COMMENT

WHOSE BEST INTEREST?
WHY MICHIGAN’S NEW ADOPTION LAW IS UNCONSTITUTIONAL AND PREVENTS THE MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES FROM HELPING ADOPTABLE CHILDREN

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INTRODUCTION

The United States’ adoption system, while affected by federal law,¹ is
primarily a legal construct created and governed by the individual states.²
This gives states a reasonable amount of discretion when passing child-
affection legislation. Some states seem up to the challenge; for example,
according to Michigan Governor Rick Snyder, Michigan is “focused on
ensuring that as many children are adopted to as many loving families as
possible regardless of their makeup.”³ Hopefully every state governor has

¹. For example, Titles IV-B and IV-E of the United States Code set forth specific
   requirements that States must follow to receive federal funds for their respective foster care
   Information Gateway has a full list of the federal statutes from 1970 to the present that affect
   the foster care and adoption system, as well as child welfare in general. Major
   www.childwelfare.gov/topics/systemwide/laws-policies/federal/search/.
². See Ex parte D.W., 835 So. 2d 186, 190 (Ala. 2002) (noting that adoption was not
   recognized by the common law); Roberts v. Sutton, 27 N.W.2d 54, 57–58 (Mich. 1947)
   (recognizing that adoption is purely statutory and has no common law background); In re
   Adoption of Eder, 821 P.2d 400, 410 (Or. 1991) (“The common law did not recognize
   adoption. In Oregon, the process of adoption is purely statutory.”).
³. Kate Abbey-Lambertz, Michigan Governor Signs Controversial Religious Freedom Adoption
   Law, Huffington Post (June 11, 2015), http://www.huffingtonpost.com/2015/06/10/
that same focus, given the reality of foster care and adoption nationwide. Since consistently only a small number of eligible children get adopted, one would think that states were focusing on efforts to increase the number of adoptions. Unfortunately, states have consistently put up barriers for a specific pool of potential candidates to adopt children: same-sex couples.

Same-sex couples are just as eager to adopt as heterosexual couples. States that have historically constructed obstacles for same-sex couples to adopt have been able to do so by narrowing the definition of “marriage.” For example, by restricting the definition of marriage to be between a man and a woman, Michigan prevented same-sex couples from jointly adopting because legal adoption required either a single person or a legally married couple. Thus, same-sex couples have widely been restricted to adopting through processes such as second-parent adoption.

michigan-adoption-bill-lgbt-parents_n_7553952.html.

4. Foster care is defined as “a situation in which for a period of time a child lives with and is cared for by people who are not the child’s parents.” See Foster Care, MERRIAM-WEBSTER (2016), http://www.merrriam-webster.com/dictionary/foster%20care.

5. Adoption is defined as “the practice in which an adult assumes the role of parent for a child who is not the adult’s biological offspring.” See Adoption, ENCYCLOPEDIA OF CHILDREN’S HEALTH (2016), http://www.healthofchildren.com/A/Adoption.html.


8. See Susan Donaldson James, Same-Sex Adoptions Next Frontier for LGBT Advocates, ABC NEWS (Nov. 6, 2013), http://abcnews.go.com/Health/sex-adoptions-frontier-lgbt-advocates/story?id=20780309 (stating that only nineteen states and Washington, D.C. “permit same-sex couples to adopt jointly,” and “only thirteen states and D.C. allow second-parent adoptions.”).

9. See Stephanie Pappas, Gay Parents Better Than Straight Parents? What Research Says., HUFFINGTON POST [Jan. 16, 2012, 8:19 AM], http://www.huffingtonpost.com/2012/01/16/gay-parents-better-than-straights_n_1208659.html (“An October 2011 report by Evan B. Donaldson Adoption Institute found that, of gay and lesbian adoptions at more than 300 agencies, 10 percent of the kids placed were older than 6 – typically a very difficult age to adopt out . . . [a]bout 25 percent were older than 3 . . . and sixty percent of gay and lesbian couples adopted across races . . .”


11. See infra, Part I.B (describing the adoption landscape in Michigan before Obergefell).

12. Second parent, or stepparent, adoption allows an individual to legally adopt the
The adoption process is not the only area where same-sex couples have faced harsh barriers. Currently, there is no federal statutory law protecting lesbian, gay, bisexual, and transgender (LGBT) persons from employment discrimination. Further, many states have been looking to bolster protections and exemptions for religious persons while not doing the same for LGBT persons. However, not every state has worked to strengthen barriers; some states have upheld the protections of same-sex couples despite prolific arguments in favor of religious exemptions.

On June 26, 2015, the Supreme Court took a big step toward making adoption an easier process for same-sex couples by declaring that they, just like heterosexual couples, have the fundamental right to legally marry.

Coincidentally, a few weeks prior, the Michigan legislature amended its Child Care Organization Act to allow private, religiously affiliated child-placing agencies to deny services to same-sex couples if doing so would go biological child of another individual without the latter losing his or her parental rights. See Emma Green, Gay Rights May Come at the Cost of Religious Freedom, 9 [July 27, 2015], 8

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For example, Indiana passed the Religious Freedom Restoration Act that arguably provides much more protection than its federal counterpart. See Paul Waldman, Answering Five Questions About Indiana’s New Discrimination Law, WASH. POST [Mar. 30, 2015], https://www.washingtonpost.com/blogs/plum-line/wp/2015/03/30/answering-five-questions-about-indianas-new-discrimination-law/. In reaction to the recent Supreme Court ruling in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), North Carolina passed a law that allows magistrates to abstain from issuing marriage licenses if doing so would be adverse to their religious beliefs. See N.C. GEN. STAT. § 51-5.5(a) (2015). Further, a substantial number of states have refused to pass legislation that would protect same-sex persons. See Kelly Catherine Chapman, Note, Gay Rights, the Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States, 100 GEO. L.J. 1783, 1785–86 (2012) (“[Twenty-nine states] still lack laws protecting gay individuals from even the most basic discrimination they may receive in public accommodations such as hotels, restaurants, and movie theaters.”).


against their “sincerely held religious beliefs.” Even though the child-placing agencies that fall under this new law are privately run, some of those agencies receive state and federal funds. Given that same-sex marriage is now federally legal, Michigan’s law probably faces a difficult constitutional battle against an Equal Protection Clause challenge. Part I of this Comment looks at the framework of Michigan’s adoption laws and how they apply to same-sex couples. Part II examines the constitutionality of Michigan’s new adoption law, specifically in the context of Equal Protection, and discusses why the United States Constitution or the Michigan Constitution would not protect these private child-placing agencies. Part III assesses the administrative state in Michigan and how the Michigan legislature has made the Michigan Department of Health and Human Services’ (MDHHS’) job more difficult with the new adoption law. Part IV recommends that the new adoption law should be declared unconstitutional and discusses how the MDHHS can better regulate the adoption system in Michigan.

I. THE ADOPTION LANDSCAPE IN MICHIGAN

Part I discusses the adoption process for same-sex couples in Michigan and examines how same-sex couples were treated in the adoption process before the Obergefell decision. It also discusses how the Obergefell decision has changed the adoption landscape for same-sex couples going forward.

A. The Basics of Adoption in Michigan

The adoption process in Michigan is straightforward. Before an
adoption can happen, the rights of the birth parents must be terminated. These rights can either be voluntarily terminated or terminated by a court action. Once the birth parents’ rights are either terminated or pending termination, the child is temporarily placed in a foster home or a relative’s home.

Typically, either the MDHHS or a private child-placing agency puts children up for adoption. Potential adoptive parents can pursue a number of different types of adoption. Once an adoption is finalized, the child becomes the legal child of the adoptive parents, and the relationship is legally similar to the relationship between the child and his or her natural parents. However, while rare, an adoption can be rescinded, and the relationship between the adopted child and his or her natural parent or parents can be restored.

Children who are not adopted simply “age out” of the foster care system and do not render the adoption void.

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22. Mich. Comp. Laws Serv. § 710.24(1) (2016); see In re Handorf, 776 N.W.2d 374, 376 (Mich. Ct. App. 2009) (“[T]he first prerequisite for adoption is termination of the parental rights of the child’s parents (in the absence of the parent’s or parents’ consent).”).

23. Mich. Comp. Laws Serv. § 710.28(1)(a); see also In re Buckingham, 368 N.W.2d 888, 890 (Mich. Ct. App. 1985) (explaining that parents can voluntarily terminate their rights under the Adoption Code).


25. Michigan does give preference to placing children with a relative or relatives when possible. See Mich. Comp. Laws Serv. § 722.954a(5) (“Before determining placement of a child in its care, a supervising agency shall give special consideration and preference to a child’s relative or relatives . . . .”); see also In re COH, 948 N.W.2d 107, 114 (Mich. 2014) (explaining that the Department of Human Services has a duty to consult with relatives regarding a child’s placement).

26. The MDHHS handles the adoption of children who are state or court wards. Adopting a Child in Michigan, DEPT OF HUMAN SERVS., 1, 5 (2015), https://www.michigan.gov/documents/dhs/DHS-PUB-0823_221566_7.pdf. Child-placing agencies are private organizations that are licensed by the state, and place children that are released to them by their parents for adoption. Id. at 1, 4. Adoptive parents could also choose against adopting through a child-placing agency or the MDHHS and participate in a direct placement. Id. at 4–5.

27. Potential adoptive parents can choose to participate in an infant adoption, agency adoption, direct placement adoption, state and court ward adoption, relative adoption, stepparent adoption, and adult adoption. Id. at 4–6.

