

No. 25-581

IN THE SUPREME COURT OF THE UNITED STATES

ST. MARY CATHOLIC PARISH,
LITTLETON, COLORADO, ET AL.,

Petitioners,

v.

LISA ROY, IN HER OFFICIAL CAPACITY AS
EXECUTIVE DIRECTOR OF THE COLORADO
DEPARTMENT OF EARLY CHILDHOOD, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

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

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INTERESTS OF AMICI CURIAE

This Court should consider those most directly impacted by the decision in this case: the intended beneficiaries of Colorado’s Universal Preschool Program (“UPK”), Colorado’s children.¹ To paraphrase Shakespeare, though they be but little, they are constitutional rights-bearers and are thus entitled to be free from state-funded discrimination.²

Amici are scholars of children and the law, education law, family law, and anti-discrimination law.³ Amici draw this Court’s attention to the significant harms children in the LGBT community⁴ would bear should Colorado be compelled to allow state-funded religious schools to discriminate against preschoolers. Exempting religious schools from the State’s equal-opportunity and antidiscrimination provisions would

¹ This brief was not authored, in whole or in part, by counsel for either party, and no party or their counsel have contributed monetarily to the preparation or submission of this brief.

² See William Shakespeare, *A Midsummer Night’s Dream* act 3, sc. 2 (“Though she be but little, she is fierce.”); see also *In re Gault*, 387 U.S. 1, 13 (1967) (“Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”).

³ See Brief of Amici Curiae Scholars for the Advancement of Children’s Constitutional Rights in Support of Defendants-Appellees, *St. Mary Catholic Parish v. Roy*, No. 24-1267 (10th Cir. Oct. 23, 2024); see also Brief of Scholars for the Advancement of Children’s Constitutional Rights as Amici Curiae in Support of Respondents, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (No. 14-556).

⁴ For purposes of this brief, we define “children in the LGBT community” as preschool-aged LGBT children and children with LGBT parents.

force Colorado to breach its statutory obligation under the UPK and infringe upon children’s First and Fourteenth Amendment rights. An exemption would deny these young learners access to a high-quality early childhood education and inflict educational, religious and spiritual,⁵ dignitary, familial, and psychological harms on them solely because of their or their parents’ LGBT identities.

SUMMARY OF ARGUMENT

Today, education is perhaps the most important function of state and local governments. . . . Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.⁶

⁵ Here, amici use the terms “spirituality” and “religion” interchangeably. Having said that, we recognize distinctions between them, consistent with the work of religious, spiritual, and psychology scholars. They explain how spirituality concerns an individual’s search for the sacred, whereas religion often encompasses the search for the sacred as it occurs within an organized community that validates and supports shared beliefs, rituals, and practices. *See e.g.*, Peter Hill et al., *Conceptualizing Religion and Spirituality: Points of Commonality, Points of Departure*, 30 J. for the Theory of Social Behaviour 51, 60-77 (2000); John Nimmo, Mona M. Abo-Zena & Debbie LeeKeenan, *Finding a Place for the Religious and Spiritual Lives of Young Children and Their Families: An Anti-Bias Approach*, Young Children 38 (2019); Christine Robinson, Brendan Hyde, Caren Forlin & Megan Best, *The Experience and Expression of Spirituality in Childhood: A Systematic Review and Qualitative Synthesis of the Literature*, 16 J. for the Study of Spirituality 24, 25 (2026).

⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

The state of Colorado has embraced the “most important function of state . . . governments” and enacted the UPK statute to provide preschoolers with equal access to a high-quality education free from discriminatory treatment. This case is not just about the prerogatives of institutions seeking a religious exemption from the State’s non-discrimination requirement. This case is about the serious, lifelong, and cumulative injuries that children in the LGBT community would suffer if Colorado were forced to abandon its equal access mandate and subsidize the discriminatory religious exemption St. Mary Catholic Parish seeks.

Amici advance four arguments. First, forcing Colorado to exempt religious providers from its equal-opportunity requirement would deny children in the LGBT community equal access to educational opportunities. Second, exempting providers would violate children’s First Amendment free exercise right and inflict religious and spiritual harms. Third, allowing state-funded discrimination would deny children’s Fourteenth Amendment right to equal protection and inflict dignitary, familial, and psychological harms. Fourth, recognizing Colorado’s compelling interest in protecting children, through enforcement of its equal opportunity and non-discrimination requirements, satisfies strict scrutiny and ensures children are insulated from these overlapping discriminatory harms.

ARGUMENT

As Amici have observed in their scholarship, even when children are at the heart of a controversy, adults' rights and interests often get top billing.⁷ As Professor Barbara Woodhouse has explained, this pattern reflects the historical treatment of children as "objects and not subjects of the law," rarely viewed as rights-bearers.⁸ Consistent with a pattern of prioritizing adults, St. Mary Catholic Parish asks this Court to force Colorado to endorse its exclusionary actions despite the varied and significant harms state-sanctioned discrimination would visit upon the children who are the focus of Colorado's UPK. Amici now enumerate these harms.

⁷ See Tanya Washington, *Real, Not Rhetorical: Children's Rights as the Strongest Constitutional Defense of Obergefell Against Religious-Liberty Challenges*, 77 Mercer L. Rev. 1715, 1739 (2026); Catherine Smith, Tanya Washington, and Robin Walker Sterling, *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., 2024).

