

**DEPENDENCY IS DIFFERENT: WHY RELIGIOUS
ACCOMMODATIONS IN AGENCY ADOPTIONS VIOLATE THE
CONSTITUTIONAL RIGHTS OF SAME-SEX FAMILIES AND
FOSTER YOUTH**

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In loving memory of Susan Franey

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INTRODUCTION

In June of 2015, the Michigan state legislature enacted Michigan House Bill 4189,¹ which allows a private child welfare agency to withhold adoption services if providing those services would conflict with the agency's sincerely held religious beliefs.² The bill further prohibits state agencies from taking adverse action against any private child welfare agency that engages in discrimination based on its professed beliefs, including an agency that benefits from government contracts or receives federal funding. Controversy has ensued over the bill's permissive language, which puts Michigan's 3,300 foster children at risk.³

The child welfare system is not a single entity; rather, it is composed of several organizations, including public agencies and government entities as well as private child welfare agencies.⁴ Public child welfare agencies use federal funds to provide resources to families who enter a state's child welfare system.⁵ Private child welfare agencies also provide adoption services and other resources to families in need.⁶ In recent years, states have begun to contract and collaborate with private child welfare agencies and community-based organizations to provide adoption services to families in the child welfare system.⁷ As a result, the distinction between public and private action has become blurred. Now, private child welfare agencies not only handle frontline case management duties for foster children in their

1. H.B. 4189, 98th Leg., Reg. Sess. (Mich. 2015).

2. *Id.*

3. See Michael Porcello, *Michigan Adoption-Specific RFRA Bills Would Protect the Personal Biases of Providers at the Expense of Foster Youth*, MOMSRISING (May 14, 2015), <http://www.momsrising.org/blog/michigan-adoption-specific-rfra-bills-would-protect-the-personal-biases-of-providers-at-the-expense> [https://perma.cc/NRS7-AVE5].

4. The Children's Bureau, located within the U.S. Department of Health and Human Services (HHS), is responsible for implementing federal child and family legislation and working with state and local government agencies to find adoptive homes for children in foster care. See CHILD WELFARE INFO. GATEWAY, HOW THE CHILD WELFARE SYSTEM WORKS 1, 2–3 (2013). These government agencies work together to create programs that focus on strengthening families to prevent child abuse and neglect. *Id.* Their goals are to protect children from further abuse, to reunite children with their natural families whenever possible, and to find permanent or adoptive families for children who cannot safely return home. *Id.*

5. Among other resources, agencies may provide reunification services, foster care services, mental health care, substance abuse treatment, parenting classes, domestic violence services, and financial or housing assistance. *Id.* at 2.

6. See *generally Adoption*, SOCIAL WORK POL'Y INST., <http://www.socialworkpolicy.org/research/adoption.html> [https://perma.cc/DFU9-XS6W].

7. *Id.*

custody, but also have the same responsibilities as public agencies to recruit prospective adoptive and foster parents and to administer foster care adoptions⁸—duties that have been traditionally carried out by government entities.

Privatization in the child welfare system has created considerable tension among public agencies, private agencies in the public sector, and members of the public, whom both public and private agencies are obligated to serve. Because public child welfare agencies are extensions of the state, their actions are subject to the U.S. Constitution, including the Equal Protection Clause of the Fourteenth Amendment. Private adoption agencies, however, are currently immune from equal protection claims.⁹ Therefore, private child welfare agencies, including those bound by government contracts, may discriminate against individuals in manners that would be impermissible if employed by a state actor—including, for example, the imposition of discriminatory preferences based on religious beliefs.¹⁰ Courts and child placement agencies are required to make placement decisions that in the best interest of the child,¹¹ and thus, agencies' religious preferences may affect the process.¹²

8. *Id.*

9. See Sheila S. Kennedy, *When Is Private Public?: State Action in the Era of Privatization and Public Private Partnerships*, 11 GEO. MASON U. C.R.L.J. 203, 209 (2001) (describing how the Supreme Court distinguishes between “invasions of rights that are constitutionally forbidden (‘public’ invasions) and those that are not (‘private’ invasions)”). Because the distinction depends on the identity of the actor and private child welfare agencies fall within the realm of private conduct, discrimination is not constitutionally forbidden and injured parties do not have a cognizable claim under the Fourteenth Amendment.

10. See Kennedy, *supra* note 9, at 216 (recognizing how private religious organizations have a free exercise right to insist that its employees adhere to its core values). In contrast, enforcing these requirements at government-run institutions would run afoul of the Fourteenth Amendment. *Id.* at 217. While adoption services may be provided by organizations affiliated with a variety of religious belief systems, organizations professing specific Judeo-Christian religious affiliations are particularly prevalent. Of the eighty-six child placement agencies in Michigan, sixteen are Catholic, twelve are Lutheran, eight are Christian, and one is Methodist. MICH. ADOPTION RESOURCE EXCH., ADOPTION AND FOSTER CARE AGENCIES BY COUNTY, <http://www.mare.org/Portals/0/Documents/Map%20of%20Agencies.pdf> [<https://perma.cc/VXF4-2VNT>].

11. All fifty states have statutes requiring courts to consider the child's best interest when determining child custody. CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 1 (2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf [<https://perma.cc/TU9A-RG8N>]. Courts make “best interests” determinations by considering various factors related to the child's circumstances and the parents' circumstances and capacity to parent. *Id.* at 2. The child's safety and well-being is the court's paramount concern. *Id.*

12. See Donald L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 FORDHAM L. REV. 383, 404–05 (1989).

Currently, all private adoption agencies are protected under Michigan House Bill 4189, including those that contract to receive federal funding in exchange for providing the state with assistance in administering foster care adoptions. Lawmakers claim that Michigan House Bill 4189 was not intended to limit or deny any person's right to adopt a child¹³—legislators reasoned that private adoption agencies should not be compelled to provide adoption services when doing so would cause an agency to become complicit in behavior that it believes to be sinful or immoral¹⁴—but the political climate in Michigan¹⁵ suggests that the bill's actual purpose is to enable private adoption agencies to withhold adoption services from prospective parents and orphaned children who identify or are identified as lesbian, gay, bisexual, transgender, or queer (LGBTQ).¹⁶

Michigan is only one of several states that have recently introduced or enacted such legislation. State legislatures, including those of Texas, Oklahoma, Alabama, and Georgia, are aggressively pursuing similar

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13. H.B. 4189, 98th Leg., Reg. Sess. (Mich. 2015) (“This amendatory act is not intended to limit or deny any person’s right to adopt a child.”).
 14. *2015 House Bill 4189: Let Adoption Agencies Refuse Adoptions That Violate Moral Convictions*, MICHIGAN VOTES: MACKINAC CTR. PUB. POLICY [hereinafter *2015 House Bill 4189*], <http://michiganvotes.org/Legislation.aspx?ID=168430> [<https://perma.cc/S7R6-ZFR5>] (illustrating legislators’ desire to allow a private agency to withhold services, “including adoptions of a child by a homosexual,” if providing those services would violate the agency’s “written religious or moral convictions”).
 15. See, e.g., Wyatt Fore, DeBoer v. Snyder: *A Case Study in Litigation and Social Reform*, 22 MICH. J. GENDER & L. 169, 171 (2015) (describing the state of Michigan as “not a place commonly associated with cutting-edge LGBT activism”). In November 2004, traditional marriage was constitutionally defined by the Michigan Marriage Amendment, which states: “To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.” MICH. CONST. art. I, § 25.
 16. While this Note refers collectively to persons who identify as lesbian, gay, bisexual, transgender, or queer (LGBTQ), I acknowledge that individual experiences can vary greatly—especially in the adoption context, where significant discretion is involved. See CHILD WELFARE INFO. GATEWAY, WORKING WITH LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING (LGBTQ) FAMILIES IN FOSTER CARE AND ADOPTION 8–9 (2016), https://www.childwelfare.gov/pubPDFs/f_profbulletin.pdf [<https://perma.cc/TG73-UB4F>] (describing how some professionals have personal biases, misinformation, or fears about working with the LGBTQ community and how the most extreme examples of bias and discrimination arise when these professionals work with clients who identify as transgender, particularly those who have undergone gender transition); see also Christina Nicole Kemper & Natalie Jazmin Reynaga, *Social Workers’ Attitudes Towards Lesbian, Gay, Bisexual, and Transgender Adoptions* 14 (June 2015) (unpublished graduate project, California State University, San Bernardino), <http://scholarworks.lib.csusb.edu/cgi/viewcontent.cgi?article=1180&context=etd>.

measures nationwide,¹⁷ where thousands of foster children still wait to be adopted.¹⁸ There are not enough foster families to care for every child;¹⁹ consequently, foster children are placed in temporary emergency shelters,²⁰ group homes,²¹ and mental health facilities.²² Children who have special

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17. South Dakota was the first state to enact adoption-specific religious exemption legislation in 2017. *South Dakota Is First State in a Series of Anti-LGBT Bills Advancing Through Legislatures Across the Country*, ACLU (Mar. 10, 2017), <https://www.aclu.org/news/south-dakota-becomes-first-state-year-enact-anti-lgbt-legislation> [<https://perma.cc/6R8D-C7KT>]; see *Legislation Affecting LGBT Rights Across the Country*, ACLU, <https://www.aclu.org/other/legislation-affecting-lgbt-rights-across-country#adoption> [<https://perma.cc/JMK3-GRCP>]; see also S.B. 145, Reg. Sess. (Ala. 2017); H.B.159, 154th Gen. Assembly, Reg. Sess. (Ga. 2017); H.B. 1507, 56th Leg., Reg. Sess. (Okla. 2017); S.B. 892, 85th Leg., Reg. Sess. (Tex. 2017); H.B. 1805, 85th Leg., Reg. Sess. (Tex. 2017).
 18. In 2014, children entered foster care in the United States at a rate of one new foster child every two minutes. *The Current State of Foster Care*, FOSTERCLUB, <https://www.fosterclub.com/article/statistics-foster-care> [<https://perma.cc/QXX9-GNVY>]. Approximately thirty-five states reported that the number of children entering foster care increased from 2014 to 2015. *Number of Children in Foster Care Increases for the Third Consecutive Year*, ADMIN. FOR CHILDREN & FAMILIES (Oct. 27, 2016) <https://www.acf.hhs.gov/media/press/2016-number-of-children-in-foster-care-increases-for-the-third-consecutive-year> [<https://perma.cc/S5AH-KL62>]. According to the Adoption and Foster Care Analysis and Reporting System, the number of children entering foster care rose to 269,509 in 2015. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT NO. 23, at 1 (2016) [hereinafter AFCARS REPORT NO. 23], <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport23.pdf> [<https://perma.cc/CXW2-8S6A>].
 19. *About Foster Parenting*, ADOPTUSKIDS, <http://www.adoptuskids.org/adoption-and-foster-care/overview/foster-parenting> [<https://perma.cc/AL5H-JE92>].
 20. ACS-NYU CHILDREN'S TRAUMA INST., EASING FOSTER CARE PLACEMENT: A PRACTICE BRIEF (2012), http://www.nctsnet.org/sites/default/files/assets/pdfs/easing_foster_care_placement_practice_brief.pdf [<https://perma.cc/WJ68-3SGJ>]. Most child welfare systems operate transitional housing facilities where children must wait for hours or days before a foster family is found. *Id.* These settings take a number of forms, including twenty-four-hour emergency shelters, emergency foster care homes, and receiving centers. *Id.*
 21. Six percent of foster youth live in long-term group homes. *The Current State of Foster Care*, *supra* note 18; *cf.* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, GROUP HOME 1 (2008) [hereinafter GROUP HOME], http://www.ojdp.gov/mpg/litreviews/Group_Homes.pdf [<https://perma.cc/FUH7-ZZD5>]. Group homes, which are typically used by youth-related public welfare agencies, serve five to fifteen children who have been placed there either by court order or through interaction with other public welfare agencies. GROUP HOME, *supra*, at 1. Group homes are generally more restrictive than family foster care placements, but less restrictive than juvenile detention centers; group home facilities are “staff-secured” rather than locked. *Id.*
 22. Eight percent of foster youth—32,204 children—live in mental health treatment facilities. AFCARS REPORT NO. 23, *supra* note 18, at 1. These facilities range from less restrictive Rate Classification Level 14 (RCL-14) group homes, where treatment programs provide stability and mental health services, to more restrictive Community Treatment Facilities (CTFs), which are locked treatment facilities intended to provide more intensive care and supervision. See L.A. CTY. DEP'T OF MENTAL HEALTH, L.A. CTY. INTER-AGENCY COUNCIL ON CHILD ABUSE & NEGLECT, THE STATE OF CHILD ABUSE IN LOS ANGELES

needs, including older children, are especially hard to place into adoptive homes.²³ Many foster children age out of the child welfare system without ever finding a permanent family.²⁴ Because adoption-specific religious exemption laws like Michigan House Bill 4189²⁵ broadly allow private agencies to deny services to LGBTQ individuals, same-sex couples, and even LGBTQ-identified foster youth based solely on sexual orientation, such laws will likely reduce or eliminate the adoption eligibility of a large proportion of prospective parents, in practice preventing many foster children from being adopted into permanent homes.²⁶

COUNTY 211 (2009). CTFs serve children who exhibit aggressive or self-destructive behaviors and who would be inadequately supported in a less restrictive environment, as evidenced by unsuccessful placement in open settings and denial of admission to RCL-14 group homes. *Id.*

23. Mary Eschelbach Hansen, *Using Subsidies to Promote the Adoption of Children From Foster Care*, 28 J. FAM. & ECON. ISSUES 377, 377 (2007).