28. Mich. Comp. Laws Serv. § 710.60; see also In re Toth, 577 N.W.2d 111, 114 (Mich. Ct. App. 1998) (“The effect of M.C.L. § 710.60(1) . . . is to make the adopted child, as much as possible, a natural child of the adopting parents, and to make the adopting parents, as much as possible, the natural parents of the child.”).

29. The relevant law here states that adult adoptees can petition to rescind a legal adoption and does not state anything about a court rescinding a minor’s adoption. Mich. Comp. Laws Serv. § 710.66(1). The Michigan courts seem reluctant to void, revoke, or rescind a final adoption dealing with a minor. See Usitalo v. Landon, 829 N.W.2d 339, 364 (Mich. Ct. App. 2012) (per curiam) (explaining that even if, theoretically, a previous court misinterpreted the Adoption Code and granted an adoption where improper, that alone does not render the adoption void).
when they turn eighteen years old. Fortunately, aging out does not mean that children can never find a “forever family”; adults can also be adopted. The adoption process is fairly easy and straightforward for adults. It is important for adults to be adoptable just as it is for children to be adoptable; a stable home and family is equally important to a fifteen-year-old as it is to a twenty-five-year-old.

1. The Role of the Michigan Department of Health and Human Services

The MDHHS plays a substantial role in Michigan’s adoption process: it is responsible for the placement of children who are state wards and court wards. To help accommodate those children, the MDHHS inspects and issues licenses to foster homes throughout the state, which is imperative because foster parents adopt a large number of children. Further, the MDHHS regulates the Michigan Children’s Institute, which houses and cares for children committed to the state.

To help place children in state custody with foster parents and adoptive

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31. MICH. COMP. LAWS SERV. § 710.22(a) (“‘Adoptee’ means the individual who is to be adopted, regardless of whether the individual is a child or an adult.”).

32. See MICH. COMP. LAWS SERV. § 710.43(3) (“If the individual to be adopted is an adult, the individual’s consent is necessary . . . but consent by any other individual is not required.”); see also *In re Adams*, 473 N.W.2d 712, 715 (Mich. Ct. App. 1991) (per curiam) (“[U]nder the Adoption Code, only the consent of the adoptee is required when the adoptee is an adult.”).


35. See MICH. COMP. LAWS SERV. § 722.113(3)–(4). Private child-placing agencies that are authorized to grant licenses also perform inspection and licensing functions similar to the MDHHS. See § 722.115(3) (“The department may authorize a licensed child placing agency . . . to investigate . . . [or] certify that [a] foster family home or foster family group home meets the licensing requirements prescribed by this act.”).


families, the MDHHS contracts with child-placing agencies. These private child-placing agencies provide adoption services for children who are state wards, and are partially funded by the MDHHS. The MDHHS also authorizes these private child-placing agencies to grant licenses to homes to operate as foster homes. Lastly, the MDHHS promulgated several rules that regulate the foster care and adoption system. Each potential foster home and private child-placing agency that desires to contract with the MDHHS or operate in Michigan must read and comply with the relevant rules.

B. Pre-Obergefell Michigan

The Michigan Adoption Code governs which persons are able to adopt a child or adult. Under the Code, only single or married (heterosexual) persons not convicted of any criminalized sexual offenses or child abuse offenses may petition a court to adopt. If a married couple wants to petition to adopt, both spouses must be present to petition the court together. Adoptive rights become complicated if a married couple divorces and one of the divorcees remarries. For example, a person who is not biologically related to his or her married partner’s child cannot simply adopt that child; the married partner must have full and sole custody of the child. Also, a person who is in a long-term, committed relationship with,


39. See MICH. ADMIN. CODE r. 400.12101–12713 (2016) (regulations dealing with child-placing agencies); MICH. ADMIN. CODE r. 400.9101400.9506 (2016) (regulations dealing with foster homes).

40. See text accompanying supra note 41.

41. See MICH. COMP. LAWS SERV. § 710.24(1)–(2).

42. Id. § 710.24(1) (“If a person desires to adopt a child or an adult . . . together with his wife or her husband, if married . . . .”); see id. § 710.22a (listing the relevant sections of the Michigan penal code that, if convicted thereunder, prevent a person from legally adopting).

43. See, e.g., MICH. COMP. LAWS SERV. § 710.24 (1); see also In re Adams, 475 N.W.2d 712, 714–16 (Mich. Ct. App. 1991) (per curiam) (holding that the two natural parents of a child cannot legally adopt their daughter under the Adoption Code because, even though they were married, they were not married to each other and the Code requires that the spouses of a marriage petition together).

44. See MICH. COMP. LAWS SERV. § 710.51(6); In re AJR, 852 N.W.2d 760, 769 (Mich.
but who is not married to, a person who has sole custody of his or her biological child, cannot legally adopt that child because the concept of adoption under Michigan’s Adoption Code severs the relationship between the biological parent(s) and creates a new legal relationship with the petitioning non-biological person(s). 47

For same-sex couples, adoption in Michigan was exceptionally difficult before the Obergefell decision. 48 For starters, Michigan’s legislature passed a law prohibiting same-sex marriage by explicitly defining marriage as “inherently a unique relationship between a man and a woman.” 49 Even if a same-sex couple obtained a marriage license in a state that recognized same-sex marriage, Michigan considered the marriage void within its borders. 50 Thus, under the Adoption Code, same-sex couples could not legally adopt as a married couple.

What if a partner in a same-sex couple was the biological parent and consented to the adoption of the child by his or her partner? Unfortunately, because Michigan judges have held that adoption statutes must be strictly read, such parents would likely be unable to adopt. 51 Again, since the biological parent continues to have legal rights to the child and the couple is not legally married, the non-biological partner could not legally adopt the same child. 52 The Adoption Code does allow for a gay individual to adopt a child as a single person; however, if that individual enters into a relationship, the new partner may not legally adopt that child. 53 In other words, a same-sex couple could raise a child together, but only one of the individuals in the relationship is the legal adoptive parent of

2014) (“Because the express language of MCL 710.51(6) provides that stepparent adoption under the statute is only available to the spouse of ‘the parent having legal custody of the child,’ meaning the parent with sole legal custody, the statute does not apply . . . [where] the parents share joint legal custody of the child.”).

47. See In re Adams, 473 N.W.2d at 714 (per curiam) (stating that the Michigan adoption scheme severs the prior natural relationship to replace it with the substitute relationship).

48. See infra notes 49–54 and accompanying text.

49. See Mich. Comp. Laws Serv. § 551.1; see also In re Burnett Estate, 834 N.W.2d 93, 98 (Mich. Ct. App. 2013) (noting the ban on same-sex marriage in Michigan’s laws and constitution).

50. See Mich. Comp. Laws Serv. § 551.272; see Opinion No. 7160, Office of the Attorney General of the State of Michigan, AG LEXIS 15, *1, **4–8 (Mich. 2004) (explaining that the Full Faith and Credit Clause does not require that Michigan recognize same-sex marriages that are performed in other states).

51. See In re Adams, 473 N.W.2d at 714 (per curiam) (maintaining that the Michigan Adoption Code must be strictly construed).

52. See Mich. Comp. Laws Serv. § 710.24(1).

53. Id. By reading the Adoption Code strictly and narrowly, Michigan judges essentially prevented any two unmarried individuals from jointly petitioning to adopt. See Jay D. Kaplan, The Invisible LGBT Family, Michigan B.J., 30 (2012).
the child. Accordingly, same-sex couples who raise children tend to experience uncertainty and anxiety because they cannot have joint legal custody over their children.

C. Post-Obergefell Michigan

On June 26, 2015, a legal tidal wave swept across the entire United States. The Supreme Court, with Justice Kennedy writing for the majority, declared that same-sex couples have the fundamental right to marry. Justice Kennedy pointed to several legal principles supporting this right.

Justice Kennedy discussed one important principle, relevant here, which is the ability of same-sex couples to provide stable and permanent homes to many children. He recognized that “the right to marry, establish a home and bring up children is a central part of the liberty protected by the Due Process Clause.” Building on that, he explained that a number of same-sex couples already provide “loving and nurturing homes to their children, whether biological or adopted,” and that several states have conceded this point by allowing same-sex individuals, and in certain places couples, to adopt children. Justice Kennedy worried that children of same-sex couples would be adversely affected by denying those couples the ability to have their marriage legally recognized.

By striking down Michigan’s ban on same-sex marriage, the Supreme Court changed the adoption landscape in Michigan. In other words, an

54. See Kaplan, supra note 53.
55. See id. at 31. For example, if a same-sex couple jointly raised a child but only one parent had legal custody over the child (whether natural or adoptive), then, in a situation where the couple split up or divorced, the parent without legal custody would have no standing to sue for custody in Michigan.
57. Id. at 2599 (“A first premise of the Court’s relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”); Id. (“A second principle in this Court’s jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”); Id. at 2600 (“A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”); Id. at 2601 (“Fourth and finally, this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order.”).
58. See id. at 2600 (explaining in dicta the important connection between marriage and raising children).
59. Id.
60. Id.
61. Id. at 2600–01 (noting that children being raised by same-sex couples who are not legally able to get married could suffer “the stigma of knowing their families are somehow lesser . . . [and] the significant material costs of being raised by unmarried parents . . .”).
62. See id. at 2607–08 (holding that same-sex couples may exercise the fundamental right to marry in all states and that there is no lawful basis for other states to refuse to
entire new pool of potential adoptive parents can now start a family or seek legal recognition of their families.63

II. THE RIGHT TO DISCRIMINATE: MICHIGAN’S NEW ADOPTION LAW IN THE FACE OF EQUAL PROTECTION

While Michigan is not the first state to enact a religious exemption law for private child-placing agencies, it is the first state to have such a law go into effect following the Supreme Court’s decision in Obergefell.64 Part II will briefly talk about the new Michigan law and its language. Part II will also discuss the new law in relation to the Fourteenth Amendment’s Equal Protection Clause.