⁸ Barbara Bennett Woodhouse, *Who Owns the Child?: Meyer, Pierce and the Child as Property*, 33 Wm. & Mary L. Rev. 995, 1043 (1992); see also, Barbara Bennett Woodhouse, *The Courage of Innocence: Children as Heroes in the Struggle for Justice*, 2009 U. Ill. L. Rev. 1567, 1577 (2009).

I. Forcing Colorado to Breach Its Non-Discrimination Requirement Would Deny Preschoolers Equal Educational Opportunities

Forcing Colorado to exempt religious preschool providers from its equal opportunity and antidiscrimination mandates would erect unequal barriers to educational access for preschoolers in the LGBT community, directly contravening Colorado’s compelling legislative priorities.

Building on its long history of centering children’s rights and interests,⁹ Colorado makes its statutory obligation to preschoolers explicit. The State requires all Colorado schools receiving funding to provide “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.”¹⁰ It is well-

⁹ Colorado’s recognition of children’s independent legal interests has deep roots. In 1901, Colorado was only the second state in the nation to establish a juvenile court to protect young people in the child welfare system. Ashley Chase & Cara Nord, *House Bill 22-1038: Colorado Continues its History of Expanding Children’s Voices and Representation in D & N Proceedings*, 52 Colo. Law. 32, 32 (Apr. 2023). In 1967, the year the U.S. Supreme Court recognized children’s own due process rights in delinquency proceedings in *In re Gault*, Colorado adopted its Children’s Code, authorizing courts to appoint independent legal counsel and a guardian ad litem, for children in dependency and neglect proceedings.

¹⁰ Colo. Rev. Stat. § 26.5-4-205(2)(b).

established that these requirements will place every Colorado preschooler on a path to educational success.

Early childhood is a formative period in which experiences and relationships shape children’s developing systems and provide the foundation for later learning, behavior, and health.¹¹ Developmental science thus confirms what this Court’s children’s-rights jurisprudence has long recognized: childhood matters because children experience and respond differently to their environments than adults.¹²

The UPK’s commitment to preschoolers reflects what evidence confirms: 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.”¹³ The benefits of attending preschool are well established. “Children who attend preschool ‘are less likely to repeat a grade’ and ‘more likely to graduate.’ Students who attend preschool are also ‘more likely to access college or higher education.’”¹⁴ The drawbacks of not attending preschool are also well documented. Children are more likely to be held back and “less likely to succeed academically and socially and emotionally

¹¹ Nat’l Sci. Council on the Developing Child, *Excessive Stress Disrupts the Architecture of the Developing Brain: Working Paper No. 3*, at 1–2 (2014).

¹² See *J.D.B. v. North Carolina*, 564 U.S. 261, 272–74 (2011); *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

¹³ *St. Mary Cath. Parish v. Roy*, 736 F. Supp. 3d 956, 981 (D. Colo. 2024).

¹⁴ *Id.* (quoting Trial Tr. (Holguin) 430:4-10).

as well.”¹⁵ Colorado recognized that to ensure young people’s academic readiness and well-being, every child must have “access to publicly funded, quality” preschool programs “of their choosing and that best fit their family’s needs.”¹⁶

To achieve these codified objectives, all Colorado schools receiving state funding—whether public or private, secular or religious—must adhere to the state’s equal-opportunity, non-discrimination mandate.¹⁷ Propelled by its UPK program, Colorado now ranks third nationally for preschool enrollment.¹⁸

Despite the state’s enviable enrollment rate and equal access to its UPK program, Petitioners seek to receive state funds while they discriminate against preschoolers in Colorado’s LGBT communities. No state should be required to use its funds to subsidize

¹⁵ *St. Mary Cath. Parish*, 736 F. Supp. 3d at 981 (quoting Trial Tr. (Holguin) 430:22-23, 430:25-431:5).

¹⁶ *St. Mary Cath. Parish*, 736 F. Supp. 3d at 1004, 1007. The Colorado Department of Early Childhood 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).

¹⁷ Colo. Rev. Stat. § 26.5-4-205(2)(b). The plain language of the UPK Program declares its intent to be as broadly applicable as possible.

¹⁸ Colorado Governor’s Office, *Colorado Ranks #3 Nationally for Preschool Enrollment, Driven by Free Universal Preschool Program* (Apr. 29, 2025); see also Allison H. Friedman-Krauss et al., *The State of Preschool 2025: State Preschool Yearbook* (Nat’l Inst. for Early Educ. Rsch. 2026).

discrimination and educational deprivation antithetical to its duly enacted laws.

A. Families Should Have An Equal Opportunity to Choose a School that Best Fits a Child's Needs

Forcing Colorado to permit religious providers to discriminate would deny preschoolers in the LGBT community access to the preschools their parents choose to best meet their child's needs.

Many considerations inform this important decision. Some families seek a preschool that offers specific extra-curricular offerings that serve the “whole child,” while others prefer a preschool with 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 instruction, and dance classes that religious preschools may offer. National data ranking school performance reflects that Catholic schools in general boast the highest standardized test scores and graduation rates.¹⁹ And Petitioners' preschools receive “four out of five stars” in “Colorado's rating system for early childhood education providers.”²⁰

¹⁹ Catholic Schools Lead Nationwide Test Scores, The Cath. Schs. Found. (Nov. 1, 2022); Anayat Durrani, *Considering Catholic School? Here's What to Know*, U.S. News (Apr. 18, 2023).

²⁰ *St. Mary Cath. Parish*, 736 F. Supp. 3d at 1007.

