

[9] 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,

initiatives, Colorado has compelling interests in ensuring children's unencumbered access to equal educational opportunities and in protecting them from discriminatory harms. The district court either discounted or wholesale ignored these harms and reversal of its ruling is thus necessary.

I. The District Court Discounted Colorado's Compelling Interest.

In reliance on *Fulton v. City of Phila.*,[10] the district court impermissibly engaged in a fact determination about the cost of discrimination to children and based on its own conclusions, summarily dismissed the discriminatory harms to an entire class of young people.

But even *Fulton* makes clear that a statutory scheme is not unconstitutional simply because it burdens free exercise rights by denying an exemption to anti-discriminatory statutory requirements that rub against religious beliefs. Instead, it is unconstitutional where the state fails to show a compelling interest. A compelling government interest can be shown where the denial of an exemption to the plaintiff is

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policies for LGBTQ+ youth, a ban on panic defense, gender-affirming ID laws and bans on conversion therapy").

[10] 593 U.S. 522 (2021).

not "logically inconsistent" with Colorado's purported interest in protecting young people from discriminatory harms.[11] In the summary judgment context, where facts about how and why the state offers exemptions in some instances but not others are in genuine dispute, a district court may not resolve this issue on summary judgment.[12]

The existence of a system of individualized exemptions is not fatal to a state policy that burdens an individual's free exercise of religion. This Court previously explained, "it would be odd if the mere fact that a law contains some secular exemptions always sufficed to prove the government lacked a compelling interest in avoiding another exemption to accommodate a claimant's religious exercise."[13] The government can show it has a compelling interest that justifies denying a religious exemption by "identifying a qualitative or quantitative difference between the particular religious exemption requested and other secular exemptions already tolerated."[14]

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[11] *Yellowbear v. Lampert*, 741 F.3d 48, 61 (10th Cir. 2014).
[12] *See id.* at 61-62; *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004) (reversing summary judgment where factual questions of how a public university grants individualized curricular exemptions to students for secular and religious reasons exist).
[13] *Yellowbear*, 741 F.3d at 61.
[14] *Id.*

The district court's finding for the DPCA can only be justified by two reasons: (1) ignorance of Colorado's compelling state interest, or (2) a negative credibility determination, which Fed. R. Civ. P. 56 precludes, as to the evidence associated with the interest. Neither is sufficient to warrant affirming the decision because each ignores the concrete harms an exemption would engender.

II. Allowing a Discriminatory Religious Exemption Will Deny Preschoolers Equal Educational Opportunities Under State and Federal Law.

DPCA receives state funds as a voluntary UPK participant while it discriminates against preschoolers in the LGBT community.[15] Affirming the district court's order would place a stamp of approval on unequal barriers to educational opportunities for these preschoolers in direct contravention of Colorado's compelling legislative priorities.

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

Consistent with Colorado's child-centered approach to children's rights and protections, education experts and Colorado voters endorsed

[15] By "preschoolers in the LGBT community," *Amici* refer to those that may identify themselves as LGBT and/or that may have parents that so identify.

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."[16] It is well-established that "[c]hildren who attend preschool 'are less likely to repeat a grade,' 'more likely to graduate,' and 'more likely to access college or higher education.'"[17] To the contrary "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.'"[18] To advance young people's academic readiness and social and emotional well-being, every child must have "access to the publicly funded, quality preschool programs *of their choosing* and that best fit their family's needs."[19]

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[16] *St. Mary Catholic Parish v. Roy*, 736 F. Supp. 3d 956, 981 (D. Colo. 2024) (quoting Trial Tr. (Holguín) 430:15-18).
[17] *Id.* (quoting Trial Tr. (Holguín) 430:4-10).
[18] *Id.* (quoting Trial Tr. (Holguín) 430:22-23, 430:25-431:5).
[19] *Id.* at *1007 (emphasis added).

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."[20]

The religious exemption DPCA seeks would deprive children and families the equal opportunity to choose the best fit for their educational needs and especially disadvantage children living in rural areas.

