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MICHIGAN'S RELIGIOUS EXEMPTION FOR FAITH-BASED ADOPTION AGENCIES: STATE-SANCTIONED DISCRIMINATION OR GUARDIAN OF RELIGIOUS LIBERTY?

*Allison L. McQueen**

Introduction

April DeBoer and Jayne Rowse didn't plan to bring the fight for marital equality to the United States Supreme Court. In fact, the couple never set out to challenge Michigan's same-sex marriage ban. At least, not initially.[1]

The Michigan couple celebrated their union in 2008 with hopes that, one day, they would be able to legally marry.[2] As Michigan voters had approved an amendment (Michigan's Marriage Amendment, or the "MMA") to their state constitution that prohibited same-sex marriage four years earlier,[3] the couple put aside thoughts of marriage and focused on expanding their family.

As Ms. DeBoer and Ms. Rowse became more familiar with their state's adoption laws, they learned that Michigan, like many other states, does not

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1 *See generally* Kiera McGroarty, *Michigan's State-Sponsored Discrimination of Same Sex Couples*, 17 Rutgers J.L. & Religion 166, 173 (2015); Julie Bosman, *One Couple's Unanticipated Journey to Center of Landmark Gay Rights Case*, N.Y. Times (Jan. 24, 2015), http://www.nytimes.com/2015/01/25/us/one-couples-unanticipated-journey-to-center-of-landmark-gay-rights-case.html?_r=0.

2 *See* Bosman, *supra* note 1.

3 The MMA amended Michigan's constitution to provide that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." Mich. Const. art. 1, § 25. Nearly 59% of constituents voted in favor of the Michigan Marriage Amendment in the November 2004 general election, and it went into effect the following month. *Michigan Marriage Amendment, Proposal 2 (2004)*, Ballotpedia, https://ballotpedia.org/Michigan_Marriage_Amendment,_Proposal_2_(2004) (last visited Nov. 25, 2017).

permit two unmarried people to jointly adopt a child.[4] Unable to build their family together as a couple, Ms. DeBoer and Ms. Rowse individually adopted four children: Ms. Rowse adopted Nolan and Jacob while Ms. DeBoer adopted Rylee and Ryanne.[5] Though the couple raised all four of their children together as a cohesive family, each parent had no legal claim to the children her partner had adopted.[6] Like many similarly situated families, this legal technicality inhibited one parent from making routine medical decisions for her children, listing herself as an official "parent" on school records, and providing health insurance and financial support for the family, among other restrictions.[7] In the worst case scenario, unmarried same-sex couples' inability to jointly adopt their children could prevent one of them from making a life-altering medical decision for a child in the event of an emergency.[8]

Ms. DeBoer and Ms. Rowse realized that, should one of them pass away unexpectedly, "[a] judge could easily order any child adopted by a deceased parent to live with a distant relative or in foster care" rather than with their surviving mother.[9] In order to safeguard their family, Ms. DeBoer and Ms. Rowse decided to meet with an attorney to draw up guardianship papers.[10] To their dismay, the attorney advised them that, under Michigan law, guardianship papers would be virtually worthless.[11] Instead, she recommended that they file a federal lawsuit challenging section 24 of Michigan's Adoption Code on the grounds that they were denied joint adoption because they were not and could not be married.[12]

What began as a challenge to Michigan's Adoption Code radically changed course when a district court judge suggested that they amend their claim to take on Michigan's law banning same-sex marriage.[13] Ms. DeBoer and Ms. Rowse took the judge's advice and the suit went forward.[14] To the surprise of many, the United States District Court for the Eastern District of Michigan held that "the MMA impermissibly discriminate[d] against same-

4 *See* MICH. COMP. LAWS ANN. § 710.24 (West 2016) (restricting adoptions to either single persons or married couples).

5 *See* DeBoer v. Snyder, 973 F. Supp. 2d 757, 760 (E.D. Mich. 2014), *rev'd*, 772 F.3d 388 (6th Cir. 2014); Bosman, *supra* note 1.

6 *See* Bosman, *supra* note 1.

7 *See* Brief of Amici Curiae the Donaldson Adoption Institute et al. in Support of Petitioners at 8–15, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556) [hereinafter Donaldson Adoption Institute Brief for the Petitioners] (detailing the "undue stress and anxiety" same-sex couples experience when they are unable to both be legal parents to children adopted into the family).

8 *See id.* at 11–12.

9 Bosman, *supra* note 1.

10 *Id.*

11 *Id.*

12 *Id.*

13 *See* DeBoer v. Snyder, 973 F. Supp. 2d 757, 760 (E.D. Mich. 2014), *rev'd*, 772 F.3d 388 (6th Cir. 2014).

14 *Id.*

sex couples in violation of the Equal Protection Clause."[15] However, a mere eight months after the MMA was declared unconstitutional, same-sex marriages in Michigan and three other states were halted by the United States Court of Appeals for the Sixth Circuit, which held that the decision to limit marriage to heterosexual couples did not violate same-sex couples' due process and equal protection rights.[16]

The end of April DeBoer and Jane Rowse's story is now well known. In June 2015, the United States Supreme Court extended the fundamental right to marry to same-sex couples, and *Obergefell v. Hodges*[17] joined the ranks of historic cases like *Brown*,[18] *Loving*,[19] and *Roe*.[20] Much like those cases, the Supreme Court's landmark decision did not bring an end to debate over the issue it had "resolved." As both Chief Justice Roberts[21] and Justice Thomas[22] predicted in their dissenting opinions, the Court's holding has raised serious questions about religious liberty.

As April DeBoer and Jayne Rowse's experience demonstrates, most of the legal obstacles faced by gay couples hoping to expand their families through adoption stemmed from prohibitions on marriage.[23] That was until *Obergefell*. Barriers to same-sex adoption have been steadily falling over the past decade,[24] and, in the wake of the Supreme Court's decision, married

15 *Id.* at 768.

16 *See* DeBoer v. Snyder, 772 F.3d 388, 410–13, 421 (6th Cir. 2014). The Sixth Circuit's decision conflicted directly with federal appeals courts in the Fourth, Seventh, Ninth, and Tenth Circuits, making it a prime case for Supreme Court review. *See* Lyle Denniston, *Sixth Circuit: Now, a Split on Same-Sex Marriage*, SCOTUSBLOG (Nov. 6, 2014, 4:50 PM), http://www.scotusblog.com/2014/11/sixth-circuit-the-split-on-same-sex-marriage/.

17 135 S. Ct. 2584, 2604–05 (2015).

18 Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that state laws establishing separate schools for black and white students violated the Equal Protection Clause).

19 Loving v. Virginia, 388 U.S. 1, 2 (1967) (holding that state laws banning interracial marriages violate the Equal Protection and Due Process Clauses).

20 Roe v. Wade, 410 U.S. 113, 164 (1973) (holding that state criminal abortion laws that except from criminality only a life-saving procedure on the mother's behalf violate the Due Process Clause).

21 *Obergefell*, 135 S. Ct. at 2625–26 (Roberts, C.J., dissenting) ("Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example . . . a religious adoption agency declines to place children with same-sex married couples. . . . There is little doubt that [this] and similar questions will soon be before this Court.").

22 *Id.* at 2638 (Thomas, J., dissenting) ("In our society, marriage is not simply a governmental institution; it is a religious institution as well. Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that *the two will come into conflict* . . . ." (emphasis added) (citation omitted)).

23 *See infra* notes 37–44 and accompanying text. Although same-sex couples were only explicitly prohibited from adopting in one state (Mississippi) prior to the Supreme Court's ruling in *Obergefell*, same-sex couples "face[d] significant legal hurdles in about half of all other states, particularly because they [could not] legally marry in those states." Sabrina Tavernise, *Adoptions by Gay Couples Rise, Despite Barriers*, N.Y. TIMES (June 13, 2011), http://www.nytimes.com/2011/06/14/us/14adoption.html.

24 *See infra* Part II.

couples are now able to adopt in every state.[25] However, there remains one pressing barrier to adoption for same-sex couples: "conscience clause" adoption laws enacted to allow faith-based adoption agencies to turn away prospective parents whose sexuality conflicts with their "sincerely held religious beliefs."[26] Though Ms. DeBoer and Ms. Rowse successfully broke down the walls inhibiting their own ability to adopt, their home state of Michigan is one of seven states that have successfully enacted this modern barrier to adoption.[27] Just days before the Supreme Court's *Obergefell* decision,[28] Michigan Governor Rick Snyder signed three bills into law that allow adoption agencies to decline services to same-sex couples on religious grounds.[29]

This Note, in Part I, will begin with an overview of domestic adoption and an explanation of the most significant barriers same-sex couples hoping to adopt have traditionally faced. Part II will explore the falling barriers to same-sex adoption both before and after the Supreme Court's ruling in *Obergefell*. In Part III, this Note will discuss the *Obergefell* decision and the case's immediate aftermath. Part IV will look at Boston, San Francisco, Washington, D.C., and Illinois, four jurisdictions where legislatures intentionally chose not to enact religious exemptions and faith-based adoption agencies closed their doors. Part V will go on to describe Michigan's religious exemption for faith-based adoption agencies, the justifications offered in support of the new law, and the arguments against it. Finally, Part VI of will analyze whether a viable challenge to Michigan's conscience clause exemption exists. Though it would undeniably be in the best interest of children to open all possible avenues to adoption, this Note will argue that challenges to Michigan's religious exemption for adoption agencies will fail. First and foremost, the new law is not discriminatory on its face, and there is not a federal or state law on which prospective plaintiffs could base their claim. Further, potential plaintiffs would have no caselaw to support an argument that they have a fundamental right to adopt a child. Finally, Michigan maintains the authority to regulate its adoption agencies and it had the power to enact this exemption under the First Amendment and its state constitution.

25 *See infra* subsection II.A.2.

26 *See infra* Part V; *see also infra* notes 114–18 and accompanying text.

27 *See infra* notes 114–18 and accompanying text.

28 Michigan Governor Rick Snyder signed the bills allowing faith-based religious adoption agencies to decline services to same-sex couples on June 11, 2015. *See* David Eggert, *New Michigan Law Lets Adoption Agencies Decline Referrals*, AP NEWS (June 12, 2015), https://www.apnews.com/133948133713447ab7e277db3c4d89e0. *Obergefell* was decided just over two weeks later on June 26, 2015. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

29 *See* MICH. COMP. LAWS ANN. §§ 400.5a, 710.23g, 722.124e (West 2016).