B. The Most Vulnerable Preschoolers Should Be Protected

The exemption Petitioners seek would inflict its greatest harm on preschoolers in LGBT families who face multiple intersecting vulnerabilities.²¹

For example, the discriminatory impact would be particularly acute for children in the LGBT community 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.”²² Because rural communities often have fewer preschool programs and greater distances exist between them, exclusion from even a single provider may effectively foreclose access to preschool altogether.²³ Moreover, socioeconomic barriers can compound the consequences of limited access to quality early childhood education, particularly for LGBT families whose children have ability, developmental, learning, or other support needs. LGBT people experience higher rates of poverty²⁴ and are also disproportionately more likely to foster or

²¹ *St. Mary Cath. Parish*, 736 F. Supp. 3d at 982 (quoting Trial Tr. (Tishelman) 382:18-24).

²² *St. Mary Cath. Parish*, 736 F. Supp. 3d at 981 (citing Trial Tr. (Goldberg) 287:4-9, 325:9-14).

²³ *St. Mary Cath. Parish*, 736 F. Supp. 3d at 981 (citing Trial Tr. (Goldberg) 325:3-8).

²⁴ See Bianca D.M. Wilson et al., *LGBT Poverty in the United States: Trends at the Onset of COVID-19* (Williams Inst., UCLA Sch. of L. 2023); M.V. Lee Badgett, *The Complexity of LGBT Poverty in the United States*, Fast Focus Policy Brief No. 53-2021, Inst. for Rsch. on Poverty, Univ. of Wis.—Madison (2021).

adopt children from the child welfare system, including children designated as “special needs”—children with disabilities, developmental differences, older youth, and sibling sets who face greater placement challenges.²⁵ Preschoolers in these families may also be more severely impacted by the dearth of preschool options that meet their specific needs.²⁶ Transportation limitations, financial constraints, and the scarcity of programs equipped to address specialized learning and developmental needs narrow parents’ preschool options. These vulnerabilities frequently overlap in a single child—*e.g.*, a 4-year-old with a learning disability growing up in a low-income LGBT family living in rural Colorado. The UPK program was meant to “[i]mprove outcomes for children and families” by expanding access to the preschools that can meet children’s needs.²⁷ Limiting LGBT families’ preschool options by allowing providers to discriminate against some of the most vulnerable preschoolers would have the opposite effect and would inflict

²⁵ See Goldberg & Conron, *How Many Same-Sex Couples in the U.S. Are Raising Children?*, Williams Inst. (2018); Tanya M. Washington, *Throwing Black Babies Out with the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans*, 6 Hastings Race & Poverty L.J. 1, 1 (2008); Gary J. Gates, M.V. Lee Badgett, Jennifer Ehrle Macomber & Kate Chambers, *Adoption and Foster Care by Gay and Lesbian Parents in the United States* (Urban Inst. & Williams Inst. 2007).

²⁶ Children’s Bureau, U.S. Dep’t of Health & Human Servs., *Child Welfare Outcomes 2016: Report to Congress* (2019); *St. Mary Cath. Parish*, 736 F. Supp. 3d at 981.

²⁷ Colo. Rev. Stat. § 26.5-1-102(1)(h) (2022).

substantial short- and long-term harm on children in the LGBT community and their families.

II. Forcing Colorado to Breach Its Equal-Opportunity Requirement Would Violate Children’s First Amendment Right to Free Exercise of Religion and Create Religious and Spiritual Harms

Colorado’s equal-access requirement protects children and families of faith from the spiritual and religious harms inflicted on a child excluded from a publicly-funded religious preschool because of their membership in the LGBT community. This Court has made clear that “the Bill of Rights is [not] for adults alone.”²⁸ “Over and over again” this Court has “held that the children themselves have constitutionally protectible interests,” including First Amendment rights.²⁹ As such, children enjoy the right to free exercise of religion and all of the concomitant benefits, as well as protection from exclusionary harms.

A. Benefits of Religious and Spiritual Early Childhood Education

Religious or spiritual education in the early years can benefit young children in many ways.³⁰ Preschool

²⁸ *In re Gault*, 387 U.S. 1, 13 (1967).

²⁹ *Wisconsin v. Yoder*, 406 U.S. 205, 243 (1972) (Douglas, J., dissenting in part); *see also id.* at 244 (recognizing “child’s free exercise of religion”); *see, e.g., West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

³⁰ *See* John Nimmo, Mona M. Abo-Zena & Debbie LeeKeenan, *Finding a Place for the Religious and Spiritual Lives of Young*

is a critical period for development of personal, social, spiritual, and religious identity.³¹ Research demonstrates that when children's spirituality is nurtured, often through play,³² children have the potential to develop resilience, a deeper understanding of their needs, and "a personal sense of agency, identity, meaning and purpose."³³ Children's spirituality involves connectedness with self, others, and nature, as

Children and Their Families: An Anti-Bias Approach, Young Children at 42 (Nov. 2019); see generally, Anna Giesenber, *The Phenomenon of Preschool Children's Spirituality* (Dec. 3, 2008) (Ph.D. dissertation, Queensland University of Technology); Jennifer Sturgeon, *Building the Foundation: The Benefits of Integrating Faith-Based Routines in Early Childhood Education*, Northwestern College (Apr. 5, 2022).

³¹ Mona M. Abo-Zena & Allegra Midgette, *Developmental Implications of Children's Early Religious and Spiritual Experiences in Context: A Sociocultural Perspective*, 10 Religions 631, 631 (2019).

