

MICHIGAN'S STATE-SPONSORED DISCRIMINATION OF SAME SEX COUPLES

*Kiera McGroarty**

I. INTRODUCTION

The United States of America: the land of the free and the home of the brave. The United States was founded on the principles of freedom and equality.¹ The fight for these rights has been ongoing since the nation's founding in 1776.² Despite the progress our nation has seen, people and groups still face adversity and unequal treatment. One group that has been on the forefront of the equal rights movement is the Lesbian, Gay, Bisexual, and Transgender ("LGBT") community.

Since 1936, the LGBT community has been fighting for their civil rights.³ Like many civil rights movements, they have experienced victories and setbacks. One of the greatest legal triumphs for the LGBT community was announced on June 26, 2015, when the United States Supreme Court rendered its much anticipated same-sex marriage decision.⁴ In a 5-4 opinion, written by Justice Kennedy, the Court announced that same-sex couples have a fundamental right to marriage under the Due Process Clause and Equal Protection Clause of the United States Constitution.⁵ While the *Obergefell* decision is a victory for those fighting for LGBT equality, it is a defeat for those who seek to

* Associate New Developments Editor, Rutgers Journal of Law and Religion; J.D. Candidate May 2017, Rutgers School of Law.

¹ See U.S. CONST. amend. I (establishing freedom of speech, religion and assembly); U.S. CONST. amend. XIV (providing equal protection of the laws to all persons).

² See Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause* (Northwestern U. Sch. of Law Faculty Working Papers, Paper No. 213, 2012), <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1212&context=facultyworkingpapers>.

³ See LGBT Rights, ACLU, <https://www.aclu.org/issues/lgbt-rights> (last visited Dec. 4, 2015) (stating that the ACLU has been fighting for LGBT rights since 1936).

⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁵ *Id.* at 2604–05. The Court not only recognized a fundamental right to marry, but also invalidated a Michigan law limiting same-sex couples' ability to adopt. See *id.* at 2605.

protect the traditional institution of marriage.⁶ As such, states, in both response to and anticipation of the Court's ruling, have proposed legislation designed to "protect" the religious freedom of faith-based organizations.⁷

For instance, just days before the Court's announcement, Michigan amended its probate code, signing into law three new bills,⁸ which collectively provide a religious exemption for faith-based adoption agencies by which to discriminate against same-sex couples.⁹ The new adoption laws permit religiously affiliated state-funded child-placement agencies to deny service to individuals and/or couples whose circumstances conflict with the agencies' sincerely held religious beliefs without the fear of losing state funding.¹⁰ Although these laws are designed to ensure that Michigan's adoption agencies can continue to provide services to the thousands of children in need of loving homes,¹¹ the laws limit services available to some by effectively allowing religious organizations to discriminate against same-sex couples.¹²

This article will discuss and analyze how religious exemption statutes, which protect faith-based adoption agencies, like the ones codified in Michigan's probate code, are being used as a vehicle for de facto discrimination against same-sex couples. The first section of this article will provide a brief overview of adoption and discuss the discriminatory effects of adoption statutes before

⁶ Daniel Burke, *The Next Battle Over Gay Rights*, CNN (June 29, 2015, 11:03 AM), <http://www.cnn.com/2015/06/26/living/next-battle-same-sex/>.

⁷ See Erik Eckholm, *Conservative Lawmakers and Religious Groups Seek Exemptions After Ruling*, N.Y. TIMES, June 27, 2015, at A14 (stating that within hours of the Court's decision, governors of Texas and Louisiana "called for stronger legal protections for those who want to avoid any involvement in same-sex marriage . . . based on religious beliefs.").

⁸ See H.B. 4188, 98th Leg., Reg. Sess. (Mich. 2015); H.B. 4189, 98th Leg., Reg. Sess. (Mich. 2015); H.B. 4190, 98th Leg., Reg. Sess. (Mich. 2015).

⁹ Kathleen Gray, *Michigan Law Allows Adoption Agencies to Say No to Gays*, USA TODAY (June 11, 2015, 9:13 PM), <http://www.usatoday.com/story/news/politics/2015/06/11/gay-unmarried-couple-adoption-michigan/71058222/>.

¹⁰ See MICH. COMP. LAWS ANN. § 722.124e (West 2015) (stating that the state shall not take an adverse action against agencies declining services due to sincerely held religious beliefs).