24. When children cannot return home to their families, child welfare systems must act quickly to find them alternative homes. *Aging Out*, CHILDREN'S RTS., <http://www.childrensrights.org/newsroom/fact-sheets/aging-out/> [<https://perma.cc/52VL-75TJ>]. Children become less and less likely to find placement in a safe, loving, and permanent home. *Id.* Because foster youth become ineligible for foster care services upon reaching the age of majority, those who are not placed in permanent homes are eventually forced out of the child welfare system. *Id.* In 2015, the number of foster youth exiting foster care between the ages of eighteen and twenty was 22,994. See AFCARS REPORT NO. 23, *supra* note 18, at 3. In 2008, Congress enacted the Fostering Connections to Success and Increasing Adoptions Act, allowing states to extend foster care and adoption assistance programs to foster youth until age twenty-one. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949; see also *Extending Foster Care Beyond 18*, NAT'L CONF. ST. LEGISLATURES (Mar. 11, 2016), <http://www.ncsl.org/research/human-services/extending-foster-care-to-18.aspx> [<https://perma.cc/XH64-NWJG>]. This piece of legislation also allows states to receive federal Title IV-E reimbursements for costs associated with supporting youths' transition into adulthood. 122 Stat. at 3951. Currently, twenty-one states provide foster care and adoption services to youth until age twenty-one with the help of federal funding. See Teresa Wiltz, *States Tackle 'Aging Out' of Foster Care*, PEW CHARITABLE TR., (Mar. 25, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/3/25/states-tackle-aging-out-of-foster-care> [<https://perma.cc/X4GR-BKPJ>]. Additionally, Indiana extended foster care to age twenty, while Florida, Wisconsin, and Delaware opted out of federal funding but maintain foster care programs using state dollars. *Id.*

25. H.B. 4189, 98th Leg., Reg. Sess. (Mich. 2015).

26. LGBTQ individuals and same-sex couples are six times more likely than their different-sex counterparts to raise foster children. GARY J. GATES, WILLIAMS INST., *LGBT PARENTING IN THE UNITED STATES* 1, 3 (2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf> [<https://perma.cc/XS52-8PRS>] ("Among couples with children under age 18, 2% of same-sex couples are raising a foster child compared to just 0.3% of different-sex couples. Approximately 2,600 same-sex couples are raising an estimated 3,400 foster children in the US."). Additionally, prospective parents in the LGBTQ community may be more likely to adopt children with special needs, who are routinely excluded from other

Private adoption agencies in the public sector are no longer purely private. This Note argues that such public-private agencies should be converted to state actors, subject to the constitutional requirements of the Fourteenth Amendment, thereby enabling parties injured by religious exemption laws like Michigan House Bill 4189 to assert a cognizable claim challenging such laws under the Equal Protection Clause.

Part I of this Note discusses the structure and function of the American domestic adoption system and provides a compare-and-contrast analysis of public and private adoptions. Part II discusses the Adoption and Safe Families Act of 1997 (ASFA), which amended the Social Security Act to incentivize foster care adoption and made federal funding contingent upon states' compliance with ASFA's mandates, fundamentally changing federal child welfare policies, procedures, and legislation in the United States. Part III addresses the conflicts that arise when private agencies enter a government domain, including contradictory opinions about what is in the foster child's best interest. Part III also compares Congress's child placement priorities and preferences to those of private, religiously affiliated adoption agencies. Part IV discusses the state action doctrine and argues that private adoption agencies are substantively state actors under the public function test. Part V of this Note argues that adoption-specific religious exemption legislation like Michigan House Bill 4189, which increases the likelihood of discrimination against LGBTQ individuals, same-sex couples, and foster youth, is motivated by an intent to discriminate constituting class-based animus and that courts should thus apply heightened scrutiny to equal protection claims involving adoption-specific religious exemption laws. Finally, Part VI analyzes the proffered purpose and effects of Michigan House Bill 4189 under heightened scrutiny.

Ultimately, this Note advocates for Michigan House Bill 4189 to be repealed because it creates a constitutionally impermissible classification among foster parents in violation of the Equal Protection Clause. This Note argues that all adoption-specific religious exemption legislation, as applied to private child welfare agencies with state contracts, is constitutionally unsound, and that the nation's foster care crisis requires that laws like Michigan House Bill 4189 be invalidated.

placements. *See, e.g.*, NATIONAL ADOPTION INFO. CLEARINGHOUSE, GAY AND LESBIAN ADOPTIVE PARENTS: RESOURCES FOR PROFESSIONALS AND PARENTS 1, 9 (2000).

I. BACKGROUND

Adoption creates a legally recognized relationship between an adult and a child who are not biologically related and terminates the rights and responsibilities of the child's natural parents.²⁷ Adoptive parents then have the same legal rights and responsibilities as biological parents.²⁸ There is no constitutional right to adoption.²⁹

Of the several adoption types practiced in the United States, the most common is domestic adoption.³⁰ Domestic adoptions can be either public or private; public domestic adoptions involve children in the child welfare system, while in private domestic adoptions, birth parents voluntarily abdicate their parental rights—thereby consenting to the adoption—and may work with attorneys or professionals in the field to place the child in an adoptive home.³¹ Thus, the American domestic adoption system effectively comprises two distinct adoption schemes: public adoption and private adoption.

A. Public Adoptions

Public adoptions are facilitated by government agencies within a state's child welfare system.³² Children enter the public child welfare system when

27. *In re Adoption of Graham*, 409 N.E.2d 1067, 1068 (Ohio Ct. Com. Pl. 1980) (“Adoption may be defined as a legal proceeding whereby the relationship of parent and child is created between persons who are not so related by nature, whereupon the person adopted becomes the legal heir of his or her adopter, and the rights and duties of domestic relation with its natural parents are terminated.”).

28. *Id.* at 1069.

29. *Lindley ex rel. Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989) (“Because the adoption process is entirely conditioned upon the combination of so many variables, we are constrained to conclude that there is no fundamental right to adopt. We also decline to find that the interest in adopting a child falls within the marital privacy right, since the statute requires adopters to submit their personal lives to intensive scrutiny before the adoption may be approved. Thus, we can find neither a fundamental right nor a privacy interest in adopting a child.”).

30. See Kathy P. Zamostny et al., *The Practice of Adoption: History, Trends, and Social Context*, 31 COUNS. PSYCHOL. 651, 652–53, 658 (2003) (describing the different adoption types characterized by relationships among parties to an adoption).

31. *Id.* at 652.

32. These government agencies, which in any given state may include the state's Department of Social Services (DSS) or its Department of Children and Family Services, receive federal, state, and local funding to administer foster care and adoption services. See generally CYNTHIA CROSSON-TOWER, *EXPLORING CHILD WELFARE* 304–37 (5th ed. 2009); *What Is the Difference Between a Public and Private Adoption Agency?*, ADOPTION.NET,

their parents' legal rights are either relinquished to local child welfare agencies or terminated by a juvenile dependency court due to parental abuse or neglect.³³ Children in foster care become eligible for adoption if the court determines that it would not be safe for them to return to their biological families.³⁴

In the public foster care and adoption scheme, the government transfers parental rights from the child's natural parents to the state's foster care system or to a public child placement agency.³⁵ Children in foster care can be placed into temporary or permanent homes by public placement agencies or by private adoption agencies.³⁶ A state's Department of Social Services (DSS) or its Department of Family and Children Services (DCFS) receives government funding to initiate and assist in the child placement process.³⁷

Some private adoption agencies contract with state governments to administer foster care and adoption services in the public sector in exchange for government funding.³⁸ These private agencies perform tasks that are similar and sometimes identical to the duties of their public agency counterparts.³⁹

<https://www.adoption.net/a/adopting/pre-adoption/what-is-the-difference-between-a-public-and-private-adoption-agency/27791> [<https://perma.cc/CJW9-EWGW>].

33. Juvenile dependency courts are responsible for deciding the issue of a child's entrance into the foster care system and for evaluating the possibility of reunifying a child with the child's natural parents. *See generally* CHILD WELFARE INFO. GATEWAY, COURT HEARINGS FOR THE PERMANENT PLACEMENT OF CHILDREN (2016), <https://www.childwelfare.gov/pubPDFs/planning.pdf> [<https://perma.cc/E77D-H6XX>] (describing the role of dependency court in child placement decisions).
34. *Id.*
35. *Id.* at 2. In public adoptions, children are placed for adoption by public or licensed private adoption agencies or by a state's DSS office. Once the rights of a child's biological parents are relinquished or terminated by court order, the adoption agency becomes legally responsible for the care, custody, and control of the child. *Adoption FAQs*, CAL. DEP'T SOC. SERVS., <http://www.childsworld.ca.gov/pg1302.htm>. [<https://perma.cc/A3X7-TWJ3>].
36. Martha M. Ertman, *Adoption*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS* (Alain Marciano & Giovanni Battista Ramello eds., continuously updated ed. 2016).
37. 42 U.S.C. § 674(a)(3) (2012); *see* Social Security Act of 1935, 42 U.S.C. §§ 620–629m, 670–679c (2012 & Supp. 2017); Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, Pub. L. No. 95-266, 92 Stat. 205; *see also* CAPTA Reauthorization Act of 2010, Pub. L. No. 111-320, 124 Stat. 3459 (authorizing grants for States that improve efforts to increase the placement of foster children who are eligible for adoption).
38. *See* MADELYN FREUNDLICH & CHARLOTTE MCCULLOUGH, *PRIVATIZATION OF CHILD WELFARE SERVICES: A GUIDE FOR STATE ADVOCATES 2* (2012).
39. *Id.* at 2, 6; *see also infra* Part II.

B. Private Adoptions

Private adoptions can be arranged by private, state-licensed adoption agencies or handled independently by a third party such as an adoption attorney or facilitator.⁴⁰ Private adoption agencies are businesses owned and operated by individuals, groups, or organizations.⁴¹ These entities must be licensed by the state or states in which they work to assist with domestic and international adoptions of infants and older children. Private adoption agencies may be run by sectarian organizations according to policies rooted in religious beliefs; thus, private adoptions arranged by religiously affiliated agencies may be subject to idiosyncratic rules enacted by an individual agency.⁴² These private and independent adoption entities frequently provide services traditionally provided in public adoptions, either independently or as required by law.⁴³ In independent adoptions, it is common for both families to take an active role in the adoption process.⁴⁴ Often the government is not initially involved at all with child placement in independent adoptions; rather, prospective adoptive parents might seek out a birth family themselves and subsequently relinquish their parental rights directly to the adoptive family.⁴⁵ Independent adoptions are attractive to both parties because of this active involvement.⁴⁶

In both private and public adoptions, the court must (1) accept the adoptive parents' petition for adoption and (2) legally terminate the rights of the biological parents. In some states, adoption is legally defined by statute,

40. Kathy Sheldon, *The Difference Between Private Adoption, Private Adoption Agency, and Public Adoption*, FAMILIES, <https://www.families.com/blog/the-difference-between-private-adoption> [<https://perma.cc/6HHZ-8QVQ>].

41. *Id.*

42. Sarah Torre & Ryan Anderson, *Adoption, Foster Care, and Conscience Protection*, HERITAGE FOUND. (Jan. 15, 2014), <http://www.heritage.org/marriage-and-family/report/adoption-foster-care-and-conscience-protection> [<https://perma.cc/Y6NY-PVZV>].

43. Mark T. McDermott, *Understanding Independent Adoption*, ADOPTIVE FAMILIES MAG., <https://www.adoptivefamilies.com/how-to-adopt/understanding-independent-adoption/> [<https://perma.cc/Q3XF-63C3>]. For example, all states require home studies, adoptive parents may obtain birth parents' medical and social histories, and psychological counseling is often available to all parties involved. *Id.*

44. *Id.*

45. See, e.g., *Independent Adoptions*, L.A. CTY. DEP'T CHILDREN & FAMILY SERVS., <http://dcfs.lacounty.gov/adoptions/independent.html> [<https://perma.cc/A8AG-7ZLN>]; see also McDermott, *supra* note 43.