³² Kathleen I. Harris, *Embracing Make Believe Play and Theories of Childhood: Understanding Children's Spirituality and the Spiritual Essence of a Young Child*, 1 Int'l J. of Integrative Pediatrics & Env't Medicine 12, 14-15 (2014); Judy Harris Helm, Stacy Berg, and Pam Scranton, *Documenting Children's Spiritual Development in a Pre-School Program*, Northminster Learning Center, 2007; Christine Robinson, Brendan Hyde, Caren Forlin & Megan Best, *The Experience and Expression of Spirituality in Childhood*, Journal for the Study of Spirituality 2026, Vol. 16, No. 1, 30.

³³ Robinson, *supra* note 32, at 34; Holly Catterton Allen, *Forming Resilient Children, The Role of Spiritual Formation for Healthy Development*, InterVarsity Press (2021) Chs. 2 and 3; Holly Catterton Allen, *Nourishing Children's Spirituality, Christian Perspectives and Best Practices*, Wipf and Stock Publishers (2008); cf. Jennifer Mata-McMahon, *Reviewing the Research in Children's Spirituality (2005–2015)*, 21 Int'l J. of Children's Spirituality 140 (2016).

well as “joy, delight and humour.”³⁴ As the district court in this case observed, many children “draw on religion as a source of solace and to help sustain them.”³⁵ Early religious and spiritual experiences are associated with lifelong wellbeing, including greater capacity to cope with pain, depression, and anxiety.³⁶ Thus, children excluded from faith-based preschools lose more than mere access to preferred educational settings; they lose important opportunities to develop their spiritual and religious lives and to flourish long-term.³⁷

B. Harms of Exclusion from Religious and Spiritual Early Education

³⁴ Robinson, *supra* note 32, at 34.

³⁵ *St. Mary Cath. Parish*, 736 F. Supp. 3d at 982.

³⁶ See Robinson, *supra* note 32, at 26; Lisa Miller, Renee Owen & Paul Freedman, *Awakening the Spirit: Dr. Lisa Miller on Spirituality and Education*, Holistic Education Review 2024, Vol. 4, No. 2; Ursula King, *The Spiritual Potential of Childhood: Awakening to the Fullness of Life*, 18 Int’l J. Child. Spirituality 4, 14 (2013). This is not to say that all children exposed to religious or spiritual early education benefit, or that children exposed to secular education do not thrive. See, e.g., Tony Eade, *Barriers to Young Children’s Spiritual Growth – and Some Pointers to How These Can Be Overcome*, 30 Int’l J. Child. Spirituality 1, 7 (2025) (“Organised religious settings can, and often do, provide a context which enables children to belong and nurtures spiritual growth. However, they can also be narrowing and restrictive, especially if enquiry and exploration is discouraged.”); see also Helena Stockinger, *Developing Spirituality—an Equal Right of Every Child?*, 24 Int’l J. Child. Spirituality 307 (2019) (describing differences in experiences of 4- and 5-year-olds from Catholic and Islamic faith-backgrounds in kindergarten).

³⁷ See Robinson, *supra* note 32, at 34.

Excluding preschoolers on religious or spiritual grounds from their faith community is a profoundly painful experience that not only burdens children's religious liberty interests but inflicts at least three distinct harms.

1. Lack of Religious Identity and Literacy

First, exclusion from religious pre-schools deprives children opportunities to develop their religious or spiritual identity. Faith-based early education can play a significant role in such development. For example, two pre-school daughters of lesbian mothers were enrolled in the Sacred Heart of Jesus School in Boulder, Colorado because their mothers, themselves Catholic-school graduates, valued the moral foundation of a Catholic education.³⁸ The girls, who had been baptized in the Catholic Church, flourished at the school, embraced their faith, and cherished their teachers, classmates, and faith community, often retelling Bible stories they learned in class.³⁹ They were later denied re-enrollment solely because their mothers were lesbians, depriving the girls of the religious education and community they had come to love.⁴⁰ In addition to children and families turned away, non-LGBT Catholic families may

³⁸ See Thomas Fox, *Children Denied Catholic Schooling, Lesbian Couple Speaks Out*, Nat'l Cath. Reporter (March 15, 2010).

³⁹ *Id.*

⁴⁰ *Id.*

also be harmed by LGBT exclusion.⁴¹ Moreover, children rejected from faith-based preschools are deprived of the opportunity to develop “religious literacy.”⁴² Religious-based education provides a cultural context in which preschoolers can gain such literacy. Without this, some children may perceive religion as mere dogma, which “diminishes respect for diversity, feeds stereotypes, and can result in religious extremism.”⁴³

2. Not Belonging to a Faith Community

Second, a child of faith rejected by a religious preschool is denied a sense of belonging, which plays a critical role in a preschooler’s personal and social

⁴¹ For example, a heterosexual Colorado Catholic couple explained that they chose Catholic school because they wanted their children to experience the same “safe, loving” Catholic education the parents had received and to reinforce the faith and values they taught at home. *See* Letter from Beth and Dan Mueller Stewart to Leaders of Colorado’s Catholic Archdiocese and the Principal of Their Children’s Catholic School. The parents withdrew their children from the school, however, because the school excluded LGBT families, indicating that they were not welcome. *Id.*

⁴² Religious literacy is the ability to “discern and analyze the fundamental intersections of religion and social/political/cultural life through multiple lenses.” Nimmo, *supra* note 30, at 40-41.