¹¹ See Laura Edghill, *ACLU Plans Suit Over Religious Liberty Protections for Michigan Adoption Agencies*, WORLD NEWS GROUP (June 16, 2015, 3:25 PM), http://www.worldmag.com/2015/06/aclu_plans_suit_over_religious_liberty_protections_for_michigan_adoption_agencie (stating that the goal of the legislation "is to get the maximum number of kids adopted by loving families").

¹² See *id.* (quoting Michigan ACLU Deputy Director Rana Elmir, who warned that same-sex couples could be affected by this legislation).

the *Obergefell* decision. The second section will discuss the Supreme Court's decision in *Obergefell v. Hodges*, and analyze the effect of the Court's decision on same-sex adoption. Finally, the last section of this article will discuss the legality of religious exemption statutes and the problems with the current state of the law.

II. BACKGROUND

A. Marriage as an Inherent Barrier to Adoption for Same-Sex Couples

Adoption¹³ is a social institution that serves many purposes in American society.¹⁴ The fundamental objective of adoption is to promote normal childhood development by placing children with nurturing families who can provide them with the stability and support necessary for becoming a productive member of society.¹⁵ Because adoption serves such an important function in our society, as a nation we have an interest in protecting both the children and the institution.

As a matter of public policy, courts generally afford adoption agencies immense discretion when it comes to placing children.¹⁶ These agencies are entrusted to choose placements that are consistent with the "best interests of the child."¹⁷ Adoption

¹³ Adoption is a mechanism by which adults legalize their parental relationship to non-biological children as well as a means to bring children into families. JO JONES, NAT'L CTR. FOR HEALTH STAT., ADOPTION EXPERIENCES OF WOMEN AND MEN AND DEMAND FOR CHILDREN TO ADOPT BY WOMEN 18–44 YEARS OF AGE IN THE UNITED STATES, 2002 at 1 (2008), http://www.cdc.gov/nchs/data/series/sr_23/sr23_027.pdf.

¹⁴ See *id.* at 2 (stating that adoption provides parents for children whose parents have died or whose rights have been terminated, and it provides a way for couples unable to conceive to bring children into their families).

¹⁵ See *Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults*, CHILD WELFARE LEAGUE OF AM. (May 29, 2014), <http://www.cwla.org/position-statement-on-parenting-of-children-by-lesbian-gay-and-bisexual-adults/>.

¹⁶ See Erika Lynn Kleiman, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327, 345 (1997) ("[W]hile the determination [of the best interests of the child] is nominally guided by statute, judges and agencies have discretion to combine virtually any combination of potentially influential factors in ranking prospective parents and matching them with available children.").

¹⁷ CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 1 (2012), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

agencies consider a number of factors when evaluating a potential family;¹⁸ one of the considerations is the marital status of the prospective parent(s).¹⁹ Over time the best interests standard has created a preference for married couples over unmarried couples in child placement.²⁰ As a result of this marital preference, unmarried same-sex couples have been denied access to adoption.²¹

States have both explicitly and implicitly evinced their preference for placing adoptive children with married couples.²² For example, Utah prohibits unmarried couples from fostering children.²³ The state also requires cohabitating individuals to be in a “legally valid and binding marriage” in order to adopt.²⁴ However, Utah’s blanket prohibition on single person adoption is the exception not the rule.²⁵ While other states have codified their marital preference in adoption, they have done so in more subtle ways, often times through proscriptions on joint adoption.²⁶

Joint adoption statutes prohibit unmarried couples from jointly adopting an unrelated child.²⁷ As a result, unmarried couples wanting to adopt can only do so if one parent legally adopts the child and then the other parent applies for second-parent adoption.²⁸ However, because not all states have second-

¹⁸ See *id.* at 2.

¹⁹ See *id.* Other factors include the mental and physical health of the prospective parents, the presence of additional children in the home, and any history of misdemeanor or felony convictions. Edghill, *supra* note 11. See generally MICH. COMP. LAWS SERV. § 722.23 (LexisNexis 2015), for a complete list of Michigan’s best interests factors.

²⁰ 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 (2006). See also Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 907 (2000) (noting that agencies allow single-parent adoptions only when unable to place children in two-parent homes).

²¹ See Storrow, *supra* note 20, at 307–09.

²² *Id.* at 305.

²³ See UTAH CODE ANN. § 62A-4a-602(5)(b) (West 2014).

²⁴ UTAH CODE ANN. § 78B-6-117(3) (West 2014).