A. The New Laws: M.C.L.A. § 722.124e and § 722.124f

Both § 722.124e and § 722.124f were introduced into the Michigan House of Representatives on February 12, 2015.65 After easily passing through the House and Senate, the Governor signed the coupled bills into law on June 11, 2015.66 Given the pending Supreme Court decision, the Michigan legislature arguably quickly introduced and pushed these bills through the legislature.67

Section 722.124e focuses on the ability of private child-placing agencies to deny services to people based on religious beliefs.68 Specifically, private child-placing agencies “shall not be required to provide any services if those services conflict with, or provide any 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.”69 The section does not stop there; it prohibits any “state or local unit of government” from taking any

recognize such marriages); Mich. Comp. Laws Serv. § 710.24(1)–(2) (LexisNexis 2016) (listing single persons and married couples as those who are eligible to adopt in Michigan).


64. North Dakota and Virginia have also passed similar statutes. See N.D. Cent. Code § 50-12-03 (2015); Va. Code Ann. § 63.2-1709.3 (2016).


66. Id.


69. Id.
“adverse action against a child placing agency on the basis that the child placing agency has declined or will decline to provide any services that conflict with, or provide any services under circumstances that conflict with,” its religious beliefs.\(^70\) The statute defines “adverse action” as including, but not limited to, the refusal to enter or renew a contract with a child-placing agency, as well as the refusal to grant or renew the license of a child-placing agency.\(^71\) Further, the statute defines “services” as including any services that child-placing agencies provide, “except foster care case management and adoption services provided under a contract with the department.”\(^72\)

Section 722.124f outlines the referrals that child-placing agencies may receive from the MDHHS.\(^73\) Under this section, if the MDHHS makes referrals to child-placing agencies that are under contract “for foster care case management or adoption services,” the child-placing agencies could turn away those referrals if accepting them would “conflict with [their] sincerely held religious beliefs.”\(^74\) It goes further to say that these agencies have “sole discretion to decide whether to engage in activities and perform services related to that referral.”\(^75\) Again, this section prevents any state or local unit of government from taking adverse action against these agencies for refusing a referral under this section, and it defines “adverse action” similar to how § 722.124e defines it.\(^76\)

**B. What Does Equal Protection Have to Do with It?**

The Equal Protection Clause of the Fourteenth Amendment ensures “[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”\(^77\) The government generally cannot favor one person over another when passing and implementing laws. However, both the federal and state governments may pass and implement laws that discriminate if those laws are appropriately related to achieving a governmental interest; the courts use varying levels of scrutiny depending on the basis for discrimination involved.\(^78\)

\(^70\) Id. § 722.124c(3).
\(^71\) Id. § 722.124c(7)(a).
\(^72\) Id. § 722.124c(7)(b).
\(^73\) Id. § 722.124f(1).
\(^74\) Id.
\(^75\) Id.
\(^76\) Id. § 722.124f(2), (5).
\(^77\) U.S. CONST. amend. XIV, § 1.
\(^78\) The Supreme Court has allowed the government, both federal and state, to pass and implement laws that discriminate if those laws are rationally related to a legitimate
Interestingly while the Equal Protection Clause applies to governmental entities that implement unequal laws, private entities tend to be freer to discriminate. However, the Supreme Court has recognized that private entities could be held accountable under the Equal Protection Clause if their actions could be considered “state action.”

1. State Action Doctrine

Unlike the states and federal government, private actors are not typically constrained by the Constitution. However, courts have held where the private actor is so closely tied to the state to the point that the private actor’s actions could be considered the state’s actions, that private actor is held accountable under the Constitution. This concept is referred to as the state action doctrine. Judges do not lightly dub a private actor as a state actor. Holding private citizens, corporations, etc., as state actors could result in an unnecessary infringement on their constitutional freedoms.

governmental interest. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973) (applying rational basis review for economic discrimination claims). However, where a law discriminates against a more protected class of persons, such as sex, the law must serve important governmental interests and must be substantially related to the achievement of those interests. See United States v. Virginia, 518 U.S. 515 (1996) (applying intermediate scrutiny, which requires the law be substantially related to achieve an important government interest, to Virginia’s creation of separate military school for women). Further, where a law discriminates against a suspect class, such as race, that law must be narrowly tailored to meet a compelling governmental interest. See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (applying strict scrutiny, which requires a law be “narrowly tailored to achieve a compelling government interest,” to a school district’s program).

79. See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972) (“The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause . . . ”).

80. See id. (noting that substantial state involvement in private activity could result in that private activity implicating the Fourteenth Amendment).

81. See Grogan v. Blooming Grove Volunteer Ambulance Corps, 768 F.3d 259, 263 (2d Cir. 2014) (stating that the state action requirement is designed to preserve areas of individual freedom from federal law, while holding private actions constitutionally accountable where the state is responsible); Logiodice v. Trs. of Me. Cent. Inst., 296 F.3d 22, 26 (1st Cir. 2002) (“Broadly speaking, the Fourteenth Amendment protects individuals only against government (leaving private conduct to regulation by statutes and common law.”).

82. See Moose Lodge, 407 U.S. at 173 (explaining that previous holdings have held private action accountable under the Constitution where the State has heavily involved itself).

83. See Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) (claiming that the Courts have never attempted to create a precise formula for state action analysis and that an answer can only be arrived at “by sifting facts and weighing circumstances” in each case).

Nonetheless, the Supreme Court has recognized that private actors and states can become so closely related so as to manifest the need to hold the state accountable for the private actor’s actions.85

The state action jurisprudence is nothing less than a jumbled mess of inconsistency.86 The Supreme Court has put forth, and the lower courts have adopted, a set of tests to help determine whether the state should be held responsible for a private actor’s actions or decisions: the public functions test,87 the joint activity test,88 the nexus test,89 and symbiotic relationship or entwinement test.90 While these tests are helpful, the Court has made it clear that these tests do not represent rigid, bright line standards.91 Instead, the facts and circumstances that arise in each individual case are weighed heavily.92

The Michigan legislature made it clear that it does not think that the new adoption law implicates the state action doctrine.93 However, the Michigan legislature should not be so confident, given the lack of

85. See Moose Lodge, 407 U.S. at 173.
86. See Edmerson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991) (O’Connor, J., dissenting) (“[O]ur cases deciding when private action might be deemed that of the state have not been a model of consistency.”).
87. See, e.g., Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157–58 (1978) (directing courts to look at whether or not a State has delegated power that is “traditionally exclusively reserved to the State” to a private entity).
88. See, e.g., Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) (directing courts to look to whether a private individual is acting as “a willful participant in joint activity with the State or its agents”).
89. See, e.g., Johnson v. Rodrigues, 293 F.3d 1196, 1202 (10th Cir. 2002) (“[T]he Court has considered whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself”).
90. See, e.g., Id. at 1202–03 (reviewing that precedent has further inquired into whether the state has put itself in a position of interdependence with a private party such that a symbiotic relationship exists between them when considering the state action doctrine); See also Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n., 531 U.S. 288, 296 (2001) (directing courts to look at whether a private actor is so entwined with governmental policies or if the government is entwined in the private actor’s management or control) (citing Evans v. Newton, 382 U.S. 296, 299–301 (1966)).
91. Brentwood Acad., 531 U.S. at 295–96 (“What [private action] is fairly attributable [to state action] is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action . . . .”).
92. Id. (acknowledging that while no one fact can be determinative of whether the state action doctrine is appropriate, case law demonstrates that certain facts have strong weight in determining if applying the doctrine is fundamentally fair).
93. See Mich. Comp. Laws Serv. § 722.124e[1][i] (LexisNexis 2016) (“Under well-settled principles of constitutional law distinguishing ‘private action’ from ‘state action,’ a private child placing agency does not engage in state action when the agency performs private-adoption or direct-placement services.”).
consistency in the state action jurisprudence. While it is fairly possible that child-placing agencies would not be held liable for providing a public function or for being in a symbiotic relationship with the government, the established tests are not dispositive as to whether private action is considered state action.

The private child-placing adoption agencies in Michigan are not purely private; they contract with the MDHHS. Through their contracts with the state, these agencies help place children who are considered state wards. These agencies also receive different types of funding from the MDHHS. While these aspects may appear as if Michigan is heavily involved in the actions of these agencies, the Supreme Court has consistently held that state funding, contracting, and regulation, without more, is not enough to constitute state action.

However, there is more to the inquiry here, and the Tenth Circuit’s opinion in Johnson v. Rodrigues provides some helpful guidance. In Johnson, the putative father (Johnson), angry that his daughter was placed for adoption and later adopted without his notice, brought suit against the


95. See Leshko v. Servis, 423 F.3d 337, 347 (3d Cir. 2005) (noting that the public function standard is a difficult standard that is rarely satisfied); Lintz v. Skipski, 807 F. Supp. 1299, 1306 (W.D. Mich. 1992) (“The care of foster children is not a power which has been exclusively reserved to the state.”).

96. See Phillips v. Pitt Cty. Mem’l Hosp., 572 F.3d 176, 182 (4th Cir. 2009) (“In the end, however, there is ‘no specific formula’ for determining whether state action is present . . .”) (quoting Holly v. Scott, 434 F.3d 287, 292 (4th Cir. 2006)).

97. When referring to “purely private,” I am referring to private child-placing agencies that do not contract with the MDHSS and are only tied to Michigan by way of having the proper operative license.