⁴³ *Id.* at 41; *see also* Abbie E. Goldberg & JuliAnna Z. Smith, *Preschool Selection Considerations and Experiences of School Mistreatment Among Lesbian, Gay, and Heterosexual Adoptive Parents*, 29 Early Child Res. Q. 22 (2013).

identity development.⁴⁴ Children engaged in faith-based preschools develop a sense of belonging in their faith community.⁴⁵ This is done through participation in shared religious practices, rituals, and activities centering religious stories, themes, and beliefs.⁴⁶ Faith-based education can not only “provide[] children with a community . . . [but also] an entry point to a new culture,” as it did for a young child who immigrated from China and was introduced to Catholicism at an early age.⁴⁷ This early introduction was foundational, providing her a “lifelong faith and belief system” that later influenced her own “parenting, ethics and support through challenging times.”⁴⁸

An excluded child loses opportunities to participate in their faith community and to learn alongside their peers through participation in age-appropriate religious practices. Such social ostracization and

⁴⁴ Elizabeth J. Erwin, Meredith Valentine & Michaela Toumazou, *The Study of Belonging in Early Childhood Education: Complexities and Possibilities*, 32 Int’l J. of Early Years Educ. 6 (2024); see also Erin Ruth Baker & Mae Woodward, *The Preschooler’s Moral Self and Executive Functions: An Experimental Approach with Exclusion*, Cognitive Development 66 (2023).

⁴⁵ See *St. Mary Cath. Parish*, 736 F. Supp. 3d at 982. (“[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.’”) (quoting Trial Tr. (Tishelman) 382:18-24).

⁴⁶ Abo-Zena, *supra* note 31, at 6; Ann Casson et al., *Faith in the Nexus: Church Schools and Children’s Exploration of Faith in the Home: A NICER Research Study of Twenty Church Primary Schools in England* 11-12 (2020).

⁴⁷ Nimmo, *supra* note 30, at 42.

⁴⁸ *Id.*

exclusion can create devastating isolation and a life-long schism with their faith community.⁴⁹

3. Estrangement from God

Third, excluded preschoolers of faith may internalize a religious pre-school's exclusion as rejection by God.⁵⁰ This rebuke may lead a child to feel as if they are not loved by God or made in God's image.⁵¹ For example, a youngster with two moms may conclude that God's community has no place for them because their parents are unacceptable to their religious community.⁵² This type of spiritual harm has incalculable emotional, developmental, and behavioral

⁴⁹ See Erwin, *supra* at note 44, at 6; *St. Mary Cath. Parish v. Roy*, 736 F. Supp. 3d at 982 (quoting Trial Tr. (Tishelman) 382:18-24); see also Abbie E. Goldberg, *Lesbian, Gay, and Heterosexual Adoptive Parents' Experiences in Preschool Environments*, 29 Early Child Res Q. 669, at 3 (2014); Abbie E. Goldberg & JuliAnna Z. Smith, *Preschool Selection Considerations and Experiences of School Mistreatment Among Lesbian, Gay, and Heterosexual Adoptive Parents*, 29 Early Child Res. Q. 1, 5 (2016).

⁵⁰ While the term "God" is used here, others may use a different term to refer to a greater power, creator, or universal spirit.

⁵¹ See Hea Jung Lee, Ashley B. Marin, Jiayue Sun & Rebekah A. Richert, *Does God Comfort You When You Are Sad? Religious Diversity in Children's Attribution of Positive and Negative Traits to God*, 14 Religion & Child Dev. 1 (2023); see *id.* at 3 ("Children indicated their certainty that God loves them, comforts them when they are sad, helps people, scares them, punishes them, and is angry with them.").

⁵² Sarah Netter, *Colorado Catholic School Boots Student with Lesbian Mothers*, ABC News (Mar. 8, 2010); see also S.A. de Roos, *Young Children's God Concepts: Influences of Attachment and Religious Socialization in a Family and School Context*, 101 Religious Educ. 84, 92 (2006); Casson, *supra* note 46, at 11-12.

consequences. As many Catholics can attest, rejection on LGBT grounds can cause scars that take a lifetime to heal.⁵³ Damage done during these tender years can turn children away from seeking a spiritual home or faith community for decades or from religion altogether,⁵⁴ depriving them of the comfort and security of knowing that they are unconditionally loved by God—a profound and potentially irreparable wound.⁵⁵

⁵³ See, e.g., Michael J. O’Loughlin, *LGBTQ Catholics Recall Moments of Faith, Joy, and Pride*, Outreach (June 25, 2024) (a “faithful LGBTQ Catholic” recounts “healing from the religious trauma I endured”); Lindsay Hueston, *Navigating the Complexities of Being Catholic and LGBTQ*, New Ways Ministry (May 28, 2018).

⁵⁴ See Lindsay Hueston, *Navigating the Complexities of Being Catholic and LGBTQ*, New Ways Ministry (May 28, 2018) (some LGBTQ Catholics “become alienated from the church because of negative messages heard in their parishes” and “leave the Church behind in attempts to liberate themselves from an institution that is often hostile towards the LGBTQ community”); see generally, Abbie E. Goldberg, Katherine R. Allen & Caroline Sanner, *Cherished Families, Unspoken Truths: Navigating Hidden and Challenging Family Experiences While Growing up with LGBTQ Parents*, 86 J. Marriage & Fam. 219 (2023) (“God concepts are likely to be formed early in life and probably exert great influence on later religious inclinations”).

⁵⁵ See Eve Tushnet, *Acts of Faith; The Challenge of Being Both Gay and Catholic*, Wash. Post (June 1, 2017).

III. Forcing Colorado to Subsidize Discrimination Would Flout Children’s Fourteenth Amendment Rights and Inflict Dignitary, Familial, and Psychological Harms

Forcing Colorado to subsidize discrimination against children in the LGBT community would also violate children’s Fourteenth Amendment rights to equal treatment and freedom from punishment for matters beyond their control, inflicting dignitary, familial, and psychological harm.