²⁵ See *Joint Adoption Laws*, FAMILY EQUALITY COUNCIL, http://www.familyequality.org/get_informed/equality_maps/joint_adoption_laws/ (last visited Dec. 8, 2015) (noting that Utah is the only state that prohibits unmarried couples from fostering children).

²⁶ See Storrow, *supra* note 20, at 334.

²⁷ *Id.* at 334.

²⁸ *Id.* at 335–36, 340. Second-parent adoption is a procedure whereby a legally recognized parent’s committed partner may adopt and become a co-parent of the child. *Id.* at 339.

parent adoption statutes,²⁹ a ban on joint adoption is often an inherent barrier to adoption for LGBT couples.³⁰ Unlike heterosexual couples, who could choose to marry to circumvent prohibitions on joint adoption, many same-sex couples did not have that choice prior to *Obergefell*.³¹ As such, it is clear that joint adoption statutes have served as a mechanism for discriminating against same-sex couples by denying them equal access to adoption services.³²

Pre-*Obergefell*, joint adoption statutes were not the only mechanism of same-sex discrimination.³³ Adoption agencies, through their broad discretionary power, could deny services to same-sex couples by simply stating that placing a child in the home of an unmarried individual was not in the best interests of the child.³⁴ Fortunately, the *Obergefell* decision has given same-sex couples greater access to adoption.³⁵ However, the fight is certainly not over.

B. Making Legal Strides: Obergefell v. Hodges

April DeBoer and Jayne Rowse (“the DeBoer’s”), lived together in Hazel Park, Michigan, with their three children.³⁶ Both

²⁹ *Id.* at 339.

³⁰ *Joint Adoption Laws*, *supra* note 25 (noting that joint adoption may require being in a legally recognized relationship).

³¹ See Danielle Kurtzben, *Map: Here’s How Same-Sex Marriage Laws Will Now Change Nationwide*, NAT’L PUB. RADIO (June 26, 2015) <http://www.npr.org/sections/itsallpolitics/2015/06/26/417715124/map-heres-how-same-sex-marriage-laws-will-now-change-nationwide> (prior to the *Obergefell* decision, thirteen states banned same-sex marriage).

³² See *supra* note 30 and accompanying text.

³³ See Kleiman, *supra* note 16, at 344–45 (noting that “even if bans on the adoption of children by gay people are not express, agencies often effectively ban gays from becoming adoptive parents by relying on pre-textual factors to reject them”).

³⁴ See *id.* at 345 (stating that agencies and judges have discretion to combine various factors); see also Rebecca Beitsch, *Despite Same-Sex Marriage Ruling, Gay Adoption Rights Uncertain in Some States*, USA TODAY (Aug. 19, 2015, 1:00 PM), <http://www.usatoday.com/story/news/nation/2015/08/19/despite-same-sex-marriage-ruling-gay-adoption-rights-uncertain-some-states/31992309/>.

³⁵ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) (ruling the ban on same-sex marriage, which prevented same-sex partners from jointly adopting children, unconstitutional).

³⁶ *Deboer v. Snyder*, 973 F. Supp. 2d 757, 759–60 (E.D. Mich. 2014), *rev’d*, 772 F.3d 388 (6th Cir. 2014), *overruled by Obergefell*, 135 S. Ct. at 2584

successful nurses, they had been together for over eight years,³⁷ but were unable to marry because of Michigan's ban on same-sex marriage.³⁸ Despite this legal barrier, the couple attempted to start a family: both DeBoer and Rowse became state-licensed foster parents and eventually sought to adopt.³⁹ Unfortunately, they were unable to adopt as a couple, and thus, had to resort to single-parent adoption.⁴⁰ As a result, Rowse became the legal parent of their two children, Nolan and Jacob, and DeBoer was the legal parent of their other child, Ryanne.⁴¹ While the five-person household functioned as a family in many of the traditional respects, in the eyes of the law they were two distinct units.⁴² With their family on the line, the couple sought relief from the courts.⁴³

The DeBoer's brought suit challenging Section 24 of Michigan's Adoption Code⁴⁴ on the grounds that it violates the equal protection clause for impermissibly discriminating against unmarried couples.⁴⁵ After amending their complaint to challenge Michigan's Marriage Amendment⁴⁶ ("MMA") on the ground that they were denied joint adoption because they were not and could not be married, the District Court ultimately held that the MMA was unconstitutional.⁴⁷

The defendants then appealed to the Sixth Circuit.⁴⁸ On appeal, the DeBoer's case was joined with other cases from Kentucky, Ohio, and Tennessee.⁴⁹ The Sixth Circuit ultimately held that the Fourteenth Amendment did not prohibit a state from defining marriage as a relationship between one man and one

³⁷ *Deboer*, 973 F. Supp. 2d at 759–60.

