

IS THE STATE PRACTICE OF CONTRACTING PRIVATE
ADOPTION AGENCIES A CONSTITUTIONAL BACK
DOOR THAT ALLOWS FOR
DISCRIMINATION AGAINST SAME-SEX COUPLES?

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I.

By denying LGBTQ families the ability to foster and adopt children, children are denied the right to safe, happy, and healthy permanent homes.

-Every Child Deserves a Family Act¹

A friend of mine said that aging out of the foster care system was the “death of a dream” that had occupied her thoughts since she found herself alone in the child welfare system as a seven-year-old. She is now in her thirties, and she still grieves that death.

-Rev. Stan J. Sloan²

Across the United States of America, the adoption process funded through the federal child welfare program is seen as a viable option for couples that struggle to retain a pregnancy or that wish to grow a family through means other than childbirth as well as for single individuals and members of the LGBTQ

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¹ *Every Child Deserves a Family Act*, HUMAN RIGHTS CAMPAIGN (Dec. 21, 2018), <https://www.hrc.org/resources/every-child-deserves-a-family-act> (last visited Mar. 12, 2019).. While this act has only been introduced into the House of Representatives, it has received broad support from organizations such as the American Psychological Association, the American Medical Association, and the American Bar Association. *Id.* If enacted, the bill would prevent any organization that receives financial assistance from the government, regardless of religious affiliation, from discriminating against any potential foster or adoptive family. *Id.*

² Rev. Stan J. Sloan, *Why We Believe Every Child Deserves a Family*, THE HUFFINGTON POST (May 25, 2017), https://www.huffingtonpost.com/entry/why-we-believe-every-child-deserves-a-family_us_59246c92e4b0e8f558bb2a47 (last visited Mar. 12, 2019).

community.³ The adoption process is especially important considering that around 6.1 million women in the United States, or approximately 10 percent of the women in the country, struggle with getting or staying pregnant.⁴ Combined with a study by the Centers for Disease Control, which states that 57 percent of women who use infertility services consider adoption⁵, it is apparent that the adoption process is an indispensable social institution. Essentially, the process allows couples whose goals are to be parents, and not simply get pregnant, experience self-fulfillment while helping those who need it most: the children.⁶ Thus, the seemingly unconstitutional practice of denying a couple the ability to adopt a child on the basis of religious beliefs is one that undermines societal interests. There is, perhaps, no group of people that religious discrimination affects more than those in the LGBT community, and such an almost individually aimed and imposed restriction is hindering societal growth as a whole.

This note serves to examine the seemingly unconstitutional practice of denying same-sex couples the right to adopt a child based upon religious purposes. Specifically, this note serves to analyze the state practices of hiring privatized adoption agencies to deal with children in the care of state adoptive systems⁷ and passing legislation⁸ that allows for private agencies to deny

³ See *How Many Couples are Waiting to Adopt?*, AMERICAN ADOPTIONS, http://www.americanadoptions.com/pregnant/waiting_adoptive_families (last visited Mar. 12, 2019).

⁴ *Id.*

⁵ See *Adoption Experiences for Women and Men and demand for Children to Adopt by Women 18-44 Years of Age in the United States, 2002*, CENTER FOR DISEASE CONTROL (Aug. 2008), https://www.cdc.gov/nchs/data/series/sr_23/sr23_027.pdf.

⁶ See *Why Adopt a Child?*, AMERICAN ADOPTION, https://www.americanadoptions.com/adopt/why_adopt_a_child (last visited Mar. 14, 2019). Only 30% to 35% of women under 35 become pregnant through infertility treatment, making adoption all the more important.

⁷ See Isabel Dobrin, *ACLU Sues Michigan After Same-Sex Couples Seeking to Adopt Are Rejected*, NPR (Sept. 23, 2017), <http://www.npr.org/2017/09/23/552873416/aclu-sues-michigan-after-same-sex-couples-seeking-to-adopt-are-rejected> (last visited Mar. 14, 2019). This complaint against the state of Michigan is the most recent example of previously passed state legislation that allows for private adoption agencies, acting as an arm of the state, to deny adoption based on religious beliefs.

⁸ See Chris Johnson, *Texas Governor signs anti-LGBT 'religious freedom' adoption bill*, WASHINGTON BLADE (June 15, 2017), <http://www.washingtonblade.com/2017/06/15/texas-governor-signs-anti-lgbt-adoption-religious-freedom-bill/> (last visited Mar. 14, 2019). Texas has become the most recent state to not only allow religious organizations to deny LGBT adoption

services in cases where the provision of services would conflict with legitimately held religious beliefs.⁹ Firstly, Part II will briefly touch upon the history of LGBT rights in the United States, the concept of LGBT families adopting through the second-parent adoption system, and the way that same-sex marriage legislation affects family rights in order to frame the issue of religious discrimination towards same-sex couples. Secondly, Part III will introduce the main issue of the note by focusing upon the constitutional limits placed upon state-run adoption processes and agencies as well as the ways that states can and have circumvented the constitutional limitations placed upon them. Thirdly, part IV will identify and outline proposed legislation aimed at placing children up for adoption with same-sex couples more frequently and how such legislation seeks to open the adoption process to any qualified family or individual, regardless of the religious beliefs of the adoption agency and the sexual or gender orientation of the prospective adopting parents. Part IV will also explore counters to such legislation and the idea of same-sex adoption in general. Fourthly, part V will review how placing children up for adoption with same-sex couples effects society as a whole through an economic and social analysis while wrapping up the discussion on introduced legislation and how such legislation interacts with current standards. Finally, part VI will show ways forward for the United States adoption system, taking into account the its history, current operational scheme, proposed legislation, and the benefits of proposed legislation. That is not to say, though, that this note will strictly support the opening of adoption centers; there exist many varied and valid arguments for why religiously-based organizations should retain a right to discrimination. Thus, this note will ultimately outline both sides in an attempt to clarify how the United States should proceed to tackle a murky and relatively untouched constitutional and practical issue.

but to also prevent government actions against organizations that exercise such a legislative right.

⁹ See Aria Bendix, *In Alabama, Faith-Based Adoption Agencies Can Deny Gay Couples*, THE ATLANTIC (May 4, 2017), <https://www.theatlantic.com/news/archive/2017/05/alabama-to-let-adoption-agencies-turnaway-gay-couples/525492/>. While this legislation can be separated from the Michigan example on the basis that it excludes state-supported agencies, it nevertheless illustrates the influence that religion and religious freedoms holds on the states concerning adoption.

II.

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

-Justice Kennedy¹⁰

Couples of the same-sex may not be deprived of that right and liberty.

-Justice Kennedy¹¹

Same-sex marriage has been one of the most hotly debated national policies in recent American history and has seen various state governments and the federal government struggle to find a middle ground on the topic. Past legislation, such as the federal Defense of Marriage Act of 1996, denied recognition to same-sex marriages for the purpose of federal law by defining “marriage” as existing strictly between a man and a woman and “spouse” as only a person of the opposite sex.¹² Under this definition, since many adoption agencies preferred prospective adoptive parents to be married, the only reliable way that non-married same-sex couples could adopt a child was through the idea of second-parent adoptions.¹³ The concept of second-parent adoptions, or co-parent adoptions, is a legal procedure that allows a same-sex parent to adopt his or her partner’s biological or adoptive child without terminating the first parent’s legal status as a parent.¹⁴ This process could be carried out by unmarried same-sex couples but many states did not allow for unmarried same-sex couples to do this by passing prohibiting legislation.¹⁵ However, current

¹⁰ Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (speaking on the fact that the right to marry is fundamental and that, under the Fourteenth amendment, same-sex couples could not be deprived of this right.).

¹¹ *Id.* at 2604.

¹² *Summary of H.R. 3396 (104th): Defense of Marriage Act, May 7, 1996*, <https://www.govtrack.us/congress/bills/104/hr3396/summary#libraryofcongress> (last visited Mar. 14, 2019).

¹³ *In re Petition of D.L.G. & M.A.H., No. 95-179001/CAD, 2 MFLM Supp. 21 (1997) (Cir. Ct. Balt. City, June 27, 1996) (stating that non-married same-sex couples in Maryland had a right to “second parent adoptions.”)*

¹⁴ *Adoption by LGBT Parents*, NATIONAL CENTER FOR LESBIAN RIGHTS (2018), http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf (last visited Mar. 14, 2019).