A. Children Are Entitled to Equal Treatment Under the Fourteenth Amendment

The UPK statute’s “equal opportunity” requirement’s origins are historical.⁵⁶ This idea is deeply rooted in our nation’s civil rights struggles and this Court’s landmark decision in *Brown v. Board of Education*, where this Court recognized and enforced children’s constitutional rights.⁵⁷ As this Court has repeatedly instructed, “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone”⁵⁸ and the Equal Protection Clause’s central command is “that all persons similarly situated should be treated

⁵⁶ Colo. Rev. Stat. § 26.5-4-205(2)(b).

⁵⁷ 347 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).

⁵⁸ *In re Gault*, 387 U.S. 1, 13 (1967).

alike.”⁵⁹ 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.⁶⁰ Yet, St. Mary Catholic Parish seeks to deny preschoolers in the LGBT community access to state-funded preschool while providing it to other children. This it cannot do.

In *Brown*, this Court held 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.⁶¹ One may argue that the discriminatory action sought in the instant case is not on par with de jure racial segregation; however, the challenged action need not be identical 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 this 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 board.”⁶² Here, St. Mary Catholic Parish seeks to impose a similar exemption by attempting to categorically ban

⁵⁹ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

⁶⁰ *Levy v. Louisiana*, 391 U.S. 68, 72 (1968).

⁶¹ 347 U.S. at 483, 495 (1954).

⁶² *Romer v. Evans*, 517 U.S. 620, 633 (1996).

preschoolers from an educational opportunity based on, in most cases, their parents' identities.

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 would contravene *Brown*’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.”⁶³ This Court should not allow state-funded private actors, religious or secular, to subvert *Brown*’s unequivocal edict that children are entitled to equal access to publicly-funded education.

Even if this Court agrees with the argument that discrimination against LGBT people is not on par with race discrimination, such arguments do not address discrimination against children for matters beyond their control, a type of discrimination that is impermissible on its own terms.⁶⁴ This Court has consistently expressed special concern with discrimination against children—protecting their right to self-determination and to flourish without being

⁶³ *Brown*, 347 U.S. at 493; see also *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

⁶⁴ See *Levy v. Louisiana*, 391 U.S. 68 (1968); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Plyler v. Doe*, 457 U.S. 202 (1982).

encumbered by circumstances they do not control, like their parents’ marital, undocumented, or LGBT status.⁶⁵ In *Obergefell v. Hodges*, a majority of this Court acknowledged harms inflicted on children with LGBT parents in the form of same-sex marriage bans through “no fault of their own.”⁶⁶

This Court has applied a similar child-protective justification in the education context as well.⁶⁷ 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 of justice.”⁶⁸ Amici also submit that children have no control over a segment of society’s moral or religious beliefs about their parents’ conduct or LGBT identity and therefore should not be subject to discriminatory treatment on that basis.

B. An Exemption Would Inflict Numerous Harms on Preschoolers

Discrimination against preschoolers in violation of these Fourteenth Amendment mandates subjects

⁶⁵ See *Levy v. Louisiana*, 391 U.S. 68 (1968); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Plyler v. Doe*, 457 U.S. 202 (1982).

⁶⁶ 576 U.S. 644, 668 (2015).

⁶⁷ *Plyler*, 457 U.S. at 219–20.

⁶⁸ *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.

children to dignitary, familial, and psychological injuries.

1. An Exemption Would Impose Dignitary Harms

In *Obergefell*, Justice Kennedy recognized a constitutional right to equal dignity.⁶⁹ 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.⁷⁰ As the *Obergefell* Court explained, the two clauses “converge in the identification and definition of [rights]”⁷¹ to advance “our understanding of what freedom is and must become.”⁷²

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 considering how developmentally different they are from adults. In a line of cases spanning almost two decades, the Court has recognized the extensive body of brain development research that shows “that

⁶⁹ 576 U.S. at 681.

⁷⁰ *Id.* at 672–73.

⁷¹ *Id.* at 672.

⁷² *Id.*

children are different from adults and that those developmental differences are of constitutional dimension.”⁷³

Petitioners’ proposed exemption violates the dignitary interests of the children Colorado seeks to educate in important ways. For example, one dignitary right is privacy. Children do not surrender their rights at the schoolhouse door.⁷⁴ 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. 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.⁷⁵

2. An Exemption Would Interfere with Family Integrity

For preschoolers, family identity and belonging are deeply intertwined. To discriminate against a child based on the identity of that child’s parents communicates that the child’s own family is less worthy of recognition, respect, and belonging in a way that

⁷³ Robin Walker Sterling, “*Children Are Different*”: *Implicit Bias, Rehabilitation, and the “New” Juvenile Jurisprudence*, 46 Loy. L.A. L. Rev. 1019, 1022 (2013).

⁷⁴ *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 505 (1969).

⁷⁵ 20 U.S.C. § 1232g (2013) (Family Educational Rights and Privacy Act).

this Court has repeatedly recognized as constitutionally significant.⁷⁶

For a young child, family is where security begins. It is where children first learn that they are cared for, where they belong, and how to understand themselves in relation to the world around them.⁷⁷ As children begin to venture beyond the home, they also begin to encounter messages about where their families fit within the larger community.