46. McDermott, *supra* note 43. Birth parents consistently report a desire to play an active role in selecting adoptive parents and to have the child go directly into the physical custody of the adoptive parents rather than into temporary foster care, which may also enable the adoptive parents to avoid waiting periods and bypass obstructive agency standards. *Id.*

while in other states, adoption is defined by judicial decision. Adoption agreements between private parties, where biological parents readily consent to the adoption and agree to place the child with an adoptive family, are relatively straightforward for courts: Once consent has been confirmed, the court will accept the adoptive parents' petition, extinguishing the biological parents' legal rights and transferring these rights to the adoptive parents.⁴⁷

In many private adoptions, the court's involvement is minimal; a family court judge must affirm the parties' preformed adoption agreement, but the adoption hearing is otherwise a mere formality. These aspects of private adoption—including preformation of the mutual adoption agreement, voluntary parental consent, and active parental participation—ensure a simplified legal process, and may even lead to better outcomes for the children involved.⁴⁸ And it is these aspects that distinguish private adoption from foster care adoption.

Unlike private adoption, the public child welfare system relies heavily on juvenile dependency courts.⁴⁹ Throughout the foster care and adoption process, juvenile dependency court judges are the primary decision-makers; they determine whether children should be reunited with their biological parents, whether a child can safely return home, and whether to terminate the rights of a biological parent. Judges also evaluate changes to a foster child's case plan, determine whether a child is eligible for adoption, and approve all public adoption agreements.

When supervising adoption proceedings in juvenile dependency court, judges are required to make adoption determinations in the best interest of the child. To determine whether an adoption is in the child's best interest, courts consider statutory factors including personal characteristics of the prospective adoptive parent, such as age, religion, marital status, health, and sexual orientation.⁵⁰

47. *See generally* *Adoption Laws*, NAT'L ADOPTION CTR., <http://www.adopt.org/adoption-laws> [<https://perma.cc/9PMU-4GRW>] (describing consent and the adoption finalization process).

48. McDermott, *supra* note 43 (describing how parental participation and openness can offer psychological benefits for birth parents, adoptive parents, and adopted children).

49. CHILD WELFARE INFO. GATEWAY, *supra* note 33.

50. *See* LESLIE COOPER & PAUL CATES, *TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING* 3 (2d ed. 2006) (describing how some states have express rules—either through statutes or appellate court decisions—about whether sexual orientation may be considered in adoption and custody cases). Because most states are silent regarding LGBTQ parenting, child welfare professionals and local family court judges have the discretion decide whether sexual orientation should be considered in adoption cases, and if so, to what extent. *Id.* *See generally* CHILD WELFARE INFO. GATEWAY, *supra* note 11 (describing the factors courts consider when determining what it in the child's best interest).

Several other characteristics distinguish public adoptions from private adoptions handled largely outside the dependency court system. Most private adoptions are completed shortly after the child is born, often with the infant being discharged directly into the adoptive parents' care. Children in private adoptions are predominantly newborns and rarely have experienced neglect or abuse—and because many adoptive families are selected for their perceived ability to provide stable, nurturing homes, private adoptions rarely result in an infant entering foster care.

In contrast, foster care adoption usually involves older children who may have endured prolonged trauma, often including parental relationships fraught with abuse or neglect. Foster children working to overcome the emotional injuries of their past experiences might be best served by adoption into a loving, supportive home; but because homes like these are in short supply, many children leave the child welfare system without positive role models or healthy adult relationships on which to model their own transition to adulthood.⁵¹ Consequently, foster children are statistically more likely to experience teen pregnancy, homelessness, incarceration, and mental health issues, while being less likely to complete their education or find employment.⁵² In sum, children in foster care often face disadvantages that are largely absent in the case of private adoptions.

While private adoptions are highly personal in nature, public adoptions are administrated on an institutional level. State legislatures, juvenile dependency court judges, and other decision-makers within the child welfare system should be cognizant of the differences between public and private adoptions when considering requirements for adoption eligibility, since restrictions or burdens on public adoption—including the types of discriminatory preferences that adoption-specific religious exemption laws would protect—could have widespread consequences for the thousands of foster children in the public child welfare system.

51. In recent years, legislators have become concerned about children aging out of foster care before gaining the skills necessary to become productive members of society. In 2008, the federal government responded to these concerns by enacting the Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949, which allows certain youth in foster care to continue receiving assistance payments after turning 18 and requires states implementing its programs to provide assistance to youths preparing to age out of foster care. See *In re A.F.*, 161 Cal. Rptr. 3d 512, 515 (Ct. App. 2013); *In re K.L.*, 148 Cal. Rptr. 4th 606, 609 (Ct. App. 2012).

52. CHILD TRENDS DATA BANK, FOSTER CARE: INDICATORS OF CHILD AND YOUTH WELL-BEING 2 (2015), https://www.childtrends.org/wp-content/uploads/2014/07/12_Foster_Care.pdf [<https://perma.cc/67BL-5YZS>].

II. THE ADOPTION AND SAFE FAMILIES ACT OF 1997

Most children who enter the child welfare system eventually return to their families.⁵³ But in the mid-1980s, the prevalence of children entering foster care began to rise significantly—within ten years, the number of foster children had nearly doubled⁵⁴—while the rate of adoption from foster care remained the same.⁵⁵ During this time, the United States also saw a rise in poverty, the emergence of the crack cocaine epidemic, and welfare reform legislation that eliminated financial support for many poor families.⁵⁶ Consequently, poverty, homelessness, and substance abuse prevented many parents from reuniting with their children.⁵⁷ In the 1990s, concerns developed about the growing number of children who could not return home.⁵⁸

The Adoption and Safe Families Act of 1997⁵⁹ (ASFA) was enacted to clarify federal policies and procedures pertaining to the safety of children in the child welfare system and to expedite adoptions for foster children who could not safely return home.⁶⁰ This fundamentally shifted child welfare

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53. See CHILD WELFARE INFO. GATEWAY, *supra* note 4, at 1 (defining the child welfare system as “a group of services designed to promote the well-being of children by ensuring safety, achieving permanency, and strengthening families to care for their children successfully”); KAREN SPAR & MATTHEW SHUMAN, CHILD WELFARE: IMPLEMENTATION OF THE ADOPTION AND SAFE FAMILIES ACT (P.L. 105-89), at 1 (2004), http://greenbook.waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/2012/RL30759_gb.pdf [<https://perma.cc/9CB9-4FCC>].
54. During the ten-year period from 1985 to 1995, the number of children in foster care increased from 270,000 to 483,000. See STAFF OF HOUSE COMM. ON WAYS & MEANS, 105TH CONG., CHILD PROTECTION, FOSTER CARE & ADOPTION ASSISTANCE 782 (1998); see also Sally Day, *Mothers in Prison: How the Adoption and Safe Families Act of 1997 Threatens Parental Rights*, 20 WIS. WOMEN’S L.J. 217, 220 (2004). See generally ACLU ET AL., CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES 3 (2005), https://www.aclu.org/sites/default/files/images/asset_upload_file431_23513.pdf [<https://perma.cc/L7DA-AGNJ>] (describing how mothers’ prolonged incarceration as a result of drug charges contributed to the loss of parental rights).
55. SPAR & SHUMAN, *supra* note 53, at 1.
56. Day, *supra* note 54, at 220.
57. See generally KATHY BARBELL & MADELYN FREUNDLICH, CASEY FAMILY PROGRAMS NAT’L CTR. RES. FAMILY SUPPORT, FOSTER CARE TODAY (2001), http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/foster_care_today.pdf [<https://perma.cc/S8WH-Z77X>] (characterizing the current socioeconomic environment of families involved in the child welfare system and describing the association between an increased risk of maltreatment necessitating removal of a child into foster care and factors such as poverty, homelessness, adolescent parenthood, parental substance abuse, and the effects of HIV/AIDS).
58. SPAR & SHUMAN, *supra* note 53, at 1.
59. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.
60. SPAR & SHUMAN, *supra* note 53, at 1.

philosophy, adding weight to concern for the safety of foster children and prioritizing permanency planning in the child's interest. ASFA revolutionized dependency proceedings by requiring states to establish permanent placement plans⁶¹ for every child who has spent twelve months in foster care⁶² and requiring juvenile courts to consider terminating parental rights when a child has been in foster care for fifteen of the previous twenty-two months.⁶³ Moreover, courts are required to terminate parental rights almost immediately upon a showing of severe abuse.⁶⁴ Since 1997, each state has enacted laws implementing parts of ASFA, and the U.S. Department of Health and Human Services (HHS) has issued regulations requiring the implementation of certain provisions of the 1997 legislation.⁶⁵

A. *Congress Provides States With Federal Funding for Foster Care Programs*

Although states individually enact and maintain foster care programs, Congress provides funding under Title IV-E of the Social Security Act to state foster care programs that comply with federal mandates.⁶⁶ Federal funding mandates impose several requirements on States, including but not limited to: abuse reporting procedures, foster home health and safety standards, regulated efforts to preserve and reunify families, timeliness in

61. Federal law requires child placement agencies to document their searches for adoptive families or other permanent living arrangements for children in their care and to make reasonable efforts to place children in an adoptive home, with a fit and willing relative, with a legal guardian, or in another planned permanent living arrangement. Otherwise an agency must finalize an adoption or legal guardianship. *See* Adoption and Safe Families Act of 1997, 111 Stat. 2115; *see also* 42 U.S.C. § 622(b)(10) (2012) (requiring a state to show that it has made effective use of cross-jurisdictional resources and eliminated legal barriers to the timely placement of waiting children). When placing children outside the home, “[t]he safety of children shall be the paramount concern.” *K.J. ex rel. Lowry v. Div. of Youth & Family Servs.*, 363 F. Supp. 2d 728, 744 (D.N.J. 2005) (alteration in original) (quoting *In re Guardianship of D.J.M.*, 737 A.2d 1179, 1181 (N.J. Super. Ct. Ch. Div. 1999)).

62. Katharine Q. Seelye, *Clinton to Approve Sweeping Shift in Adoption*, N.Y. TIMES (Nov. 17, 1997), <http://www.nytimes.com/1997/11/17/us/clinton-to-approve-sweeping-shift-in-adoption.html> [<https://perma.cc/W2VL-T78B>].

63. Adoption and Safe Families Act § 103(a)(3), 111 Stat. at 2118.

64. *See id.* (amending Section 471(a)(15) of the Social Security Act to bypass reunification when a biological parent has subjected the child to aggravated circumstances, including but not limited to abandonment, torture, chronic abuse, and sexual abuse, or if the parent has caused the death of a sibling).

65. SPAR & SHUMAN, *supra* note 53, at 1.

66. CHILD WELFARE INFO. GATEWAY, MAJOR FEDERAL LEGISLATION CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION FACT SHEET (2015) <https://www.childwelfare.gov/pubPDFs/majorfedlegis.pdf> [<https://perma.cc/9QUJ-QEG7>].

permanent placement, and criminal background check procedures for prospective foster parents.⁶⁷

Under Title IV-E, the federal government reimburse states for the foster care costs it incurs.⁶⁸ Foster care costs include foster care maintenance payments,⁶⁹ administration fees, and training costs, which are reimbursed on a per-child basis provided that each child meets the eligibility requirements of the Aid to Families With Dependent Children Act.⁷⁰ The legal principle of *parens patriae*⁷¹ requires states to pay for each foster child's housing, education, transportation, clothing, food, medical insurance, and psychological health services.⁷² These expenses typically cost states millions and sometimes billions of dollars each year.⁷³

ASFA was enacted to relieve the financial burdens of foster care by expediting dependency proceedings and prioritizing the placement of children in permanent homes. Expedited dependency proceedings save courts both time and money, as finding adoptive homes for children absolves the government of its financial responsibilities by transferring these responsibilities to the child's adoptive parents. ASFA further amended Title

67. *Id.* at 17–19.

68. Social Security Act of 1935, 42 U.S.C. §§ 670–679c (2012 & Supp. 2017).

69. *Id.* § 675(4)(A) (“Foster care maintenance payments are used to cover the costs of food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, reasonable travel to the child's home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement. In the case of institutional care, such term shall include the reasonable costs of administration and operation of such institution as are necessarily required to provide the items described in the preceding sentence.”).

70. *Id.* §§ 601–687. This section of the Social Security Act is commonly referred to as the Aid to Families With Dependant Children. *See* Act of Aug. 22, 1996, Pub. L. No. 104-193, 110 Stat. 2105.

71. In the United States, *parens patriae* governs the treatment of children in foster care, mentally ill persons, and other individuals who are legally incompetent to manage their affairs; in these cases, a state's government becomes the guardian of dependents within its jurisdiction, and that state's courts have the power to intervene in the interest of a child whose welfare is compromised. This power is typically supplemented by legislation defining the scope of child welfare protections in each state. *Parens Patriae*, Free Dictionary, <http://legal-dictionary.thefreedictionary.com/parens+patriae> [<https://perma.cc/G7FG-XDEY>].