¹⁵ *Id.*

Supreme Court rulings have overruled older definitions of “marriage” and “spouse” on the basis of the 5th amendment,¹⁶ opening the door to more liberal adoption rights. Perhaps the most important ruling concerning same-sex marriage is one of the most recent ones. In *Obergefell v. Hodges*, the Supreme Court ruled, 5 to 4, that same sex marriage was legal in all 50 states of the union.¹⁷ Penning the majority opinion, Justice Kennedy focused on the cries of the LGBT community for dignity in the eyes of the law and stated that “The Constitution grants them that right.”¹⁸ The four dissenting opinions, though took a different approach. Justice Scalia, in his dissent, stated that the Supreme Court had “descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.”¹⁹ Justice Thomas likewise criticized the decision by stating that it facially was “at odds not only with the constitution but with the principles upon which our nation was built.”²⁰ Justice Alito stated that the Court acted on “...the temptation to achieve what is viewed as a noble end...”²¹ Nevertheless, The President of the United States of America at the time, Barack Obama, responded to the holding by calling it “a victory for America” that would “strengthen all of our communities.”²² By all accounts, the problems surrounding the definition of marriage, what it meant to be a spouse, who could legally get married, and where they could legally get married should have been settled.

Through the allowance of same-sex couples to marry, the second-parent adoptive process became but one method for same-sex couples to adopt. Through a combination of the second-parent adoptive process and more traditional agencies, same-sex couples are raising four percent of all adopted children in the United

¹⁶ *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) (stating that the federal Defense of Marriage Act was unconstitutional as it denied fundamental fairness and equal protection under the law to gay citizens in the United States).

¹⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594-95 (2015) (the ruling that gay marriage was legal in all 50 states of the United States of America arose from a complaint by Obergefell that he could not place his name on his late husband’s death certificate since their same-sex marriage was not recognized as legal).

¹⁸ *Id.* at 2608.

¹⁹ *Id.* at 2630 n.22 (Scalia, J., dissenting).

²⁰ *Id.* at 2631 (Thomas, J., dissenting).

²¹ *Id.* at 2643 (Alito, J., dissenting).

²² Bill Chappell, *Supreme Court Declares Same-Sex Marriage Legal in All 50 States*, NPR: THE TWO-WAY (Jun. 26, 2015, 11:15 AM), <http://www.npr.org/sections/thetwo-way/2015/06/26/417717613/supreme-court-rules-all-states-must-allow-same-sex-marriages>.

States.²³ Likewise, over 14,000 foster children circulating around the nation are moving through same-sex households.²⁴ Out of all of the same-sex households with children, 21.20 percent are comprised of only adopted children, with another 6 percent of same-sex households being made up of a combination of adopted and biological children.²⁵ These numbers far and away dwarf the percentage of both married and unmarried opposite-sex couples.²⁶ Ultimately, as a result of same-sex couples being able to marry, the doors to adoption have been opened to same-sex couples nationwide, especially given that states continue to recognize children living under the watch of same-sex couples as equal to children living in a more traditional family setting.²⁷

Same-sex marriage, though hotly disputed in the past, has come a long way in the past decade. As illustrated by the 1996 legislation defining “marriage” as being between a man and a woman²⁸ to the United States Supreme Court ruling same-sex marriage as being legal throughout all 50 states of the United States of America²⁹, and from same-sex couples being almost wholly unable to adopt outside of the second-parent system³⁰ to a more open system that has created an overwhelming disparity between same-sex and opposite-sex couples concerning familial composition,³¹ the American outlook on rights held by same-sex couples is clearly changing for the better. Unfortunately, though changes have been wholly positive, remnants of discrimination have continued to exist and adapt alongside the American mindset. Religion, in particular, has become the new hotspot of

²³ Gary J. Gates et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States* (March, 2007), https://www.urban.org/research/publication/adoption-and-foster-care-lesbian-and-gay-parents-united-states/view/full_report, (last visited March 31, 2019).

²⁴ *Id.* at 17.

²⁵ *LGBT Adoption Statistics*, LIFELONG ADOPTIONS, (Oct. 15, 2017), <https://www.lifelongadoptions.com/lgbt-adoption/lgbt-adoption-statistics>.

²⁶ *Id.* Only 4.40 percent of married opposite-sex couples with families are comprised of only adopted children while only 5.2 percent of unmarried opposite-sex couples with families are comprised of only adopted children.

²⁷ Defense of Marriage Act, H.R. 3396, 104th Cong. (1996) (Library of Congress Summary), <https://www.govtrack.us/congress/bills/104/hr3396/summary#libraryofcongress>.

²⁸ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

²⁹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-08 (2015).

³⁰ NAT'L CTR. FOR LESBIAN RIGHTS, ADOPTION BY LGBT PARENTS (2018), http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf.

³¹ *LGBT Adoption Statistics*, Oct. 15, 2017, <https://www.lifelongadoptions.com/lgbt-adoption/lgbt-adoption-statistics>.

debate when it comes to the rights held by same-sex couples. While arguments around the rights of same-sex couples to adopt can be said to have only come about as a result of debates surrounding same-sex marriage,³² adoption has become one of the main issues butting heads with religion.

III.

It was kind of a slap in the face. They didn't even know us. How could you say no to people you don't even know?

-Dana Dumont on how she felt after being told that an adoption agency wouldn't work with her³³

The most important piece of this is getting some information out there so kids can find permanent, loving homes. We are just one couple in this situation. There are lots of couples out there. If it's happening to us, it's happening to others as well.

-Kristy Dumont on the importance of bringing suit against the state of Michigan.³⁴

Kristy and Dana Dumont are a married, same-sex couple that has been together for a cumulative 11 years.³⁵ In that time, they moved to Michigan, found a house in a diverse and strong school district with more than enough space to start a family, and started to consider the possibility of adoption based upon an email they received from the Michigan Department of Health and Human Services.³⁶ However, despite the legalization of same-sex marriage³⁷ and the growing normality of same-sex adoption,³⁸ they were told that they would not be worked with by every adoption

³² Cynthia Godsoe, *Adopting the Gay Family*, 90 TUL. L. REV. 311, 314 (Dec. 2015) (Quoting Jayne Rowse who stated "It really blew up when it became gay marriage. When it was just about gay couples adopting people were, like, "Ehh ... [.]' But, when it became about gays getting married, people really got interested.").

³³ Dobrin, *supra* note 7.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

³⁸ *LGBT Adoption Statistics* (Oct. 15, 2017), <https://www.lifelongadoptions.com/lgbt-adoption/lgbt-adoption-statistics> (last visited March 31, 2019).

agency that they contacted.³⁹ The reason for such non-cooperation on the part of the various adoption agencies was simple: the fact that the Dumont family was one based around the union of two same-sex individuals went against the religious beliefs of the various adoption agencies.⁴⁰ Thus, the Dumont family has decided to bring suit against the state of Michigan based around the takedown of a state practice allowing for discrimination on the basis of religious beliefs.⁴¹

The child welfare system across America is both an important and an expensive endeavor, with both the federal and state governments spending around 25 billion dollars per year while enacting more than 300 bills during that same 12-month span.⁴² The money spent and bills enacted all go to state and federal foster and adoption systems as well as the promotion of child maltreatment prevention and education around reasonable and prudent parenting.⁴³ While the federal government is involved in the child welfare system, a majority of the burden concerning structuring, funding, and overseeing child welfare programs falls upon the states.⁴⁴ As a result of putting such an emphasis on state-determined organization of child welfare, the actual system can vary from state to state. Some states utilize a centralized administrative framework that puts one blanket coverage across the entire state while some follow a county administered system that creates various differing systems throughout a state.⁴⁵ A select few states even utilize a hybrid system, allowing a centralized administration to work alongside a county-level administration.⁴⁶ All in all, state child welfare systems are complicated organizations to run and to monitor, yet all of them are subject to federal standards and the Constitution of the United States of America.

³⁹ Dobrin, *supra* note 7.