³⁸ *See id.* at 759 (in 2004, Michigan voters approved the "Michigan Marriage Amendment," which defines marriage as a union between one man and one woman); *see also* MICH. CONST. art. I, § 25.

³⁹ *Deboer*, 973 F. Supp. 2d at 760.

⁴⁰ *Id.* Julie Bosman, *One Couple's Unanticipated Journey to Center of Landmark Gay Rights Case*, N.Y. TIMES, Jan. 25, 2015, at A14.

⁴¹ *Deboer*, 973 F. Supp. 2d at 760.

⁴² *See* Bosman, *supra* note 40 (because DeBoer and Rowse were forced to adopt as single individuals, "[e]ach parent legally had no claim to the children her partner had legally adopted.").

⁴³ *See id.*

⁴⁴ MICH. COMP. LAWS ANN. § 710.24 (West 2015).

⁴⁵ *Deboer*, 973 F. Supp. 2d at 760.

⁴⁶ *See supra* note 37 and accompanying text.

⁴⁷ *Deboer*, 973 F. Supp. 2d at 760, 775.

⁴⁸ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

⁴⁹ *Deboer*, 772 F.3d at 397–99, *overruled by Obergefell*, 135 S. Ct. at 2584.

woman.⁵⁰ It was the first circuit court of appeals to uphold a state's same-sex marriage ban.⁵¹ The circuit split prompted the United States Supreme Court to hear the DeBoer's case.⁵²

On June 26, 2015, the United States Supreme Court made history, holding that same-sex couples are guaranteed the fundamental right to marriage by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment⁵³ to the United States Constitution.⁵⁴ Justice Kennedy's opinion included a long review of our nation's history and the decisions that supported the Court's ruling.⁵⁵ In holding same-sex couples have the fundamental right to marriage under the Due Process Clause, the Court referenced four principles of law to support its finding, the most significant of which was the Court's third point.⁵⁶ The Court stated that protecting the right to marry "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."⁵⁷ In support for extending this protection, the Court stated that "[t]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause."⁵⁸ Thus, it is clear from Justice Kennedy's opinion that the interests of the children of same-sex couples influenced the Courts decision.⁵⁹ By legalizing

⁵⁰ *Deboer*, 772 F.3d at 416.

⁵¹ Lyle Denniston, *Sixth Circuit: Now, a Split on Same-Sex Marriage*, SCOTUSBLOG (Nov. 6, 2014, 9:56 PM), <http://www.scotusblog.com/2014/11/sixth-circuit-the-split-on-same-sex-marriage/>.

⁵² *See id.* (noting that the split would likely lead to Supreme Court review).

⁵³ This article will not discuss the Court's reasoning for finding a fundamental right to marriage under the Equal Protection Clause. *See Obergefell*, 135 S. Ct. at 2604 (stating that the "marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right.").

⁵⁴ *See id.* at 2604–05.

⁵⁵ *See id.* at 2595 ("The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change.").

⁵⁶ *See id.* at 2599–601. First, the Court reiterated the constitutional principle that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." *Id.* at 2599. Second, the Court stated that the right to marry is fundamental because it "supports a two-person union unlike any other in its importance to committed individuals." *Id.* Fourth, the Court stated that Supreme Court precedent and the county's traditions demonstrated that "marriage is a keystone of our social order." *Obergefell*, 135 S. Ct. at 2601.

⁵⁷ *Id.* at 2600.

⁵⁸ *Id.* (citing *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)).

⁵⁹ *See id.* at 2600–01 ("Without the recognition, stability, and predictability

same-sex marriage, the Court extended legal protection to LGBT families.⁶⁰

The majority's decision was not without opposition. Chief Justice Roberts authored a dissenting opinion in which he voiced concerns about the practical implications of the majority's decision, specifically with regard to the free exercise of religion.⁶¹ Justice Roberts warned that "[h]ard 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."⁶² Not surprisingly, the ALCU has already vowed to bring such a challenge against Michigan's religious exemption statute.⁶³

C. Adoption After Obergefell

Interestingly, the DeBoer's had no intention of constitutionally challenging the same-sex marriage ban.⁶⁴ Rather, their sole motivator for bringing legal action was the welfare of their children.⁶⁵ However, as a result of their legal action and as a result of the Supreme Court's ruling, same-sex couples have been given the fundamental right to marry, and the DeBoer's ultimately achieved their legal goal: gay and lesbian couples can now jointly adopt children.⁶⁶ Additionally, same-sex couples that already had children, but were unable to adopt their partner's child, can now do so under existing stepparent statutes.⁶⁷ The *Obergefell* decision

marriage offers, their children suffer the stigma of knowing their families are somehow lesser The marriage laws at issue here thus harm and humiliate the children of same-sex couples.”).