72. Kay P. Kindred, *God Bless the Child: Poor Children, Parens Patriae, and a State Obligation to Provide Assistance*, 57 OHIO ST. L.J. 519, 521 (1996).

73. In 2016, Michigan's budget for human services was \$5.5 billion. *2016 Human Services Budget Continues Disinvestment in Families and Children*, MICH. LEAGUE PUB. POL'Y (June 2, 2015), <http://www.mlpp.org/2016-human-services-budget-continues-disinvestment-in-families-and-children> [<https://perma.cc/E82Z-F3K5>].

IV-B and Title IV-E of the Social Security Act⁷⁴ to incentivize and increase the number of foster care adoptions. This legislation authorizes annual incentive payments to states that surpass their previously set record for foster care adoptions in a given year,⁷⁵ with larger payments for adoptions of children with special needs.⁷⁶ Congress also reauthorized and revised this program in 2003⁷⁷ to create separate incentives for adoptions of older children.⁷⁸ Since 1997, Congress has amended ASFA⁷⁹ and has enacted several laws⁸⁰ governing the treatment of children in foster care. This legislation illustrates Congress's continued commitment to reducing time spent in long-term foster care, and demonstrates that legislators are cognizant of the current nationwide crisis in foster care.

B. States Provide Funding to Public and Private Child Placement Agencies

Title IV-B of the Social Security Act authorizes the discretionary funding of an array of state child welfare services.⁸¹ In an effort to satisfy

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74. The Social Security Act is the legislative source of federal child welfare funding. *See generally* 42 U.S.C. §§ 671(a)–672. State and local child welfare agencies that do not comply with federal requirements become ineligible for federal funding under part E of the Social Security Act. *In re Darlene T.*, 78 Cal. Rptr. 3d 119, 124 (Ct. App. 2008).
75. *See* 42 U.S.C. § 673(b). The amount of the incentive payment is calculated by multiplying the number of foster child adoptions by \$5,000. *Id.* Adoption incentives vary depending on the type of foster care adoption. *Id.*
76. Children with special needs include: (1) those with documented medical, physical, mental, or emotional conditions, (2) those with histories of suffering abuse, neglect, or other identified predisposing factors, (3) members of sibling groups of three or more children, (4) members of ethnic, racial, or cultural minority groups, and (5) those who are eight years of age or older. *ASW v. Oregon*, 424 F.3d 970, 972 n.1 (9th Cir. 2005).
77. *See* Adoption Promotion Act of 2003, Pub. L. No. 108-145, 117 Stat. 1879.
78. SPAR & SHUMAN, *supra* note 53, at 1 (“Congress reauthorized and revised this program in 2003 (P.L. 108-145), to create separate incentives for adoptions of older children. For adoptions in FY1998-FY2003, states ‘earned’ a total of \$178 million (of which \$17.9 million were earned by 31 states and Puerto Rico for adoptions finalized in 2003). HHS data indicate approximately 52,500 children were adopted with the involvement of public child welfare agencies in 2002, for an increase of nearly 70% since 1997.”).
79. *See, e.g.*, Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, 128 Stat. 1919 (2014).
80. Congress also passed the Child and Family Services Improvement and Innovation Act and amended the Social Security Act to extend the Child and Family Services Program. *See* Child and Family Services Improvement and Innovation Act, Pub. L. No. 112-34, 125 Stat. 369 (2011).
81. *See* Shardé Armstrong, *The Foster Care System Looking Forward: The Growing Fiscal and Policy Rationale for the Elimination of the “AFDC Look-Back”*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 193, 212 (2014).

legislative goals and receive additional funding, states and public agencies have turned to the private sector, funding private agency contracts using their own tax revenues as well as federal grants. These privatization arrangements take several forms, ranging from vouchers to public-private partnerships.⁸²

Privatization in the child welfare system may take the form of performance-based contracts (PBCs). In recent decades, social services and child welfare agencies have experimented with PBCs that make private agency reimbursements directly or indirectly contingent upon placement outcomes.⁸³ The core effect of PBCs is that at least some performance failure risk is transferred from government agencies to private contractors; although the nature of the risk and the distribution scheme may vary.⁸⁴ The privatization of foster care has also resulted in the transfer of frontline case management functions to private entities.⁸⁵ These case management functions include setting case goals, providing services to children and parents, assessing changes in a child's or family's situation, and managing various resources to meet the child's and family's needs.⁸⁶ These resources include but are not limited to parenting classes, anger management classes, drug testing, paternity testing, and family counseling.

While performance-based contracting has allowed private agencies to provide public agencies with much-needed assistance, these contracts also bestow a measure of government authority onto private agencies without the same level of government accountability; thus, although public and private agencies are currently equal in their authority and responsibilities under the law, private agencies alone are immune from constitutional claims. By shifting these public functions to private entities, the government has insulated these functions from constitutional oversight. Because children's safety and permanency are at stake, insulating private entities that are not acting in the children's best interest is inherently problematic.

82. See FREUNDLICH & MCCULLOUGH, *supra* note 38, at 2.

83. *Id.*

84. *Id.* at 4.

85. *Id.*

86. *Id.*

III. FOSTER CARE AND THE CHILD'S BEST INTEREST

A. *Consistent With ASFA, States Must Prioritize Safety and Permanency*

The United States Constitution presumes that a child's biological parents are capable caregivers, and it protects parents' natural right of custody, care, and control over their children. However, state governments may intervene when allegations of abuse or neglect against one or both biological parents have been substantiated. If the child is at risk for further abuse, the juvenile court will terminate parental rights. Terminating parental rights triggers the need for permanency planning, ideally in the form of adoption. Thus, the juvenile court and various organizations comprising the child welfare system will subsequently search for families to adopt these dependent children. These organizations include public child placement agencies like DSS and DCFS, and private child placement agencies with state contracts.

This section discusses the government's roles and responsibilities in caring for dependent children, Congress's commitment to placing these children in safe and permanent homes, and federal legislation advocating for the recruitment of families that reflect the diversity of the foster care populations it serves. Because some private child placement agencies engage in parental recruitment practices that are inconsistent with Congress's goals, privatization has resulted in tensions between public and private agencies when it comes to determining what type of families are in the child's best interest. This section elaborates upon that tension by comparing and contrasting the agencies conflicting views.

Parens patriae charges the government with protecting the interests of dependents in its care, and it is this rationale which underlies the government's regulation of the selection of foster and adoptive parents. States may set forth eligibility requirements for foster and adoptive parents to guide agency determinations about the fitness of prospective parents and the safety of a potential placement;⁸⁷ in some cases, further licensing criteria may also be imposed at the discretion of the child placement agency. Thus, while biological parents are presumed to be capable caregivers, prospective foster and adoptive parents often must go to considerable lengths before they can be considered for placement of a foster child.

87. Ariana R. Jaffe, *Foster Parenting and Adoption*, 3 GEO. J. GENDER & L. 393, 393 (2002).

The foster care licensing process allows child placement agencies to perform thorough, rigorous, and comprehensive evaluations of parental fitness and home placement suitability in order to ensure that foster children receive proper care. Foster care licensing determinations typically include assessments of an applicant⁸⁸ and of the applicant's family⁸⁹ as well as an inspection to determine whether the applicant's home is a safe and suitable environment for the placement of a foster child. Licensure is denied if the results of these evaluations indicate that the applicant is not equipped to provide suitable care for a foster child. Although specific licensing requirements may vary, state agencies consistently prioritize the task of placing foster children with parents who can provide a safe and nurturing home environment.

Social workers involved in the foster care licensing process typically receive training and guidelines requiring them to neutrally evaluate a prospective parent's application. In some states, anti-discrimination laws prohibit social workers from rejecting a foster care applicant on the basis of the applicant's race, ethnicity, religion, sexual orientation, or gender identity. Some states have even updated their licensing forms to embrace non-traditional households by changing labels from "mother" and "father" to "applicant one" and "applicant two." Other states, however—including those considering legislation like Michigan House Bill 4189—would allow social workers from private child placement agencies to evaluate applicants' suitability based on an agency's religious beliefs. Because this approach allows an agency to use sexual orientation and gender identity as a basis for denying a placement, the law authorizes an approach that conflicts with the goals of federal child welfare legislation.

88. Individual states and the federal government may impose requirements regarding characteristics such as an applicant's age, income and financial situation, medical history, physical ability, and mental health. *See, e.g.*, ALA. ADMIN. CODE r. 660-5-29-.02(3)(a) (2002) ("Prior to approval, foster parents shall submit required medical information to establish their physical and emotional ability to provide the necessary supervision and guidance to foster children."). Licensing requirements may also extend to practical considerations such as whether an applicant possesses a valid driver's license, reliable transportation, and sufficient automobile insurance. CHILD WELFARE INFO. GATEWAY, HOME STUDY REQUIREMENTS FOR PROSPECTIVE FOSTER PARENTS 2 (2014), <https://www.childwelfare.gov/pubPDFs/homestudyreqs.pdf> [https://perma.cc/WPW7-EE9K]. Favorable characteristics include "the ability to provide a safe and nurturing family environment for a child in foster care, flexibility in dealing with the needs of these children and their birth families, and a willingness to work with the social services agency in meeting program requirements." *Id.* at 2.

89. *See, e.g.*, ALA. CODE § 38-7-4 (2012); ALA. ADMIN. CODE r. 660-5-29-.02 (2002).

B. Congress Wants Diverse Families Representative of Foster Care Populations

Several federal laws, which legislators continue to update and revise in recognition of the ongoing foster care crisis in the United States, require child welfare agencies to prioritize permanency when deciding placements and setting case plans. In passing such legislation, Congress has explicitly expressed a desire to encourage the participation of foster families from diverse backgrounds and has urged states to refrain from delaying or denying placement of children in adoptive homes based on immutable characteristics that have no bearing on a prospective parent's ability to provide suitable care. The Multi-Ethnic Placement Act⁹⁰ (MEPA) and the Indian Child Welfare Act⁹¹ (ICWA) are two examples of federal legislation that incorporates the government's views regarding the preferences of adoption agencies tasked with matching foster children to adoptive families.

MEPA was enacted in 1994 as a response to child welfare agencies' reluctance or outright refusal to place foster children of color in adoptive homes based on the racial and ethnic characteristics of those foster youth and the prospective parents.⁹² Before the 1994 enactment of MEPA, child-family matching was left largely to the discretion of agencies, whose practices discouraged transracial adoption based on the belief that it was in children's best interest to be adopted by families who shared their racial and ethnic makeup.⁹³ Congress determined that these policies were inconsistent with the duties of the child welfare system; children of color continue to comprise the majority of foster children, while many adoptive families are white.⁹⁴ Thus, allowing agencies to utilize racial matching in placement decisions was, statistically speaking, unlikely to serve the best interests of any given child. On the contrary, agencies' use of racial matching was more

90. Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056 (codified as amended at 42 U.S.C. § 1996b (2012)).

91. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901-1963).

92. Cynthia R. Mabry, *A MEPA-IEP Review From Adoption Attorneys' Perspectives: Continuing to Make Permissible Assessments Based on Race for the Best Interests of Children of Color*, 38 CAP. U. L. REV. 319, 322-23 (2009).

93. *See id.*

94. *See* Cynthia G. Hawkins-León & Carla Bradley, *Race and Transracial Adoption: The Answer Is Neither Simply Black or White nor Right or Wrong*, 51 CATH. U. L. REV. 1227, 1260 (2002). Hawkins-León and Bradley contend that, while many prospective African American adults are interested in adopting minority children from foster care, they tend to have greater difficulty accessing the adoption system than many prospective white adoptive parents. *Id.*

likely to ensure that children of color would “languish[] in [long-term] foster care” without ever being adopted.⁹⁵

Like MEPA, the Indian Child Welfare Act (ICWA)—which, having been passed in 1978, precedes MEPA by more than a decade—prohibits child welfare agencies from using racial or ethnic preferences to inform placement decisions; specifically, ICWA requires agencies to place Native American foster children with Native American families whenever possible.⁹⁶ ICWA was enacted after child welfare agencies, which have historically targeted Native American communities, began to remove Native American children from their homes at alarmingly high rates, alienating many children from their tribes in an attempt to facilitate the cultural assimilation of Native American cultures.⁹⁷ The rationale for these removals and other acts of forced assimilation largely depended on the belief of social workers and agencies that Native American cultures and customs were inferior to normative American (and non-Native) Judeo-Christian culture and beliefs.⁹⁸ ICWA now stands as an example of Congress’s disapproval of discrimination based on culture, customs, or spiritual beliefs, and demonstrates the federal legislature’s understanding that a child’s best interest may not be served when case plans and placement determinations are bound by a child welfare agency’s sincerely held beliefs.