⁴⁰ *Id.*

⁴¹ Complaint, *Dumont v. Lyon*, 341 F. Supp. 3d 706 (E.D. Mich. 2018) (No. 17-cv-13080).

⁴² *Child Welfare*, NCSL (Oct. 10, 2017), <http://www.ncsl.org/research/human-services/child-welfare.aspx>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *State vs. County Administration of Child Welfare Services*, Child Welfare Information Gateway (2018), <https://www.childwelfare.gov/pubs/factsheets/services/>. With respect to the Dumont family and their suit against the state of Michigan, Michigan is a state that follows the centralized administrative framework rather than a county-level administrative framework.

⁴⁶ *Id.*

The Dumont family's suit against the state of Michigan is, perhaps, the perfect example of the problem with regulating state-run child welfare systems, especially with regards to federal and constitutional standards. Although such constitutional standards, such as the First Amendment⁴⁷ and the Fourteenth Amendment,⁴⁸ serve to prevent states in the union from unduly oppressing the rights of the people, it still is possible to work around these constitutional standards.

Michigan, which itself is responsible for child welfare, work arounds to religious discrimination abound. In order to place children under state care, with families for both fostering and adoption, the state of Michigan contracts with privatized adoption agencies across the state.⁴⁹ To contract with the state of Michigan, an application is submitted by the potential contractor, a review of the contractor's program is enacted by the state. Then expectations are conveyed from the state to the contractor and finally the contract is formed.⁵⁰ Since they are operating as an agent of the state, such contracted states are then subject to the same constitutional limitations as the state itself.⁵¹

While seemingly standard fare for forming a contract, the problem with Michigan's system comes from previously passed legislation in the forms of Michigan House Bills 4188, 4189, and 4190. Bill 4188, passed alongside bills 4189 and 4190 in March of 2015, allows religiously-based adoption organizations contracted with the state of Michigan to cite conflicts with religious ideologies in order to turn away adoption applicants when presented with the

⁴⁷ US CONST. AMEND. I. The Establishment Clause prevents Congress from creating any legislation that abridges or prohibits the free exercise of religion. However, it also prevents the state governments from delegating governmental functions to religious organizations.

⁴⁸ US CONST. AMEND. XIV, §1. The Equal Protections Clause provides equal protection under the laws of the United States of America to all citizens of the United States of America. This amendment was key in the decision made by the Supreme Court in *Obergefell* to legalize same-sex marriage across all of the states. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁴⁹ *Contractor Resources*, MICHIGAN DEPT. OF HEALTH & HUMAN SERVICES (July 31, 2017), http://www.michigan.gov/mdhhs/0,5885,7-339-71551_7199---,00.html.

⁵⁰ *Child Placing Agency Master Contract*, MICHIGAN DEPT. OF HEALTH & HUMAN SERVICES (July 31, 2017), http://www.michigan.gov/documents/dhs/Adoption_Master_Contract_Template_466964_7.pdf. Some major expectations placed upon contractors by the state of Michigan include having fewer than 5 percent of both placements and finalized adoptions fail and having no fewer than 80 percent of adoptable children have finalized adoptions by the end of the fiscal year.

⁵¹ Complaint, *Dumont v. Lyon*, No. 2:17-cv-13080-PDB-EAS, 2017 WL 4161971 (E.D.Mich. Sept. 20, 2017).

possibility of litigation.⁵² Bill 4189 works in tandem with 4188 and requires that any cited religious ideologies must be sincerely held. The bill effectively amends the Michigan adoption code to allow for agencies to refuse referrals based upon such religious reasons.⁵³ Finally, Michigan House Bill 4190 amended the Michigan social welfare act to prevent the Department of Health and Human Services from taking any adverse action against a religiously-based organization that declined to provide services based upon a sincerely held religious belief.⁵⁴

When combined, all three of these pieces of legislation give immense power to the religiously-based adoption agency that has contracted with the state. While the First Amendment prevents the State from discriminating based upon religion and from giving government functions to religious organizations,⁵⁵ Michigan's legislature blurs the lines between what a government function is. Likewise, even though the 14th amendment prevents the state from depriving citizens of equal rights under the law,⁵⁶ the power given to religious organizations has allowed the state to do just that. Thus, even though Michigan is in charge of its own child welfare and social welfare system, so, too are private organizations.

Although Michigan has made recent headlines because of the Dumont family's lawsuit⁵⁷, it is not the first, or only, state to enact such pro-religion and anti-LGBT adoption legislation.⁵⁸ In May of 2017, the state of Alabama signed a bill that made it legal for private, religiously based organizations to decline the provision

⁵² 2015 HB 4188 (citing a faith-based initiative for recruiting families into the adoption and foster-parent process as the reason for providing protection to religiously affiliated adoption and placement agencies).

⁵³ 2015 HB 4189.

⁵⁴ 2015 HB 4190 ("It is the intent of the legislature to protect child placing agencies' free exercise of religion protected by the United States constitution).

⁵⁵ U.S. CONST. AMEND. I.

⁵⁶ U.S. CONST. AMEND. XIV, §1.

⁵⁷ Dobrin, *supra* note 7.

⁵⁸ Sarah Torre, *Virginia Protects Religious Liberty in Adoption and Foster Care*, THE DAILY SIGNAL (April 22, 2011), <http://dailysignal.com/2011/04/22/virginia-protects-religious-liberty-in-adoption-and-foster-care/>. In 2011, even before the legalization of same-sex marriage, the state of Virginia passed legislation that allowed private adoption agencies to discriminate based upon sexual orientation, age, and religion, amongst other things. This legislation predates that of more recently passed bills in states such as Texas and Michigan.

of service without fear of adverse action.⁵⁹ The bill was ratified by a vote of 23-9 and the dissenting senators held back no words when speaking on its implications.⁶⁰ Senator Rodger Smitherman pointed to the potential that the bill would “sanction discrimination” and Representative Patricia Todd called the bill “bigotry in the first degree” but Senate President Adelbert Marsh spun it the other way, stating that the bill made it so that individuals could not “discriminate against religious organizations.”⁶¹ This bill also has arisen in a state that, while operating under a centralized administrative framework, has some counties that still refuse to issue marriage licenses to same-sex couples.⁶²

Like Alabama and Michigan, South Dakota, too, has passed legislation preventing adverse actions against faith-based organizations that refuse service to same-sex couples on the basis of legitimately held beliefs.⁶³ Similar to the reasoning given by Alabama Senate President Adelbert Marsh, South Dakota Governor Dennis Daugaard cited a desire to protect faith-based organizations from lawsuits stemming from members of a “protected class” such as those in the LGBT community.⁶⁴ In the case of South Dakota, though, the ACLU has expressed that it is exploring legal action against the state; a move similar to the current Dumont Family situation and one meant to avoid what was described by the Human Rights Campaign’s legal director as “a dark new reality for the fight for LGBTQ rights.”⁶⁵

State circumventions of constitutional limitations concerning religious discrimination, particularly in the field of same-sex couples’ rights to adopt, all seem to follow the same pattern. A state will open applications to and contract with private adoption agencies,⁶⁶ pass legislation that grants broad protections

⁵⁹ *Texas Governor signs anti-LGBT ‘religious freedom’ adoption bill*, WASHINGTON BLADE (June 15, 2017), <http://www.washingtonblade.com/2017/06/15/texas-governor-signs-anti-lgbt-adoption-religious-freedom-bill/>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Associated Press, *South Dakota Governor Signs Religious Adoption Protections*, FOX NEWS (Mar. 10, 2017), <http://www.foxnews.com/us/2017/03/10/south-dakota-governor-signs-religious-adoption-protections.html>.

⁶⁴ *Id.*

⁶⁵ *Id.* (Quoting Sarah Warbelow’s statement concerning South Dakota’s religious adoption protections)

⁶⁶ Chris Johnson, *Texas Governor signs anti-LGBT ‘religious freedom’ adoption bill*, WASHINGTON BLADE (June 15, 2017),

against litigation stemming from a denial of service on the basis of a violation of legitimately held religious beliefs,⁶⁷ and will then cite fears of a loss of religious autonomy, as well as a fear of the collapse of certain adoption services, as the reason for protecting contracted organizations.⁶⁸ As such litigation goes almost constitutionally unchallenged, state governments are being criticized as being too pro-private agencies and not enough pro-child.⁶⁹ Despite such an outlook, though, legislation that severely limits the options for prospective adoptive families continues to be discussed and passed nationwide.