I. Expanding Same-Sex Families

There are approximately 690,000 married and unmarried same-sex couples in the United States.[30] Of those nearly 1.4 million Americans, almost one-fifth are raising a child under the age of eighteen.[31] Same-sex couples with children are raising, on average, 1.7 children in their homes; as a result, there are more than 122,000 same-sex couple households raising approximately 210,000 children across the country.[32] Because married same-sex couples are generally more likely to have children than unmarried same-sex couples, those numbers will likely rise in the wake of the Supreme Court's *Obergefell* decision.[33]

There is not a singular story of how same-sex couples go about expanding their families. The vast majority of children who have gay or lesbian parents are born within the context of a heterosexual relationship.[34] Many lesbian couples pursue parenthood through artificial insemination, while many gay couples use surrogate parents.[35] Another large group of same-sex couples become parents through foster care and adoption.[36]

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30 Brief for Gary J. Gates as Amicus Curiae in Support of Petitioners at 7, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) [hereinafter Gary Gates Brief for the Petitioners]. In the 2010 Census, same-sex couples resided in all fifty states and in 93% of U.S. counties. *Id.* at 9.

31 *Id.* at 7, 10.

32 *Id.* at 10. The total number of Americans with LGBT parents is far higher when one accounts for the number of individuals who have been raised by single parents or parents in heterosexual relationships. Based on results from a Gallup Daily Tracking Survey showing that an estimated 3.5% of adults self-identify as LGBT (meaning that there are more than 8.2 million LGBT adults in the United States) and that about three million LGBT individuals are parents, Gary Gates estimates that as many as six million American children and adults have an LGBT parent (approximately 2% of all Americans). Gary J. Gates, The Williams Inst., LGBT Parenting in the United States 2 (2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf.

33 *See* Gary J. Gates, The Williams Inst., Demographics of Married and Unmarried Same-Sex Couples: Analyses of the 2013 American Community Survey 2 (2015). "More than a quarter (27%) of married same-sex couples have children under age 18 compared to 15% of unmarried same-sex couples." *Id.* As more than half of gay men and 41% of lesbian women want to have a child, it is very likely that these numbers will continue to rise over time. Gary J. Gates et al., Adoption and Foster Care by Gay and Lesbian Parents in the United States 5 (2007), https://www.urban.org/sites/default/files/publication/46401/411437-Adoption-and-Foster-Care-by-Lesbian-and-Gay-Parents-in-the-United-States.PDF.

34 *See* Gary J. Gates, Opinion, *The Real 'Modern Family' in America*, CNN (Mar. 25, 2013), http://edition.cnn.com/2013/03/24/opinion/gates-real-modern-family/ (stating that 59% of children being raised by same-sex couples are the biological children of one of the partners).

35 *See* Abbie E. Goldberg et al., The Williams Inst., Research Report on LGB-Parent Families 5, 10–11, 13 (2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/lgb-parent-families-july-2014.pdf.

36 *See id.* at 5, 11–13.

Adoption is "a creature of statute," and each state has the discretion to determine the contents of its adoption regulations and laws.[37] Though each state statute differs, the "governing standard in virtually all [jurisdictions] pertaining to the custody of a child . . . is a determination of what is in the child's 'best interests.'"[38] For many years, state statutes and agency attitudes reflected the belief that it is not in a child's best interest to be adopted by a homosexual individual or a same-sex couple. Many states had statutes expressly prohibiting this class of Americans from adopting.[39] Even in the absence of an explicit law, a prospective parent's sexual orientation was a factor that was considered by many adoption agencies and that worked against them in placement decisions.[40]

One of the most widely agreed upon factors that plays into a "best interests" determination is the belief that it is best for a child to be raised by two parents in a committed relationship.[41] That widespread belief has led many states, including Michigan, to include a provision prohibiting joint adoption by an unmarried couple in their adoption statutes.[42] The partiality towards

37 Mark Strasser, *Conscience Clauses and the Placement of Children*, 15 J.L. & FAM. STUD. 1, 1 (2013). Though the Constitution and some federal laws provide overarching standards for domestic adoption (with which state adoption laws must comply), domestic adoption is largely governed by state law. *Id.*

38 Erika Lynn Kleiman, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327, 345 (1997). Rather than defining exactly what a child's best interest is, statutes lay out a number of specific factors to be considered by courts and adoption agencies in determining parent eligibility and the ranking of prospective adoptive parents. "Among the factors considered are age, religion, financial stability, emotional health, capacity for parenthood, physical health, marital status, infertility, adjustment to sterility, quality of the marital relationship, motives for adoption, attitudes toward nonmarital parenthood, the attitude of significant others, total personality, emotional maturity, and feelings about children." Joseph Evall, *Sexual Orientation and Adoptive Matching*, 25 FAM. L.Q. 347, 350–51 (1991).

39 *See infra* Section II.A.

40 *See* GATES ET AL., *supra* note 33, at 3.

41 The thought behind this factor is that the support of two parents is presumably better than one. *See* W. Bradford Wilcox & Robin Fretwell Wilson, *Bringing up Baby: Adoption, Marriage, and the Best Interests of the Child*, 14 WM. & MARY BILL RTS. J. 883 (2006). There is a "large body of social scientific literature indicat[ing] that children are significantly more likely to thrive if they are raised in a home headed by married parents" than in a home headed by a single parent or cohabitating parents. *Id.* at 891–98.

42 Of the states with statutes that prohibit unmarried couples from jointly adopting a child, about nineteen states and the District of Columbia use gender-neutral language (such as "spouses" or "married couples") that could allow adoption by same-sex couples. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., WHO MAY ADOPT, BE ADOPTED, OR PLACE A CHILD FOR ADOPTION? 2 (2016). On the other hand, there are twenty-four states that further require that the married couple petitioning for adoption be a "husband and wife." *Id.* at 2 n.1. Some statutes also state that, given the choice between a married couple and a single parent, a child should always be placed with the married couple. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-103(D) (2017) ("If all relevant factors are equal and the choice is between a married man and woman certified to adopt and a single adult certified to adopt, placement preference shall be with a married man and woman.").

married couples also extends to states that have not codified their marital preference. Since statutes entrust individual placement decisions with adoption agencies and courts, "judges and agencies have discretion to combine virtually any combination of potentially influential factors" in order to determine which adoption placement is in a child's best interest.[43] Over time, this discretion has led to the creation of a strong preference for married couples over unmarried couples in child placement.[44] Before the right to marry was extended to homosexuals by *Obergefell*, this strong preference was used by adoption agencies as a justification for denying same-sex couples access to adoption.

Given the historic discrimination against LGBT adoption applicants and the strong preference for placing children who are eligible for adoption with a married couple, many same-sex families could only pursue single-parent adoption.[45] As April DeBoer and Jayne Rowse realized, "that allow[s] only one parent to be recognized legally, and children could potentially be taken away from their families in the event of the illness, death, or separation of the one legal parent."[46] In addition, "[s]chools, hospitals, and other institutions could also deny non-legal parents the ability to make decisions about their children."[47] The most parents could generally do to safeguard their relationship with their child would be to draw up coparenting agreements, custody arrangements, and other paperwork with an attorney.[48]

Despite the barriers they have historically faced, a substantial number of same-sex couples have adopted. Data released by the U.S. Census Bureau suggests that more than 16,000 same-sex couples are currently raising about 22,500 adopted children.[49] Those adoptions have been facilitated by both public and private adoption agencies.[50] Public adoption agencies are typically run by state or city governments, and they generally oversee the adoption of children in the state child welfare system.[51] Private adoption agencies, on the other hand, are generally privately managed, not-for-profit

43 Kleiman, *supra* note 38, at 345.

44 Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 334–36 (2006).

45 Suzy Khimm, *The New Nuclear Family: What Gay Marriage Means for the Future of Parenthood*, NEW REPUBLIC (July 23, 2015), https://newrepublic.com/article/122349/new-nuclear-family.

46 *Id.*

47 *Id.*

48 *Id.*

49 GATES, *supra* note 32, at 1; Gates, *supra* note 34. This number does not include couples raising a child that has been adopted by their biological parent's partner through second-parent adoption or step-parent adoption, or children that have been adopted by gay single parents. There are about 65,000 adopted children living in homes in which the head of the household is a gay man or woman. Tavernise, *supra* note 23. This number represents about four percent of the adopted population. *Id.*

50 *See generally* Kleiman, *supra* note 38, at 329–30.

51 CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADOPTION OPTIONS 3 (2010); Kleiman, *supra* note 38, at 329.

agencies.[52] Birth parents relinquish their parental rights to these agencies, who in turn "match" the child with a prospective adoptive family.[53] Despite the differences between them, public and private adoption agencies share one important characteristic: both are licensed by the state.[54] Though courts and statutes have generally afforded adoption agencies immense discretion when it comes to selecting adoptive parents and "matching" children with them, all agencies are still expected to fully comply with their jurisdiction's licensing requirements.[55]

II. CRUMBLING BARRIERS TO SAME-SEX ADOPTION

Critics of adoption by same-sex couples have long argued that ideal child rearing requires both a female parent and a male parent. Many assumed that a child could not develop properly outside of a cookie-cutter, heterosexual family structure because they would be missing either male or female influences.[56] Some went so far as to argue that homosexual parents would "make their children gay," sexually abuse their children, raise children who were unsure of their gender identity, or raise children who were confused about traditional male and female behaviors and gender roles.[57] Over time, recognition of the growing need for adoptive families,[58] increased acceptance of gay and lesbian individuals and couples in American society,[59] research sup-

52 Kleiman, *supra* note 38, at 329.

53 CHILD WELFARE INFO. GATEWAY, *supra* note 51, at 5.

54 *Id.* at 3–4.

55 IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 695 (abr. 5th ed. 2014).

56 *See, e.g.*, Donald H.J. Hermann, *Defending the Public Good and Traditional Society: Non-Scriptural Religious Objections to Same-Sex Marriage*, 49 VAL. U. L. REV. 1, 8–9 (2014).

57 *Lesbian, Gay, Bisexual and Transgender Parents*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (2013), http://www.aacap.org/aacap/families_and_youth/facts_for_families/fff-guide/Children-with-Lesbian-Gay-Bisexual-and-Transgender-Parents-092.aspx.