98. See Adoption Services by a Contracted Adoption Agency, supra Note 38.

99. Id.


101. See Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (noting that solely being subject to state regulation does not establish state action under the Fourteenth Amendment); Rendell-Baker v. Kohn, 457 U.S. 830, 840–42 (1982) (concluding that state action is not necessarily found where the private entity’s primary funding is public funding and where the field is heavily regulated). See also Crissman v. Dover Downs Entm’t, Inc., 289 F.3d 231, 244 (3d Cir. 2002) (explaining that state funds and regulations, which are separately unpersuasive in a state action inquiry, together do not establish state action); Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1448 (10th Cir. 1995) (“[T]he fact that a private entity contracts with the government or receives governmental funds or other kinds of governmental assistance does not automatically transform the conduct of that entity into state action.”).

102. 293 F.3d 1196 (10th Cir. 2002).
birth mother, adoptive parents, and the private adoption agency for violating his Fourteenth Amendment rights. Johnson argued that a sufficient nexus existed between the birth mother, adoptive parents, private adoption agency, and the State of Utah; and he argued that the private parties and the State of Utah acted jointly or in conspiracy to deprive him of his constitutional rights under the Fourteenth Amendment. The Tenth Circuit ultimately decided that Johnson had not submitted enough evidence to establish a sufficient nexus between the private parties and the State of Utah. In doing so, the court explained that the statutory scheme of encouraging private agencies to promote adoption was not enough to transform private action into governmental action.

How Johnson applies to Michigan child-placing agencies may be best explained by looking at a same-sex couple’s (the couple’s) theoretical claim against a private child-placing agency for the denial of services. The claim would likely allege that the child-placing agency’s actions (Agency A) either violated the couple’s rights under the Fourteenth Amendment Equal Protection Clause or gave rise to a claim under 42 U.S.C. §1983. Arguably, a sufficient nexus exists between Agency A and the state of Michigan that goes beyond mere funding and regulation because Michigan, via its legislature, has provided significant encouragement for Agency A’s specific actions.

The Michigan legislature significantly encouraged Agency A’s action or decision, due to its religious beliefs, to turn away the couple because the Michigan legislature gave Agency A an affirmative right to discriminate sheathed as a necessary protection of religious liberty. Section 722.124e

103. See id. at 1201 (explaining that, while Johnson contested that he was not bringing a suit under 42 U.S.C. § 1983, he was nonetheless alleging a violation of his Fourteenth Amendment rights).
104. Id. at 1202.
105. See id. at 1203–04 (stating that the adoptive parents and birth mother made a private decision to avail themselves of Utah’s adoption laws, and the adoption center made the private decision to facilitate the child’s adoption).
106. See id. at 1206 (“To encourage private agencies to promote adoption does not metamorphose private performance into government activity.”).
107. Since a claim has yet to be brought against a child-placing agency in Michigan, the state action analysis must be based on a theoretical situation.
108. See Johnson, 293 F.3d at 1201–02 (noting that, within the context of a federal suit, the state action analysis is essentially the same for a §1983 claim and a Fourteenth Amendment claim).
109. See supra, notes 38–39 and accompanying text; see also Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367, 1396 (2003) (arguing that the power of private entities, due to privatization, “often represent forms of government authority”).
110. See infra, notes 111–115 and accompanying text.
111. See Mich. Comp. Laws Serv. § 722.124e(1)(e), (2) (LexisNexis 2016); see also Kiera McGroarty, Michigan’s State-Sponsored Discrimination of Same-Sex Couples, 17 Rutgers J. L. &
specifically describes the right to free exercise of religion as including “the freedom to abstain from conduct that conflicts with an agency’s sincerely held religious beliefs.”

However, this protection is already fully guaranteed to Agency A by both the U.S. Constitution and Michigan Constitution. Absent § 722.124e, if MDHHS decided to either force Agency A to serve the couple or cease contracting with Agency A for refusing to serve the couple due to its religious beliefs, then Agency A would have a possible remedy under the First Amendment of the U.S. Constitution or the Michigan Constitution. The U.S. Constitution is supreme; thus, there is no need to codify or restate a right that is already given to Agency A therein.

Further, the Michigan legislature ensured that Agency A could discriminate against same-sex couples without fear of any negative

RELIGION 166, 178 (2015) (“States such as Michigan, which have religious exemption statutes yet do not have antidiscrimination statutes [protecting people on the basis of sexual orientation], send the message that discrimination against LGBT individuals is preferred . . . .”).

112. § 722.124e(2).

113. See U.S. CONST. amend. I, (“Congress shall make no law . . . prohibiting the free exercise [of religion].”); MICH. CONST. art. I, § 4 (“Every person shall be at liberty to worship God according to the dictates of his own conscience . . . . The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.”).

114. Id.; see infra, Part II.C. (discussing the religious liberty interests of private child-placing agencies).

115. U.S. CONST. art. VI. (“This Constitution . . . shall be the supreme Law of the Land.”). This is especially true if the Michigan Constitution provides broader protection of religious liberty than the First Amendment Free Exercise Clause. See infra, Part II.C. (discussing the protections provided by both the U.S. Constitution and the Michigan Constitution). Further, judges arguably prefer to rely on their own interpretations and precedents when it comes to constitutional rights, rather than refer to a legislative interpretation or restatement thereof. Cf. Ira C. Lupu, The Failure of RFRA, 20 U. ARK. LITTLE ROCK L. REV. 575, 599–602 (1998) (arguing that the Religious Freedom Restoration Act (RFRA) essentially stunted the expansion of constitutional religious liberty under the First Amendment and that judges are much more likely to further constitutional religious freedom by revisiting, or overruling, their own constitutional interpretations rather than a legislature’s; see also Edward M. Mullins, The Reporter’s Right to Remain Silent: A Proposal for Legislation to Codify and Augment the Journalists’ Privilege in Florida, 43 FLA. L. REV. 739, 759 (1991) (“[T]he only real danger of codifying a constitutional privilege is failing to protect individuals’ constitutional rights fully by drafting the statute too narrowly.”); Eugene Grossman, RFRA: A Comedy of Necessary and Proper Errors, 21 CARDOZO L. REV. 507, 516–19 (1999) (arguing that Congress overstepped into the Judicial Branch’s territory with passing RFRA and asserted its own interpretation of the Free Exercise Clause). But see Bonnie I. Robin-Vergeer, Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act, 69 S. CAL. L. REV. 589, 652 (1996) (“RFRA is unconstitutional only if Congress lacked the authority under the Constitution to enact it. It is not rendered invalid simply because it legislates a standard that, according to [Employment Div. v.] Smith, is not compelled by the First Amendment.”).
governmental action.\textsuperscript{116} It would seem that the Michigan legislature passed §§ 722.124e and 722.124f knowing that Agency A, and other similar agencies, would discriminate against the couple, and those similarly situated.\textsuperscript{117} Had the Michigan legislature not desired to encourage discrimination, it would have refrained from passing the above legislation and amended its civil rights legislation to ensure the most expansive protections possible.\textsuperscript{118} In other words, the legislature chose to give Agency A, and other similar agencies, the ability to discriminate against the couple, and other similar couples, instead of amending Michigan’s Civil Rights Law to include sexual orientation along with passing the new adoption bill, which would protect religious liberty while also protecting same-sex couples from unnecessary discrimination.\textsuperscript{119}

Going outside of the theoretical claim above, the Michigan legislature has gone beyond simply turning a blind eye to the issue by authorizing private, religiously affiliated child-placing agencies to discriminate against same-sex couples that conflict with their religious beliefs.\textsuperscript{120} Along with

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\item[116] If Agency A or any other agency invokes the right put forth under §§ 722.124e or 722.124f, any and all state or local government entities are prevented from initiating any negative action against the said agency. See §§ 722.124e(3), 722.124f(2).
\item[117] The laws do not mention “same-sex persons or couples” anywhere within its text. However, given the timing of the of the introduction and passage of the law in relation to the Obergefell decision, it is difficult to see how the law’s true purpose is to protect religious liberty instead of granting private, religiously affiliated child-placing agencies an opportunity to legally discriminate against same-sex couples. See H.B. 4188 (H-2), 4189, & 4190: Analysis as Reported from Committee, Opposing Arguments, SENATE FISCAL AGENCY (May 12, 2015) [hereinafter Analysis as Reported from Committee], https://www.legislature.mi.gov/documents/2015-2016/billanalysis/Senate/hm/2015-SFA-4188-A.htm (“The bills seek to legalize discrimination based on private agencies’ religious beliefs . . . ”); Jack Lessenberry, Laws That Discriminate Against Same-Sex Couples and the Poor, MICHIGAN RADIO (June 12, 2015), http://michiganradio.org/post/laws-discriminate-against-same-sex-couples-and-poor (“The legislation doesn’t mention gay people, but everyone knows that’s what this is about.”); Duane Breijak, MSW-MICHIGAN Testimony for Public Hearing Re: House Bills 4188, 4189, 4190 (adoption/foster care), NAT’L ASS’N OF SOC. WORKERS (Apr. 22, 2015), http://www.nasw-michigan.org/news/228104/NASW-Michigan-Testimony-for-Public-Hearing-Re-House-Bills-4188-4189-4190-adoptionfoster-care.htm (“This legislation is clearly intended to allow faith-based adoption agencies to refuse to work with gay and lesbian parents.”).
\item[118] Again, private, religiously affiliated child-placing agencies already have a legal avenue in the situation that they are forced to act against their religious beliefs or prevented from exercising their religious beliefs. See supra, note 113 and accompanying text. Since such a remedy exists to private entities, the Michigan legislature could ensure that true discrimination would not happen by amending the Elliot-Larsen Civil Rights Act to include sexual orientation. See MICH. COMP. LAWS SERV. § 37.2302(a) (LexisNexis 2016) (listing only religion, race, color, national origin, age, sex, and marital status as classes protected against discrimination).
\item[119] See McGroarty, supra note 111, at 178 (noting that Michigan has a religious exemption statute, but not an antidiscrimination statute against LGBT).
\item[120] The Supreme Court has recognized that mere state acquiescence of private action
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reiterating the fact that these private, religiously affiliated child-placing agencies work under contract with and receive funding from the MDHHS, it is also important to note that these same agencies have the ability to certify potential foster care homes. While the statute only allows these agencies to deny services that do not include foster care management or adoption services provided under contract with the MDHHS, these agencies can still deny an opportunity to same-sex couples that is otherwise only available from the MDHHS directly. If one of these agencies were to deny services to a Jewish African American couple and cite religious beliefs as the reason for doing so, would MDHHS or the legislature allow it? Under §§ 722.124e and 722.124f, it would seem that the agency could do so; however, Michigan has a civil rights law already in place that prevents discrimination based on race and religion. If the adoption laws won out, then, arguably, the new laws were truly put in place to protect religious liberty. On the other hand, if Michigan’s civil rights law prevailed, then such an allowance would evince legislative encouragement for these agencies to discriminate solely against same-sex couples.