IV.

I believed at the time that it was a principled position based upon my faith. But I no longer believe it was right.

-Ronnie Musgrove, former Mississippi Governor, on his changed feelings towards his passing of a Mississippi ban preventing same-sex couples from adopting⁷⁰

We want the other name on the birth certificate like my first mom, because both of my moms want to be a mommy

-Hannah Marie Phillips expressing, from an eight-year-old's perspective, the importance of same-sex adoption rights⁷¹

It 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

<http://www.washingtonblade.com/2017/06/15/texas-governor-signs-anti-lgbt-adoption-religious-freedom-bill/>

⁶⁷*Id.*

⁶⁸ Associated Press, *South Dakota Governor Signs Religious Adoption Protections*, FOX NEWS (Mar. 10, 2017), <http://www.foxnews.com/us/2017/03/10/south-dakota-governor-signs-religious-adoption-protections.html>. In the article, it is noted that religious agencies have shut down in states such as Massachusetts, California, and Illinois as well as Washington DC after the passing of non-discrimination laws preventing religious groups from declining service.

⁶⁹ *Id.*

⁷⁰ Tamar Lewin, *Mississippi Ban on Adoptions by Same-Sex Couples Is Challenged*, THE NEW YORK TIMES (Aug. 12, 2015), <https://www.nytimes.com/2015/08/13/us/mississippi-ban-on-adoptions-same-sex-couples-challenged.html>.

⁷¹ *Id.*

then conclude that married gay couples can be denied that very same benefit.

-US District Judge Daniel Jordan's reasoning for issuing a preliminary injunction against the Mississippi ban on same-sex adoption⁷²

The story of the Smith-Phillips family should be a familiar sounding one. A same sex couple, consisting of Janet Smith, Donna Phillips, and a daughter, Hannah Marie Phillips, sought to complete the adoption process by allowing Ms. Smith to adopt Hannah, since Ms. Phillips was the only legal adopter.⁷³ The state they lived in at the time though, Mississippi, prevented same-sex adoptions through a one sentence law: "Adoption by couples of the same gender is prohibited."⁷⁴ This led to an interesting conundrum: although a couple, Ms. Smith was legally nothing in relation to her partner's adopted daughter Hannah.⁷⁵ As a result, Ms. Smith and Ms. Phillips challenged the system and eventually won.⁷⁶ The news of Mississippi's state law banning same-sex adoption receiving an injunction caused news outlets to proclaim that "Same-sex couples can now adopt children in all 50 states."⁷⁷ The Human rights commission in Mississippi praised the downfall of the law, declaring that those who stood against same-sex adoption rights were on "the wrong side of history" and were now proven to also be on "the wrong side of the law."⁷⁸ Change, though, did not come; the proclaimed nation-wide freedom of adoption by same-sex couples never fully crystallized. As outlined before, states such as Alabama⁷⁹, Virginia⁸⁰, and South Dakota⁸¹ all

⁷² Mollie Reilly, *Same Sex Couples Can Now Adopt Children in All 50 States*, HUFFINGTON POST (Mar. 31, 2016), https://www.huffingtonpost.com/entry/mississippi-same-sex-adoption_us_56fdb1a3e4b083f5c607567f.

⁷³ Tamar Lewin, *Mississippi Ban on Adoptions by Same-Sex Couples Is Challenged*, THE NEW YORK TIMES (Aug. 12, 2015), <https://www.nytimes.com/2015/08/13/us/mississippi-ban-on-adoptions-same-sex-couples-challenged.html>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Mollie Reilly, *Same Sex Couples Can Now Adopt Children in All 50 States*, HUFFINGTON POST (Mar. 31, 2016), https://www.huffingtonpost.com/entry/mississippi-same-sex-adoption_us_56fdb1a3e4b083f5c607567f.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Bendix, *supra* note 9.

⁸⁰ Torre, *supra* note 58.

enacted and continue to maintain laws that prevent same-sex adoption based upon the religious views of the adoption agency while some states, such as Michigan,⁸² further contract with such religiously motivated and affiliated adoption agencies, seemingly manipulating the child placement process.

United fronts against the various bans on same-sex adoption rights do exist through legislation, though, with perhaps the most prominent movement being the one surrounding the Every Child Deserves a Family Act. While the Every Child Deserves a Family Act has not yet been passed, it has been a consistent presence in the senate through re-introduction, appearing first in 2009⁸³ and being re-introduced in subsequent years with the most recent year being 2017.⁸⁴ The text of the most recent re-introduction of the act itself is as follows:

This bill prohibits adoption or foster care placement entities that receive federal assistance from using the sexual orientation, gender identity, or marital status of a prospective adoptive or foster parent, or from using the sexual orientation or gender identity of the child, to: (1) deny a person the opportunity to become an adoptive or foster parent; (2) delay or deny the placement of a child for adoption or into foster care; or (3) require different or additional screenings or procedures for adoptive or foster placement decisions, including whether to seek the

⁸¹ Associated Press, *South Dakota Governor Signs Religious Adoption Protections*, FOX NEWS (Mar. 10, 2017), <http://www.foxnews.com/us/2017/03/10/south-dakota-governor-signs-religious-adoption-protections.html>.

⁸² *Child Placing Agency Master Contract*, MICHIGAN DEPT. OF HEALTH & HUMAN SERVICES (July 31, 2017), http://www.michigan.gov/documents/dhs/Adoption_Master_Contract_Template_466964_7.pdf.

⁸³ Shelley Halstead, *Every Child Deserves a Family*, NATIONAL CENTER FOR LESBIAN RIGHTS (May 27, 2015), <http://www.nclrights.org/every-child-deserves-a-family/>. The Every Child Deserves a Family Act has been supported on both sides, with the most recent reintroduction being backed by two Democrats, Senator Gillibrand and Representative Lewis, and one Republican, Representative Ros-Lehtinen.

⁸⁴ Every Child Deserves a Family Act, S. 1303, 115th Cong. (2017-2018).

termination of birth parent rights or to make a child legally available for adoptive placement.

The Department of Health and Human Services (HHS) shall publish guidance on legal compliance with the requirements of this bill and assist entities with casework practices, recruitment efforts, and cultural competency training.

HHS may withhold payments under part B (Child and Family Services) or part E (Foster Care and Adoption Assistance) of title IV of the Social Security Act from states that fail to comply with the requirements of this bill.⁸⁵

The Every Child Deserves a Family Act counters the perceived backdoor way that states such as Michigan prevent same-sex couples from adopting. If passed, the act would prevent entities receiving federal assistance from discriminating on the basis of sexual orientation, gender identity, or marital status.⁸⁶ Although many states, again such as Michigan, provide their contracted adoption agencies with some funding as a result of being contractually bound,⁸⁷ the federal government itself provides states with the funding to administer child welfare programs.⁸⁸ Since child welfare system is set up where the federal government provides the state governments with funding, the state governments provide contracted agencies with funding, and such agencies can and have been argued to be agents of the state,⁸⁹

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *State v. Cty. Admin. of Child Welfare Serv.'s*, CHILD WELFARE INFORMATION GATEWAY (2012), <https://www.childwelfare.gov/pubs/factsheets/services/> (last visited March 31, 2019).

⁸⁸ *Foster Care Funding and Federal Programs*, FINDLAW, <http://family.findlaw.com/foster-care/foster-care-funding-and-federal-programs.html> (last visited March 31, 2019).