58 Although the number of children in foster care is on the rise, the number of annual adoptions has dramatically decreased since the 1970s. Brenda K. DeVries, Note, *Health Should Not Be a Determinative Factor of Whether One Will Be a Suitable Adoptive Parent*, 6 IND. HEALTH L. REV. 137, 138 (2009). Today, only about 127,000 children are adopted every year in the United States. *Id.* That number includes both children adopted from private adoption agencies and children adopted from the child welfare system. Since there are about 115,000 children in the child welfare system who are waiting to be adopted at any one time, the number of available adoptive parents is far lower than the demand. Tavernise, *supra* note 23. As a result, "more adoption agencies and social workers are seeing same-sex couples as a badly needed resource for children in government care." *Id.*

59 Americans have become increasingly supportive of the right of same-sex couples to expand their families, particularly through adoption. According to a 2014 Gallup survey, a majority of Americans (63%) believe that same-sex couples should have the legal right to adopt a child. Art Swift, *Most Americans Say Same-Sex Couples Entitled to Adopt*, GALLUP (May 30, 2014), http://www.gallup.com/poll/170801/americans-say-sex-couples-entitled-adopt.aspx. At the time this survey was conducted, this number was higher than the portion of Americans who supported same-sex marriage (55%). *Id.* In the two decades Gal-

porting the conclusion that gay parents are qualified, loving parents,[60] and changes to discriminatory state statutes have led to a significant increase in the number of same-sex couples choosing to expand their families through adoption. In the past ten years alone, "the number of lesbian and gay adoptive couples has tripled."[61] Despite the obstacles to adoption that they have historically faced, same-sex couples, particularly married same-sex couples, are now far more likely to be raising adopted children than heterosexual couples.[62] Even though homosexual couples are less likely to be raising children than heterosexual couples, they are approximately 4.5 times more likely to be raising adopted children.[63]

A. Breaking Down State-Specific Barriers

For many years, the greatest barriers to adoption for same-sex couples were statutes forbidding them from adopting individually or with a partner. Over the past twenty years, states have slowly lifted these bans through legislative action.[64] For many states, statutory amendments were brought about by state courts that allowed homosexual individuals to adopt individually,

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lup has been surveying Americans on this issue, the majority has shifted from saying that same-sex couples should not be able to legally adopt to saying that they should. *Id.*

60 Over the past three decades, virtually all studies have reached the same unequivocal conclusion: gay parents can be great parents and their children grow up to be as successful as children raised by heterosexual families. Despite the fears of many, "[t]here is no scientific basis for [the conclusion] that same-sex couples are any less fit or capable parents than heterosexual couples, or that their children are any less psychologically healthy and well adjusted." Brief of the Am. Psychological Ass'n et al. as Amici Curiae in Support of Petitioners at 22, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556).

61 Jamie McGonnigal, *Catholic Charities Abandons Thousands of Children Instead of Adopting to LGBT Parents*, HUFFINGTON POST (Nov. 15, 2011, 2:56 PM), http://www.huffingtonpost.com/jamie-mcgonnigal/catholic-charities-adoption_b_1095396.html. Between 2000 and 2009, the percentage of same-sex couples with children who were raising an adopted child rose from 8% to about 19%. Tavernise, *supra* note 23. The number of same-sex couples raising adopted children is particularly high in the socially liberal Northeast (20% of same-sex couples are raising children) and West (14% of same-sex couples are raising children). Gary J. Gates, *For Same-Sex Couples, a Tale of Two Paths to Parenting*, HUFFINGTON POST (Feb. 16, 2012, 3:14 PM), http://www.huffingtonpost.com/gary-j-gates/for-samesex-couples-a-tal_b_1277784.html. The percentage of same-sex couples raising adopted children is lower in the Midwest (12% of same-sex couples are raising children) and the South (11% of same-sex couples are raising children). *Id.*

62 Gary Gates Brief for the Petitioners, *supra* note 30, at 4–5.

63 GOLDBERG ET AL., *supra* note 35, at 11. "Among same-sex couples with children under the age of 18 in the home, 13% have an adopted child, compared to only 3% of opposite-sex couples." Donaldson Adoption Institute Brief for the Petitioners, *supra* note 7, at 25; *see also* Gary Gates Brief for the Petitioners, *supra* note 30, at 11–12 (explaining that "married same-sex couples [are] more than five times more likely to have [adopted or foster] children than their married different-sex counterparts").

64 "New Jersey was the first state formally to lift a ban against unmarried-couple adoptions as part of a consent decree in litigation brought by the American Civil Liberties Union on behalf of a gay couple." ELLMAN ET AL., *supra* note 55, at 607. After the litigation, "[t]he state's administrative code was revised to provide a general non-discrimination

allowed unmarried same-sex couples to adopt jointly, or found their state's ban on gay adoption to be unconstitutional.[65]

1. Florida: Second Time's the Charm

Florida's long road to abolishing its prohibition on gay adoption received particular attention in the media. Like many other states, Florida added a provision to its adoption law in 1977 that prohibited "[any] person eligible to adopt under [the] statute" from doing so "if that person is a homosexual."[66] Florida's statute was first challenged in *Lofton v. Secretary of the Department of Children and Family Services*.[67] The case was brought by foster parents, legal guardians, and children eligible for adoption who argued that Florida's statute violated their "fundamental rights and the principles of equal protection."[68] When the case reached the Eleventh Circuit in 2004, the court accepted the state's argument that it "ha[d] a legitimate interest in encouraging [an] optimal family structure by seeking to place adoptive children in homes that have both a mother and father."[69] The court found nothing in the Constitution forbidding the State of Florida from making "the determination that it is not in the best interests of its displaced children to be adopted by [gay] individuals."[70]

When a similar case was brought seven years later, Florida's Third District Court of Appeals reached the opposite conclusion. *Florida Department of Children & Families v. Adoption of X.X.G.*[71] was brought by F.G., a homosexual foster parent hoping to adopt his two young children.[72] Though "[t]he trial court found, and all parties agree[d], that F.G. [was] a fit parent and that the adoption [was] in the best interest of the children," he was not eligible to adopt under Florida's statute.[73] After reviewing the state's justifications for the law, the court concluded that there was "no rational basis for the statute" and that its "blanket exclusion of homosexual adoption" violated the equal protection rights F.G. was guaranteed by the Florida Constitution.[74]

Though state officials did not enforce Florida's gay adoption ban after it was struck down in 2010, the statute did not come off the state's books until July 1, 2015. Coincidentally, Governor Rick Scott signed the bill repealing Florida's gay adoption ban on June 11, 2015, the same day Governor Rick

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clause that included sexual orientation as a protected status in seeking adoptive homes for children of that state." *Id.*

65 *See id.* at 606–07.

66 FLA. STAT. § 63.042(3) (2002).

67 358 F.3d 804 (11th Cir. 2004).

68 *Id.* at 807–08.

69 *Id.* at 819.

70 *Id.* at 827.

71 45 So. 3d 79 (Fla. Dist. Ct. App. 2010).

72 *Id.* at 82.

73 *Id.* at 81.

74 *Id.* at 88, 91, 92.

Snyder signed the bills allowing Michigan's religious adoption agencies to decline services to same-sex couples.[75]

2. Mississippi: The Last State in the Union

Ironically, the state with the highest proportion of same-sex couples raising children was the last state to allow same-sex couples to adopt.[76] In 2000, Mississippi revised its adoption statute to explicitly prohibit "same gender" couples from adopting.[77] The new provision reads: "[a]doption by couples of the same gender is prohibited."[78]

Mississippi's adoption statute was overturned by *Campaign for Southern Equality v. Mississippi Department of Human Services*[79] on March 31, 2016, just nine months after the Supreme Court's decision in *Obergefell*. It came as little surprise that the United States District Court for the Southern District of Mississippi relied heavily on the Supreme Court's *Obergefell* decision in deciding the case.[80] The court began its analysis by stating that "the majority's approach [in *Obergefell*] . . . evidence[d] [their] intent for sweeping change."[81] Directly quoting *Obergefell* for support, the district court explained that the Supreme Court had "extended its holding to marriage-related benefits—which includes the right to adopt."[82] The court argued that, "[i]n sum, the majority opinion [in *Obergefell*] foreclosed litigation over laws interfering with the right to marry and 'rights and responsibilities inter-

75 Michael K. Lavers, *Florida Gay Adoption Ban Repealed*, WASH. BLADE (June 12, 2015), http://www.washingtonblade.com/2015/06/12/florida-gay-adoption-ban-repealed/; *see also* Eggert, *supra* note 28. Though he signed this bill, "Gov[ernor] Rick Scott still wants private, religious-based adoption agencies [in Florida] to be able to turn gay couples away." Associated Press, *Gov. Scott Signs Bill Officially Repealing Ban on Gay Adoptions*, ORLANDO SENTINEL (June 11, 2015), http://www.orlandosentinel.com/news/politics/os-scott-signs-bill-repealing-ban-on-gay-adoptions-20150611-post.html.

76 Fred Barbash, *Federal Judge Voids Mississippi Ban on Same-Sex Couple Adoptions*, WASH. POST (Apr. 1, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/04/01/federal-judge-voids-mississippi-ban-on-same-sex-couple-adoptions/ ("29 percent of Mississippi's same-sex couples were raising children under 18 in their households, but had been barred by state law from successfully seeking and completing adoption applications."); Gates, *supra* note 34.

77 *See* MISS. CODE ANN. § 93-17-3(5) (West 2017).

78 *Id.*

79 175 F. Supp. 3d 691 (S.D. Miss. 2016). The plaintiffs in the case were four lesbian couples and two advocacy groups. *Id.* at 697. "Two of the couples [sought] a private adoption involving the biological child of one of the partners. The others desire[d] adoption through Mississippi's foster-care system." *Id.*; *see also* Barbash, *supra* note 76 (telling the personal stories of the plaintiffs in *Campaign for Southern Equality*); Tamar Lewin, *Mississippi Ban on Adoptions by Same-Sex Couples Is Challenged*, N.Y. TIMES (Aug. 12, 2015), http://www.nytimes.com/2015/08/13/us/mississippi-ban-on-adoptions-same-sex-couples-challenged.html (same).

80 *See infra* notes 81–84 and accompanying text.

81 *Campaign for S. Equal.*, 175 F. Supp. 3d at 709.