⁶⁰ See *infra* Section II, C (explaining that as a result of the Court's decision, same-sex couples can marry and legally adopt their spouse's/partner's child).

⁶¹ See *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting).

⁶² *Id.* at 2625–26.

⁶³ 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.

⁶⁴ Bosman, *supra* note 40.

⁶⁵ *Id.*

⁶⁶ See *Obergefell*, 135 S. Ct. at 2604–05; *Joint Adoption Laws*, *supra* note 25.

⁶⁷ See Storrow, *supra* note 20, at 336 (“Step-parent adoption is recognized in all states and permits a parent's new spouse to adopt and become a co-parent of the child.”). Same-sex couples are also permitted to adopt under second parent adoption laws, which unlike stepparent statutes do not require the parents to be legally married. See *id.* at 339.

also limits the discretionary power of adoption agencies to discriminate against same-sex couples because agencies that were once able to discriminate against same-sex couples under the guise of marital status can no longer do so because gay marriage is now legally recognized across the United States.⁶⁸

While the Supreme Court's ruling removes many of the barriers to same-sex adoption, push back from religious organizations and adoption agencies is creating new roadblocks to same-sex adoption.⁶⁹ Specifically, religious groups have solicited the help of state governments to circumvent the new law.⁷⁰

D. The Religious Exemption Response

On the other side of the LGBT community's fight for equal rights is the fight for religious freedom. In response to the Court's decision, many religious organizations opposed to gay rights have sought First Amendment protection under the Free Exercise Clause.⁷¹ Three states have passed RFRA-like⁷² laws to help protect the religious freedom of faith-based adoption agencies.⁷³ These laws allow state-funded adoption agencies to deny prospective parents if the circumstances of the potential parents conflict with the agencies' religious beliefs.⁷⁴ Of the three states that have passed religious exemption laws for faith-based adoption agencies, Michigan's timing with regard to enacting their statute is particularly suspect.⁷⁵

⁶⁸ See Beitsch, *supra* note 34 (quoting Julie Hoffman, adoptions administrator for the North Dakota Department of Human Services, "[n]ow that gay couples are allowed to marry, they'll be treated like any other married couple who's adopting").

⁶⁹ *Id.*

⁷⁰ See Eckholm, *supra* note 7.

⁷¹ See *id.*

⁷² In 1993, Congress passed the Religious Freedom Restoration Act (RFRA), which states that "the government [can] only burden a person's exercise of religion if doing so would further a compelling government interest, and if it [is] the least restrictive means of doing so." 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/>.

⁷³ See *id.* (stating that Michigan, Virginia, and North Dakota have passed such laws and that Texas, Florida, and Alabama have introduced similar laws).

⁷⁴ Gray, *supra* note 9.

⁷⁵ 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_

Exactly fifteen days before the Supreme Court announced its landmark same-sex marriage decision,⁷⁶ Michigan Governor Rick Snyder signed a package of religious exemption legislation, which allows adoption agencies to deny services to same-sex couples if doing so would conflict with an organization's sincerely held beliefs.⁷⁷ The law states:

In accordance with sections 14e and 14f of 1973 PA 116, MCL 722.124e and 722.124f, 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. Also, in accordance with sections 14e and 14f of 1973 PA 116, MCL 722.124e and 722.124f, the state or a local unit of government shall not take an adverse action against a child placing agency on the basis that the child placing agency has declined or will decline to provide adoption services that 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.⁷⁸

plans.html. A spokesman for Governor Snyder stated in April 2015 that the Governor would veto any religious exemption legislation unless there was an expansion of Civil Rights protections for LGBT people. *See id.* Just two months later, the Governor signed religious exemption legislation, exempting faith-based agencies from providing services that conflict with their sincerely held beliefs. *See* Kerry Eleveld, *Gov. Rick Snyder Breaks Promise, Signs Antigay 'Religious Freedom' Bill on Adoption*, DAILY KOS (June 11, 2015, 3:07 PM), <http://www.dailykos.com/story/2015/6/11/1392503/-Gov-Rick-Snyder-breaks-promise-signs-antigay-religious-freedom-bill-on-adoption>.