⁸⁹ Complaint, *Dumont v. Lyon*, No. 2:17-cv-13080-PDB-EAS, 2017 WL 4161971 (E.D.Mich. Sept. 20, 2017).

contracted agencies would be receiving federal funding. Thus, under the Every Child Deserves a Family Act, all contracted agencies would not be able to discriminate.⁹⁰ To further incentivize a lack of discrimination, the Every Child Deserves a Family Act also includes a provision that would withhold funding until discrimination ceased.⁹¹

Ultimately, the Every Child Deserves a Family Act is the most prominent prospective anti-discriminatory legislation centering around adoption for a reason. It aims to end discrimination in order to house the over twenty-thousand youths who aged out of child welfare systems without finding a permanent home, let alone foster care;⁹² it seeks to lower the over three-year wait time experienced by thirty-two percent of children in the child welfare system to finally be adopted;⁹³ it seeks to further normalize the diverse and interracial same-sex community.⁹⁴

While the pro-same-sex adoption camp builds an argument focused on what can essentially be called taxpayer-funded discrimination, the opposite side posits that legislation allowing discrimination is in line with religious protection. Representative Rich Wingo of Tuscaloosa, Alabama, for example, viewed his state's exclusionary bill as a protection for religious organizations, stating that "This bill is not about prohibiting gay and lesbian couples from adopting or fostering a child... It's about protecting and not discriminating against faith-based agencies that, due to their religious beliefs, could have their right to choose where to place a child taken away from them."⁹⁵ Furthermore, Representative Wingo emphasized that the closing of approximately 30 percent of adoption agencies in the state because of laws denying them the right to discriminate creates a burden that would impact the children.⁹⁶

⁹⁰ Every Child Deserves a Family Act, S. 1303, 115th Cong., (2017-2018) <https://www.congress.gov/bill/115th-congress/senate-bill/1303>.

⁹¹ *Id.*

⁹² *The Every Child Deserves a Family Act*, Family Equality Council (July 20, 2018), https://www.familyequality.org/get_informed/advocacy/ecdf/.

⁹³ Shelley Halstead, *Every Child Deserves a Family*, NATIONAL CENTER FOR LESBIAN RIGHTS (May 27, 2015), <http://www.nclrights.org/every-child-deserves-a-family/>.

⁹⁴ *Id.*

⁹⁵ Anna Claire Vollers, *Religious freedom or taxpayer-funded discrimination? Child welfare bill prompts debate* (Feb. 9, 2017), http://www.al.com/news/index.ssf/2017/02/religious_freedom_taxpayer_fun.html.

⁹⁶ *Id.*

A similar view exists in Texas, where a bill passed allowing for discrimination in adoption as long as it goes against the adoption agency's reasonably held principles.⁹⁷ Senator Charles Perry said of his state's bill, "Without this bill we stand to lose 25 percent of our service providers...This bill is not discriminatory."⁹⁸ Likewise, the president of the Texas Freedom Network, Kathy Miller, echoed the voices of faith leaders in her state by stating, "bills like this are about discrimination and hurting people, not religious freedom."⁹⁹ Thus, one argument against same-sex adoption rings true across the nation: The prevention of same-sex couples from adopting from certain agencies, and the ability of certain agencies to prevent same-sex couples to adopt, isn't about truly hurting same-sex couples, it's about protecting the religious freedoms of faith-based organizations.

Another argument against the mandatory and forced opening of religiously-affiliated adoption agencies is that the protection of such agencies actually increases the diversity of providers and, thus, increases the likelihood of adoption.¹⁰⁰ A motivating factor in selecting where to adopt from is the values that a parent wishes to pass on to their child or children¹⁰¹ and, thus, having various religiously affiliated organizations opens up the opportunity for prospective adopters to have a concern be effectively and compassionately addressed.¹⁰² This diversity remains evident across the nation, with organizations such as the Bethany Christian Services, LDS Family Services, and Harvest of Hope providing faith-based agencies for adopters looking to pass on beliefs.¹⁰³ Such diversity is directly threatened by the Every Child Deserves a Family Act, which includes the stripping of organizations of funding until discriminatory acts

⁹⁷ Bendix, *supra* note 9.

⁹⁸ Eva-Marie Ayala & Lauren McGaughy, *Texas bill to protect religious adoption agencies that deny prospective parents likely to become law*, THE DALLAS MORNING NEWS (May 21, 2017), <https://www.dallasnews.com/news/texas-legislature/2017/05/21/texas-bill-protect-religious-adoption-agencies-deny-prospective-parents-likely-become-law>.

⁹⁹ *Id.*

¹⁰⁰ Ryan Anderson & Sarah Torre, *Adoption, Foster Care, and Conscience Protection*, THE HERITAGE FOUNDATION (Jan. 15, 2014), <https://www.heritage.org/marriage-and-family/report/adoption-foster-care-and-conscience-protection>.

¹⁰¹ Ayala & McGaughy, *supra* note 98.

¹⁰² Anderson & Torre, *supra* note 100.

¹⁰³ *Id.*

have ended.¹⁰⁴ Not every agency needs to provide the same service, and that is the driving force behind diversity through protection of religious rights.¹⁰⁵

Perhaps the argument against same-sex adoption that hits most towards the idea of opening religiously-affiliated agencies for the children is that children themselves know the difference between growing up in a same-sex household and growing up in what was traditionally viewed as a normal, heterosexual household.¹⁰⁶ Although an antiquated view at its core, this view posits that children growing up in a same-sex household can experience something similar to those that grow up in a household that went through a divorce in that such children could feel that their childhood experience was “deprived, disadvantaged, and deficient” on the basis of a lack of normalcy.¹⁰⁷ Prevailing over such a theory is that it is up to the legislature and not the judiciary branch to posit change and, although recent legislation has been reintroduced to attempt to open up adoption nationwide¹⁰⁸, change has not truly been made across the board.¹⁰⁹ Until such legislation passes, this argument posits that the children cannot see same-sex adoption as normal.

Tying all of the reasons against opening up faith-based organizations to same-sex adopters together is the idea that opening them up wouldn’t necessarily aid the system. Hundreds of thousands of children enter the foster care system, for example, but bounce around from home to home until they are aged out of the system having never found a permanent family and entering the world with no familial ties.¹¹⁰ According to the National Foster Youth Institute, more than twenty three thousand children a year age out of the foster care system without finding a home.¹¹¹ This means that approximately 20 percent of the children that were in the foster care or adoption system become homeless at the age of eighteen and, out of that

¹⁰⁴ Every Child Deserves a Family Act, S. 1303, 115th Cong. (2017).

¹⁰⁵ Anderson & Torre, *supra* note 100.

¹⁰⁶ Lynn D. Wardle, *Preference for Marital Couple Adoption - Constitutional and Policy Reflections*, 5 J. L. FAM. STUD. 345, 225 (2003) (“Kids may be immature but they are not stupid. They are aware of the differences).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* *supra* note 79.

¹⁰⁹ Anderson & Torre, *supra* note 100.

¹¹⁰ *Id.*

¹¹¹ *51 Useful Aging out of Foster Care Statistics I Social Race Media*, NATIONAL FOSTER YOUTH INSTITUTE (May 2017), <https://www.nfyi.org/51-useful-aging-out-of-foster-care-statistics-social-race-media/>, (last visited March 31, 2019).

twenty percent, only half tend to find some form of gainful employment by the age of 24.¹¹² While opening up the foster and adoption system to same-sex couples by removing religiously-motivated discriminatory legislation would provide more chances to children in need to find a home by increasing the number of homes available, there is no guarantee that an increase in homes would lead to a meaningful increase in adoption rates.

Legislation such as the Every Child Deserves a Family Act exists, and is supported by strong organizations¹¹³ and government officials¹¹⁴, to open up the adoption process to same-sex couples. Should this legislation pass, faith-based organizations, especially those contracted to the state that they are in, would need to either open up their doors to same-sex couples, face a lack of funding from the government until discriminatory acts ended¹¹⁵, or close. While the opening up of religiously-based agencies would provide an increased market for children to find homes, the argument exists that this would not actually make a difference as children across the nation bounce around from home to home¹¹⁶ and age out without finding a permanent home or family.¹¹⁷ Ultimately, the argument is that more houses available do not guarantee more successful adoptions, despite the other side arguing the opposite.¹¹⁸

¹¹² *Id.*

¹¹³ *ACLU Letter of Support for the Every Child Deserves a Family Act (S. 1069)*, AMERICAN CIVIL LIBERTIES UNION (May 13, 2014), <https://www.aclu.org/other/aclu-letter-support-every-child-deserves-family-act-s-1069>. This letter emphasized the lack of homes willing to adopt children as a reason for the increase in numbers of children in the child-welfare system. It also emphasized that the states that have passed legislation that allow private organizations to discriminate are in the minority. *Id.*

¹¹⁴ Shelbi Day, *Every Child Deserves a Family Act, Reintroduced in the House of Representatives*, FAMILY EQUALITY COUNCIL (May 25, 2017), https://www.familyequality.org/equal_family_blog/2017/05/25/2173/every_child_deserves_a_family_act_reintroduced_in_house_of_representatives. This article names the congressman and congresswoman who have advocated for the passing of the Every Child Deserves a Home Act. *Id.*

¹¹⁵ Every Child Deserves a Family Act, S. 1303, 115th Cong. (2017),

¹¹⁶ Anderson & Torre, *supra* note 100.