82 *Id.* at 709–10.

twined with marriage.'"[83] The court went on to point out that "[i]t also seems highly unlikely that the same court that held a state cannot ban gay marriage because it would deny benefits—expressly including the right to adopt—would then conclude that married gay couples can be denied that very same benefit."[84] The district court concluded that the law "impose[d] an unconstitutional impediment that ha[d] caused stigmatic and more practical injuries" in violation of the Equal Protection Clause, and the judge issued a preliminary injunction prohibiting the state from enforcing it.[85] With that, married same-sex couples could legally adopt in all fifty states.[86]

III. *OBERGEFELL* AND ITS AFTERMATH

A. The Decision

Together with the abolition of state-specific statutes banning adoption by gay individuals and couples, the legalization of gay marriage made adoption accessible to everyone, regardless of their sexual orientation. Because the Court found that "the fundamental right to marry" extends to same-sex couples "under the Due Process and Equal Protection Clauses of the Fourteenth Amendment,"[87] same-sex couples are no longer inhibited by state statutes limiting adoption to married couples.[88]

Throughout Justice Kennedy's majority opinion, the Court recognized that extending the fundamental right to marry to same-sex couples would bring much-needed stability to the lives of children and families. One of the "four principles and traditions" Justice Kennedy discussed to demonstrate that marriage is a fundamental right under the Constitution centered around the well-being of children and their homosexual parents.[89] Justice Kennedy argued that the "third basis for protecting the right to marry is that it safeguards children and families."[90] Citing *Meyer v. Nebraska*[91] and *Pierce v. Society*

83 *Id.* at 710 (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2606 (2015)).

84 *Id.*

85 *Id.* at 711.

86 *See* Mollie Reilly, *Same-Sex Couples Can Now Adopt Children in All 50 States*, HUFFINGTON POST (Mar. 31, 2016, 8:26 PM), http://www.huffingtonpost.com/entry/mississippi-same-sex-adoption_us_56fdb1a3e4b083f5c607567f. In light of this decision, it will be interesting to see whether those states with statutes that use "husband and wife" language to describe couples eligible for adoption will amend them. *See supra* note 42.

87 *Obergefell*, 135 S. Ct. at 2604.

88 Utah's adoption law, for example, bans adoption by all unmarried couples. UTAH CODE ANN. § 78B-6-117(3) (West 2017) ("A child may not be adopted by a person who is cohabitating in a relationship that is not a legally valid and binding marriage under the laws of this state."). After the Supreme Court's decision in *Obergefell* extended the right to marry, same-sex couples in states with statutes like Utah's could decide to marry in order to become eligible for adoption.

89 *Obergefell*, 135 S. Ct. at 2599–2601. The four principles Justice Kennedy discussed were "individual autonomy," "intimate association," "safeguard[ing] children and families," and marriage's place as a "keystone of [the Nation's] social order." *Id.*

90 *Id.* at 2600.

of Sisters,[92] two of the earliest cases in the Court's parental autonomy jurisprudence, Justice Kennedy explained that the right to marry "draws meaning from related rights of childrearing, procreation, and education."[93] The Court summarized these "related rights"[94] to "marry, establish a home and bring up children"[95] as a "unified whole"[96] that are "a central part of the liberty protected by the Due Process Clause."[97]

In his opinion for the majority, Justice Kennedy acknowledged that, because marriage "affords . . . permanency and stability important to children's best interests," the children of same-sex couples were being deprived of "the recognition, stability, and predictability marriage offers."[98] His opinion also stated that the children of same-sex couples were "suffer[ing] the stigma of knowing their families are somehow lesser."[99] The Court recognized that many of the children affected by the exclusion of same-sex couples from marriage were adopted,[100] and stated that this fact "provides powerful confirmation . . . that gays and lesbians can create loving, supportive families."[101]

Both Justice Kennedy's majority opinion and two of the four dissenting opinions recognized that many questions about religious liberty would arise in the wake of *Obergefell*. Justice Kennedy downplayed this concern. In his opinion, he acknowledged those "who deem same-sex marriage to be wrong . . . based on decent and honorable religious or philosophical premises" and assured them that "neither they nor their beliefs [were] disparaged" by the Court's ruling.[102] Justice Kennedy also encouraged future dialogue between those who opposed same-sex marriage and those who supported it, reaffirming the First Amendment's protection for "religious organizations and persons . . . teach[ing] the principles that are . . . central to their lives and faiths."[103]

The tone of the dissenting opinions was far less optimistic. In his dissent, Chief Justice Roberts said that the majority's opinion "creates serious

91 262 U.S. 390, 399 (1923) (holding that liberty, as guaranteed by the Constitution, includes "not merely freedom from bodily restraint but also the right of the individual to . . . marry, establish a home and bring up children").

92 268 U.S. 510, 534–35 (1925) (striking down an Oregon statute that "unreasonably interfere[d] with the liberty of parents . . . to direct the upbringing and education of children under their control").

93 *Obergefell*, 135 S. Ct. at 2600.

94 *Id.*

95 *Id.* (quoting Zablocki v. Redhail, 434 U.S. 374, 384 (1978)).

96 *Id.* at 2600.

97 *Id.* (quoting *Zablocki*, 434 U.S. at 384).

98 *Id.*

99 *Id.*

100 *Id.* ("Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents.").

101 *Id.*

102 *Id.* at 2602.

103 *Id.* at 2607.

questions about religious liberty."[104] The Chief Justice went on to predict the clash between same-sex couples and religious adoption agencies, writing:

> Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example . . . a religious adoption agency declines to place children with same-sex married couples. . . . There is little doubt that [this] and similar questions will soon be before this Court.[105]

Justice Thomas similarly called the Court's decision a "threat[ ] [to] the religious liberty our Nation has long sought to protect,"[106] and expressed his fear that *Obergefell* could have "potentially ruinous consequences for religious liberty."[107]

B. The Response

The Justices were right to foresee a heightened conflict between religious liberty and LGBT rights. Within hours of the Court's holding, conservative politicians, religious groups, and everyday citizens "called for stronger legal protections for those who want to avoid any involvement in same-sex marriage . . . based on [their] religious beliefs."[108] "They demanded [the establishment of] clear religious exemptions from discrimination laws, tax penalties or other government regulations for individuals, businesses and religious-affiliated institutions . . . ."[109] Citizens and lawmakers alike wondered what impact marriage equality would have on issues like workplace and hiring discrimination, spousal benefits, the provision of goods and services for same-sex functions, the issuance of same-sex marriage licenses, the performance of wedding ceremonies, sexual conduct policies at religious universities, and gay adoption.[110]

In the wake of *Obergefell*, at least twenty-six states considered new religious-freedom-protection bills during the 2015 or 2016 legislative sessions.[111] A notable number of those bills mirrored Michigan's and sought to extend a religious exemption to faith-based adoption agencies that choose not to offer

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104 *Id.* at 2625 (Roberts, C.J., dissenting).

105 *Id.* at 2625–26. The Chief Justice also worried about the fact that, unlike "every State that has adopted same-sex marriage democratically," "[t]he majority's decision imposing same-sex marriage [could not] . . . create any such accommodations" "for religious practice." *Id.* at 2625.

106 *Id.* at 2638 (Thomas, J., dissenting).

107 *Id.* at 2639.

108 Erik Eckholm, *Conservative Lawmakers and Faith Groups Seek Exemptions After Same-Sex Ruling*, N.Y. TIMES (June 26, 2015), http://www.nytimes.com/2015/06/27/us/conservative-lawmakers-and-faith-groups-seek-exemptions-after-same-sex-ruling.html.

109 *Id.*

110 *See* Emma Green, *Gay Rights May Come at the Cost of Religious Freedom*, ATLANTIC (July 27, 2015), http://www.theatlantic.com/politics/archive/2015/07/legal-rights-lgbt-discrimination-religious-freedom-claims/399278/.

111 Emma Green, *Can States Protect LGBT Rights Without Compromising Religious Freedom?*, ATLANTIC (Jan. 6, 2016), http://www.theatlantic.com/politics/archive/2016/01/lgbt-discrimination-protection-states-religion/422730/.

their services to same-sex couples.[112] While some of these bills have died,[113] four have already become law in 2017 alone.

In March 2017, South Dakota joined North Dakota, Virginia, and Michigan as the fourth state to successfully enact such legislation.[114] South Dakota's new law states that "[t]he state may not discriminate or take any adverse action against a child-placement agency . . . on the basis . . . that [it] has declined or will decline to provide any service that conflicts with . . . a sincerely-held religious belief or moral conviction."[115] Alabama followed suit in May 2017 with the passage of the Alabama Child Placing Agency Inclusion Act, which "prohibit[s] the state from discriminating against or refusing to license" an agency that "declines to provide a child placing service or carry out an activity that conflicts with [its] religious beliefs."[116] In June 2017, Texas's Freedom to Serve Children Act became the country's sixth religious exemption statute for faith-based adoption agencies.[117] Like the laws that came before it, this Act protects publicly funded child welfare service providers who have "declined or will decline to provide, facilitate, or refer a person

112 Many are linking this increase in legislation concerning religious freedom protection to the transition from the Obama administration to the Trump administration. As one supporter of expanded religious freedom laws stated in an interview with *Newsweek*, "I think states probably feel freer to pursue this type of legislation because, candidly, during the Obama administration, states knew that when they passed this type of legislation there was a great possibility that the Obama administration would come after them." Emily Cadei, *Religious Freedom Efforts: Next Front Opens in Battle on Gay Marriage*, NEWSWEEK (Mar. 15, 2017), http://www.newsweek.com/state-religious-freedom-laws-568299.

113 Though multiple states have proposed analogous statutes, North Dakota, Virginia, Michigan, South Dakota, Alabama, and Texas remain the only six states with enacted legislation that provides an exemption to religious adoption agencies. Florida, Oklahoma, and Georgia have introduced similar legislation since the *Obergefell* ruling, but all three measures have failed to pass through their state legislatures. *See* Kiley Crossland, *South Dakota Proactively Defends Adoption Agencies*, WORLD (Mar. 16, 2017), https://world.wng.org/2017/03/south_dakota_proactively_defends_adoption_agencies; Carolyn Davis & Hannah Hussey, *Strengthening Child Welfare Systems by Resisting LGBT Discrimination*, CTR. FOR AM. PROGRESS (June 3, 2015), https://www.americanprogress.org/issues/religion/news/2015/06/03/114387/strengthening-child-welfare-systems-by-resisting-lgbt-discrimination/; Alana Semuels, *Should Adoption Agencies Be Allowed to Discriminate Against Gay Parents?*, ATLANTIC (Sept. 23, 2015), http://www.theatlantic.com/politics/archive/2015/09/the-problem-with-religious-freedom-laws/406423/; *see also CS/HB 7111: Conscience Protection for Actions of Private Child-Placing Agencies*, FLA. SENATE, https://www.flsenate.gov/Session/Bill/2015/7111 (July 1, 2015); *Legislative Research: GA HB159*, LEGISCAN, https://legiscan.com/GA/research/HB159/2017 (last visited Nov. 8, 2017); *OK HB 1507*, LEGISCAN, https://legiscan.com/OK/bill/HB1507/2017 (last visited Nov. 8, 2017).