Turning back to Johnson, the Tenth Circuit concluded that Johnson

is alone not enough to change the private action to state action. See Blum v. Yaretsky, 457 U.S. 991, 1004–05 (1982) (“Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives . . .”). However, a state can arguably become overly involved in a private actor’s decisions without “compelling” the private actor to partake in such actions. See Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 171, n.4 (1978) (Stevens, J., dissenting) (noting that the Court decided that there was state action in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), even though the Pennsylvania statute did not compel the Moose Lodge to implement a discriminatory rule).

121. See supra, notes 38–39.
122. See supra, note 40 and accompanying text.
123. See MICH. COMP. LAWS SERV. § 722.124e(7)(b).
124. The ability of private, religiously affiliated child-placing agencies to investigate and grant certificates for potential foster homes is authorized by the MDHHS, which in and of itself is problematic for state action purposes. See MICH. ADMIN. CODE r. 400.12310–12311 (2015); see also West v. Atkins, 487 U.S. 42, 56, n.15 (1988) (“If an individual is possessed of state authority and purports to act under that authority, his action is state action.”) (quoting Griffin v. Maryland, 378 U.S. 130, 135 (1964)). This is especially troubling when coupled with the fact that, out of 106 licensed adoption agencies in Michigan as of February 25, 2015, 43 of them indicated a religious affiliation. See Analysis as Reported from Committee, supra Note 117.
125. See MICH. COMP. LAWS SERV. § 37.2302(a).
126. 2015 MICH. PUB. ACTS 53 (“It is the intent of the legislature to protect child placing agencies’ free exercise of religion protected by the United States constitution and the state constitution of 1963.”).
127. See McGroarty, supra note 111, at 180 (“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.”).
failed to present any evidence of the nexus aspect of his claim.\textsuperscript{128} Couples positioned similarly to the theoretical situation above could point to the fact that these child-placing agencies are not only dealing with potential parents, but are dealing with adoptable children who are ultimately reliant on the state to become officially adopted.\textsuperscript{129} Also, the Michigan legislature did not simply change the law to favor child-placing agencies’ decisionmaking power, but actually amended the law to give them an affirmative right that is arguably unnecessary.\textsuperscript{130}

Given the factors listed above, it is difficult to see how the actions of private, religiously affiliated child-placing agencies in Michigan do not constitute state action.

2. The Current Standard: Rational Basis

When a party claims that a state or federal law violates the Equal Protection Clause of the Fourteenth Amendment, courts, in part, analyze the group claiming the unequal treatment to determine what standard of scrutiny to use to evaluate the said law.\textsuperscript{131} Here, because sexual orientation is not a suspect class, heightened scrutiny is not required, and the rational basis standard is applied.\textsuperscript{132}

Rational basis is a low standard of scrutiny and is usually not difficult for the government to overcome.\textsuperscript{133} The rational basis standard only requires that the law at hand be rationally related to a legitimate governmental interest.\textsuperscript{134} Further, the legitimate governmental interest does not necessarily need to be concrete; if the law meets any conceivable legitimate intention.

\textsuperscript{128} See Johnson v. Rodrigues, 293 F.3d 1196, 1203–04 (10th Cir. 2002) (stating the adoption center made a private decision).

\textsuperscript{129} See Blum v. Yaretsky, 457 U.S. 991, 1027–28 (1982) (Brennan, J., dissenting) (noting the fact that the nursing homes’ reimbursement rates, along with the fact that the residents in the nursing homes are essentially dependent on the state for their support and placement, make a strong case for finding state action); Adopting a Child in Michigan, supra Note 26 at 7–8.

\textsuperscript{130} Contra Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 54 (1999) (“But it cannot be said that [shifting from one facet from favoring the employees to favoring employers] ‘encourages’ or ‘authorizes’ the insurer’s actions . . . .”).


\textsuperscript{133} See Saphire, supra note 131, at 598 (“The rational basis test, as a general matter, entails a significant degree of judicial deference.”).

\textsuperscript{134} See City of Cleburne v. Cleburne Living Circ., Inc., 473 U.S. 432, 446 (1985) (“To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose.”).
interest, the courts will be more likely to uphold it.\textsuperscript{135} While traditional rational basis review gives great deference to the legislature, the Supreme Court has time and time again struck down discriminatory laws under a more rational basis review.\textsuperscript{136} For example, the Court in \textit{Department of Agriculture v. Moreno}\textsuperscript{137} struck down a law that excluded people from the food stamp program that lived in a household where any one unrelated person resided.\textsuperscript{138} The Court stated that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must . . . mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”\textsuperscript{139} Another example is the Court’s decision in \textit{Cleburne v. Cleburne Living Center}.\textsuperscript{140} In that case, the Court reversed the City of Cleburne’s decision to require a special zoning permit for the construction of a home designated to house mentally ill individuals.\textsuperscript{141} While the city reasoned that the house would be difficult to evacuate because it would have been located on a five hundred year old flood plain, the Court reasoned that other residences that were similarly situated, such as nursing homes, would also have difficulty evacuating the area, but they received a special permit.\textsuperscript{142}

Section 722.124e lists some of the purposes of the law and interests of Michigan.\textsuperscript{143} For example, the law specifies that an important goal of Michigan is to ensure that children are placed in a “safe, loving, and supportive home.”\textsuperscript{144} Further, the law states that Michigan has an interest in maintaining as many private child-placing agencies as possible because “the more qualified agencies taking part in this process, the greater the likelihood that permanent child placement can be achieved.”\textsuperscript{145} Michigan Governor Snyder has also voiced a desire to continue to place as many children in forever homes as possible.\textsuperscript{146} Lastly, the alleged purpose of the law is “to protect child placing agencies’ free exercise of religion.”\textsuperscript{147}  

\textsuperscript{135} \textit{See} Robert C. Farrell, \textit{article, The Two Versions of Rational-Basis Review and Same-Sex Relationships, 86 Wash. L. Rev. 281, 287 (2011) (noting the legislative purpose of the law does not necessarily need legislative unanimity).}  
\textsuperscript{136} \textit{See} Kenneth J. Bartschi, \textit{The Two Faces of Rational Basis Review and the Implications for Marriage Equality, 48 Fam. L.Q. 471, 485–86 (2014).}  
\textsuperscript{137} 413 U.S. 528 (1973).  
\textsuperscript{138} \textit{Id.} at 534, 538.  
\textsuperscript{139} \textit{Id.} at 534.  
\textsuperscript{140} 473 U.S. 432 (1985).  
\textsuperscript{141} \textit{Id.} at 450.  
\textsuperscript{142} \textit{Id.} at 449.  
\textsuperscript{143} \textit{Mich. Comp. Laws Serv. § 722.124e(1)(a), (1)(c), (1)(e), (1)(g) (LexisNexis 2016).}  
\textsuperscript{144} \textit{Id.} § 722.124e(1)(a).  
\textsuperscript{145} \textit{Id.} § 722.124e(1)(c).  
\textsuperscript{146} \textit{See} Abbey-Lambertz, \textit{supra note 3.}  
It is difficult to see how sections 722.124e and 722.124f are rationally related to achieving the interests listed in the laws. The legislature has not put forth any evidence indicating more than a speculation that, if private, religiously affiliated child-placing agencies chose to deny services to same-sex couples on the basis of religion, then the MDHHS would take adverse action against them.\(^\text{148}\) If the MDHHS did so, those agencies would have a potential remedy under the Michigan Constitution or the First Amendment of the U.S. Constitution.\(^\text{149}\) Further, potentially allowing almost half of the private child-placing agencies to refuse services to same-sex couples, while granting the same services to others does not seem rationally related to Michigan’s interest of ensuring that each child is placed in a safe and loving permanent home.\(^\text{150}\)

Thus, the law arguably serves no other purpose than to allow these private child-placing agencies to discriminate by citing their religious beliefs, and it could potentially do more harm than good.\(^\text{151}\) Protecting the religious liberty of persons or organizations is a legitimate interest, but the U.S. Constitution and Michigan Constitution already provide adequate safeguards against adverse actions due to religious beliefs.\(^\text{152}\)

\(^{148}\) Some officials have merely pointed to the fact that in other states, such as Massachusetts and Illinois, private, religiously affiliated child-placing agencies have closed their doors when the state did not allow them to discriminate against same-sex couples. See Analysis as Reported From Committee, supra Note 117; Manya A. Brachear, Catholic Charities Loses Ruling on Foster Care, CHI. TRIB., Aug. 19, 2011, http://articles.chicagotribune.com/2011-08-19/news/ct-met-catholic-charities-0819-20110819_1_civil-unions-act-catholic-charities-religious-freedom-protection.