C. *Private Agencies and the Role of Religious Preferences*

Like public agencies, private adoption agencies working within the child welfare system are responsible for recruiting prospective families, assessing the fitness of prospective parents, and investigating the safety of potential placements before approving applicants for foster care or adoption. Religiously affiliated adoption agencies have historically recruited families that comport with the values, customs, and traditions espoused by an

95. NAT’L INDIAN CHILD WELFARE ASS’N, MULTI-ETHNIC PLACEMENT ACT AND AMENDMENTS: POTENTIAL IMPACTS ON INDIAN CHILDREN, <http://www.nicwa.org/law/mepa/MEPA.pdf> [<https://perma.cc/U9AF-NVKY>] (describing the plight of African-American children “languishing in foster care” as a result of lengthy searches for same-race adoptive homes).

96. See Indian Child Welfare Act of 1978, 92 Stat. at 3073; see also *Indian Child Welfare Act of 1978*, NAT’L INDIAN CHILD WELFARE ASS’N, http://www.nicwa.org/Indian_Child_Welfare_Act [<http://perma.cc/95X5-DF3X>].

97. See sources cited *supra* note 96; see also Hawkins-León & Bradley, *supra* note 94, at 1238.

98. Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 506-07 (2017).

agency's affiliated belief system.⁹⁹ Because these values typically include traditional definitions of marriage as a union exclusively between one man and one woman¹⁰⁰—and the related belief that childrearing is best accomplished by a married father and mother—religiously affiliated agencies tend to recruit and place children with married different-sex couples single heterosexual-identified individuals, whose family structures are consistent with the agency's professed religious beliefs.¹⁰¹

Advocates of this child placement approach have referred to it as “imitative adoption” to describe the process of selecting adoptive parents who are meant to resemble in type and characteristics the child's own biological parents.¹⁰² This approach would still consider adoption by an unmarried individual to fall within the concept of imitative adoption, since the conjugal family norm is not violated, though one parent remains unrepresented.¹⁰³ Many agencies employ these threshold requirements because they sincerely believe that these families are both historically and currently the most successful household structures, and that the child's adoptive family should therefore replicate or resemble the institution that predates it, that being the biological, conjugal family. Thus, prospective parents who are not married, different-sex couples, or single heterosexual individuals may be outright rejected by these agencies during the recruitment and assessment processes.

Advocates of the imitative adoption scheme claim that this is not invidious discrimination but rather, “a rational means of legislating requirements [that are] most likely to yield the legitimate state goal of providing a loving, stable home for adoptive children.”¹⁰⁴ Religiously affiliated agencies falsely contend that American families remain willing to adopt—claiming that for every child waiting to be adopted from foster care, there are five hundred married households and three religious congregations in America willing to care for them—and thus would prefer to keep a child in foster care until a traditional adoptive family can be recruited rather than

99. See, e.g., *Foster Care Adoptions*, BETHANY CHRISTIAN SERVS., <https://www.bethany.org/adoption/foster-care-adoption> [<http://perma.cc/BMG6-GUDL>]. Bethany Christian Services is a private, licensed, non-profit adoption and family service agency, serving 30 states from over 70 locations and in 13 international countries. *Id.*

100. Camille S. Williams, *Family Norms in Adoption Law: Safeguarding the Best Interests of the Adopted Child*, 18 ST. THOMAS L. REV. 681, 682 (2006).

101. Torre & Anderson, *supra* note 42, at 4–6.

102. See Williams, *supra* note 100, at 682.

103. *Id.*

104. *Id.* at 684.

place a child with a non-traditional family.¹⁰⁵ This ignores the social realities of adoption and foster care, including not only the fact that rejecting non-traditional placements might significantly reduce a child's chance of adoption but also the potential detrimental effects that long-term foster care can have on a child's future.

Among the thousands of LGBTQ people who would like to adopt and the millions who have seriously considered it, countless members of the LGBTQ community assume, are told, or learn from firsthand experience that there are several "impediments" that will interfere with their ability to adopt a child, and these impediments may go beyond discrimination based on one's sexual orientation and gender identity.¹⁰⁶ Michael Boucai explains how these impediments tend to cluster on the "demand" rather than "supply" side of the "adoption market." The obstacles on the demand side of the adoption market tend to reflect an irrational mistrust of non-biological parenthood and can include "intrusive" and "demeaning" screening processes, endless paperwork and "red tape," confusing regulations that vary from one jurisdiction to another, and discrimination based on applicants' age, sex, race, class, ability, and marital status.¹⁰⁷ Thus, while same-sex couples and LGBTQ individuals are more likely to adopt, more likely to contemplate adoption, and more likely to identify adoption as "their preference from the start" than non-LGBTQ prospective parents,¹⁰⁸ members of the LGBTQ community must oftentimes overcome additional hurdles.

The "supply" side of the "adoption market" refers to the quantity and characteristics of the children available for adoption through public agencies. Michael Boucai describes the adoption market's so-called "shortage" of "healthy white infants" and how adoptive parents' preferences for these children reinforce the second-class status of children who do not match this description. Children available in public adoptions have been described as a "grab bag of . . . generally older, darker, and less healthy" children, and studies also show LGBTQ youth are overrepresented in the

105. Torre & Anderson, *supra* note 42, at 3.

106. *Id.* at 1111.

107. *Id.* at 1111–12.

108. Michael Boucai, *Is Assisted Reproduction an LGBT Right?*, 2016 WIS. L. REV. 1066, 1105–06 (quoting Gerald P. Mallon, *Lesbian and Gay Prospective Foster and Adoptive Families: The Homestudy Assessment Process*, in *ADOPTION BY LESBIANS AND GAY MEN* 130, 131 (David M. Brodzinsky & Adam Pertman ed., 2012)).

pool of foster children.¹⁰⁹ In general LGBTQ prospective parents are more willing to adopt or foster children who are “the most difficult to place,” including older children, and those with developmental delays, psychological issues, and physical disabilities, including AIDS. Same-sex families are also more likely than different-sex couples to adopt “across racial lines.”¹¹⁰ Because LGBTQ applicants may be excluded by religious agencies and these high-needs children are less likely to be adopted by non-LGBTQ families, these children tend to spend more time in long-term foster care.

Research shows that children in long-term foster care face serious challenges later in life.¹¹¹ These youth are more likely to experience teen pregnancy, homelessness, incarceration, and mental health issues, and they are less likely to graduate from high school and find employment.¹¹² Male former foster youth are more than four times as likely to commit a crime than are males in the general population; for females, a history of long-term foster care increases the likelihood of criminal behavior tenfold. Former foster youth are also seven times more likely to become addicted to drugs and twice as likely to become dependent on alcohol than the general population.¹¹³ Additionally, some foster children continue to experience abuse within the child welfare system, and LGBTQ youth are particularly at risk. The Williams Institute found that LGBTQ foster youth have experienced rejection, abuse, and discrimination by their caseworkers, foster parents, congregate care facility employees, and other foster youth¹¹⁴; in some cases, LGBTQ children have been labeled unadoptable, have been

109. *Id.* at 1111 n.295 (quoting JUDITH STACEY, UNHITCHED: LOVE, MARRIAGE, AND FAMILY VALUES FROM WEST HOLLYWOOD TO WESTERN CHINA 62–63 (2011)). *See generally* BIANCA D.M. WILSON ET AL., WILLIAMS INST., SEXUAL AND GENDER MINORITY YOUTH IN FOSTER CARE: ASSESSING DISPROPORTIONALITY AND DISPARITIES IN LOS ANGELES 11 (2014) (describing how LGBTQ youth are overrepresented in foster care and face unique challenges to finding permanent adoptive homes as a result of their sexual orientation).

110. Boucai, *supra* note 108, at 1105 (citing Abbie E. Goldberg & Mark Gianino, *Lesbian and Gay Adoptive Parent Families*, in *ADOPTION BY LESBIANS AND GAY MEN* 204, 211 (David M. Brodzinsky & Adam Pertman eds., 2012)).

111. *See The Current State of Foster Care*, *supra* note 18.

112. *Id.*

113. *Id.*

114. WILSON ET AL., *supra* note 109, at 11. The terms “sexual minority” and “gender minority” can be used interchangeably to refer to social statuses outside of the dominant heteronormative framework. While this terminology is intended to highlight the political and social nature of nonconforming sexuality and gender identities and norms, it may also serve as an umbrella term encompassing identity labels such as lesbian, gay, bisexual, and transgender. *Id.* at 11 n.3.

blamed for their own harassment or abuse by others, and have frequently been housed in isolation, either for their own safety or to keep them from preying on other youth.¹¹⁵ LGBTQ foster youth are more likely to experience unequal treatment or frequent and repeated changes in placement resulting from the discomfort of a caregiver.¹¹⁶ One study revealed that 56 percent of LGBTQ foster youth who were surveyed ran away and spent time on the streets because they felt safer there than in group homes or foster placements.¹¹⁷ LGBTQ youth in foster care are less likely than other foster youth to be reunited with their biological families or to be placed into an adoptive family and face greater difficulty overall in finding a permanent home.¹¹⁸

Religiously affiliated child welfare agencies have recently come under fire for openly engaging in and advocating for the discriminatory use of sexual orientation as a threshold consideration in determining parental fitness. While private agencies have many of the same rights and responsibilities as public agencies, they alone are immune from constitutional claims of otherwise impermissible discrimination. Conflict has ensued over such agencies' private status and accompanying constitutional immunity. Because private agencies are not purely private due to their contractual performance of state functions, this Note ultimately proposes that these private-public agencies be held liable as state actors for claims of unconstitutional discrimination.

IV. PRIVATE-PUBLIC AGENCIES AS STATE ACTORS

Constitutional restrictions are not one-size-fits-all and do not restrict all conduct equally.¹¹⁹ The text of the Constitution and its earliest interpretations demonstrate the framers' intent to distinguish between government action and private action,¹²⁰ drawing a line between

115. *Id.* at 11.

116. For example, caregivers are more likely to discipline LGBTQ youth for engaging in age-appropriate conduct that might not have been punished were it between youth of different sexes. *Id.* at 11–12.

117. *Id.* at 12.

118. *Id.*; see also Court Appointed Special Advocates for Children, *Addressing the Needs of LGBTQ Youth in Foster Care*, CONNECTION, Fall 2009, at 7. Transgender youth have a particularly difficult time achieving permanency. *Id.*

119. Julie K. Brown, Note, *Less Is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 561 (2008).

120. Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1395 (2007); see also U.S. CONST. art. I, § 10 (limiting the powers

government-controlled domains and privately controlled sectors.¹²¹ Government-controlled domains are public actors, present throughout the vertical structure of government and subject to the rules and provisions of the Constitution.¹²² These public actors include the various government branches, departments, agencies, and officials. Privately controlled sectors, or private actors, are relatively unburdened by constitutional restrictions and retain a degree of freedom and exclusionary power unavailable to government entities¹²³—private citizens, groups, and organizations have no duty of procedural or substantive due process under the Fourteenth Amendment and are therefore immune from such constitutional claims.¹²⁴ This distinction between public and private actors, known as the state action doctrine, determines whether an individual may assert a cognizable constitutional claim and directly affects the availability of constitutional remedies to an injured party.¹²⁵

The state action doctrine is a threshold concern: Before a constitutional claim is considered on its merits, its basis in governmental wrongdoing must be established.¹²⁶ The significance of a finding of state action is to hold the actor liable under the Fourteenth Amendment Equal Protection Clause,¹²⁷ which protects individuals only against violations of their constitutional rights by public entities and state actors.¹²⁸ If a court finds that a private entity's actions are sufficiently within the realm of public conduct, then that private entity can, for constitutional purposes, be considered a public entity or state actor whose actions are subject to the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹²⁹

of state governments); U.S. CONST. art. IV (imposing limits and obligations upon state and federal governments).

121. Brown, *supra* note 119, at 561.

122. *Id.*

123. *Id.*

124. *See id.* at 562–63.

125. *Id.* at 563; Daphne Barak-Erez, *State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1170 (1995) (discussing effects of privatization on the application of constitutional standards to the administration of social services).

126. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 532–33 (5th ed. 2015); Brown, *supra* note 119, at 561.

127. U.S. CONST. amend. XIV.

128. CHERMERINSKY, *supra* note 126, at 532–33 (“The Constitution’s protections of individual liberties and its requirement for equal protection apply only to the government.”); Carl H. Esbeck, *Regulation of Religious Organizations via Governmental Financial Assistance*, in RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 349, 354 (James A. Serritella et al. eds., 2006).