114 Crossland, *supra* note 113.

115 S.B. 149, 2017 Leg., 92d Sess. § 4 (S.D. 2017) (enacted).

116 H.B. 24, 2017 Leg., Reg. Sess. (Ala. 2017) (enacted).

117 Jon Herskovitz, *Texas Governor Approves Adoption Bill that Critics Contend Discriminates*, REUTERS (June 15, 2017), https://www.reuters.com/article/us-texas-adoption-lgbt/texas-governor-approves-adoption-bill-that-critics-contend-discriminates-idUSKBN19631H.

for . . . services that conflict with . . . the provider's sincerely held religious beliefs."[118]

Though the post-*Obergefell* period has seen a significant influx of religious freedom legislation that many consider discriminatory, LGBT advocates got a short-lived win in Mississippi in June 2016. In the spring of that year, Mississippi's state legislature passed House Bill 1523 (the Religious Liberty Accommodations Act), which is the most extensive religious freedom law that has been passed since the Supreme Court's *Obergefell* decision.[119] The bill, which was set to go into effect on July 1, 2016, broadly protects people who believe any of the following: that marriage is between a man and a woman; that sex should only happen in the context of marriage; and that the words "male" and "female" refer to "an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth."[120]

Under the bill's extensive protection, everyone from religious organizations refusing to rent out their social halls for a same-sex wedding to religiously affiliated employers that choose to "fire a single mother who gets pregnant" are protected from discrimination claims.[121] Naturally, this protection extends to religious adoption agencies that decline to place children with same-sex couples.[122]

In an order issued one day before the bill was set to become law, a federal district judge blocked it from going into effect.[123] In a lengthy opinion, Judge Carlton Reeves held that the bill violated both the Fourteenth Amendment's Equal Protection Clause and the First Amendment's Establishment Clause.[124] Judge Reeves began his analysis by determining that the legislation was designed to, and had the effect of, discriminating against the LGBT community in violation of the Fourteenth Amendment.[125] Judge Reeves wrote that, "[u]nder the guise of providing additional protection for religious exercise, [the bill] create[d] a vehicle for state-sanctioned discrimination on the basis of sexual orientation and gender identity."[126] The law clearly "grant[ed] special rights to citizens who [held] one of three 'sincerely held religious beliefs or moral convictions'" and explicitly "reflect[ed] disapproval of lesbian, gay, transgender, and unmarried persons."[127] Judge Reeves went on to hold that the bill's facial differentiation among religions "established[d] an official preference for certain religious beliefs over

118 H.B. 3859, 85th Leg., Reg. Sess. § 1 (Tex. 2017) (enacted).

119 Emma Green, *Why Mississippi's Law on Religious Rights and LGBT Discrimination Got Blocked*, ATLANTIC (July 1, 2016), https://www.theatlantic.com/politics/archive/2016/07/why-mississippis-law-on-religious-rights-and-lgbt-got-blocked/489731/.

120 *Id.* (quoting H.B. 1523, 2016 Leg., Reg. Sess. § 2(c) (Miss. 2016)).

121 *Id.*

122 *Id.*

123 *See* Barber v. Bryant, 193 F. Supp. 3d 677 (S.D. Miss. 2016), *rev'd*, 860 F.3d 345 (5th Cir. 2017).

124 *See id.*

125 *Id.* at 707–09.

126 *Id.* at 710.

127 *Id.* at 688 (quoting H.B. 1523, 2016 Leg., Reg. Sess. § 2 (Miss. 2016)).

others" in violation of the Establishment Clause.[128] The bill clearly "enumerate[d] three beliefs entitled to protection" and "explicitly tied" each of its protections to them.[129] "[T]he State ha[d] not identified any actual, concrete problem of free exercise violations" or a "compelling government interest in favoring three enumerated religious beliefs over others," and the bill's "broad religious exemption [came] at the expense of other citizens."[130] Because the bill did "not honor [the] tradition of religion freedom, nor . . . respect the equal dignity of all of Mississippi's citizens," the court determined that it "must be enjoined."[131]

This significant win for the LBGT community was not long-lived. Though Mississippi's Attorney General announced soon after Judge Reeves's ruling that his office would not pursue an appeal, Mississippi's Governor, Phil Bryant, retained his own private attorney.[132] On June 22, 2017, the United States Court of Appeals for the Fifth Circuit determined that the *Barber* plaintiffs[133] had "failed to provide sufficient evidence of an injury-in-fact from HB 1523" and consequently "ha[d] not made a clear showing of standing."[134] Judge Reeves's injunction was thereby reversed,[135] making Mississippi the seventh state to provide an exemption to religiously affiliated adoption agencies.

IV. Denying Religious Exemptions for Faith-Based Adoption Agencies

Buzz about religious exemptions for faith-based adoption agencies began long before the Supreme Court's decision in *Obergefell*. Though some adoption agencies with religious affiliations served same-sex couples in the early 2000s,[136] a statement released by the Vatican in 2003 made it clear that

128 *Id.* at 716. Judge Reeves determined that "HB 1523 violates the Establishment Clause because it chooses sides in this internal debate [over LGBT rights]" and leaves "persons who hold contrary religious beliefs . . . unprotected." *Id.* at 688, 719.

129 *Id.* at 716 ("On its face, HB 1523 constitutes an official preference for certain religious tenets. If three specific beliefs are 'protected by this act,' it follows that every other religious belief a citizen holds is *not* protected by the act." (quoting Miss. H.B. 1523 § 2)).

130 *Id.* at 720–21.

131 *Id.* at 723–24.

132 *See* Jimmie E. Gates, *AG Jim Hood Won't Appeal HB 1523 Ruling*, Clarion-Ledger (July 13, 2016), http://www.clarionledger.com/story/news/2016/07/13/hood-wont-appeal-hb-1523-ruling/87047284/.

133 The plaintiffs in *Barber v. Bryant* were two organizations and thirteen individuals who fell "into three broad and sometimes overlapping categories: (1) clergy and other religious officials whose religious beliefs are not reflected in HB 1523; (2) members of groups targeted by HB 1523; and (3) other citizens who, based on their religious or moral convictions, do not hold the beliefs HB 1523 protects." *Barber*, 193 F. Supp. 3d at 688.

134 Barber v. Bryant, 860 F.3d 345, 353 (5th Cir. 2017). The Court of Appeals rejected the plaintiffs' arguments that they had standing to challenge a religious display, standing under religious-exercise caselaw, standing for an injury suffered from the House Bill's legal effect, taxpayer standing, or standing under the Equal Protection Clause. *Id.* at 353–58.

135 *Id.* at 358.

136 *See infra* notes 145–46 & 154 and accompanying text.

doing so contradicts Catholic teaching.[137] The Vatican's statement argued that placing children with same-sex couples "do[es] violence to these children" because it "creates obstacles in [their] normal development" and "deprive[s] [them] of the experience of either fatherhood or motherhood."[138] Drawing from the Church's traditional teaching that marriage is between one man and one woman, the Vatican concluded by describing the practice of placing children with same-sex couples as "gravely immoral."[139] In response to pressure from the Vatican, their local religious order, and church leaders, Catholic Charities and other religiously affiliated adoption agencies have been left with three choices: seek a legislative exemption, ignore their religious tradition, or get out of the adoption business.

For four major branches of Catholic Charities, complying with state law became synonymous with violating church doctrine. When they were denied a religious exemption, Catholic Charities agencies in Boston, San Francisco, Washington, D.C., and Illinois were caught between complying with state licensing requirements and honoring the instructions of their religious leaders. For each agency, the choice was unfortunately a clear one: they could not place children with foster and adoptive persons in same-sex relationships. Over the past twelve years, all four have closed their doors.

A. Boston

Catholic Charities of the Boston Archdiocese, one of the nation's oldest adoption agencies, specialized in finding homes for difficult-to-place children before it closed its doors in 2006.[140] Like all other adoption agencies in Massachusetts, Catholic Charities was licensed by the state.[141] To maintain their eligibility for a state license, Massachusetts adoption agencies are expected to obey state laws banning discrimination, including discrimination on the basis of sexual orientation.[142] When Massachusetts became the first state in the country to legalize same-sex marriage in 2003,[143] Catholic Chari-

137 *See* Joseph Ratzinger & Angelo Amato, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons*, VATICAN (June 3, 2003), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html.

138 *Id.*

139 *Id.* Same-sex marriage is opposed by many religious institutions apart from the Roman Catholic Church. "Religious groups that continue to oppose same-sex marriage include conservative evangelical churches (like the Southern Baptist Convention), . . . Eastern Orthodox churches, the Church of Jesus Christ of Latter-day Saints (known better as the Mormon Church), Orthodox Judaism and Islam." Eckholm, *supra* note 108.

140 Maggie Gallagher, *Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty*, WEEKLY STANDARD (May 15, 2006), http://www.weeklystandard.com/banned-in-boston/article/13329.

141 *Id.*

142 *Id.*

143 Perhaps not coincidentally, the Massachusetts Supreme Judicial Court's landmark holding in *Goodridge v. Department of Public Health* came in the same year that the Vatican

ties could no longer legally limit its services to married heterosexual couples.[144]

In the two years before closing the agency, the Archdiocese of Boston facilitated adoptions to thirteen same-sex married couples.[145] After news of those adoptions broke in an October 2005 *Boston Globe* article, Cardinal Seán O'Malley, who had authority over Catholic Charities of Boston, said the agency could no longer facilitate adoptions with same-sex couples.[146] In an effort to salvage the adoption agency, Cardinal O'Malley reached out to then-Governor Mitt Romney and requested a religious exemption from the ban on sexual orientation discrimination.[147] When the governor told him that he did not have the legal authority to unilaterally grant a conscience clause exemption, the Cardinal and governor turned to the state legislature.[148] The legislature refused to budge, essentially leaving the agency in a take-it-or-leave-it scenario.[149]

In response to the legislature's refusal to act, Catholic Charities of the Boston Archdiocese announced that they would not be renewing their contract with the Massachusetts Department of Social Services.[150] In the twenty years leading up to its closure, Catholic Charities' adoption services had placed 720 children in Massachusetts homes.[151]

B. San Francisco

A few months later, San Francisco's branch of Catholic Charities followed in its Boston counterpart's footsteps and announced that it would no longer provide full adoption services.[152] Between 2000 and the agency's closing in 2006, Catholic Charities placed a total of 136 children with families in the San Francisco Bay Area.[153] Five of those children were placed with same-sex couples.[154] Upon learning of those placements, the archdiocese

released its statement condemning adoption by same-sex couples. 798 N.E.2d 941 (Mass. 2003) (extending the right to marry in Massachusetts to same-sex couples).