\(^{149}\) See supra, note 113 and accompanying text.

\(^{150}\) A lot of same-sex couples have been and are currently raising children nationwide. See Daphne Lofquist, Same-Sex Couple Households, U.S. CENSUS BUREAU, Sept. 2011, https://www.census.gov/prod/2011pubs/acsbr10-03.pdf; Further, private, religiously affiliated child-placing agencies, being plentiful in number, are responsible for a large number of adoptions in Michigan. See Analysis as Reported From Committee, supra Note 117.


\(^{152}\) See infra, Part II.C (discussing the religious liberty interest of private child-placing agencies); see also Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015) (“The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths . . . .”).
placing agencies an “opt out” when it comes to serving same-sex couples.\textsuperscript{153} Laws that seek to put same-sex couples at a disadvantage in the adoption process, whether implicitly or expressly, cannot be rationally related to a legitimate governmental interest.\textsuperscript{154} Same-sex couples are just as deserving of equal adoption services, whether they seek to adopt from a religious or non-religious child-placing agency.\textsuperscript{155}

\textit{C. Where’s My Religious Freedom?}

As mentioned earlier, the First Amendment of the U.S. Constitution and the Michigan Constitution are possible avenues of legal remedy for individuals who feel that the government has infringed on their ability to freely exercise their religious beliefs.\textsuperscript{156} While both avenues are possible, the analytical standards for the Michigan constitution and the First Amendment are different in part due to the Supreme Court’s decision in \textit{Employment Division v. Smith}.\textsuperscript{157}

During the pre-\textit{Smith} years, the Supreme Court interpreted the Free Exercise Clause in favor of religious persons on multiple occasions, and it simultaneously strayed away from inquiring into the validity of one’s religious beliefs.\textsuperscript{158} In doing so, the Court established a fairly consistent

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  \item \textsuperscript{153} See infra, Part IV.B (discussing the potential rules that the MDHHS should promulgate to reduce unnecessary barriers to the adoption process).
  \item \textsuperscript{154} See \textit{U.S. Dep’t of Agric. v. Moreno}, 413 U.S. 520, 534 (1973) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must . . . mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”); see also \textit{Lawrence v. Texas}, 539 U.S. 558, 583 (2003) (O’Connor, J., concurring) (noting that moral disapproval of a group cannot serve as a legitimate governmental interest to satisfy a rational basis analysis).
  \item \textsuperscript{155} See \textit{Obergefell}, 135 S. Ct. at 2600 (explaining that same-sex couples are able to provide loving and nurturing environments to children similar to their heterosexual counterparts).
  \item \textsuperscript{156} See supra, note 113. This Section will focus exclusively on the Michigan Constitution analysis since it is likely more possible that an individual would bring a suit primarily under that versus the First Amendment or RFRA. See \textit{City of Boerne v. Flores}, 521 U.S. 507, 511, 536 (1997) (holding that RFRA was unconstitutional as applied to the states because it violated the principles of federalism and separation of powers).
standard for weighing religious freedom against governmental legislation: if a neutral law infringed on a person’s ability to exercise his or her religion, the Court looked to whether the government’s compelling interest, if one existed, was met through the “least restrictive means.”159 This was the prevailing inquiry when the Free Exercise clause was concerned until the Court decided Smith.160 There, the Court declined to use the compelling interest analysis and instead held that a person cannot be excused from following “an otherwise valid law prohibiting conduct that the State is free to regulate” due to that person’s religious beliefs.161

Michigan courts have stated that the First Amendment of the U.S. Constitution and Article 4 of the Michigan Constitution should be interpreted similarly.162 However, the Michigan Supreme Court has hinted toward a broader reading to provide more protection.163 In People v. DeJonge,164 the Michigan Supreme Court faced a situation where parents wanted to homeschool their child without obtaining a teaching license as required by Michigan law.165 The Court decided that the situation fell under a Smith exception since it dealt with parents’ ability to choose how their child is educated; thus, a strict scrutiny analysis was necessary.166 The Court further made it clear that it was not determining whether the Michigan Constitution actually provides more protection than its federal counterpart.167

The strict scrutiny analysis put forth by the Michigan Supreme Court

be terminated his employment based on his religious beliefs; Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (holding that Wisconsin could not compel persons of the Amish faith to send their children to public schools before the age of sixteen in accordance with its compulsory education law); Sherbert v. Verner, 374 U.S. 398, 410 (1963) (holding that a Seventh Day Adventist cannot be forced to either violate his religious beliefs by working on a Saturday or quit working and be ineligible for unemployment benefits); see also United States v. Seeger, 380 U.S. 163, 184-85 (1965) (noting that it is not the Court’s job to question the validity of a person’s religious beliefs, but only the sincerity in which it is held).

159. See Yoder, 406 U.S. at 215; Sherbert, 374 U.S. at 406.
160. Smith, 494 U.S. 872.
161. Id. at 879, 885–86.
162. See In re Legislature’s Request for an Op., 180 N.W.2d 265, 274 (Mich. 1970) (“[Article 1, § 4 of the Michigan Constitution is] an expanded and more explicit statement of the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution . . . . They are, accordingly, subject to similar interpretation.”).
163. See People v. DeJonge, 501 N.W.2d 127, 134 (Mich. 1993) (concluding that strict scrutiny was required since the situation fell under an exception under Smith).
165. Id. at 129–131.
166. Id. at 134.
167. Id. at 134, n.27 (“However, because the ruling of Smith . . . commands that strict scrutiny be applied in the case at issue, we do not undertake to determine at this time the extent of the Michigan Constitution’s protection of the free exercise of religion generally.”).
has five prongs: (1) whether one’s belief, or conduct motivated by belief, is sincere; (2) whether that belief or conduct is religious in nature; (3) whether a regulation burdens the exercise of such belief or conduct; (4) whether a compelling state interest justifies an imposed burden on a defendant’s belief or conduct; (5) whether a less obtrusive form of regulation exists for the state.168 While the Michigan Supreme Court does not speak to the broadness of protection under this analysis, as compared to the First Amendment, it appears that the above analysis is more favorable to religious parties.169

Absent the new Michigan adoption law, private, religiously affiliated child-placing agencies would likely argue that the Michigan laws and regulations requiring the agencies to serve same-sex couples impose a burden on their belief or conduct.170 In other words, if these agencies were forced to serve and place children with same-sex couples, then they would be violating their religious beliefs because placing children in these couples’ care would make the agencies complicit in the couples’ “lifestyle.”171 This argument, of course, is similar to arguments that other religiously affiliated private sector companies have made.172

The “burden” that the Michigan laws would theoretically put on these adoption agencies is constitutionally insignificant because these agencies

168. Id. at 135.
169. See Donkers v. Kovach, 749 N.W.2d 744, 746 (Mich. 2008) (Markman, J., dissenting) (concluding that the Michigan Supreme Court has interpreted Michigan Constitution, art.1, § 4, as imposing “a greater burden upon the government” than the First Amendment’s Free Exercise Clause but has not cited any Michigan precedent holding such).
170. The first two prongs are typically easy to satisfy, thus the focus is usually on the burden, compelling interest, and least obtrusive means. See DeJonge, 501 N.W.2d at 135–36.
172. See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2765–66 (2014) (explaining that the appellant corporations believed that financing certain types of contraception in accordance with the Affordable Care Act ran adverse to their deeply held religious beliefs).
voluntarily undertook these burdens and became liable state actors.\footnote{173}{See supra, Part II.B.1 (discussing private child-placing agencies in the context of the state action doctrine).} These agencies voluntarily chose to enter into contracts with Michigan and become involved in a primarily state-run system where children’s interests ideally trump all else.\footnote{174}{Cf. McCready v. Hoffius, 593 N.W.2d 545 (Mich. 1999) (Kelly, J., dissenting) (“The requirements of the Civil Rights Act do not force defendants to violate their sincerely held religious beliefs. Instead, the burden placed on their religious beliefs merely affects their commercial decision to enter the real estate market and impose these beliefs on their potential customers.”). Further, these child-placing agencies arguably do not have a "right" in their contracts with Michigan, despite the new adoption laws assuming such. See Manya A. Brachear, Judge: State Not Required to Renew Contract with Catholic Charities, CHI. TRIB. (Aug. 18, 2011), http://www.chicagotribune.com/news/local/breaking/chi-judge-state-not-required-to-renew-contract-with-catholic-charities-20110818-story.html (“No citizen has a recognized legal right to a contract with the government.”).} Further, it is difficult to see how these agencies’ religious beliefs would be “burdened” by serving same-sex couples because providing adoption services is not the same as partaking in, facilitating, or financing a suggested “sinful action.”\footnote{175}{See Hobby Lobby, 134 S. Ct. at 2765–66 (noting that the corporations believed that paying for insurance that covered the contested contraceptives would force them to partake or facilitate the ability of a woman to commit a “sinful action”); see also Thomas v. Review Bd. of Ind. Emp’t Sec., 450 U.S. 707, 710 (1981) (noting that the petitioner’s participation in producing weapons violated his religious beliefs).} The argument sounds more like the actions or lifestyle of same-sex couples would infringe on these agencies’ religious beliefs, which is potentially problematic.\footnote{176}{See Douglas NeJaime and Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 YALE L.J. 2516, 2566–77 (2015) (discussing the potential material and dignitary harms to third parties as a result of complicity-based conscience claims).} Ultimately, providing adoptable children to same-sex couples is not adverse to these agencies’ ability to practice their religion.\footnote{177}{Michigan courts have not been shy about concluding that certain actions or conduct are not fundamental to a particular religion. See Abdur-Ra’ooof v. Dep’t of Corr., 562 N.W.2d 251, 253 (Mich. Ct. App. 1997) (“[Testimony established] that ‘Muslims may be legitimately excused from Friday services for reasons such as sickness and work activities,... attendance at the services is not fundamental to plaintiffs’ religion.’”); see also Reid v. Kenowa Hills Pub. Sch., 680 N.W.2d 62, 69–70 (Mich. Ct. App. 2004) (concluding that the inability to participate in interscholastic athletics while being homeschooled for religious reasons does not unconstitutionally burden a person’s free exercise of religion).} Michigan has a compelling interest in ensuring that every adoptable child receives a permanent home, regardless of whether a private, religiously affiliated adoption agency personally agrees with who the potential parents are or how they live their lives.\footnote{178}{Cf. Dep’t of Soc. Serv. v. Emmanuel Baptist Preschool, 455 N.W.2d 1, 33 (Mich. 1990) (Boyle, J., concurring) (“We conclude that a compelling state interest in protecting children in childcare centers [exists].”)}
these agencies would conclude, the new Michigan adoption laws are not a less obtrusive form of regulation because they essentially create state-sponsored discrimination in Michigan.  