129. *See* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 550–51 (4th ed. 2013). The Supreme Court acknowledges that there are some instances where private conduct must comply with

In most cases, it is obvious whether an entity's objectionable conduct constitutes state action or private action; for example, a constitutional cause of action would clearly arise from biased treatment at the hands of a state employee or at the direction of a state agency or court. In recent decades, however, the United States has entered a "golden age of privatization" in which public duties are increasingly performed by private entities with government backing, blurring the line drawn by the state action doctrine between public action and private action.¹³⁰

As privatization increases, the determination of which conduct is public and which is private has proven both confusing and controversial.¹³¹ The U.S. Supreme Court has accepted that, under certain circumstances, the activities of private entities should be construed as state action.¹³² Exceptions to the state action doctrine fall into two categories, each of

the Constitution, and thus it established two exceptions to the state action doctrine: the public function exception and the entanglement exception. *Id.* at 551–52. Despite this determination, however, the cases concerning these exceptions have been viewed as a "conceptual disaster area." *Id.* at 552 (quoting Charles L. Black Jr., *Forward: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967)). Two cases in particular, *Marsh v. Alabama*, 326 U.S. 501 (1946), and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), aptly illustrate the Court's inconsistencies in evaluating private action under the public function exception. In *Marsh*, the court was expansive in its definition and its opinion could be used to find a great deal of private conduct as state action, while the Jackson court narrowed the exception, making it difficult to find that a private actors is performing a public function. CHEMERINSKY, *supra*, at 553. When evaluating the Court's state action jurisprudence, legal scholars like Erwin Chemerinsky believe it is important to consider the costs and benefits of the doctrine. *Id.* at 551. Without the state action doctrine and absent statutory restrictions, private conduct may trample upon even the most basic rights. *Id.* Thus, society's most cherished values, such as free speech, privacy, and equality can be violated without any redress from the courts. *Id.* On the other hand, Chemerinsky recognizes that the doctrine can be desirable because it creates a private zone of autonomy and enhances federalism. *Id.* Those who believe the disadvantages of the doctrine outweigh the advantages want broad exceptions, while those who believe the reverse prefer a narrow interpretation. *Id.*

130. Brown, *supra* note 119, at 561. Legal scholars have recognized that the realities of growing privatization, including the development of new forms of government action, are changing the landscape of state action. Some scholars have concluded that the substance of the state action doctrine, and its application to the actions of private entities, must also change. Current doctrine characterizes state action as the operation of a public function with the involvement of a government entity; however, this definition is limited by old notions regarding the traditional functions of the state. In the current age of privatization, these limitations may result in the inadequate application of constitutional protections to the operation of state services and activities administered by or with the cooperation of private entities. See Barak-Erez, *supra* note 125, at 1191–92.

131. Sacha M. Coupet, *The Subtlety of State Action in Privatized Child Welfare Services*, 11 CHAP. L. REV. 85, 106 (2007).

132. *Id.* at 106–07. The Court has applied this treatment rarely, finding most activities of private entities to be private action despite clear indicators of government involvement. *Id.* at 107.

which represents a distinct approach to evaluating possible state action: the entanglement test and the public function test.¹³³ In the context of child welfare civil rights litigation, the public function test appears most frequently.¹³⁴

The public function test determines whether a state is significantly involved in the private conduct at issue, focusing primarily on (1) the nature of the activity engaged in by the private person or entity; and (2) whether the private person or entity is exercising a traditional and exclusive state function.¹³⁵ Generally, state action will be found when a government contracts with private entities for the performance of functions that implicate official, statutory, or constitutional duties.¹³⁶ The rationale behind the public function test is to prevent the government from avoiding constitutional accountability by delegating responsibilities to private actors.¹³⁷

A. Private Adoption Agencies With State Contracts Engage in Activities That Are Public in Nature

Government child welfare functions are increasingly being privatized under performance-based contracts, which transfer the guardianship of foster youth to private agencies, task private agencies with case management and other responsibilities, and grant private agencies the same rights and responsibilities given to public child welfare agencies. The private sector now handles core mandatory child welfare functions traditionally provided by public agencies.¹³⁸ Private agencies are now responsible for keeping foster children safe and for finding both temporary and permanent homes for foster children in their care. Like government social services entities, private agencies are expected to recruit prospective adoptive parents,

133. CHEMERINSKY, *supra* note 126, at 542.

134. Coupet, *supra* note 131, at 107.

135. *Id.*

136. 1 IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1:4 (2011); *see* Frazier v. Bailey, 957 F.2d 920, 928 (1st Cir. 1992) (finding that social services agencies under contract with state to provide services required by statute performed functions that were inherently governmental in nature and therefore acted under color of law); *see also* Fabrikant v. French, 691 F.3d 193, 207–11 (2d Cir. 2012) (concluding that because city had delegated to private animal rescue organization the authority to perform animal control—a traditional public function—private animal rescue’s seizure and surgical treatment of animals constituted state action).

137. CHEMERINSKY, *supra* note 126, at 544.

138. FREUNDLICH & MCCULLOUGH, *supra* note 38, at 1.

perform background checks and home inspections, and administer family interviews and child/family matches.¹³⁹ Private agencies, like their public partners, must also comply with the adoption and foster care procedures mandated by ASFA.

When the government endows private entities with powers or functions that are governmental in nature, these private entities become instrumentalities of the government and are subject to the Constitution.¹⁴⁰ Because private agencies under contract with state governments provide the same services as their public counterparts and serve the same populations as their public counterparts, these agencies are engaging in governmental activities that are public in nature, satisfying the first prong of the public function test.¹⁴¹

B. *Foster Care Is a Traditional, Exclusive State Function*

The contractual performance of child welfare services by private agencies also satisfies the second prong of the public function test, which finds state action when private actors or entities perform traditional and exclusive state functions.¹⁴² While the roots of informal child welfare systems and the concept of foster care can be traced back to religious texts and teachings,¹⁴³ the government has taken responsibility for the safety,

139. See generally ADOPTUSKIDS, MINORITY SPECIALIZING AGENCY AND RESOURCE DIRECTORY, http://www.adoptuskids.org/_assets/files/NRCRRFAP/resources/minority-specializing-agency-directory.pdf [https://perma.cc/Q4VD-LW8S] (describing the various roles and responsibilities of private agencies working under contract within the child welfare system).

140. *Evans v. Newton*, 382 U.S. 296, 299 (1965).

141. See, e.g., *Adoption Contract Management*, MICH. DEP'T HEALTH & HUMAN SERVS., http://www.michigan.gov/mdhhs/0,5885,7-339-73971_7116-23480--,00.html [https://perma.cc/73XK-KPUS] (stating that private foster care agencies with state contracts have the same primary responsibilities as public agencies); see also *The Adoption Process*, GA. DIV. FAMILY & CHILDREN SERVS., <http://dfcs.georgia.gov/adoption-process> [https://perma.cc/LF5P-5XGG] (describing private agencies' contractual duty to provide services similar to those offered by state Division of Family and Children Services, such as new parent orientations, information sessions, pre-service trainings, family evaluations, and placement and supervision services).

142. *Harvey v. Harvey*, 949 F.2d 1127, 1131 (11th Cir. 1992) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)); see also *Brown*, *supra* note 119, at 565.

143. See, e.g., John Aloisi, *Orphan Care, Adoption, and the Church: Historical Reflections and Contemporary Challenges*, DETROIT BAPTIST THEOLOGICAL SEMINARY (Oct. 2011), <http://www.dbts.edu/media/mp3/macp/2011/11ja01.mp3> [https://perma.cc/7N7R-FZCU] (presenting a recording of an address at the Mid-American Conference on Preaching: Church Planting and Renewal and describing various religious texts that promote the adoption and care of orphaned children); see also Joanie Gruber, *Orphan Care in the Early Church—A Heritage*

care, and custody of foster children in the United States since the country's inception.¹⁴⁴ During the seventeenth and eighteenth centuries, colonial legislatures and state governments enacted social policies patterned after the English Poor Laws,¹⁴⁵ subsequently, the American tradition of public responsibility for the care of dependent children was established by Congress in the early 1900s.¹⁴⁶

Prior to the government's intervention and regulation of the child welfare system, children were perceived as chattel, and child abuse was an acceptable practice in biological families and informal foster families alike. In the early 1900s, leaders in the child welfare field began to recognize the importance of instituting strong regulatory systems, which included licensing, service monitoring, and case accountability, to protect the interests of dependent children. In 1912, Congress established the U. S. Children's Bureau, a federal agency created to represent children's interests and to investigate and report on matters regarding orphanages, juvenile courts, desertion, and children's health and safety. As a result, state welfare

to Recapture, Presentation at the North American Association of Christians in Social Work Convention (Oct. 2011), <http://www.nacsw.org/Publications/Proceedings2011/GruberJOrphanCareE.pdf> [<https://perma.cc/XHW8-SNHL>] (discussing orphan care in ancient civilizations and the various responses from Romans, Greeks, Spartans, Carthaginians, Egyptians, Chinese, Nigerians, and Mayans, with an emphasis on the Judeo-Christian views of orphans and notable scripture calling for the care of dependent children).

144. *Smith v. Beasley*, 775 F. Supp. 2d 1344, 1354 (M.D. Fla. 2011); *see also* FLA. STAT. ANN. § 409.1671(1)(f)1 (repealed 2014). Because early American settlers were preoccupied with their own survival and freedom in their new country, there was no child welfare system in the outset. Brenda G. McGowan, *Historical Evolution of Child Welfare Services*, in *CHILD WELFARE FOR THE TWENTY-FIRST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS* 10, 11 (Gerard P. Mallon & Peg McCarrat Hess eds., 2005). Nevertheless, two groups of children were presumed to require attention by public authorities: orphans and paupers' children. *Id.*

145. McGowan, *supra* note 144, at 12.

146. *Id.* at 20; *see also* John E. Hansan, *Poor Relief in Early America*, VA. COMMONWEALTH U.: THE SOCIAL WELFARE HISTORY PROJECT, <http://socialwelfare.library.vcu.edu/programs/poor-relief-early-amer/> [<https://perma.cc/NP52-J66G>]. Before colonial legislatures and Congress codified child welfare regulations, American church leaders and charities addressed the social welfare needs of orphans by placing them in almshouses, auctions, or indentured servitude. Hansan, *supra*. Almshouses, which have been characterized as meager living arrangements "made on a reluctant, begrudging basis to guarantee a minimal level of subsistence," were created to cost localities as little as possible in the best interests of the community, not to serve the interests of the individual child. McGowan, *supra* note 144, at 12. Advocates of these arrangements failed to appreciate the inevitable physical and social consequences of housing children with other classes of dependent persons, and thus, states were forced to investigate these accommodations during the mid-1800s. *Id.* at 13. Multiple states issued reports describing almshouse arrangements as "symbols of human wretchedness and political corruption" and called for special provisions protecting dependent children in both public and private auspices. *Id.*

departments enhanced licensing standards and increased regulation of public and private childcare facilities.¹⁴⁷

Additionally, the common law doctrine of *parens patriae* provides states with exclusive authority over children in the child welfare system.¹⁴⁸ Without the government's acquiescence, private adoption agencies would not have access to these children, nor would they be able to profit from offering their assistance through state contracts.¹⁴⁹ States have enacted stringent requirements governing the care and custody of foster children; thus, private adoption agencies must be licensed and deemed competent by the state before being authorized to work with and act on behalf of dependent youth.¹⁵⁰

Moreover, constitutional duties arise in privatization and PBCs because children have fundamental liberty interests at stake in child welfare proceedings.¹⁵¹ These liberty interests, elaborated upon in case law,¹⁵² include the child's right to effective legal counsel, and courts recognize that a child has an interest in his or her own health and safety, as well as an

147. McGowan, *supra* note 144.

148. Kindred, *supra* note 72, at 521 (describing common law doctrine of *parens patriae*, which requires states to ensure the safety and wellbeing of children and grants states exclusive authority to remove minors from families who fail to provide proper food, clothing, shelter, and medical care for their children).

149. *Id.* at 527 ("Child welfare cases are decided under the neglect jurisdiction of juvenile courts nationwide."). Juvenile courts have the authority to adjudicate matters involving the custody, visitation, support, control, and disposition of a child who has been abused or neglected. *Id.* (citing VA. CODE ANN. § 16.1-241 (West 1988)); *see also* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat 2115 (1997); CHILD WELFARE INFO. GATEWAY, REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN 1–2 (2016), <https://www.childwelfare.gov/pubPDFs/reunify.pdf> [<https://perma.cc/SS4W-G6C5>] (requiring juvenile dependency courts to provide services to children in foster care and authorizing the termination of parental rights when allegations of abuse have been substantiated and the court has determined the child cannot be safely returned home); FREUNDLICH & MCCULLOUGH, *supra* note 38, at 4–5 (acknowledging that agencies profit from state contracts and how this aspect may compromise the quality of the services provided by these agencies).