144 Gallagher, *supra* note 140.

145 Joseph R. LaPlante, *Tough Times for Catholic Adoption Agencies*, OSV NEWSWEEKLY (May 7, 2014), https://www.osv.com/OSVNewsweekly/ByIssue/Article/TabId/735/ArtMID/13636/ArticleID/14666/Tough-times-for-Catholic-adoption-agencies.aspx.

146 Gallagher, *supra* note 140.

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.* In their statement announcing the discontinuation of the agency's adoption services, spokespersons for Catholic Charities said that they had "encountered a dilemma [they] cannot resolve. . . . The issue is adoption to same-sex couples." *Id.*

151 *Catholic Charities Pulls Out of Adoptions*, WASH. TIMES (Mar. 14, 2006), http://www.washingtontimes.com/news/2006/mar/14/20060314-010603-3657r/.

152 Cicero A. Estrella, *Catholic Charities Scaling Back Its Role in Adoption Services*, SF GATE (Aug. 3, 2006), http://www.sfgate.com/bayarea/article/SAN-FRANCISCO-Catholic-Charities-scaling-back-2515267.php.

153 *Id.*

154 *Id.*

announced that the agency would no longer facilitate adoptions for same-sex couples; five months later, Catholic Charities stopped directly placing children in homes and began limiting its work to identifying children eligible for adoption.[155] Catholic Charities had been actively involved in finding homes for children awaiting adoption in the San Francisco Bay Area for nearly one hundred years before it brought its services to an end.[156]

C. Washington, D.C.

Less than four years later, Catholic Charities of the Archdiocese of Washington, D.C., became the third branch in the country to end a foster care program or discontinue adoption services.[157] Much like Boston's Catholic Charities office, the Washington, D.C., agency had a partnership with the District of Columbia for its foster care and public adoption programs.[158] With no religious exemption to turn to, the agency found itself facing the District's pending same-sex marriage law, which would have obligated it to recognize same-sex couples seeking adoption services.[159] Under pressure from the Washington Archdiocese, the agency was left to decide between shedding its adoption services and closing down completely.[160] After supporting children and families in Washington for eighty years, the agency decided to end its program and transfer its caseload of foster children and foster families to other agencies.[161] In the year preceding the program's close in February 2010, Catholic Charities had processed twelve adoptions.[162]

D. Illinois

In 2011, Catholic Charities affiliates providing adoption and foster care services across the state of Illinois made the difficult decision to close their

155 *Id.*; *see also* Elizabeth Fernandez, *Catholic Agency Finds Way out of Adoption Ban, Alliance with Other Groups Gets Around Same-Sex Parent Issue*, SF GATE (Aug. 27, 2006), http://www.sfgate.com/bayarea/article/SAN-FRANCISCO-Catholic-agency-finds-way-out-of-2470402.php (explaining that, after ending its direct placement services, Catholic Charities began a collaboration with other agencies to "provide staff and financial resources to connect needy children to adoptive parents").

156 Estrella, *supra* note 152.

157 Julia Duin, *Catholics End D.C. Foster-Care Program*, WASH. TIMES (Feb. 18, 2010), http://www.washingtontimes.com/news/2010/feb/18/dc-gay-marriage-law-archdiocese-end-foster-care/.

158 AD HOC COMM. FOR RELIGIOUS LIBERTY, U.S. CONF. OF CATHOLIC BISHOPS, DISCRIMINATION AGAINST CATHOLIC ADOPTION SERVICES: USCCB FACT SHEET (2017), http://www.usccb.org/issues-and-action/religious-liberty/upload/Discrimination-against-Catholic-adoption-services.pdf.

159 Duin, *supra* note 157.

160 *Id.*

161 *Id.* The agency's "foster care and adoption programs had been two among the 63 social service programs that the D.C. government paid Catholic Charities $22.5 million to run. Of that amount, $2 million went to the foster care program." *Id.*

162 *Id.*

doors.[163] Up until that time, Catholic Charities had been responsible for providing roughly a quarter of the state's adoption services.[164] Prior to the passage of the Illinois Religious Freedom Protection and Civil Union Act,[165] Catholic Charities had referred both heterosexual and homosexual unmarried couples to secular adoption and foster care services so as not to violate the teachings of the Catholic Church.[166]

In order to maintain its state-funded adoption and foster care contracts under the new Illinois legislation, Catholic Charities would have had to extend its services to same-sex couples in civil unions.[167] When the legislature refused to amend the Act to allow Catholic Charities to continue referring families to other agencies, the dioceses of Joliet, Springfield, and Belleville filed a lawsuit, and Catholic Charities in Rockford immediately ended its adoption services.[168] Recognizing that they would not win their fight for a religious exemption, Illinois Catholic Charities eventually decided to withdraw its lawsuit and became the fourth diocese to end its adoption practice.[169]

V. Michigan's Conscience Clause Legislation

Days before the Supreme Court extended the fundamental right to marry to same-sex couples, Governor Rick Snyder signed three bills creating a religious exemption for Michigan's private adoption agencies.[170] Under the new law:

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163 McGonnigal, *supra* note 61. Before they ended their adoption and foster care programs, Catholic Charities was serving up to 2200 children across the state of Illinois every year. *Id.*

164 Waymon Hudson, *Illinois Catholic Charities Ends Adoption Lawsuit*, Huffington Post (Feb. 2, 2016, 3:25 PM), http://www.huffingtonpost.com/waymon-hudson/illinois-catholic-charities-adoption_b_1094723.html. Before ending its contract with Catholic Charities because its agencies would not offer their services to same-sex couples in civil unions, Illinois maintained a $30 million annual contract with the organization. *Id.* Catholic Charities in the Rockford Diocese alone "handle[d] approximately 350 foster family and adoption cases in 11 counties in northern Illinois with a state budget of $7.5 million." *Rockford Diocese to Discontinue Adoption Services*, WIFR (May 26, 2011), http://www.wifr.com/home/headlines/Rockford_Diocese_to_Discontinue_Adoption_Services_122680219.html.

165 750 Ill. Comp. Stat. Ann. 75/20 (West 2011) (extending most of the rights of marriage to same-sex couples in a civil union).

166 *Rockford Diocese*, *supra* note 164.

167 *Id.*

168 Cheryl Corley, *Illinois, Catholic Agencies at Odds over Gay Adoptions*, NPR (July 5, 2011), http://www.npr.org/2011/07/05/137622143/illinois-catholic-agencies-at-odds-over-gay-adoptions; Hudson, *supra* note 164.

169 *See* Hudson, *supra* note 164.

170 Michigan was not the first state to enact a law explicitly exempting religiously affiliated adoption agencies from serving same-sex couples. North Dakota was the first state to enact similar legislation, Virginia was the second, and, in 2017, South Dakota, Alabama, Texas, and Mississippi became the fourth, fifth, sixth, and seventh. *See supra* notes 114–35 and accompanying text; *see also* N.D. Cent. Code Ann. § 50-12-07.1 (2017) ("A child-placing agency is not required to perform, assist, counsel, recommend, facilitate, refer, or par-

> [A] child placing agency shall not be required to provide adoption services if those adoption services conflict with, or provide adoption services under circumstances that conflict with, the child placing agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child placing agency.[171]

Two main arguments have been offered in support of Michigan's statutory exemption for religiously affiliated adoption agencies. First, the law draws much of its strength from "the right to free exercise of religion under both the state and federal constitutions."[172] The statute specifically states that, "[u]nder well-settled principles of constitutional law, [the right to free exercise] includes the freedom to abstain from conduct that conflicts with an agency's sincerely held religious beliefs."[173] Second, recognizing the very real possibility that the state's faith-based adoption agencies may have closed their doors if this exemption had not been enacted, it has also been argued that the legislation benefits children and families.[174] As the statute says, "[h]aving as many possible qualified adoption and foster parent agencies in [the] state is a substantial benefit to . . . children . . . who are in need of these placement services."[175] The Michigan Department of Health and Human Services "has about 13,000 children in the foster care system at any given time, with about 2,400 who have the goal of adoption."[176] The state relies on

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ticipate in a placement that violates the agency's written religious or moral convictions or policies."); VA. CODE ANN. § 63.2-1709.3(A) (2017) ("To the extent allowed by federal law, no private child-placing agency shall be required to perform, assist, counsel, recommend, consent to, refer, or participate in any placement of a child for foster care or adoption when the proposed placement would violate the agency's written religious or moral convictions or policies."). As each state has different antidiscrimination laws and religious freedom protections, and different nuances to their religious exemption statutes, this Note will focus exclusively on Michigan's legislation.

171 MICH. COMP. LAWS ANN. § 710.23g (West 2017); *see also* § 722.124(2) (providing the same exemption). Like other states, Michigan's law includes a provision preventing the government from taking adverse action against an agency that denies individuals access to adoption because of their sincerely held religious beliefs. *See* §§ 400.5a, 710.23g. Unlike others, however, Michigan's law requires faith-based agencies to refer families to adoption agencies which are able to serve them. *See* § 722.124(4).

172 § 722.124(1)(e).

173 *Id.*

174 Catholic Charities and Bethany Christian Services, who conduct between twenty-five and thirty percent of the state's foster care adoptions, specifically expressed concern that they would be forced to close their doors if the state did not enact a religious exemption for them. Eggert, *supra* note 28; *see also* Kate Abbey-Lambertz, *Michigan Governor Signs Controversial Religious Freedom Adoption Law*, HUFFINGTON POST (June 10, 2015, 3:38 PM), http://www.huffingtonpost.com/2015/06/10/michigan-adoption-bill-lgbt-parents_n_7553952.html (quoting Senator Rick Jones, who referenced closing agencies in Boston, Washington, D.C., San Francisco, and Illinois in his defense of the new law).

175 § 722.124e(1)(c). The statute goes on to more specifically state that "[e]nsuring that faith-based child placing agencies can continue to provide adoption and foster care services will benefit the children and families who receive publicly funded services." § 722.124e(1)(g).