⁷⁶ 2015 Mich. Pub. Acts N. 53 (codified in MICH. COMP. LAWS ANN. § 710.23g (West 2015)), <http://www.legislature.mi.gov/documents/2015-2016/publicact/pdf/2015-PA-0053.pdf>.

⁷⁷ *See* MICH. COMP. LAWS ANN. § 710.23g.

⁷⁸ *Id.* *But see* H.B. 4840, 98th Leg., Reg. Sess. (Mich. 2015); S.B. 498, 98th Leg., Reg. Sess. (Mich. 2015) (amending MICH. COMP. LAWS ANN. § 710.23g).

Section 14e(4) creates a mandatory referral policy for organizations that deny services on the basis of their sincerely held religious beliefs.⁷⁹

Like Michigan, North Dakota also has a law protecting adoption agencies from being required to facilitate an adoption that violates their sincerely held beliefs.⁸⁰ The last clause of the statute recognizes that there may be a conflict with the religious affiliations of the organization and the best interests of the child:⁸¹

Refusal by a child-placing agency to perform, assist, counsel, recommend, facilitate, refer, or participate in a placement that violates the child-placing agency's written religious or moral convictions or policies does not constitute a determination that the proposed adoption is not in the best interest of the minor.⁸²

Comparatively, Virginia also enacted legislation allowing child-placing agencies to refuse services to prospective parents whose circumstances conflict with their sincerely held religious beliefs.⁸³ The Virginia statute provides three additional protections for organizations that act in accordance with their sincerely held religious beliefs.⁸⁴ First, faith-based adoption agencies cannot be denied licensing.⁸⁵ Second, agencies cannot be denied a contract to participate in a government program.⁸⁶ Third, these agencies are exempt from tort liability.⁸⁷

While all three states' religious exemption statutes are similar in many respects, they are also very different. All three statutes contain provisions preventing the state government from taking adverse action against an agency that denies individuals an adoption because of its sincerely held beliefs.⁸⁸ However, the Virginia statute goes even further by exempting religiously

⁷⁹ See MICH. COMP. LAWS ANN. § 722.124e(4) (West 2015).

⁸⁰ See N.D. CENT. CODE ANN. § 50-12-07.1 (West 2015).

⁸¹ *Id.*

⁸² *Id.*

⁸³ See VA. CODE ANN. § 63.2-1709.3 (West 2015).

⁸⁴ See *id.*

⁸⁵ VA. CODE ANN. § 63.2-1709.3(B).

⁸⁶ VA. CODE ANN. § 63.2-1709.3(C).

⁸⁷ VA. CODE ANN. § 63.2-1709.3(D).

⁸⁸ See VA. CODE ANN. § 63.2-1709.3; MICH. COMP. LAWS ANN. § 710.23g (West 2015); N.D. CENT. CODE ANN. § 50-12-07.1 (West 2015).

affiliated agencies from tort liability as well.⁸⁹ Additionally, only the Michigan law requires faith-based agencies to refer families that are denied services.⁹⁰

There is also a significant difference between the Michigan law and the North Dakota law. Particularly, the Michigan statute directly addresses the concern regarding how an agency's refusal affects the prospective parents' ability to adopt.⁹¹ While the Michigan statute provides protection for prospective parents, the North Dakota statute recognizes that its provision will not necessarily serve the best interests of the child.⁹² At first glance these two provisions appear to be unrelated; however, after a closer look it is clear that they speak to the same point. Fundamentally, these laws are designed to protect the religious freedom of adoption agencies first, regardless of whether they undermine the best interests of a child by denying individuals the ability to adopt who are qualified to be parents.⁹³

III. ANALYSIS

A. Problems with Michigan's Exemption Statutes

The problem with allowing religious organizations to deny same-sex couples access to adoption is multifaceted. For one, it allows faith-based agencies to discriminate against people using a statute that was designed to protect people and organizations from discrimination on the basis of religious beliefs.⁹⁴

As the law currently stands, there is no federal law prohibiting discrimination on the basis of sexual orientation.⁹⁵ Such protection is necessary for two reasons. First, without such a law, state-sponsored discrimination is permissible.⁹⁶ Second, an

⁸⁹ See VA. CODE ANN. § 63.2-1709.3(d).