1. 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 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."[21] Because the population is less dense in rural areas, unsurprisingly, there are often fewer options

[20] COLO. REV. STAT. § 26.5-4-205(2)(b) (emphasis added).
[21] *St. Mary Catholic Parish*, 736 F. Supp. 3d at 981(citing Trial Tr. (Goldberg) 287:4-9, 325:9-14).

for early childhood education, and the schools are more dispersed.[22] The UPK Program is meant to "[i]mprove outcomes for children and families" by expanding preschool options, not shrinking them[23]

These challenges can swell into an insurmountable barrier that may mean LGBT preschoolers do not attend school at all. 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.'"[24] It is no exaggeration to say that denying a child the opportunity for a quality preschool education could reverberate through generations of that child's family.

The district court discounted these harms and determined they were not "credible enough" to justify a trial on the merits.

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[22] *Id.* (citing Trial Tr. (Goldberg) 325:3-8).
[23] COLO. REV. STAT. § 26.5-1-102(1)(h).
[24] *St. Mary Catholic Parish*, 736 F. Supp. 3d at 981 (quoting Trial Tr. (Holguín) 430:11-15 (alterations in original)).

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

An exemption would interfere with families of preschoolers best-fit assessment in choosing a school. 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,"[25] by being subjected to unequal treatment in any school, including DPCA.

[25] Roberts, *supra* n. 2.

Additionally, children and families in the LGBT community might seek a preschool with a religious mission. Indeed, "some 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.'"[26] The discriminatory exemption DPCA seeks would limit faith-based preschool options for LGBT children and families, depriving them of the opportunity to "draw on religion as a source of solace and to help sustain them."[27] This is especially significant where, like here, the school seeking an exemption "is the only Christian school in the county that offers a preschool."[28]

The discriminatory exemption is merely the proverbial camel's nose under the tent. If DPCA is permitted an exemption based on its religious beliefs, "others would necessarily follow and the number of preschools denying equal access to LGBTQ+ children and families would quickly

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[26] *St. Mary Catholic Parish*, 736 F. Supp. 3d at 982 (quoting Trial Tr. (Tishelman) 382:18-24).
[27] *Id.* at 982.
[28] *Darren Patterson Christian Acad. v. Roy*, 699 F. Supp. 3d 1163, 1171 (D. Colo. 2023).

grow,"[29] undermining the state's compelling goal to increase access to preschools by limiting options for preschoolers in the LGBT community.

Because LGBT people are more likely to live in poverty and raise kids with disabilities who need additional services, LGBT families be more severely impacted by the dearth of providers.[30] 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 flow from being part of a religious community.

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[29] *St. Mary Catholic Parish*, 736 F. Supp. 3d at 1008.

[30] 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 Catholic Parish*, 736 F. Supp. 3d at 981 ("'[I]f 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)).

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

Allowing discrimination against preschoolers 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.[31] 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.[32] "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone,"[33] and the Equal Protection Clause's mandate is "that all persons similarly situated should be treated alike."[34] Children in the LGBT community are *identically situated* to children outside of the LGBT

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[31] COLO. REV. STAT. § 26.5-4-205(2)(b).
[32] 347 U.S. 483 (1954). *See also* Catherine E. 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.").
[33] *Application of Gault*, 387 U.S. 1, 13 (1967).
[34] *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

community in their need for and entitlement to equal educational opportunities.[35] Yet, DPCA seeks to discriminate against four-year-olds and deprive them of equal 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.[36] 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 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

[35] *See Levy v. Louisiana*, 391 U.S. 68, 72 (1968).
[36] 347 U.S. at 495.

board."[37] Here, DPCA claims it will permit children in the LGBT community to enroll in its school but preemptively seeks a blanket exemption to discriminate against them in their daily existence as students based on religious beliefs.