176 Semuels, *supra* note 113.

religious adoption and foster family agencies to find temporary and permanent homes for many of those children, and this legislation has likely allowed many of them to keep their doors open.[177] As the statute reasons, "the more qualified agencies taking part in this process, the greater the likelihood that permanent child placement can be achieved" for Michigan children desperately in need of homes.[178]

On the other side of the debate, many are calling Michigan's legislation state-sponsored discrimination against homosexual individuals and couples. Though the statute states that "a private child placing agency does not engage in state action when the agency performs private-adoption or direct-placement services,"[179] those who oppose the legislation argue that state licensing practices and state and federal funding allocations suggest otherwise. Like all other private adoption agencies, faith-based agencies are required to maintain contracts with the state in order to operate.[180] Each state has complete control over the standards private adoption agencies must abide by in order to renew their operating licenses each year.[181] Many argue that the state is sponsoring discrimination by allowing agencies that turn away a particular class of people to maintain their licenses.[182] Faith-based adoption agencies also receive a significant amount of state and federal funding. "In the 2014–15 budget year, $19.9 million in state and federal monies went toward supporting agencies for adoption and foster care services" in Michigan.[183] Of that total funding, nearly $10 million went to faith-based adoption agencies covered by Michigan's religious exemption.[184] Many believe that the state facilitates discrimination against the LGBT community

177 Eggert, *supra* note 28. Of the "105 licensed adoption and foster care agencies" in Michigan "approximately 25 percent . . . are faith-based." *Id.* Those faith-based adoption agencies are responsible for facilitating a significant portion of the adoptions in the state each year. *See* Semuels, *supra* note 113 ("Bethany Christian Services and various subsets of Catholic Charities, two of the biggest supporters of the bill, together helped finalize 689 adoptions [in 2014], about one-third of the total in the state . . . . Add other agencies with a religion in their title, whether it be Lutheran or Methodist, and faith-based agencies finalized 1,128 adoptions in Michigan, more than half of those completed [in 2014].").

178 § 722.124e(1)(c).

179 § 722.124e(1)(i).

180 *See supra* notes 54–55 and accompanying text.

181 *See supra* note 37 and accompanying text.

182 *See, e.g.*, Matthew A. Issa, Note, *Guaranteeing Marriage Rights: Examining the Clash Between Same-Sex Adoption and Religious Freedom*, 18 GEO. J. GENDER & L. 207, 222 (2017); Kiera McGroarty, *supra* note 1; Kathleen Gray, *Michigan Law Allows Adoption Agencies to Say No to Gays*, USA TODAY (June 11, 2015), http://www.usatoday.com/story/news/politics/2015/06/11/gay-unmarried-couple-adoption-michigan/71058222/; Susan Miller, *ACLU Sues Michigan over Religious Exemptions for Adoptions*, USA TODAY (Sept. 20, 2017), https://www.usatoday.com/story/news/nation/2017/09/20/aclu-sues-michigan-over-religious-exemptions-adoptions/682065001/; Semuels, *supra* note 113.

183 Gray, *supra* note 182.

184 *See id.*

by allocating a significant amount of taxpayer dollars to religiously affiliated adoption agencies which deny them services.[185]

On the same day Governor Rick Snyder signed Michigan's exemption into law, the ACLU of Michigan vowed to legally challenge the state's new statutes on these grounds.[186] Though the ACLU planned to file a lawsuit before the new law took effect,[187] Michigan's conscience clause legislation was not challenged until September 2017.[188] The ACLU filed its recent lawsuit on behalf of two prospective same-sex adoptive couples who were turned away from religiously affiliated adoption agencies and a Michigan taxpayer who grew up in the state's foster care system.[189] The lawsuit, which was filed in the United States District Court for the Eastern District of Michigan, was brought pursuant to 42 U.S.C. § 1983 against officials within Michigan's Department of Health and Human Services.[190] The complaint alleges that the state's religious exemption for adoption agencies violates the plaintiff's constitutional rights under the First Amendment and the Fourteenth Amendment's Free Exercise Clause.[191]

VI. MICHIGAN'S RELIGIOUS EXEMPTION FOR FAITH-BASED ADOPTION AGENCIES: HERE TO STAY

Over the past two decades, recognition of the fact that gay and lesbian individuals and couples make wonderful parents, the abolishment of discriminatory state statutes, and the Supreme Court's *Obergefell* decision have opened up adoption as a means of expanding same-sex families. In Michigan, there is one limitation on the ability of same-sex couples to adopt that is very unlikely to fall: the state's religious exemption for faith-based adoption agencies.

While the unfortunate effect of this legislation will be to inhibit the ability of same-sex couples to adopt from some agencies, it must be recognized that there are ultimately "*two* impositions of indignity here—the possible affront to lesbian and gay couples who are turned aside, and the affront to

185 *See* Semuels, *supra* note 113.

186 *RFRA-Style Adoption Bill Signed by Governor, ACLU of Michigan Vows Legal Challenge*, ACLU (June 11, 2015), https://www.aclu.org/news/rfra-style-adoption-bill-signed-governor-aclu-michigan-vows-legal-challenge; *see also* Abbey-Lambertz, *supra* note 174; Jonathan Oosting, *ACLU of Michigan Vows Lawsuit Against 'Discriminatory' Religious Objection Adoption Law*, MLIVE (June 12, 2015), http://www.mlive.com/lansing-news/index.ssf/2015/06/aclu_vows_lawsuit_against_disc.html.

187 *See* Oosting, *supra* note 186.

188 *See* Lauren del Valle, *Michigan ACLU Alleges State Bias Against Same-Sex Foster, Adoptive Couples*, CNN (Sept. 23, 2017), http://www.cnn.com/2017/09/22/us/michigan-aclu-same-sex-foster-adoptive-couples/index.html.

189 Complaint at 16–19, Dumont v. Lyon, No. 2:17-CV-13080 (E.D. Mich. Sept. 20, 2017).

190 *Id.* at 5–7.

191 *Id.* at 5.

religious believers who are told that their beliefs are not to be tolerated."[192] Despite the benefits of placing children in same-sex adoptive families, no state can condition an agency's right to be an adoption provider on the requirement that they give up their religious views about family. Similarly, the government cannot attach that condition to the provision of funding or licensing that agencies depend upon to operate. Michigan's religious exemption is narrowly tailored to a particular group of agencies that provide a specific service, and its language does not limit its application to same-sex couples. For that reason, a court would likely read it as an affirmance of the right to freely exercise religion[193] rather than as a discriminatory law targeting the LGBT community.

A. Michigan's Religious Exemption Statute Is Not Discriminatory

1. The Statute Is Not Discriminatory on Its Face

Discrimination claims will fail because Michigan's statute does not *tell* its adoption agencies that they must turn away members of the LGBT community. Unlike the discriminatory statutes once enacted in Florida, Mississippi, and many other states,[194] Michigan's statute allows a limited group of agencies[195] to turn away prospective parents if serving them violates the religious beliefs that they were founded upon. Even then, the legislation does not require that those agencies choose not to serve same-sex couples, or anyone else for that matter. Some of the state's religiously affiliated agencies, particularly those that are not Catholic, will likely continue providing services to the LGBT community.

In addition, though the strongest voices to be heard in this debate are advocates of the LGBT community, Michigan's new legislation does not single out same-sex couples as the only group that will be affected by this exemption. Under the statute's broad language, "a child placing agency shall not be required to provide adoption services"[196] to any individual or couple whose lifestyle or beliefs are in serious conflict with the principles the agency was founded upon.[197] Though the majority of couples that religious agencies will refer to other agencies will be homosexual, there will undoubtedly be heterosexual couples they refer as well. Unlike Mississippi's religious exemption law, which explicitly targets same-sex couples and transgender

192 Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1505 (2012).

193 *See* U.S. CONST. amend. I.

194 *See supra* Section II.A.

195 Michigan's religious exemption only applies to agencies with "sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child placing agency" that limit the class of prospective parents it can place children with. MICH. COMP. LAWS ANN. § 710.23g (West 2017).

196 *Id.*

197 *See id.*

individuals,[198] Michigan's statute does not specifically exempt agencies from serving the LGBT community.

2. Opponents Lack a Federal or State Statute to Support Their Claim

Even if a court were to find that Michigan's religious exemption statute is discriminatory, those who oppose it do not have a federal or a state law on which to base their claim. Though the Fourteenth Amendment guarantees equal protection and due process to all citizens, there is no federal law prohibiting discrimination on the basis of sexual orientation[199] and the number of states who have enacted antidiscrimination legislation is still relatively small.[200] Despite attempts to change the scope of its nondiscrimination statute,[201] the Elliott-Larsen Civil Rights Act,[202] Michigan remains one of twenty-eight states that do not prohibit discrimination on the basis of sexual orientation.[203] The Elliott-Larsen Civil Rights Act safeguards the right of Michigan's citizens "to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status."[204] Though adoption agencies undoubtedly qualify as a "[p]lace of public

198 Among the three beliefs the Mississippi laws protects is the belief that "Marriage is or should be recognized as the union of one man and one woman" and the belief that "Male (man) or female (woman) refer[s] to an individual's immutable biological sex as objectively determined by anatomy and genetics at the time of birth." H.B. 1523, 2016 Leg., Reg. Sess. § 2(a), (c) (Miss. 2016).

199 Semuels, *supra* note 113.

200 "Only twenty-one states and the District of Columbia have laws prohibiting employment discrimination based on sexual orientation, and only eighteen states prohibit such discrimination based on gender identity." Travis Gasper, Comment, *A Religious Right to Discriminate:* Hobby Lobby *and "Religious Freedom" as a Threat to the LGBT Community*, 3 TEX. A&M L. REV. 395, 400 (2015) (citations omitted). At the other extreme, Tennessee and Arkansas have passed laws that explicitly prohibit their local jurisdictions from passing nondiscrimination laws. *See* Semuels, *supra* note 113.

201 *See* Kyle Feldscher, *Gov. Snyder Plans to Veto Michigan Version of Religious Freedom Bill Causing Controversy in Indiana*, MLIVE (Apr. 2, 2015), http://www.mlive.com/lansing-news/index.ssf/2015/04/if_it_passes_gov_snyder_plans.html (explaining that debate about expanding the Elliott-Larsen Civil Rights Act died in 2014 when a proposal to expand its protection to gays and lesbians could not get out of committee).

202 § 37.2101.

203 *See* Green, *supra* note 111.

204 § 37.2102(1). Unlike some other states, sexual orientation does not fall under the broad umbrella of "sex" in the Elliott-Larsen Civil Rights Act. The statute defines discrimination on the basis of sex as "sexual harassment" or discrimination based on "pregnancy, childbirth, or a medical condition related to pregnancy or childbirth that does not include nontherapeutic abortion not intended to save the life of the mother." §§ 37.2103(i), 37.2201(d).

accommodation" under the statute,[205] the simple fact remains that the law does not protect against discrimination on the basis of sexual orientation.