⁹⁰ See MICH. COMP. LAWS ANN. § 722.124e(4) (West 2015).

⁹¹ See MICH. COMP. LAWS ANN. § 722.124e(6).

⁹² See N.D. CENT. CODE ANN. § 50-12-07.1. The final clause of the North Dakota statute implies that the agency's interest in protecting its religious freedom trumps the needs of the children it is hired to serve.

⁹³ See *infra* Section III, A.

⁹⁴ See Semuels, *supra* note 72. Religious exemption statutes, like the federal RFRA, were passed "in order to protect religious minorities from being harmed by government action." *Id.* However, state-based RFRA laws are now being used to inflict harm on others. *Id.*

⁹⁵ *Id.*

⁹⁶ See Semuels, *supra* note 72 (noting that in jurisdictions where there is no

anti-discrimination law is necessary to ensure that same-sex couples have equal access to adoption. In Chief Justice Robert's dissent in *Obergefell*, he expressed concern that the majority's decision may conflict with the free exercise of religion.⁹⁷ However, passing legislation that prohibits discrimination on the basis of sexual orientation will likely reduce the conflict between the two groups because religious organizations will no longer be entitled to discriminate.⁹⁸ States such as Michigan, which have religious exemption statutes yet do not have antidiscrimination statutes, send the message that discrimination against LGBT individuals is preferred over discrimination against religious groups.⁹⁹ However, states that adopt antidiscrimination statutes are "not telling religious groups which beliefs they are permitted to have; instead, such a state is merely refusing to permit the groups in question to ignore antidiscrimination protections."¹⁰⁰ As such, enacting an antidiscrimination statute will not necessarily undermine the religious freedom of faith-based organizations.

The harmful affects of Michigan's law extend far beyond the LGBT community. The law is particularly injurious to the thousands¹⁰¹ of children in need of loving homes for two reasons. First,, Michigan's adoption laws favor the interest of the adoption

law banning sexual orientation discrimination, religious organizations qualified for exemptions are permitted to discriminate while still being guaranteed state funding). Opponents of the law argue that "[d]iscrimination shouldn't be happening at all, and it shouldn't be done with taxpayer dollars." Beitsch, *supra* note 34. Others assert that the freedom to practice religion is not unconditional, and thus, individuals should be required to abide by the laws of the state, including "laws governing others' rights and freedoms and their ability to be protected from discrimination and intolerance." Jason Miller, *Freedom of Religion Shouldn't Be Unconditional*, TIME (Dec. 11, 2014), <http://time.com/3629943/michigan-religious-freedom-restoration-act/>. However, without an antidiscrimination law protecting LGBT people, there are no laws for religious organizations to abide by.

⁹⁷ See *supra* Section II, B.

⁹⁸ See Mark Strasser, *Conscience Clauses and the Placement of Children*, 15 J. L. & FAM. STUD. 1, 7 (2013) (stating that states refusing to enact exemptions are not telling agencies what beliefs to hold but rather that they cannot ignore antidiscrimination protections).

⁹⁹ See *id.*

¹⁰⁰ *Id.*

¹⁰¹ Approximately 3,000 of Michigan's 14,000 foster children are legally freed for adoption each year. *Michigan Foster Care and Adoption Guidelines*, ADOPTUSKIDS, <http://www.adoptuskids.org/for-families/state-adoption-and-foster-care-information/michigan> (last visited Dec. 16, 2015).

agency over the best interests of the child.¹⁰² Second, the law impedes access to adoption for children in state care.¹⁰³

As mentioned previously, adoption agencies have a legal obligation to serve the best interests of the child.¹⁰⁴ Adoption agencies are required to thoroughly investigate any potential family before placing a child.¹⁰⁵ However, when a faith-based adoption agency is permitted to refuse services to an entire group of people, e.g. same-sex couples, without regard to the best interests of the child, and only in regard to its own religious interest, the agency no longer fulfills its legal obligation to serve the interests of the child.¹⁰⁶ From a public policy standpoint, it is impermissible to allow child-placing agencies to facilitate adoptions when they can no longer serve the best interests of the child.¹⁰⁷

Even in light of this jarring problem, supporters of Michigan's religious exemption statute argue that faith-based organizations are indispensably necessary to ensure that the children of Michigan are adopted.¹⁰⁸ The fear is that if faith-based organizations are not permitted to discriminate, they will close

¹⁰² See DAVID M. BRODZINSKY, EVAN B. DONALDSON ADOPTION INSTITUTE, EXPANDING RESOURCES FOR CHILDREN III: RESEARCH-BASED BEST PRACTICES IN ADOPTION BY GAYS AND LESBIANS 4 (2011), http://www.adoptioninstitute.org/old/publications/2011_10_Expanding_Resources_BestPractices_ExecSumm.pdf (concluding that "hindering lesbians and gay adults from fostering or adopting will reduce the number of permanent and nurturing homes for children in need").