¹¹⁷ *51 Useful Aging out of Foster Care Statistics I Social Race Media*, NATIONAL FOSTER YOUTH INSTITUTE (May 2017), <https://www.nfyi.org/51-useful-aging-out-of-foster-care-statistics-social-race-media/> (last visited March 31, 2019).

¹¹⁸ Lindsey Bever, *Children of same-sex couples are happier and healthier than peers, research shows*, THE WASHINGTON POST (July 7, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/07/07/children-of-same-sex-couples-are-happier-and-healthier-than-peers-research-shows/?utm_term=.8fcf6ba31f98. This article, focusing on research done by the University of Melbourne in Australia, seeks to counter the idea that children

Alongside this argument are the arguments that the forceful opening of religious-based agencies are an attack on religious freedoms masquerading as a fight for equality¹¹⁹ and that the protection of private rights ultimately increase diversity.¹²⁰ Thus, the fight between legislation and religion is focused around this major question: Should religious liberties be given up in order to equalize and normalize same-sex couples?

V.

LGB foster parenting and adoption in the child protection system...has remained largely below the radar. Yet this type of family formation has been occurring for decades, long before same-sex marriage was a possibility, and has served as a meaningful avenue to parenthood for gay men and lesbians.

-Cynthia Godsoe on the under-recognized prevalence of same-sex and LGBT adoptions and their importance¹²¹

While adopting and fostering remain rare, practicing Christians are more than twice as likely as the general public to adopt and significantly more likely to consider adopting or fostering.

-Marriage and Religion Research Institute¹²²

The largest and most public battle in the realm of same-sex rights has been the one surrounding same-sex marriage. It is a

being raised in an environment with same-sex parents are not as happy or healthy as their more traditionally viewed counterparts. *Id.* Although this is one study that has been done, it is often relied upon in arguments for opening up adoption to same-sex couples. *Id.*

¹¹⁹ Anderson & Torre, *supra* note 100.

¹²⁰ *Id.*

¹²¹ Godsoe, *supra* note 32, at 330.

¹²² *Religion and Adoption*, MARRIAGE AND RELIGION RESEARCH INSTITUTE, <https://downloads.frc.org/EF/EF15A71.pdf>, (last visited March 14, 2019). Included in this article is a table illustrating comparative adoption numbers based on research acquired by the Barna Group. *Id.* at 1. In this table, religious families are shown to have adopted at a 5% rate compared to the 2% general public, 38% of religious families seriously considered adoption compared to a 26% consideration from the general public, and 31% of religious families considered fostering compared to 11% of the general public. It should be noted, though, that the research admits that the patterns hold for only groups involved and do not represent the wide variation among individuals. *Id.*

battle that brought into question religious beliefs, economic standings, and the very definition of what it means to be a family. Underpinning such a battle, and addressed in the preceding sections, is the battle for same-sex adoption rights. Part of the reason that this battle has not been focused on as much as the larger-scale marital fight is because it, on the surface, has been won. While forty-three states had banned same-sex marriage before the supreme court overturned the legislation,¹²³ only seven states had banned same-sex adoption.¹²⁴ Economically, this trend makes sense. Should a national ban on same-sex fostering alone, not including same-sex adoption, ever be enacted, the costs would range from 87 to 130 million dollars.¹²⁵ In Texas, before legislation passed that allowed for discrimination against same-sex couples on a religious basis,¹²⁶ a proposed ban on all same-sex adoptions and fostering would have cost 76 million dollars over the course of five years.¹²⁷ Although many argue that more homes wouldn't lead to a significant increase in adoptions, less homes would definitely lead to significantly lower adoption rates as well as age-out rates. It is estimated that the financial costs of age-outs a year in the United States sit at an ungodly eight billion dollars a year.¹²⁸

On the social of adoptions, a similarly proposed ban would have uprooted 630 children from foster homes in Kentucky while preventing 85 children from being adopted.¹²⁹ This social impact would have also been coupled with a 5.3 million dollar cost in the first year alone.¹³⁰ An even more immediate social impact of bans would be the need to train new families and individuals to replace the lost same-sex couples. This alone ties social and economic impacts together as it requires both money to spend and people to spend it on. The effect of already-in-place same-sex fostering and adoption systems is a clear benefit to the states that they exist in and the economic and social effect they have on the states is clear.

¹²³ Defense of Marriage Act, H.R. 3396, 104th Cong. (1996) (Library of Congress Summary),

<https://www.govtrack.us/congress/bills/104/hr3396/summary#libraryofcongress>.

¹²⁴ Godsoe, *supra* note 32, at 315.

¹²⁵ *Id.*

¹²⁶ Chris Johnson, *Texas Governor signs anti-LGBT 'religious freedom' adoption bill*, WASHINGTON BLADE (June 15, 2017),

<http://www.washingtonblade.com/2017/06/15/texas-governor-signs-anti-lgbt-adoption-religious-freedom-bill/>.

¹²⁷ Godsoe, *supra* note 32, at 348.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

With established systems in place in many states illustrating clear advantages and costs of removal, the question and focus shifts to the situation of states that have not yet fully opened up same-sex adoption and instead have doubled down by enacting legislation to protect religiously-affiliated organizations. In total, there are seven states that have protections in place that allow religiously-affiliated adoption agencies to deny service to same-sex couples.¹³¹ These states are North Dakota, South Dakota, Virginia, Texas, Mississippi, Alabama, and the recently challenged Michigan.¹³² The connecting thread between all of these states is that they allow for state-licensed and contracted agencies to deny service and they all cite religious protections as the main motivator for seemingly discriminatory legislation. This highlights the largest social aspect of the situation that is also a factor in blocking presented legislation: religion is an engrained social institution that plays a part in the determination of state activities to an extent, regardless of constitutional interpretation and writings.

The state of Virginia, for example, would suffer mightily from a banning of religious discretion in the adoption process. In 2002, almost eighty percent of adoptions in Virginia were facilitated by private organizations.¹³³ Of those private organizations, forty-two percent have particular religious affiliations.¹³⁴ Should Virginia be forced to open adoption rights, almost half of all private organizations would presumably shut their doors. This, once again, emphasizes the economic and social costs of training up and contracting with new, non-faith based child services providers.

Texas, too, would suffer. Texas House Bill 3859 reads as follows:

¹³¹ Léa Rose Emery, *Marriage Isn't the Last Hurdle for LGBTQ Couples*, BRIDES (Nov. 10, 2017), <https://www.brides.com/story/marriage-isnt-the-last-hurdle-for-lgbtq-couples>. While 7 states still allow for religiously affiliated adoption agencies to discriminate, according to a 2014 Gallup poll, an overwhelming 63% of the public supported LGBT adoption rights. *Id.* This, though, isn't surprising since the majority of states already have barred discriminatory adoptive policies. *Id.*

¹³² *Joint Adoption Laws, Equality Maps*, FAMILY EQUALITY COUNCIL, https://www.familyequality.org/get_informed/resources/equality_maps/joint_adoption_laws/ (last visited March 31, 2019). On top of showing states allowing for discriminatory adoption policies, this chart also shows that 5 states allow for discrimination based solely on sexual orientation and an additional 3 states allow for discrimination based on sexual orientation and gender identity. *Id.* Interestingly, these states are silent on the issue of religious discrimination. *Id.*

¹³³ Torre, *supra* note 58.