B. Michigan's Religious Exemption Statute Does Not Inhibit a Fundamental Right

Michigan's religious exemption does not limit the ability of the state's citizens to exercise one of their fundamental rights. The Supreme Court has long held that Americans have a fundamental right to raise their children without state interference.[206] This privacy right is protected under the Due Process Clause of the Fourteenth Amendment.[207] However, the right to parental autonomy in childrearing is not equivalent to a right to bear or adopt children.[208] Neither the United States Constitution nor any state constitution suggests that there is an inherent right to have a child, much less a right to adopt one.[209]

The district judge in *Campaign for Southern Equality v. Mississippi Department of Human Services* was right to conclude that *Obergefell* "foreclosed litigation over laws interfering with the right to marry and 'rights and responsibilities intertwined with marriage.'"[210] However, the language of *Obergefell* does not go so far as to establish a fundamental right to adopt as his opinion suggested. The right to raise one's children without state involvement is a right intertwined with the right to marry, but the rights to bear children or adopt a child are not. Both same-sex couples and opposite-sex

205 § 37.2301(a) (defining a "[p]lace of public accommodation" as an "institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public").

206 The Court first affirmed this right in *Meyer v. Nebraska*, where it held that "[the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children." 262 U.S. 390, 399 (1923).

207 *Id.* at 399–400.

208 Each time the United States Supreme Court has discussed the right to parent, the Court has spoken in terms of the right to "direct the upbringing and education of children," not in terms of the creation of a family. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); *see also* Troxel v. Granville, 530 U.S. 57, 66–67 (2000) (plurality opinion) (holding that a grandparent-visitation statute failed to respect "the fundamental right of parents to make decisions concerning the care, custody, and control of their children"); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (holding that a compulsory school-attendance statute impinged "the fundamental interest of [Amish] parents . . . to guide the religious future and education of their children"); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (holding that the interest of a parent in his or her children "undeniably warrants deference and, absent a powerful countervailing interest, protection"); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Meyer*, 262 U.S. at 400 (holding that parents have a fundamental right to direct their children's education).

209 *See generally* Strasser, *supra* note 37.

210 Campaign for S. Equal. v. Miss. Dep't of Human Servs., 175 F. Supp. 3d 691, 710 (S.D. Miss. 2016) (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2606 (2015)).

couples must have access to adoption agencies that will serve them, but no class of prospective parents has an inherent right to expand their family through adoption or any other means.

C. Michigan Had the Authority to Enact This Legislation

1. State Regulation of Adoption Agencies

As explained in Part I of this Note, federal law bestows a general grant of authority upon each state to enact their own adoption statutes.[211] Michigan, like all other states, has broad power to determine the standards of operation for its licensed adoption agencies.[212] Though Massachusetts, California, Washington, D.C., and Illinois chose not to act, the state of Michigan had the authority to determine that extending this religious exemption was in the best interest of children.

2. Free Exercise Protection

Federal law, the United States Constitution, and some state constitutions grant states the authority to enact a religious exemption for their adoption agencies. The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[213] This provision "allows governments and officials to 'single out' religion for 'special constitutional protection'" in the form of religious exemptions.[214] "Religious freedom in a pluralistic society and under the regulatory state requires a willingness to . . . accommodate religious believers and institutions through exemptions from generally applicable laws."[215] In this case, a special exemption from Michigan's generally applicable adoption laws was necessary to safeguard the religious freedom of the state's adoption agencies.

Michigan's legislation is further supported by its state constitution, which secures the right to free exercise of religion in Article I.[216] Though the case for this legislation would be even stronger if Michigan's proposed state Religious Freedom Restoration Act had made it out of committee in 2015,[217] the state had sufficient power under the First Amendment and its

211 *See supra* note 37 and accompanying text.

212 *See supra* note 37 and accompanying text.

213 U.S. CONST. amend. I.

214 Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39, 42 (2014) (quoting Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3, 11 (2000)).

215 *Id.* at 48–49.

216 *See* MICH. CONST. art. I, § 4 (West, Westlaw through Nov. 2016 amendments).

217 The Michigan Religious Freedom Restoration Act was introduced in the Michigan House of Representatives at the end of the 2013–2014 legislative session, but it never made it to the governor's desk. *See* Feldscher, *supra* note 201. In January 2015, Senator Mike Shirkey introduced the state's RFRA proposal in the Senate. S.B. 0004, 2015 Reg. Sess. (Mich. 2015). The bill required the application of a compelling interest test "to all cases

state constitution to enact it. The First Amendment's grant of authority to "specifically and deliberately" "accommodate those with religious commitments and objections" extends to all states, regardless of whether they have enacted a state RFRA.[218]

Michigan also had a rational basis for enacting this legislation. The chain of closing Catholic Charities in Boston, San Francisco, Washington, D.C., and Illinois has made it clear that many adoption agencies have no choice but to close if they are not given a religious exemption.[219] For many of these agencies, knowingly extending their adoption services to same-sex couples is a blatant violation of their religion's teachings.[220] Had Michigan chosen not to enact this legislation, a significant portion of its faith-based adoption agencies might have had no choice but to get out of the adoption business.[221] Michigan recognized the compromising position religious adoption agencies across the country have found themselves in, and, rather than forcing them to choose between closing their doors and disobeying the Vatican, the state chose to provide them with an exemption.

D. Michigan's Religious Exemption Can Serve the Best Interests of the State's Children

Though the debate over Michigan's religious exemption is undoubtedly contentious, there is one point that both supporters of the legislation and those who oppose it should be able to agree on: this legislation allows the state's religious adoption agencies to continue serving children in need. Though children would undoubtedly benefit from placement in a forever-home led by a same-sex couple as opposed to remaining in foster care, Michigan's decision to enact this legislation has at the very least allowed all the state's religiously affiliated adoption agencies to keep their doors open.

Michigan's religious exemption statute states that "placing [a] child in a safe, loving, and supportive home is a paramount goal of [the] state."[222] By giving adoption agencies the religious exemption that so many of them require to remain in operation, Michigan ensured that as many children as possible will find the safe, loving, and supportive homes they need and deserve. As the experience of Catholic Charities in Boston, San Francisco, Washington, D.C., and Illinois demonstrates, the so called "choice" between serving same-sex couples and adhering to religious teaching is not a choice at all for many faith-based adoption agencies. Though Michigan's statute will

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where free exercise of religion is substantially burdened by government." *Id.* § 3(a). No progress has been made since the bill was referred to the Judiciary Committee that same day. *Senate Bill 0004 (2015)*, MICH. LEGISLATURE, http://legislature.mi.gov/doc.aspx?2015-SB-0004 (last visited Sept. 18, 2017). If this legislation is ever enacted, it will likely *require* that Michigan extend a religious exemption to its faith-based adoption agencies.

218 Garnett, *supra* note 214, at 43.

219 *See supra* Part IV.

220 *See supra* Part IV.

221 *See supra* Part IV.

222 MICH. COMP. LAWS ANN. § 722.124e(1)(a) (West 2017).

surely prevent some children from being adopted into wonderful families headed by same-sex couples, the number of children who would lose the opportunity for placement in a permanent home would be far higher if Michigan's religious adoption agencies were to close. At any one time, there are about 500,000 children in foster care nationally, about 100,000 of which are waiting to be adopted.[223] This legislation will ensure that as many of them as possible find permanent homes.

The legislation's requirement that religiously affiliated agencies refer prospective parents they cannot serve elsewhere should mitigate some of the barriers to adoption it created.[224] Michigan's legislation undoubtedly limits the number of agencies that same-sex couples can adopt from, but there are alternative providers they can receive these services from. While the requirement that agencies refer those they cannot serve to specific resources cannot eliminate this added hurdle to adoption for same-sex couples, referring prospective parents to other agencies goes a long way to rectify some of the difficulties caused by this exemption. In fact, by requiring agencies to provide prospective parents with both written information and a referral,[225] the statute has made it relatively easy for gay couples to seek out one of the many secular organizations willing to serve them. Michigan's referral requirement evidences the state's intent to balance the competing interests of religious liberty and the LGBT community.

CONCLUSION

April DeBoer and Jayne Rowse brought their initial lawsuit challenging Michigan's Adoption Code with one thing in mind: the welfare of their children. Like so many other same-sex couples, they wanted to give their children the security that only adoption could provide. Along with sixteen other couples, six of which had adopted or fostered children, Ms. DeBoer and Ms. Rowse finally brought that much-needed stability to same-sex families in Michigan and across the country.[226]

Though the newest barrier to adoption for same-sex couples in Michigan is unlikely to fall, we can find solace and hope in the leaps and bounds this area of the law has taken. When *Obergefell v. Hodges* extended the fundamental right to marry to same-sex couples, it also made adoption a concrete

223 *See* ACLU, OVERVIEW OF LESBIAN AND GAY PARENTING, ADOPTION AND FOSTER CARE (2010), https://www.aclu.org/fact-sheet/overview-lesbian-and-gay-parenting-adoption-and-foster-care. Because of the lack of qualified adoptive families, only about 20,000 eligible children in the child welfare system are adopted each year. *Id.*

224 *See* § 722.124e(4).

225 *See id.*

226 Cynthia Godsoe, *Adopting the Gay Family*, 90 TUL. L. REV. 311, 313 (2015). After the Supreme Court's ruling in *Obergefell*, Ms. DeBoer and Ms. Rowse got married, formally adopted each other's legal children, and jointly adopted a fifth child, a daughter named Kennedy. Katrease Stafford, *DeBoer, Rowse Formally Adopt Their 5 Children*, DETROIT FREE PRESS (Nov. 5, 2015), http://www.freep.com/story/news/local/michigan/oakland/2015/11/05/jayne-rowse-april-deboer-adoption-wedding/75208698/.

way for all couples to expand their families. In the wake of the Supreme Court's decision, all states now allow same-sex couples to adopt. Traditional biases about the ability of same-sex couples to parent have largely disintegrated, and statutes limiting adoption to married couples are no longer a barrier. The number of gay couples choosing to adopt continues to grow, and children adopted by same-sex couples now have the same legal protections as children adopted by heterosexual couples. Though Michigan's religious exemption will limit the number of agencies that same-sex couples can seek services from in this new adoption era, the bright side of this accommodation is that it will preserve the ability of religious agencies to deliver effective services to children in need.