The messages children receive in preschool are especially powerful because it is one of the first places where children encounter a community beyond their own homes. For children with LGBT parents, exclusion or marginalization in an early educational setting can make the family itself the basis for social stigma and can affect whether parents feel able to participate openly and fully in their child's school community.⁷⁸ The injury from exclusion may be deeply personal to a child, fostering feelings of shame

⁷⁶ See *United States v. Windsor*, 570 U.S. 744, 772 (2013); *Obergefell v. Hodges*, 576 U.S. 644, 667–68 (2015).

⁷⁷ See Ellen C. Perrin et al., *Promoting the Well-Being of Children Whose Parents Are Gay or Lesbian*, 131 *Pediatrics* e1374, e1374–83 (2013).

⁷⁸ See Abbie E. Goldberg, *Lesbian, Gay, and Heterosexual Adoptive Parents' Experiences in Preschool Environments*, 29 *Early Childhood Rsch. Q.* 669, 669–81 (2014); Abbie E. Goldberg & JuliAnna Z. Smith, *Preschool Selection Considerations and Experiences of School Mistreatment Among Lesbian, Gay, and Heterosexual Adoptive Parents*, 29 *Early Childhood Rsch. Q.* 64, 64–75 (2014).

and isolation and communicating that the child’s family is somehow less worthy of acceptance.⁷⁹

This Court has expressly recognized the injury that governmental devaluation of a family inflicts upon its children. In *Windsor*, this Court concluded that the federal government’s refusal to recognize same-sex marriages “humiliates tens of thousands of children now being raised by same-sex couples” and “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.”⁸⁰ The injury thus belonged not only to the parents whose marriages were denied recognition, but also to their children, who were forced to understand that the government regarded and treated their families differently.

Two years later, *Obergefell* reaffirmed and expanded that principle. Most significantly, the Court recognized the expressive injury familial discrimination imposes upon children, who “suffer the stigma of knowing their families are somehow lesser.”⁸¹ *Windsor* and *Obergefell* together establish a principle directly relevant here: when government marks a child’s family as unequal, the injury reaches the child

⁷⁹ See Nat’l Acads. of Scis., Eng’g & Med., *Understanding the Well-Being of LGBTQI+ Populations* 35–50, 231–45 (2020).

⁸⁰ *Windsor*, 570 U.S. at 772.

⁸¹ *Obergefell*, 576 U.S. at 668.

and implicates the child's security, stability, and understanding of the integrity of their own family.⁸²

For example, the discriminatory exemption Petitioners seek would communicate to a preschooler with two fathers or a single LGBT parent that other children and their families belong here; yours does not. *Windsor* and *Obergefell* recognize the constitutional significance of precisely that message and prohibit it, especially when it is driven by matters beyond a child's control.⁸³

Anticipating rejection, parents may avoid desirable preschools or religious schools, conceal aspects of their family identity, or forego educational and faith-based opportunities that would benefit their children. Importantly, early interactions with schools can shape parents' expectations of, connection to, and involvement with their children's schools over time. Such pressures burden family decision-making and can alter a family's relationship with both educational and religious institutions.

Colorado should not be forced to allow its UPK to become the vehicle for these familial injuries to children. Its equal-opportunity law protects more than a child's ability to obtain a preschool seat. It protects

⁸² See *Obergefell*, 576 U.S. at 668 (citing Brief for Scholars of the Constitutional Rights of Children as *Amici Curiae* 22-27).

⁸³ *Windsor*, 570 U.S. at 772, 775; *Obergefell*, 576 U.S. at 667-68; see generally Kyle C. Velte, *Obergefell's Expressive Promise*, 6 Hous. L. Rev. Off the Rec. 157 (2015).

children from being told—through state-funded discrimination—that the “integrity and closeness” of their own families are less worthy than that of their classmates’ families.

3. An Exemption Would Inflict Psychological Harm

In addition to dignitary and familial harms, forcing Colorado to subsidize discrimination would inflict psychological harms.

Preschool is particularly important to children’s psychological development. The shared social experiences young children have with peers and adults outside their families provide an important foundation for individual and collective identity.⁸⁴ Conversely, social exclusion can threaten preschoolers’ sense of belonging and self-esteem.⁸⁵ This Court has long recognized the constitutional significance of precisely that type of injury in education. In *Brown*, the Court explained that state-imposed segregation generates “a feeling of inferiority as to [children’s] status in the community” that may affect their “hearts and minds in a way unlikely ever to be undone.”⁸⁶ *Brown*’s insight was not limited to the physical denial of a seat in a classroom. The injury arose from the harmful messaging, inherent in government-sanctioned

⁸⁴ See Erwin, *supra* at note 44, at 6-20.

⁸⁵ See Erin Ruth Baker & Amanda Mae Woodward, *The Preschooler’s Moral Self and Executive Functions: An Experimental Approach with Exclusion*, 66 Cognitive Dev. 101310 (2023).

⁸⁶ *Brown*, 347 U.S. at 494.

exclusion, that conveys to children their diminished status and worth.

This Court carried that acknowledgment of the harm educational exclusion inflicts forward in *Plyler v. Doe*. There, the Court recognized the “lasting impact of [education’s] deprivation on the life of the child,” and concluded that denying children an education based on a characteristic or circumstance beyond their control imposes an “inestimable toll” on their “social, economic, intellectual, and *psychological well-being*.”⁸⁷ This Court has repeatedly emphasized the injustice of burdening children for circumstances beyond their control, including the moral disapproval of their parents’ conduct, relationships, or identity.

The testimony 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 the kind of discrimination Petitioners are asking the State to sanction.