150. McGowan, *supra* note 144, at 21 (describing how state welfare departments are responsible for setting standards, licensing, and regulating public and private childcare facilities); *see, e.g.*, Child Care Organizations Act, MICH. COMP. LAWS ANN. § 722 (West 2011 & Supp. 2017) (protecting children by licensing and regulating child care organizations, establishing standards of care for child care organizations, and prescribing the powers and duties of certain departments of the state and adoption facilitators).

151. Barbara J. Elias-Perciful, *The Constitutional Rights of Children*, 73 TEX. B.J. 750, 751 (2010).

152. *See, e.g.*, *Kenny A. ex rel Winn v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005).

interest in maintaining the integrity of their family unit and having a relationship with his or her natural parents and siblings.¹⁵³

With the rise of privatization and the prevalence of PBCs, public agencies and private agencies now work in conjunction to make decisions regarding foster youth with the expectation that both public and private actors will prioritize the child's best interest. The transfer of responsibilities and authority from the government to private agencies has effectively endowed private agencies with the power to perform functions that otherwise would be left to the government.¹⁵⁴ Because private adoption agencies provide services that are public in nature and perform government functions through state contracts, these agencies are imbued with governmental authority and should thus be subject to the Equal Protection Clause of the Fourteenth Amendment.

V. THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause of the Fourteenth Amendment provides that “no State shall . . . deny to any person within its jurisdiction the equal protection of the laws”¹⁵⁵ and protects individuals whose constitutional rights have been violated by government entities and state actors.¹⁵⁶ The Equal Protection Clause requires state actors to treat all similarly situated persons alike,¹⁵⁷ as the constitution “neither knows nor tolerates classes among citizens.”¹⁵⁸ Thus, to establish a cognizable claim under the Equal

153. *Id.* at 1359–60; Elias-Perciful, *supra* note 151, at 751.

154. Coupet, *supra* note 131, at 95; *see* Perez v. Sugarman, 499 F.2d 761, 765 (2d Cir. 1974); Phillips *ex rel.* Green v. New York, 453 F. Supp. 2d 690, 738 (S.D.N.Y. 2006) (finding that private foster agency acted under color of state law where private agency performed duties that would otherwise have been performed by city government and private agency was presumed to be authorized under state law); Harris *ex rel.* Litz v. Lehigh Cty. Office of Children & Youth Servs., 418 F. Supp. 2d 643, 651 (E.D. Pa. 2005) (finding that agencies involved in the placement of foster children perform a function that has been traditionally the exclusive prerogative of the state regardless of whether the child is forcibly taken from his home); *see also* Keyes v. Huckleberry House, 936 F.2d 578 (9th Cir. 1991) (stating that “a private child care institution might be found to be a state actor if the child was in effect a ward of the state and the state was providing care through the private agency”); Barron v. Washington Cty. Children & Youth Soc. Servs. Agency, No. 05-1517, 2006 WL 931678, at *4 (W.D. Pa. Apr. 11, 2006) (distinguishing between foster care agencies and foster parents for purposes of finding state action).

155. U.S. CONST. amend. XIV, § 1.

156. Because adoption is a statutory privilege and does not fall within the fundamental right to raise a child, this Note will not address the arm of equal protection analysis that determines whether a law burdens a fundamental right.

157. Kristapor Vartanian, *Equal Protection*, 10 GEO. J. GENDER & L. 227, 229 (2009).

158. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

Protection Clause, plaintiffs must show that a law creates a classification that impermissibly discriminates against an identifiable suspect class of persons.¹⁵⁹

In equal protection cases, the appropriate standard of judicial review is determined by the nature of the right or class that is affected.¹⁶⁰ Courts analyze equal protection claims by employing one of three standards of judicial review, each of which provides a different level of rigor (in decreasing order): strict scrutiny,¹⁶¹ intermediate scrutiny,¹⁶² and rational basis review.¹⁶³ Rational basis review is the appropriate standard for classifications that do not involve a suspect or quasi-suspect class, which are presumptively constitutional so long as they bear a conceivable rational relationship to a legitimate government interest.¹⁶⁴

Rational basis review is the most deferential standard applied by courts analyzing equal protection claims. Courts applying rational basis review are permitted to speculate as to a legitimate governmental interest that motivating the state action at hand if a legitimate government interest is not readily apparent. A distinction may be rendered “arbitrary or irrational,” and therefore unconstitutional, if the connection between the classification and the government’s proffered objective is unclear. Rational basis review does not consider governmental objectives motivated by class-based animus to be legitimate.¹⁶⁵

In addition to the three tiers outlined above, an additional category of equal protection scrutiny called “rational basis with bite” has also developed within Supreme Court jurisprudence.¹⁶⁶ This fourth standard of judicial review, located between rational basis review and intermediate scrutiny,¹⁶⁷ provides for a heightened level of scrutiny when legislative animus towards an unpopular political group has been alleged.¹⁶⁸ Under the “rational basis with bite” standard of review, courts purport to use rational basis judicial

159. See Vartanian, *supra* note 157, at 230–32.

160. Jeremy B. Smith, Note, *The Flaws of Rational Basis With Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2772 (2005).

161. *Id.* at 2773.

162. *Id.*

163. See Vartanian, *supra* note 157, at 229–30.

164. See *id.* at 235.

165. *Id.*

166. Smith, *supra* note 160, at 2774.

167. Vartanian, *supra* note 157, at 237.

168. See Smith, *supra* note 160, at 2774.

review but ultimately apply a heightened level of scrutiny¹⁶⁹ by more closely examining the law's purpose and effects.¹⁷⁰ "Rational basis with bite" has been applied primarily, if not exclusively, in cases where a classification discriminates against an unpopular minority group and where the government's asserted interest bears no rational relationship to that discrimination.¹⁷¹

While, as of 2017, the U.S. Supreme Court has not extended heightened scrutiny to new classifications for several years, it has substantively applied an unconventional level of scrutiny in several cases involving the rights of sexual minorities, including *Romer v. Evans*,¹⁷² *Lawrence v. Texas*,¹⁷³ and *United States v. Windsor*.¹⁷⁴ Thus, some have interpreted the Court's analysis in *Romer*, *Lawrence*, and *Windsor* as applying a rational basis "with bite" standard of review. In contrast, some courts guided by the Supreme Court's jurisprudence have understood these opinions to require the application of a heightened, intermediate level of scrutiny in cases involving sexual orientation discrimination.¹⁷⁵ Given that

169. *Id.* at 2774.

170. *Id.*; see also Kevin H. Lewis, Note, *Equal Protection After Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175, 180 (1997).

171. Smith, *supra* note 160, at 2774; see also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448–50 (1985) (affirming the invalidation of a city ordinance requiring special permit for group home for intellectually disabled individuals); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 529, 538 (1973) (invalidating a Food Stamp Act provision which deemed households containing unrelated individuals ineligible for the program).

172. 517 U.S. 620 (1996) (invalidating Colorado's constitutional amendment preventing the LGBTQ community from accessing and enacting anti-discrimination legislation). Using a more searching form of judicial review, the Court found that the breadth of Colorado's constitutional amendment was so far removed from its proffered justifications that it was impossible to credit them, and the Court ultimately concluded that the amendment seemed inexplicable by anything other than animus. *Id.* at 620, 632, 635.

173. 539 U.S. 558 (2003) (invalidating a state statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct, as it applied to adult males who had engaged in a consensual act of sodomy in the privacy of their home).

174. 133 S. Ct. 2675 (2013) (affirming the Second Circuit's use of heightened scrutiny for classifications based on sexual orientation).

175. See, e.g., *Witt v. Dep't of the Air Force*, 527 F.3d 806, 813 (9th Cir. 2008) (holding that *Lawrence* required heightened scrutiny under the Due Process Clause); see also, e.g., *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 482–84 (9th Cir. 2014) (interpreting *Windsor*); *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013) (concluding that classifications based on sexual orientation are quasi-suspect and subject to a heightened level of judicial scrutiny); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 333 (D. Conn. 2012); cf. *De Leon v. Perry*, 975 F. Supp. 2d 632, 652 (W.D. Tex. 2014) (concluding that it was unnecessary to apply heightened scrutiny because Texas's same-sex marriage ban failed "even under the most deferential rational basis level of review").

the opinions in *Romer*, *Lawrence*, *Windsor*, and *Obergefell* were all delivered by Justice Kennedy and he is not reasoning within the conventional Equal Protection framework, much debate remains about how exactly these cases should be interpreted. This Note will analyze Michigan's adoption-specific religious exemption legislation using the rational basis "with bite" standard of review. If the law cannot pass this level of scrutiny, it certainly cannot pass any higher level of scrutiny that may in fact apply.

VI. MICHIGAN'S ADOPTION-SPECIFIC RELIGIOUS EXEMPTION LEGISLATION VIOLATES THE EQUAL PROTECTION CLAUSE

While Michigan's adoption-specific religious exemption legislation does not create an express classification based on sexual orientation, the contemporary Supreme Court's decisions on sexual orientation discrimination have been less focused on questions of classification and more interested in the law's social meaning—that is, how laws are being understood to denigrate LGBTQ people as a group.¹⁷⁶ Accordingly, an equal protection analysis drawing on *United States v. Windsor*¹⁷⁷ and *Obergefell v. Hodges*¹⁷⁸ could view Michigan's adoption specific religious exemption legislation as presenting an equality problem, regardless of whether or not the law creates a classification based on sexual orientation. Thus, in examining the law's purpose and effects, a discriminatory purpose and disparate impact becomes apparent.

Michigan House Bill 4189¹⁷⁹ allows private child placement and adoption agencies to withhold services if providing those services would conflict with an agency's sincerely held religious beliefs.¹⁸⁰ It also prohibits state and local governments from taking adverse legal or financial actions against agencies that withhold services for religious or moral reasons.¹⁸¹

176. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015); *United States v. Windsor*, 133 S. Ct. 2675, 2681 (2013).

177. 133 S. Ct. 2675.

178. 135 S. Ct. 2584.

179. H.B. 4189, 98th Leg., Reg. Sess. (Mich. 2015).

180. See *id.* Michigan State Representative Andrea LaFontaine stated: "This bill package will allow private agencies to continue to operate without violating their moral or religious beliefs and without the fear of losing their license, the cancellation of contracts or decreases in funding." Jonathan Oosting, *Religious Exemption Adoption Bills Return in Michigan, Renew Debate Over LGBT Access*, MLIVE (Feb. 18, 2015, 3:04 PM), http://www.mlive.com/lansing-news/index.ssf/2015/02/gay_couples_could_be_refused_r.html [<https://perma.cc/WJY6-9TQE>].

181. See *id.*

The Michigan legislature stated that its intent was to protect agencies' free exercise of religion and that the act was not intended to limit or deny any person's right to adopt a child.¹⁸² However, in examining the law's purpose and effects, it becomes clear that the Michigan legislature has impermissibly harnessed public law to reflect and enforce private biases.

A. Michigan House Bill 4189 Was Enacted for a Discriminatory Purpose

In *Village of Arlington Heights v. Metropolitan Housing Corp.*,¹⁸³ the Supreme Court determined that discriminatory intent can be evidenced by a number of factors, including the historical background of the challenged decision, contemporary statements of the decisionmakers, specific antecedent events, and departures from normal procedures.¹⁸⁴ Here, the legislature's discriminatory purpose is evidenced by the historical background of House Bills 4188, 4189, and 4190; the contemporary statements of both the bills' sponsors and its opponents; the support and sponsorship of religious organizations favoring the traditional definition of marriage and lawmakers' expectation that the Supreme Court would legalize same-sex marriage within two weeks; and the departure from normal voting procedures by Michigan's State Senate.

The historical background of Michigan's adoption-specific religious exemption bills aptly illustrates some lawmakers' express disapproval of same-sex couples and LGBTQ individuals forming families through adoption. The bills' sponsors, Andrea LaFontaine (R-Columbus Township), Harvey Santana (D-Detroit), and Eric Leutheuser (R-Hillsdale), for example, asserted that sexual orientation anti-discrimination laws, along with the redefinition of marriage and the recognition of same-sex civil unions would prevent private foster care and adoption providers from placing children in "suitable" homes.¹⁸⁵ Religious organizations nationwide have sought religious exemptions from laws concerning reproduction and family planning on the basis that these laws "make the objector complicit in

182. H.B. 4189 ("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. This amendatory act is not intended to limit or deny any person's right to adopt a child.")

183. 429 U.S. 252 (1977).

184. *Id.* at 253.