¹³⁴ *Id.*

Chapter 45. Protection of Rights of Conscience for Child Welfare Services Providers

Sec. 45.01. Legislative Intent

- (a) *It is the intent of the legislature to maintain a diverse network of service providers that offer a range of foster capacity options and that can accommodate children from various cultural backgrounds. To that end, we expect reasonable accommodations to be made by the state to allow people of diverse backgrounds and beliefs to be a part of meeting the needs of children in the child welfare system*

Sec. 45.004. Child Welfare Services Providers Protected

A governmental entity or any person that contracts with this state or operates under governmental authority to refer or place children for child welfare services may not discriminate or take any adverse action against a child welfare services provider on the basis, wholly or partly, that the provider:

- (1) *Has declined or will decline to provide, facilitate, or refer a person for child welfare services that conflict with, or under circumstances that conflict with, the provider's sincerely held religious beliefs¹³⁵*
- (2) *Provides or intends to provide children under the control, care, guardianship, or direction of the provider with a religious education, including through placing the children in a private or parochial school or otherwise providing a religious education in accordance with the laws of this state*

Section 45.005: Secondary Service Providers

- (b) *A governmental entity or any person that operates under governmental authority to refer or place children for child welfare services shall:*
- 1) *Ensure that a secondary service provider is available in the catchment area...¹³⁶*

¹³⁵ This provision is not limited to LGBT couples. Since it allows for discrimination on the basis of religiously held beliefs, an organization could discriminate against other religions, political parties, or races. This opens the door up for a whole host of future litigation that, although somewhat unrelated to same-sex adoption, is still troubling.

¹³⁶ Foluké Tuakli, *Michigan Sued After Gay Couples are Rejected for Adoption*, NBC NEWS (Sep. 20, 2017), <https://www.nbcnews.com/feature/nbc-out/michigan-sued-after-gay-couples-are-rejected-adoption-n803236>. Michigan, too, requires the government to provide secondary service providers in order to ensure that those individuals who do not want to adopt from religious organizations or are turned away from faith-based organizations have alternatives. *Id.*

2) *If there is an insufficient number of secondary service providers willing or able in that catchment area to provide those services, provide for one or more secondary service providers in an adjacent catchment area.*¹³⁷

In essence, Texas' laws surrounding the protections of religious liberty center around the prior asserted idea that religious discrimination can actually lend itself to the increase in adoption diversity,¹³⁸ the similarly voiced opinion that religious freedoms are an important aspect of society rather than something that needs to be suppressed through taxpayer money,¹³⁹ and the idea that religious discrimination in adoption is a protection for organizations rather than a punishment for LGBT couples.¹⁴⁰

As for the state currently at the center of this issue, Michigan's religious exemption statute and the problems that follow adhere to the canon set by other states such as Virginia and Texas. The Michigan law, House Bill No. 4188, reads as follows:

The People of the State of Michigan Enact:

Sec. 14E. (1) The Legislature Finds and Declares All of the Following:

(A) *When it is necessary for a child in this state to be placed with an adoptive or foster family, placing the child in a safe, loving, and supportive home is a paramount goal of this state.*

(C) *Having as many possible qualified adoption and foster parent agencies in this state is a substantial benefit to the children of this state who are in need of these placement services and to all of*

¹³⁷ H.B. 3859, 85th Leg. (Tex. 2017), <https://legiscan.com/TX/text/HB3859/id/1563171>. Furthermore, section 45.006 allows for religiously-affiliated organizations to assert a private right of action against those who violate the statute. *Id.* Remedies stemming from this include declaratory relief outlined in the Civil Practice and Remedies Code or injunctive relief to prevent the threatened or continued adverse action. *Id.*

¹³⁸ Anderson & Torre, *supra* note 100.

¹³⁹ Anna Claire Vollers, *Religious freedom or taxpayer-funded discrimination? Child welfare bill prompts debate* (Feb. 9, 2017), http://www.al.com/news/index.ssf/2017/02/religious_freedom_taxpayer-fun.html.

¹⁴⁰ H.B. 3859, 85th Leg. (Tex. 2017), <https://legiscan.com/TX/text/HB3859/id/1563171>.

the citizens of this state because the more qualified agencies taking part in this process, the greater the likelihood that permanent child placement can be achieved

(E) Private child placing agencies, including faith-based child placing agencies, have the right to free exercise of religion under both the state and federal constitutions. Under well-settled principles of constitutional law, the rights include the freedom to abstain from conduct that conflicts with an agency's sincerely held religious beliefs.

(F) Faith-based and non-faith based child placing agencies have a long and distinguished history of providing adoption and foster services in this state.

(G) Children and families benefit greatly from the adoption and foster services provided by faith-based and non-faith-based child placing agencies. Ensuring 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.¹⁴¹

Just like the statutes that came before it and that it influenced later on,¹⁴² the Michigan law is focused on three main elements. First, the Michigan bill puts forth the idea that the adoption process is important on all fronts, both religious and non-religious.¹⁴³ This is apparent not only in the language of the bill, but in the most recent statistical analyses of the Michigan adoption process as well. As of 2016, an approximate 12,666 children were in foster care.¹⁴⁴ To support that massive amount of children, there were only 6,079 foster homes to supplement the established adoption-agency system.¹⁴⁵ This number was actually a decrease from the previous year and, in fact, was illustrative of a trend of falling foster home numbers nationwide.¹⁴⁶ Coupled with

¹⁴¹ H.B. 4188, 2015 Leg. (Mich. 2015).

¹⁴² The Virginia bill was enacted in 2011 while the Texas bill was signed into law in 2017, placing the laws before and after the Michigan bill.

¹⁴³ See *supra* note 140

¹⁴⁴ MICH. DEP'T OF HEALTH & HUM. SERV., MICH. ADOP. FACTS (JAN. 2017), <http://courts.mi.gov/Courts/MichiganSupremeCourt/PublicInfoOffice/PublicOutreach/Documents/Adoption%20Fact%20Sheet%202016.pdf>.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

the fact that adoptions from foster homes only amounted to less than one-sixth of the children in foster care,¹⁴⁷ the business of state-contracted adoption agencies is all the more important. In Michigan, approximately twenty-five percent of adoption agencies are currently faith-based,¹⁴⁸ so the requiring of such de-exemption would likely result in the collapses touched upon earlier.¹⁴⁹

Secondly, Michigan focuses on the idea that having a girth of adoption agencies for potential adopters to draw from is beneficial to society and have been beneficial to the state for a long period of time.¹⁵⁰ This is in line with both the recent Texas bill regarding religious exemptions¹⁵¹ and theories voiced about the promulgation of diversity through religious exemption.¹⁵² Thirdly, and finally, the Michigan bill makes the constitutional argument that all organizations are free to practice their own reasonably held religious beliefs.¹⁵³

In Michigan, and other states, the reasons for religious exemptions are both simple and consistent: Organizations have the right to follow their own religious ideologies under the

¹⁴⁷ *Id.* Although the number of children adopted in the year 2016 increased from the previous year, it was still a significant decrease from prior years and, in fact, follows a trend of falling adoption numbers since 2012. No year from 2013 to 2016 has been able to eclipse the 2012 adoption rate.

YEAR	ADOPTIONS
2011	2,426
2012	2,538
2013	2,361
2014	2,185
2015	1,815
2016	2,015

¹⁴⁸ Foluké Tuakli, *Michigan Sued After Gay Couples are Rejected for Adoption*, NBC NEWS (Sep. 20, 2017), <https://www.nbcnews.com/feature/nbc-out/michigan-sued-after-gay-couples-are-rejected-adoption-n803236>.

¹⁴⁹ Associated Press, *South Dakota Governor Signs Religious Adoption Protections*, FOX NEWS (Mar. 10, 2017), <http://www.foxnews.com/us/2017/03/10/south-dakota-governor-signs-religious-adoption-protections.html>.

¹⁵⁰ H.B. 4188, 2015 Leg. (Mich. 2015). (See specifically, parts (C), (F), and (G) address the importance of a variety of options in adoption, the history of organizations in the states, and the beneficial nature of the adoption process regardless of faith).

¹⁵¹ H.B. 3859, 85th Leg. (Tex. 2017), <https://legiscan.com/TX/text/HB3859/id/1563171>

¹⁵² See Anderson & Torre, *supra* note 100.