A religious exemption to the UPK’s equal opportunity requirement would also cause preschoolers and

⁸⁷ *Plyer v. Doe*, 457 U.S. 202, 222 (1982) (emphasis added).

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.

In addition to the psychological harm of exclusion at the schoolhouse door, children may suffer greater harm should they join the preschool community and then be expelled, or as in the Sacred Heart incident, not be permitted to re-enroll. 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 expelled and required to change schools. Describing this devastating harm, she 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.⁸⁸

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 d[on]’t have a way to be different.”⁸⁹ The burden a discriminatory, religious exemption would place on preschoolers’ young shoulders simply because they are part of the LGBT community is unjustifiable.

IV. Enforcement of the Equal Opportunity and Non-Discrimination Requirement Satisfies Strict Scrutiny

The UPK statute serves a compelling state interest in providing an equal educational opportunity for all children and its non-discrimination requirement is narrowly tailored to that end. As such, St. Mary Catholic Parish’s claim to a religious exemption fails.

A. Colorado has a Compelling State Interest in Protecting Preschoolers from Discriminatory Harm

Colorado has a compelling interest in satisfying its statutory and constitutional obligations to children by refusing to grant the discriminatory and harmful

⁸⁸ *St. Mary Cath. Parish*, 736 F. Supp. 3d at 982–83 (quoting Trial Tr. (Tishelman) 391:5-12).

⁸⁹ *St. Mary Cath. Parish*, 736 F. Supp. 3d at 982 (quoting Trial Tr. (Tishelman) 348:14-18)

exemption St. Mary Catholic Parish seeks. To do so would undermine children's rights and interests and contravene Colorado's duty to provide preschoolers with equal access to education and to protect them from harm.

Critically, Colorado's interest is not merely in ensuring that every child has some publicly-funded preschool seat somewhere; it is in ensuring that no child is turned away from an otherwise-available preschool because of who that child is or who that child's parents are. As the unrebutted trial testimony confirmed, preschools are not interchangeable: they vary widely in location, class size, curriculum, and the specialized support they offer young learners. When a four-year-old is excluded from an available program because of protected-class status, the harm falls on the child—who loses access to a particular school's teachers, peers, community, and faith instruction and experience. That harm is especially acute for children living in poverty or in rural areas, who may have few or no accessible alternatives.

The nondiscrimination provision of the UPK statute is simple: any religious, public, or private preschool may apply for, and receive, state funding—so long as they comply with Colorado's nondiscrimination mandate. Granting the exemption would require Colorado to breach its duty to the very children the UPK statute was enacted to protect and thwart its child-centered initiatives.

B. While Rational Basis Review Applies, Even Under Strict Scrutiny, Colorado's Non-Discrimination Mandate is the Least Restrictive Means to Satisfy Strict Scrutiny

While this Court should apply the rational basis review standard to the issues in this case, even if it were to apply strict scrutiny review, Colorado's non-discrimination requirement is the least restrictive means to satisfy the state's objectives. The breadth and extent of the UPK equal-opportunity, non-discrimination law reflect the State's interests in enforcing children's rights, ensuring equal educational opportunities, and protecting young people from discriminatory harms. Any alternative system of exceptions or exemptions would result in some form of exclusion with grave consequences for the statute's primary beneficiaries: preschoolers. Notably, the UPK statute classifies the equal-opportunity requirement as a quality standard related to health and safety. This is a clear recognition that shielding children from discriminatory exclusion is essential to their well-being, not merely a policy preference.

The non-discrimination provision does not give any state or educational official discretionary authority to determine exceptions or allowances.⁹⁰ In fact, creating the type of religious exemption demanded by the Petitioners in this case would directly contradict

⁹⁰ *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021).

the type of discretionary authority that the Court expressly rejected in *Fulton*: “creation of a system of exceptions under the contract undermines the City’s contention that its non-discrimination policies can brook no departures.”⁹¹ Colorado’s UPK program is a concrete, statutorily-outlined program with defined purposes and requirements well above and beyond the “broadly formulated” general interests of the City in *Fulton*.⁹² The Petitioners’ attempt to require the State to create a discriminatory, harmful exemption would not only have Colorado adjudicating the type of discretionary decisions this Court has warned against, but would also require state officials to interrogate the veracity and sincerity of different faith systems to determine whether an exception to the general non-discrimination mandate is warranted. This could spill over into subsequent litigation that would require the State to explain why discretionary choices were made, since those choices themselves would exemplify favor, disfavor, or at the very least selectivity in which programs were allowed. Under the equal-opportunity, non-discrimination provision, no program is compelled to express or condone any beliefs it does not agree with, just as no program is compelled to receive state funds.⁹³ Rather, the benefit of the UPK program is for the entire population of preschoolers in

⁹¹ *Fulton*, 593 U.S. at 542.

⁹² *Id.* at 541 (quoting *Gonzales v. O Centro Espirita*, 546 U.S. 418, 431 (2006)).

⁹³ *See 303 Creative v. Elenis*, 600 U.S. 570, 602 (2023).

Colorado, not one particular sect, creed, faith, or belief system.

The Court should recognize that Colorado took *Brown v. Board of Education* at its word. Having undertaken to provide preschoolers an educational opportunity, the State enacted its UPK statute to make that opportunity available to all preschoolers “on equal terms.” The State has a compelling interest in fulfilling these statutory and constitutional obligations to protect preschoolers from the harvest of foreseeable harms that would befall them from LGBT discrimination. The State satisfies its obligation to preschoolers through enforcement of its equal-opportunity, non-discrimination law.

CONCLUSION

This Court should affirm the judgment of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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