III. MDHHS’ ROLE IN THE DOUBLE STANDARDS OF THE MICHIGAN LEGISLATURE’S ADOPTION SCHEME

The Michigan Constitution provides the underlying basis for the administrative state in Michigan. The governor has the ability to change the structure of Michigan’s administrative agencies by way of issuing executive orders. The MDHHS was created by an executive order and is an administrative agency that serves at the pleasure of the governor.

Administrative agencies, in general, interpret statutes and promulgate appropriate rules. Accordingly, in the context of the Michigan Child Organization Act, the MDHHS’ duty is to promulgate rules that reasonably interpret these laws to help ensure efficiency within the field of adoption and foster care. Specifically regarding private child-placing agencies, the MDHHS has promulgated multiple rules about the requirements that these agencies need to meet. These rules range from the necessary qualifications of agency staff to the necessity of establishing recruiting efforts to ensure that as many children are being placed as possible.

A. The Power Dichotomy of the Michigan Legislature and Administrative Agencies

The Michigan Administrative Procedure Act (MAPA) sets up the basic structure of the administrative agencies in Michigan. It covers the

179. See McGroaty, supra, note 111, at 180–81 (concluding that Michigan’s adoption law essentially allows for de facto discrimination against same-sex couples).
182. Id.
186. See id. at r. 400.12206.
187. See id. at r. 400.12706.
188. See Robert D. McLellan, Michigan’s APA Turns 40, 89 Mich. B.J. 20 (Dec. 2010) (stating that the APA was successful in creating a solid structure for Michigan’s executive
multiple facets of administrative agency functions, such as the rulemaking process and procedures for contested cases. MAPA does not govern how strictly Michigan courts consider the separation of powers doctrine, and it is hesitant to confer too much power to administrative agencies.

Administrative agencies are creatures of statute; thus, the Michigan legislature determines how much power administrative agencies have when interpreting statutes and passing regulations. Michigan courts have been clear about agency power: agency power in Michigan is strictly construed; agencies cannot change or amend a statute, nor can they rely on “inherent powers”; agencies cannot exceed the explicit powers granted to them in the enabling statute or the constitution; and, agencies cannot hear constitutional questions. For example, where a statute only lists one requirement for an organization to be eligible for public financial aid, the administrative agency functioning under the guise of the said statute cannot promulgate rules that would create additional eligibility requirements.

Further, if the legislature grants certain powers to an administrative agency, it cannot unilaterally strike down certain rules or actions by the agency without changing the statute. The Supreme Court of Michigan

administrative agencies).

189. See Mich. Comp. Laws Serv. §§ 24.231–264 (covering the procedure for processing and publishing rules); §§ 24.271–287 (covering contested cases procedures).

190. See Detroit Pub. Sch. v. Conn, 863 N.W.2d 373, 378 (Mich. Ct. App. 2014) (per curiam) (explaining that administrative agencies only have those powers that are explicitly put forth in the enabling statute and do not have any common law power).

191. See Soap & Detergent Ass’n v. Nat. Res. Comm’n, 330 N.W.2d 346, 350 (Mich. 1982) (“It is beyond debate that the sole source of an agency’s power is the statute creating it.”).


194. See Herrick Dist. Library, 810 N.W.2d at 117 (“An administrative agency that acts outside its statutory boundaries usurps the role of the legislature.”).

195. See Universal Am-Can, Ltd. v. Attorney Gen., 494 N.W.2d 787, 790 (Mich. Ct. App. 1992) (explaining that an agency with quasi-judicial powers generally cannot determine the constitutionality of a statute). However, it is possible for an agency with quasi-judicial functions to hear and decide an issue that is “couched in constitutional terms that do not involve the validity of a statute.” Id.

196. See Herrick Dist. Library, 810 N.W.2d at 119–20 (holding that the State Aid to Public Libraries Act did not grant the Department of Education either the express or the implicit authority to promulgate rules that would create more eligibility requirements for libraries to receive state funding).

made this clear in Blank v. Department of Corrections. There, the Court struck down two provisions of the MAPA that required that the legislature, through a joint legislative committee or by itself, approve a proposed rule before it went into effect. The Court, relying on I.N.S. v. Chadha, made clear that the legislature had to follow the presentment and enactment requirements of the Michigan constitution if it wanted to change an agency’s power.

B. The Michigan Legislature Tying the Hands of the MDHHS

Sections 722.124e and 722.124f prohibit adverse action by the MDHHS against private religiously affiliated child-placing agencies for invoking their rights under those sections. Again, the sections define “adverse action” as including the refusal to contract with or license an agency, as well as the refusal to renew a license. The legislature drafted the “adverse action” definition to be non-exhaustive. Such a broad prohibition arguably inhibits the MDHHS’ ability to properly enforce some of its rules.

For example, the MDHHS’ rules about recruitment require that private child-placing agencies adopt a recruitment plan that considers all of the following: ages and developmental needs of children; racial, ethnic, and cultural identity of children; sibling relationships of children; and special needs of children. Thus, if a private, religiously affiliated child-placing agency turns away multiple couples or refuses referrals from the MDHHS based on religious beliefs, then those agencies are arguably not following

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198. Id.
199. Id. at 539–40.
200. 462 U.S. 919 (1983). In Chadha, the Supreme Court held that Congress could not simply reverse a decision made by the U.S. Attorney General under the Immigration and Nationality Act by a one-house resolution. Id. at 959. The Court made clear that the Constitution allowed for one-house actions only in limited situations, and if those exceptions were not present, then Congress was required to go through the bicameralism and presentment processes found in Article I. Id. at 956–58.
201. Blank, 611 N.W.2d at 542 (“Action taken [by the legislature] pursuant to [the reserved] authority [to approve or disprove proposed executive agency rules] is inherently legislative in nature and does not comply with the enactment and presentment requirements of the constitution.”).
203. See supra, note 70 and accompanying text.
204. Id.
205. For example, a child-placing agency, both public and private, must establish a recruiting strategy as set by the MDHHS to operate under contract with the MDHHS. See Mich. Admin. Code r. 400.12706 (1996). Theoretically, if one of the said agencies drafted an appropriate recruiting policy but refused to follow it occasionally based on sincerely held religious beliefs, then the MDHHS would arguably have no recourse against it.
206. Id. at r. 400.12706(2).
the recruiting plan that they are required to adopt. Not allowing the MDHHS to take action where one of these agencies violates this rule could be problematic because the MDHHS may confront a situation where a private, non-religiously affiliated child-placing agency violates the same rule and the MDHHS is able to take action. The Michigan legislature has seemingly disregarded the possible negative effects on the placement of children in the care of these agencies by prohibiting the MDHSS from taking adverse action whenever these agencies defend their actions as invoking religious freedom.

Further, the Michigan legislature is forcing the MDHHS to violate its own non-discrimination policy when it comes to adoption services. The MDHHS’ non-discrimination policy states that the department “will not discriminate against any individual or group because of . . . sexual orientation . . . .” Of course, unlike a promulgated rule, such a policy or guideline is not binding on the public. However, the policy guideline, according to the MAPA, does bind the agency. Thus, the MDHHS is put in a situation where it is legally required to allow private, religiously affiliated child-placing agencies to refuse an agency referral when a same-sex couple is involved, while potentially not allowing other contracted agencies to do the same.