To permit a state-funded preschool such as DPCA 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*'s timeless pronouncement that where a state has undertaken to provide an educational opportunity in its public schools, "[s]uch an opportunity . . . is a right which must be made available to all on equal terms."[38] To allow state-funded private actors, religious or secular, to subvert *Brown's* equal education mandate places the state's endorsement on the singling out of preschoolers "by a single trait and then denies them protection across the board."[39]

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

III. 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.

A. The discriminatory exemption would impose dignitary harms.

In *Obergefell*, Justice Kennedy recognized a constitutional right to equal dignity.[40] 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. [41] As the *Obergefell* Court explained, the two clauses "converge in the identification and definition of [rights]"[42] to advance "our understanding of what freedom is and must become."[43]

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[40] *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).
[41] *Id.* at 672–73.
[42] *Id.* at 672.
[43] *Id.*

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,[44] the Court has recognized the extensive body of adolescent brain development research that shows "that children are different from adults and that those developmental differences are of constitutional dimension."[45]

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[44] *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 offenders who commit capital crimes) See also *Graham v. Florida*, 560 U.S. 48, 82 (2010); *J.D.B. v. North Carolina*, 564 U.S. 261, 281 (2011); *Miller v. Alabama*, 567 U.S. 460, 489 (2012); *Jones v. Mississippi*, 593 U.S. 98, 118 (2021)

[45] 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).

In particular, this carve-out violates their right to privacy.[46] Children do not surrender their rights at the schoolhouse doors.[47] Federal law requires schools to safeguard information like a student's gender identity and sexual orientation, and it prohibits schools from divulging that information without a youth's consent.[48]

It strains credulity, then, that a state-funded education program should be permitted to force students to publicly reveal their identities which may otherwise not be known and based on that revelation allow them to be subjected to discrimination For example, if a preschooler presents as a girl but DPCA forces her to use the boys' bathroom under their policies because she was assigned male at birth, her identity will be exposed to the school community (and likely beyond) without her consent and to her detriment.

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[46] 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.").

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

[48] 20 U.S.C. § 1232g (2013).

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 openly discriminate against children in the LGBT community would humiliate and embarrass them, which would also be confusing and painful. The Supreme Court has repeatedly acknowledged that discrimination causes psychic harm to children.[49] In *U.S. v. Windsor*, the 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."[50]

In a recent case, Dr. Tishelman, a clinical and research psychologist and research associate professor at Boston College, testified about the

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[49] *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: 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.").

[50] 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. 49 at 2.

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.[51]

In addition, in *Obergefell*, the Supreme Court drew attention to the uncertainty that marriage bans interjected into the lives of LGBT people and families.[52] A religious exemption in this case would also interject 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.'"[53] And DPCA's

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[51] *St. Mary Catholic Parish*, 736 F. Supp. 3d at 982 (quoting Trial Tr. (Tishelman) 348:10-13).

[52] *Obergefell,* 576 U.S. at 678 ("April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them certainty and stability that all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon.").

[53] *St. Mary Catholic Parish*, 736 F. Supp. 3d at 983 (quoting Trial Tr. (Tishelman) 368:3-6).

own expert below admitted that challenging a child's identity in a school setting would be "hostile" and "interfere with a child's ability to learn."[54]

This treatment exacts "the inestimable toll" that the *Plyler* Court described as the "social, economic, intellectual, and *psychological* well-being of the individual," by excluding preschoolers from public education for matters beyond their control.[55]

Additionally, children may suffer greater harm should they join the preschool community and subsequently identify as LGBT. Dr. Tishelman highlighted the specific harm that children could experience if they begin preschool at a religious school, *then* begin to identify as LGBT and are subsequently required to change schools or be forced to endure discrimination. 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."[56]

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[54] 9.App.1824 (quoting 7.App.1639-40).
[55] *Plyer,* 457 U.S. at 222 (emphasis added).
[56] *St. Mary Catholic Parish*, 736 F. Supp. 3d at 982-83 (quoting Trial Tr. (Tishelman) 391:5-12).

Finally, the hardship of the religious exemption may be even greater for LGBT children if they were forced to conform to or are "rejected for something that they can't change about themselves . . . because they [don't] have a way to be different."[57] The burden a religious exemption would place on preschoolers' small shoulders simply because they are part of the LGBT community is not justifiable. And despite Colorado's credible evidence of these harms, the district court discounted the burdens on children, violating summary judgment standards established by Fed. R. Civ. P. 56.

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. [58]

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[57] *Id.* at 982 (quoting Trial Tr. (Tishelman) 348:14-18).

[58] *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.").