¹⁰³ See Storrow, *supra* note 20, at 347 (noting that when same-sex couples are denied the opportunity to adopt because of their sexual orientation alone, courts and adoption agencies are barred from making the individual assessment—whether the interests of this particular child are promoted by permitting this couple to adopt—that the best interests standard requires).

¹⁰⁴ *Determining the Best Interests of the Child*, *supra* note 17, at 1–2; see also MICH. COMP. LAWS ANN. § 722.23 (West 2015) (outlining "best interests of the child" factors).

¹⁰⁵ See *id.* (explaining that best interests determinations are made based on in part the caregiver's circumstances and ability to parent).

¹⁰⁶ See Jonathan Oosting, *Religious Exemption Adoption Bills Return in Michigan, Renew Debate Over LGBT Access*, MLIVE (Feb. 18, 2015, 3:04 PM), http://www.mlive.com/lansing-news/index.ssf/2015/02/gay_couples_could_be_refused_r.html (quoting Michigan State Representative Marcia Hovey-Wright, D-Muskegon, who questioned "whether the policy is in the best interest of children seeking homes").

¹⁰⁷ See *In re Adoption of E.*, 279 A.2d 785, 792 (N.J. 1971) (standing for the proposition that excluding an entire class of people from adoption for not believing in a Supreme being is bad public policy because doing so eliminates the individual factual inquiry that the best interests standard demands).

¹⁰⁸ Semuels, *supra* note 72.

their doors and Michigan will lose roughly one-third of its adoption services.¹⁰⁹ However, other states¹¹⁰ have denied religious organizations similar exemptions and their child welfare systems have yet to collapse.¹¹¹

Additionally, if faith-based adoption agencies are going to close because they are not permitted to discriminate, then Michigan should let them close. Faith-based agencies represent about twenty-five percent of Michigan's private adoption organizations that receive state funding.¹¹² Yet, these agencies receive half of the State's funding.¹¹³ If these religiously affiliated child-placing agencies were to close, resources could easily be redistributed to state agencies and non-religious agencies that are legitimately serving the best interests of children.

IV. CONCLUSION

The United States has an interest in promoting equality and protecting religious freedom. The Supreme Court's landmark same-sex marriage decision was the latest equal rights triumph for the LGBT community. However, the effect of the Court's decision has been limited by the enactment of religious exemption statutes, which permit religiously affiliated adoption agencies to deny services to those whose circumstances conflict with the agency's sincerely held religious beliefs. Because these statutes allow religiously affiliated adoption agencies to deny otherwise qualified parents on the basis of their sexual orientation, states, like Michigan, that have such laws have essentially endorsed de facto discrimination of same-sex couples. Without a federal law prohibiting discrimination on the basis of sexual orientation, these

¹⁰⁹ *Id.*

¹¹⁰ *See id.* (faith-based adoption agencies in Boston, Illinois, and Washington, DC closed because they were required to provide services to same-sex couples).

¹¹¹ *See* Joseph R. LaPlante, *Tough Times for Catholic Adoption Agencies Unwilling to Abandon Doctrine and Place Children With Same-Sex Couples, Charities Forced to Adapt*, OUR SUNDAY VISITOR (May 7, 2015), <https://www.osv.com/OSVNewsweekly/ByIssue/Article/TabId/735/ArtMID/13636/ArticleID/14666/Tough-times-for-Catholic-adoption-agencies.aspx> (discussing the changing landscape for Catholic adoption agencies—particularly those in Massachusetts and Washington, D.C.—that are required to treat all applicants equally as a condition of their receipt of state funding).

¹¹² Edghill, *supra* note 11.

¹¹³ Gray, *supra* note 9.

religious exemption statutes will allow faith-based adoption agencies to put their sincerely held religious beliefs ahead of the best interests of the children that they were hired to serve. As a result, a federal law prohibiting discrimination on the basis of sexual orientation is needed to protect both same-sex couples trying to adopt and the interests of the children they seek to adopt.