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207. The rules regarding recruitment do not mention the consideration of the private child-placing agency’s personal beliefs or biases. \[Id. at r. 400.12706.\]

208. \[See Mich. Comp. Laws Serv. § 24.232(2) (LexisNexis 2016) (“[A]n exception to a rule shall not discriminate in favor of or against any person. A person affected by a rule is entitled to the same benefits as any other person under the same or similar circumstances.”); Lambroff v. Ram’s Horn Rest., 385 N.W.2d 775, 777 (Mich. Ct. App. 1986) (explaining that, in accordance with the MAPA, an agency cannot “sporadically or selectively enforce its own rule”).\]

209. Given that private child-placing agencies with a religious affiliation accounted for 1,084 of the 2,361 adoptions in 2012–2013, it is difficult to see how allowing these agencies to deny services to a new field of adoptive parents (legally married same-sex couples) would be beneficial. \[See Analysis as Reported from Committee, supra Note 117.\]

210. \[See Mich. Comp. Laws Serv. § 722.124e(3), (7)(a); supra, Part IIA (discussing “adverse action” and what it includes within the context of Michigan’s new statute).\]

211. \[See Adoption Service Policy Bulletin for MCL, The Michigan Department of Health and Human Services, 1, 4 (June 1, 2015), http://www.mfia.state.mi.us/OLMWEB/EX/AD/Public/ADB/2015-001.pdf#pagemode=bookmarks.\]

212. \[Id.\]

213. \[See Mich. Comp. Laws Serv. § 24.203(7) (1970) (“‘Guideline’ means an agency . . . declaration of policy that the agency intends to follow, that does not have the force or effect of law, and that binds the agency but does not bind any other person.”).\]

214. \[Id.\]

215. \[See Mich. Comp. Laws Serv. § 722.124e(3) (prohibiting adverse action against child-placing agencies for refusing referrals based on religious beliefs); McGroarty, supra note 111, at 180 (“Because these statutes allow religiously affiliated adoption agencies to deny otherwise qualified parents on the basis of their sexual orientation, Michigan’s laws have
IV. MICHIGAN CAN, AND SHOULD, DO BETTER

Given the number of private adoption agencies that have a religious affiliation in Michigan and the amount of adoptions that those agencies have helped facilitate, it makes little sense for laws such as §§ 722.124e and 722.124f to stand. If these laws were to be repealed, it could potentially result in fewer barriers for a broader population of people to adopt, particularly same-sex couples.

A. Michigan’s New Law is Unconstitutional and Should be Struck Down

Either the Michigan legislature needs to repeal or amend these laws, or the laws should be struck down as unconstitutional in either state or federal court. The private child-placing agencies that are authorized and licensed to provide services in Michigan are currently considered state actors under the current state action jurisprudence. If these child-placing agencies want to turn away or deny services to people (particularly same-sex couples) based on religious beliefs, then these agencies should separate themselves as much as possible from the state and perform purely private transactions. This is not to argue that private religiously affiliated child-placing agencies should be prevented from discriminating based on their religious beliefs, however, they should not be able to do so and receive substantial support and funding from the state of Michigan.

Further, the Michigan laws are not rationally related to the purported purposes, or other conceivable purposes, of the Michigan legislature. The law makes little sense in light of the current protections for private religious parties. Children are arguably no better off in states that are essentially endorsed de facto discrimination of same-sex couples.

216. See supra, note 209 and accompanying text.

217. See supra, Part II.B.1 (discussing the state action analysis in the context of Michigan private, religiously affiliated child-placing agencies).

218. By separating themselves from the state, these agencies avoid running the risk of being held in violation of the U.S. Constitution and can freely discriminate absent a statutory restriction on such. See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972) (“The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause . . . .”); Private child-placing agencies should stick to performing their private functions. See Fairfax, supra note 33, at 51–52.

219. See supra, Part II.C (discussing the private adoption agencies’ religious liberty interest).

220. See supra, Part II.B.2 (discussing the rational basis review of Michigan’s new adoption law).

221. See U.S. CONST. amend. I, (“Congress shall make no law . . . prohibiting the free exercise [of religion].”); MICH. CONST. art. I, § 4 (“Every person shall be at liberty to worship God according to the dictates of his own conscience . . . . The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.”).
considered “anti-gay” than they are in states that are considered “gay-friendly” or “neutral.”222 In fact, the Michigan legislature should provide more protection for same-sex couples instead of the opposite. The current civil rights statute in Michigan is under-inclusive, as it does not protect against discrimination based on sexual orientation.223 Same-sex couples that desire to serve as parents already face potential public prejudice, and the Michigan legislature does not need to create more barriers for them.224 Same-sex couples are just as capable of parenting children as heterosexual couples and should be treated accordingly.225

B. The MDHHS Should Promulgate Rules That Put Children’s Interests First

In the case that Michigan’s new adoption laws are repealed, amended, or struck down, the MDHHS should expand on or increase its rules regulating private child-placing agencies and the adoption process. The Obergefell decision has the potential to send ripple effects that could reach into multiple facets of everyday life, and the current regulations do not take into account these possible effects within the field of adoption.226 The MDHHS should promulgate rules that ensure widespread participation in the adoption process by reducing unnecessary barriers to potential parents.227 For example, an amendment to the recruiting rules that disallows any personal bias or influence on the part of the child-placing agency itself could provide protection against unnecessary discrimination without rewriting the statute itself.228

222.  See Analysis as Reported from Committee, supra Note 117.
223.  See, e.g., MICH. COMP. LAWS SERV. § 37.2302/a (LexisNexis 2016) (listing only color, religion, national origin, race, sex, age, and marital status as classes protected against discrimination). However, there is a bill in the Michigan legislature that sets out to amend the statute to include sexual orientation. See H.B. 4538, 98th Leg., Reg. Sess. (Mich. 2015) (adding sexual orientation and gender identification to the Elliott-Larsen civil rights act).
227.  One of the main purposes of Michigan’s Adoption Code is to put adoptable children in permanent, stable homes as quickly as possible. See MICH. COMP. LAWS SERV. § 710.21a(d). Making sure that all potential adoptive parents receive convenient adoption services from child-placing agencies, both public and private, would reasonably promote that purpose.
228.  The current recruiting requirements only take into account the child’s interest
The MDHHS should amend its rule regulating the placement process that private child-placing agencies go through. The rule currently requires that child-placing agencies document how the following factors were considered when choosing adoptive parents: (1) the physical, emotional, medical, and educational needs of the child; (2) the child’s needs for continued contact with the birth parents, siblings, relatives, foster parents, and other persons significant to the child; (3) the racial, ethnic, and cultural identity, heritage, and background, which may only be considered if doing so is in the best interest of the child. The rest of the rule makes no mention of factoring in a child-placing agency’s belief when placing a child with adoptive parents. Silence is not an appropriate deterrent or solution; the rule should include a prohibition on a child-placing agency considering its personal or religious beliefs when choosing adoptive parents because a personal, subjective bias should not be the difference between a child remaining in foster care or moving into a loving family.

The MDHHS should also clarify its policies on entering into contracts with private child-placing agencies. Currently, the chief director of the MDHHS is the only person authorized to terminate a contract. One of the reasons available for terminating a contract is “performance issues.” The MDHHS should promulgate a rule or rules that specifically target contracts with private child-placing agencies that have sincere religious beliefs. If private religiously affiliated child-placing agencies want to enter into contracts with the MDHHS and receive public funds, then they should be held accountable if denying referrals and services causes “performance issues” or any other issues.

Further, the MDHHS should promulgate a rule that prohibits private child-placing agencies that are authorized to grant foster care home certifications from factoring in its own personal and religious bias in the decisionmaking process. The MDHHS can authorize private child-placing agencies to certify a foster care home. When investigating and going through the certification process, a private child-placing agency should not be able to include its personal or religious beliefs in the process. The foster

specifically, but a prohibition on a child-placing agency taking into account its personal bias or beliefs could go a long way. See Mich. Admin. Code r. 400.12706 (1996).
230. Id. at r. 400.12709.
232. Id.
233. See supra, note 209 and accompanying text (noting the number of private child-placing agencies that help facilitate adoptions in Michigan).
234. See supra, note 40.
care system is important to parentless children, and a child-placing agency should not complicate the system because of its religious convictions. If a private child-placing agency highly favors its religious beliefs, then it should leave those beliefs behind when entering the public sphere to certify foster care homes, and the MDHHS should ensure that these child-placing agencies do just that.

Lastly, the MDHHS should simply not allow private child-placing agencies under contract to engage in unnecessary discrimination within the adoption process. The MDHHS itself abides by a non-discrimination policy. The MDHHS should require that private child-placing agencies under contract abide by the non-discrimination policy when providing adoption and foster care services. Doing so would be a step toward ensuring that unnecessary barriers do not reduce the efficiency of the adoption process in Michigan, which would ultimately benefit adoptable children.

CONCLUSION

The new Michigan law allows private child-placing agencies to illegally discriminate against individuals under the cloak of religious freedom. Governor Snyder has stated that the foster children of Michigan are of the utmost importance to the state. Providing private child-placing agencies with sincere religious beliefs with a pass to discriminate while receiving public funds does not seem to be the best solution.

Further, the MDHHS should be allowed to reasonably regulate under Michigan’s Adoption Code and Child Care Organization Act. It would likely not do Michigan any good to completely forgo contracting with private child-placing agencies that have a religious affiliation. However,

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236. See, e.g., Application to Adopt: Non-Discrimination, Adoption Services Manual, Department of Health and Human Services, 1 (June 1, 2015), http://www.mhfa.state.mi.us/olmweb/ex/AD/Mobile/ADM/ADM%20Mobile.pdf (“Michigan Department of Health and Human Services (DHHS) will not discriminate against any individual or group because of . . . gender identity or expression [or] sexual orientation . . . .”).

237. There is currently a bill in the United States Senate that would help reduce unnecessary barriers within the adoption and foster care system. See Every Child Deserves a Family Act, S. 1382, 114th Cong. (2015) (prohibiting discrimination against potential foster or adoptive parent based on his or her sexual orientation or gender identity).

238. See Abbey-Lambertz, supra note 3.

239. See supra note 209 and accompanying text (noting the number of adoptions that
private child-placing agencies that contract with the state and receive public funds while at the same time discriminating would be a different situation. Religious liberty is important, but when a state allows that liberty to intrude into the foster child placement equation, it leads one to ask: whose best interest is really most important?