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."[59] Children are most impacted by the environments where they spend significant time, especially in school where most children seek and receive affirmation from teachers and peers. Discriminatory treatment 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.[60] Moreover, these very young children may internalize a harmful message that they, as individuals, are "less worthy" than other people.[61] "If a child 'is being implicitly or explicitly told that there is something wrong with them or their family, this can create negative self-views.'"[62] A child being

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[59] 570 U.S. at 772.

[60] *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).

[61] *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.").

[62] *St. Mary Catholic Parish*, 736 F. Supp. 3d at 982 (quoting Trial Tr. (Goldberg) 297:11-13).

taught that they or their family do not deserve equal treatment may also "affect their hearts and minds in a way unlikely ever to be undone."[63]

IV. A Religious Carve-out Would Give Legal Effect to Private Convictions at the Expense of Children in Contravention of Fourteenth Amendment Precedent.

Colorado has a compelling interest in refusing to give state-sanctioned 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*,[64] 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.[65] 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.[66]

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" of a child being raised

[63] *Brown*, 347 U.S. at 494.
[64] 466 U.S. 429 (1984).
[65] *Id.* at 430.
[66] *Id.*

in "an interracial marriage."[67] 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 interest, so that she did not "suffer from. . . social stigmatization" in a society that did not fully accept interracial relationships.[68]

The Supreme Court reversed because of the lower court's actual reliance on a segment of society's views of interracial relationships.[69] 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."[70] *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 non-discrimination mandate.

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.*

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[67] *Id.*
[68] *Id.* at 431.
[69] *Id.* at 432.
[70] *Id.* at 433.

Virginia,[71] in which the Supreme Court explicitly acknowledged the religious origins of anti-miscegenation laws and held that such laws were outweighed by the constitutional gravitas of the Fourteenth Amendment's right to marry.[72]

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 Exemption Gives Impermissible Legal Effect to Sex Discrimination.

Allowing a preschool to discriminate against children in the LGBT community would place the imprimatur of the state itself on impermissible sex classifications, a practice that this Court has long held carries a "strong presumption" of "invalid[ity]" under the Equal Protection guarantee.[73]

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[71] 388 U.S. 1 (1967).

[72] *Id.* at 12; *see also id.* at 3 (noting that the trial court 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.").

[73] *J.E.B. v. Alabama,* 511 U.S. 127, 152 (1994) (Kennedy, J., concurring).

The Supreme Court, in *Bostock v. Clayton County,*[74] held it is impossible to discriminate against LGBT people without engaging in sex discrimination under Title VII of the Civil Rights Act of 1964:

> 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.[75]

In this case, the reason for the exemption DPCA seeks is to permit them to discriminate against preschoolers based on the preschoolers' membership in and/or relation to the LGBT community.[76] *Bostock*'s pronouncement should apply with equal or greater force to equal protection and other anti-discrimination provisions, like Colorado's. Forcing children to adhere to policies that do not honor their identities by, for example, addressing them by incorrect pronouns or demanding they use bathrooms that do not correspond with their gender identities based on religious precepts, constitutes sex discrimination. Were the state to exempt DPCA from Colorado law, it would be giving legal effect

[74] 590 U.S. 644 (2020).
[75] *Id.* at 649.
[76] *See id.* at 656

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 that when the belief has been deemed violative of Fourteenth Amendment law, the government may not give it legal effect.

B. Allowing the Exemption 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. This line of reasoning is distinct from the sex discrimination argument. The Supreme Court has expressly confirmed that "many same-sex couples provide loving and nurturing homes to children, whether biological or adopted."[77] 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 Fourteenth Amendment strictures.[78] The State of Colorado explicitly recognizes the harm of this kind of discrimination, yet DPCA nevertheless seeks the State's legal blessing to receive state funds while acting upon their personal, religious beliefs. But the freedom to exercise

[77] *Obergefell*, 576 U.S. at 668.
[78] *Romer*, 517 U.S. at 635.

one's religion is not absolute.[79] 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 interests and contravenes Colorado's duty to provide preschoolers with equal access to education and to protect them from harm.

[79] *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)).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted this 15th day of September, 2025,

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