¹⁵³ H.B. 4188, 2015 Leg. (Mich. 2015), <http://www.legislature.mi.gov/documents/2015-2016/billconcurrent/House/pdf/2015-HCB-4188.pdf>.

constitution, religious organizations are a core part of the adoption process, religious organizations are not the only option for potential adopters, and religious organizations add to the overall diversity of the adoption playing field. Thus, it can be argued, that religious exemptions do not truly impede LGBT adoption laws. Faith-based organizations are not the be-all-end-all since secondary service providers in states with exemptions are ever-present government functions¹⁵⁴ and the reform that would follow the ending of exemptions would be a costly blow¹⁵⁵ to what is in some states a statistically declining market.¹⁵⁶

VI.

It puts an unfair burden on my husband and I. It's a double standard that doesn't make a lot of sense

-Brad O'Conner, a Pittsfield, Michigan native, on the struggles he and his husband face in the light of Michigan's religious exemption laws.¹⁵⁷

There are a lot of loving and nurturing people interested in adopting children who need good homes, and if this bill keeps even one LGBT couple from being able to adopt then it's a blatantly discriminatory measure that must be fought

-Rabbi Jason Miller of Farmington Hills, Michigan, on the passing of Michigan's religious exemption laws¹⁵⁸

The question faced by the Dumont family, the O'Conner family, and many others across the nation is one of great importance and represents a clash of core American values: Freedom of Religion and Societal Interest. On the societal side, the

¹⁵⁴ Foluké Tuakli, *Michigan Sued After Gay Couples are Rejected for Adoption*, NBC NEWS (Sep. 20, 2017), <https://www.nbcnews.com/feature/nbc-out/michigan-sued-after-gay-couples-are-rejected-adoption-n803236>.

¹⁵⁵ Godsoe, *supra* note 32, at 348. The idea of this being costly centers around the massive dollar values put forth by states.

¹⁵⁶ *Michigan Department of Health & Human Service*, MICHIGAN ADOPTION FACTS (Jan. 2017), <http://courts.mi.gov/Courts/MichiganSupremeCourt/PublicInfoOffice/PublicOutreach/Documents/Adoption%20Fact%20Sheet%202016.pdf>.

¹⁵⁷ Niraj Warikoo, *Mixed Reaction Greets Michigan's New Gay Adoption Law*, USA TODAY (June 12, 2015), <https://www.usatoday.com/story/news/politics/2015/06/12/gay-unmarried-couple-adoption-michigan/71115236/>.

¹⁵⁸ *Id.*

advantages and challenges to removing religious exemptions are clear. Removing exemptions would allow for more people to adopt from a wider variety of backgrounds and lifestyles¹⁵⁹. In essence, loving families that just so happened to be LGBT families would not be turned away and the goals set forth by various laws to provide loving homes for families¹⁶⁰ in times where adoption and fostering is necessary. Ultimately, an opening up of the adoption process would create more opportunities for the victims of the current system, children, to find a permanent home. This, though, would come at the costs of millions of dollars,¹⁶¹ both in opening up new adoption agencies and training new contributors nationwide, which could lead to the collapse of religiously-affiliated organizations, lending itself to a decline in available outlets for adoption.¹⁶²

The hard-hitting question at the core of this conflict, though, is not societal: it is constitutional. In particular, this conflict centers around the extent of powers of the applicable operative language of both the first and fourteenth amendments of the United States Constitution. Just how far reaching is the first amendment's prohibition on legislation abridging the free exercise of religion¹⁶³ and, on that note, just how strong is the equal protections clause of the 14th amendment in its protections provided to all citizens in the United States?¹⁶⁴

Having taken up the battle, the ACLU has posited that the Establishment clause clearly defeats Michigan's, and by extent the other 6 discriminatory states', religious exemption laws. According to the ACLU, the Establishment clause prevents the state from

¹⁵⁹ See H.B. 3859, 85th Leg., (Tex. 2017),

<https://legiscan.com/TX/text/HB3859/id/1563171> (stating that it is a goal of the Texas adoption system to "allow people of diverse backgrounds and beliefs to be a part of meeting the needs of children in the child welfare system." In the context of the Texas bill, though, this terminology was used to enforce religious exemptions on the grounds that faith-based organizations lend themselves to the furtherance of diversity). *Id.*

¹⁶⁰ See 4188, 2015 Leg. (Mich. 2015),

<http://www.legislature.mi.gov/documents/2015-2016/billconcurrent/House/pdf/2015-HCB-4188.pdf> (stating that "...placing the child in a safe, loving, and supportive home is a paramount goal of this state"). *Id.*

¹⁶¹ Godsoe, *supra* note 32, at 348.

¹⁶² Associated Press, *South Dakota Governor Signs Religious Adoption Protections*, FOX NEWS (Mar. 10, 2017),

<http://www.foxnews.com/us/2017/03/10/south-dakota-governor-signs-religious-adoption-protections.html>.

¹⁶³ U.S. CONST. amend. I.

¹⁶⁴ U.S. CONST. amend. XIV. §1.

refusing to provide government services based on religious criteria.¹⁶⁵ Since, in the case of Michigan and the other states with active religious exemptions, the state funds and contracts with private religious organizations, the argument stands that the faith-based organizations are arms of the state and that makes them liable to the Establishment clause.¹⁶⁶ Moreover, the Equal Protection clause bolsters this argument by preventing discrimination based on sexual orientation; A classification that is itself commonly cited as conflicting with religious ideologies.¹⁶⁷ Further supporting this argument is the fact that this challenge of the adoption process, in particular the Michigan law that paved the way for other states to follow suit, occurred prior to the federal government's legalization of gay marriage nationwide. Essentially, marriage equality, a topic that once overshadowed adoption equality, could end up bolstering the case for adoption equality.¹⁶⁸ The constitutional argument coming from the opposition to adoption equality is equally clear: Religious organizations are not the only adoption show in town,¹⁶⁹ religion adds to diversity,¹⁷⁰ and privately contracted agencies are private and not operating as an agent of the state.¹⁷¹ Secondary services exist in states with exemptions¹⁷² and religious freedoms are the basis of the founding of the nation.¹⁷³

¹⁶⁵ Complaint, *Dumont v. Lyon*, (E.D. Mich. Sept. 20, 2017) (2:17-cv-13080-PDB-EAS).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Niraj Warikoo, *Mixed Reaction Greets Michigan's New Gay Adoption Law*, USA TODAY (June 12, 2015),

<https://www.usatoday.com/story/news/politics/2015/06/12/gay-unmarried-couple-adoption-michigan/71115236/>.

¹⁶⁹ See H.B. 4188, 2015 Leg. (2015 Mich.),

<http://www.legislature.mi.gov/documents/2015-2016/billconcurrent/House/pdf/2015-HCB-4188.pdf>.

¹⁷⁰ Anderson & Torre, *supra* note 100.

¹⁷¹ See H.B. 4188, 2015 Leg. (2015 Mich.),

<http://www.legislature.mi.gov/documents/2015-2016/billconcurrent/House/pdf/2015-HCB-4188.pdf> (stating that “a private child placing agency does not engage in state action when the agency performs private-adoption or direct-placement services” despite the fact that such agencies still receive state, and by extent federal, funding.)

¹⁷² H.B. 3859, 85th Leg. (Tex. 2017),

<https://legiscan.com/TX/text/HB3859/id/1563171>.

¹⁷³ Niraj Warikoo, *Mixed Reaction Greets Michigan's New Gay Adoption Law*, USA TODAY (June 12, 2015),

<https://www.usatoday.com/story/news/politics/2015/06/12/gay-unmarried-couple-adoption-michigan/71115236/>.

Whether or not change will come is unclear. With a wealth of arguments on each side, and a perception that there is a tendency for federal judges to make rogue decisions without any immediate form of accountability,¹⁷⁴ the current cases, such as those of the Dumont Family, could come out either way. The closeness of the issue, though, highlights that an issue exists. States are currently operating in a grey zone devoid of significant policing through the practice of contracting with private child services providers and through the passing of legislation giving such providers freedom in choosing who they do and do not serve. Gay marriage was a fight that was fought, and won, over the course of a tumultuous length of time; LGBT adoption equality in the face of religious discrimination is primed to be next.

¹⁷⁴ *Id.*