185. Suzanne Lowe, *H.B. 4188, 4189, & 4190: Analysis as Reported From Committee*, MICH. LEGIS. (May 12, 2015), <http://www.legislature.mi.gov/documents/2015-2016/billanalysis/senate/htm/2015-SFA-4188-A.htm> [<https://perma.cc/ZT3G-262G>].

the assertedly sinful conduct of others.”¹⁸⁶ Republican representatives contended that recent legislative action and judicial rulings in other jurisdictions have sought to prevent faith-based child placement agencies from operating according to their religious traditions, and these bills would prevent the same thing from happening to agencies in Michigan.¹⁸⁷

The Michigan Catholic Conference, an organization governing the state and local Catholic adoption agencies, stated that the church’s preference for traditional marriage will not change despite the cultural shift in society’s understanding of marriage and relationships.¹⁸⁸ The organization’s spokesperson, Dave Maluchnik, noted that the bill allows religious groups to take a stand against policies asking them to violate their beliefs, and the bill will allow Catholic Charities adoption agencies to remain open.¹⁸⁹ Maluchnik explained that Catholic adoption agencies in Boston, Illinois, and Washington, D.C., have stopped providing adoption services because these jurisdictions recognized same-sex marriages and civil unions, and he stated that Michigan’s Catholic adoption agencies would likewise be shut down if they are forced to provide services to same-sex couples.¹⁹⁰

Some Michigan House Representatives were concerned that the adoption-specific legislation would give faith-based adoption agencies “a license to discriminate against lesbian, gay, bisexual and transgender people who want to adopt and raise children as well as people of differing faiths.”¹⁹¹ Before the three-bill package was adopted by votes of 65–44 in the Republican-controlled House, Representative Jeff Irwin attempted to “tie

186. Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2516 (2015). These requests are commonly referred to as complicity-based conscience claims. *Id.*

187. Lowe, *supra* note 185.

188. Alana Semuels, *Should Adoption Agencies Be Allowed to Discriminate Against Gay Parents?*, ATLANTIC (Sep. 23, 2015), <https://www.theatlantic.com/politics/archive/2015/09/the-problem-with-religious-freedom-laws/406423/> [<https://perma.cc/R4W5-NB98>].

189. *Id.*

190. *Id.* Bethany Christian Services and various subsets of Catholic Charities were two of the biggest supporters of House Bill 4189. *Id.*; see also Chris Johnson, *Michigan Governor Signs Religious Freedom Adoption Bills*, WASH. BLADE (June 11, 2015, 2:52PM), <http://www.washingtonblade.com/2015/06/11/michigan-governor-signs-religious-freedom-adoption-bills/> [<https://perma.cc/46HS-PB4E>]. On April 23, 2015, the CEO of the Michigan Catholic Conference sent a letter to Governor Rick Snyder threatening to shut down Catholic adoption agencies in Michigan if the adoption-specific religious exemption bills were not signed into law. *Id.*

191. Gary Heinlein, Chad Livengood & Karen Bouffard, *House Would Let Agencies Turn Away Gay Adoptions*, DETROIT NEWS (Mar. 18, 2015, 5:45 PM), <http://www.detroitnews.com/story/news/politics/2015/03/18/michigan-house-adoptions/24973141/> [<https://perma.cc/EL4Z-D6NU>].

bar” House Bills 4188, 4189, and 4190 with House Bill 4133, meaning that House Bills 4188, 4189, and 4190 could not become law unless House Bill 4133 did also.¹⁹² House Bill 4133 would authorize “second parent adoption” in Michigan, which would allow an individual in a same-sex relationship to adopt his or her partner’s biological or adoptive child without terminating the other party’s legal status as a parent.¹⁹³ Representative Irwin’s amendment was rejected on March 17, 2015 and again on June 10, 2015 when it was reintroduced by Senator Bert Johnson.¹⁹⁴

Democrat lawmakers also proposed amendments that would allow state and local officials to deny a placement and take adverse action against a faith-based agency if it is determined that the faith-based adoption was not in the best interests of the child, require the written statements of religious or moral convictions the bill specifies to be made available to the public on request, add language stating that an agency exercising the choice the bill would sanction must comply with the state’s Elliott-Larsen civil rights law, require an agency that refused to participate in a child placement to not only refer the applicant to an agency willing to participate (already in the bill) but also provide a list of such agencies, and require an agency exercising its rights of conscience as authorized by the bill to also post on its website and its offices the circumstances under which it will refuse to participate in a child placement.¹⁹⁵ These amendments were rejected by voice vote in the House on March 17, 2015.¹⁹⁶

When the Michigan State Senate received the three-bill package on March 19, 2015, Democrat lawmakers reintroduced the House’s amendments, in addition to requiring an agency affected by the bill to disclose the circumstances that would cause them to decline to provide a service to the state before entering a placement contract, and adding language stating that an agency exercising the choice the bill would sanction must comply with the federal Civil Rights Act of 1964.¹⁹⁷ These amendments also failed by voice vote on June 10, 2015.¹⁹⁸ The Republican-controlled House and Senate’s rejection of civil rights protections and its unwillingness to remove some of the barriers the bills erect for LBG adoptive families further illustrates the legislature’s animosity towards these

192. 2015 House Bill 4189, *supra* note 14.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

individuals. After vowing to veto any stand-alone religious freedom legislation, Governor Rick Snyder signed the bill package into law on June 11, 2015 after Senate Republicans held an unexpected vote on the legislation on June 10.¹⁹⁹ Significantly, the vote was not on the chamber's published agenda.²⁰⁰ Michigan Representative Marcia Hovey-Wright (D-Muskegon) charged that these bills were proposed by Republicans as a strategy to undermine the U.S. Supreme Court's decision to legalize same-sex marriage in Michigan.²⁰¹

In light of the legislative record and Michigan lawmakers' tendencies to restrict access to adoption by same-sex couples in general,²⁰² one could conclude that House Bills 4188, 4189, and 4190 were enacted in anticipation of the Supreme Court's decision in *Obergefell v. Hodges*.²⁰³ Indeed, the Supreme Court's landmark decision in *Obergefell v. Hodges* legalized same-sex marriage on June 26, 2015. Prior to the ruling, same-sex couples in Michigan were not allowed to adopt jointly because the state prohibited unmarried couples from adopting children. One of the cases consolidated in the *Obergefell* lawsuit, *DeBoer v. Snyder*,²⁰⁴ was brought by a lesbian couple challenging Michigan's same-sex marriage ban because it prevented them from jointly adopting their four special needs children. Because these women were both pediatric nurses, they were uniquely equipped to care for these children who had debilitating and life threatening illnesses. However, the joint-adoption ban prevented both women from obtaining legal custody and only parents with legal custody are allowed to make life-saving, medical decisions for children. Given the unpredictable nature of terminal illnesses, these adoption restrictions put the children at risk in the event that a life-saving decision needed to be made and the legal custodian was not available during a medical emergency. The legalization of same-sex marriage removed these barriers to second-parent adoption by LGBTQ couples.

Despite the Supreme Court's ruling, however, religious organizations and Republican lawmakers have sought to prevent the LGBTQ community

199. Gary Heinlein, *Snyder Signs Controversial Faith-Based Adoption Bills*, DETROIT NEWS (June 11, 2015, 1:24 PM), <http://www.detroitnews.com/story/news/politics/2015/06/11/snyder-signs-controversial-faith-based-adoption-bills/71069548/> [https://perma.cc/N64H-7P8V].

200. *Id.*

201. *Id.*

202. See, e.g., *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

203. 135 S. Ct. 2584 (2015).

204. 772 F.3d 388.

from forming families through adoption. The Senate Committee Report makes it clear that House Bills 4188, 4189, and 4190 were intended to provide religious child placement agencies with statutory authority to withhold adoption services and to protect these agencies in administrative or judicial proceedings that may arise as a result of religious discrimination.²⁰⁵ Notably, both the House and the Senate rejected amendments intended to protect foster children's best interest and safeguard the civil rights of Michigan residents who may be unfairly discriminated against. Thus, while the legislature's intent could be both to protect religious liberty and to exclude LGBTQ persons, the bare desire to harm a politically unpopular group can never be a legitimate governmental interest.²⁰⁶

B. Adoption-Specific Religious Exemptions Disproportionately Affect The LGBTQ Community

While disparate-impact claims cannot be asserted under the Equal Protection Clause without a showing of intentional discrimination,²⁰⁷ the majority opinions in *Windsor* and *Obergefell* illustrate the Court's interest in eradicating legislation when the social meaning of those laws has been understood to allow the denigration of the LGBTQ community.²⁰⁸ Moreover, the Supreme Court of Nebraska recently held that the state's ban on LGBTQ foster care and adoption was unconstitutional.²⁰⁹ The Court stated that when the government erects a barrier and makes it more difficult for one group to obtain a benefit than another, a member of the disadvantaged group seeking to challenge the barrier only needs to demonstrate that he or she is ready and able to perform, and that a discriminatory policy prevents him or her from doing so on an equal basis.²¹⁰ Thus, it is possible that contemporary courts would similarly overturn adoption-specific religious exemption legislation because the social

205. *Id.*

206. *See* U.S. Dep't of Agric. v. Moreno, 413 U. S. 528, 534–35 (1973).

207. *See* Washington v. Davis, 426 U.S. 229 (1976).

208. *See* United States v. Windsor, 133 S. Ct. 2675, 2681 (2013) (holding that DOMA is unconstitutional because its avowed purpose and practical effect was to impose a disadvantage, a separate status, and a stigma on same-sex couples); *see also* *Obergefell*, 135 S. Ct. at 2590 (legalizing same-sex marriage because it safeguards children and families and recognizing how children of same-sex parents suffer from the stigma of knowing their families are somehow lesser).

209. *Stewart v. Heineman*, 892 N.W.2d 542 (Neb. 2017).

210. *Id.*

meaning of these laws denigrates LGBTQ prospective parents and the policy denies them equal access to the adoption process.

Disparate-impact claims concern policies and practices that may not single out LGBTQ people for unfavorable treatment, but nevertheless affect these individuals disproportionately relative to the population at large. The disparate-impact doctrine has been used both as an “evidentiary dragnet” designed to identify impermissible but “hidden motives” and “deliberately concealed intentions to discriminate,” and as a tool for eradicating policies and practices that preserve status- and identity-based disparities without just cause.²¹¹

Michigan’s adoption-specific religious exemption laws will inevitably have a disproportionate effect on the LGBTQ community because LGBTQ persons are overrepresented in the pool of prospective adoptive and foster parents.²¹² Studies continuously show that LGBTQ individuals are more open to the possibility of adopting than their non-LGBTQ counterparts, and thus, their overrepresentation in foster care adoption²¹³ makes it likely that adoption-specific religious exemptions will be invoked against LGBTQ parents as a group.

This legislation will also have a disproportionate effect on LGBTQ prospective parents because religious objections will be invoked to deny services to LGBTQ people more than others. As a result, accommodating religious objections in foster care adoption can inflict both material and dignitary harms on LGBTQ families and the children who are waiting to be adopted.²¹⁴ Material harms include the tangible, practical effects of complicity-based objections, such as restricted access to goods and services, while dignitary harms describe the social consequences, including stigma, that results from complicity-based objections.²¹⁵

1. *Material Harms*

Accommodating complicity-based objections in foster care adoption will impose material burdens on LGBTQ prospective parents by deterring and obstructing their ability access to adoption services. Allowing religious

211. *Id.*; see also Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 *FORDHAM L. REV.* 523, 526 (1991) (describing the “fault theory” of disparate impact).

212. *GATES*, *supra* note 26, at 3.

213. *Id.*

214. See NeJaime & Siegel, *supra* note 186, at 2527.

215. *Id.* at 2516.

agencies to deny adoption services and simultaneously withhold information that would enable LGBTQ adoptive parents to find alternative providers erects unnecessary, inconvenient, and demoralizing barriers; and thus, while these individuals may be ready and able to adopt children waiting for a permanent home in foster care, Michigan's religious exemptions makes it more difficult for these parents to participate in the adoption process. Although the Court in *Burwell v. Hobby Lobby Stores, Inc.*²¹⁶ sanctioned a retail employer's complicity claims, it did so because it believed there would be "zero affects" on third party employees. Unlike retail employment, however, the material harms in foster care adoption are unavoidable and detrimental to both LGBTQ prospective parents and foster children waiting to be adopted.

In 2015, the Williams Institute found that approximately 250 foster children were living with LGBTQ individuals or same-sex couples in Michigan, and these children were placed with these families because agencies determined that these homes were in the best interest of each child. However, while some of these foster parents may wish to adopt the children in their care, the tangible and practical effects of Michigan's religious exemption legislation allows private agencies with religious or moral objections associated with same-sex sexual orientations to reject these placements; and thus, denies children these situations a permanent home through adoption by their foster families.²¹⁷

Furthermore, accommodating agencies' complicity-based conscience claims also inflicts material harms on foster children waiting to be adopted. The breadth of Michigan's religious exemption legislation allows private agencies to reject foster youth who identify or appear to be LGBTQ. Unlike the retail employees in *Burwell v. Hobby Lobby Stores, Inc.*, these children are relying on adoption agencies to act in their best interest and they do not have the option of requesting an alternative adoption provider or caseworker. Thus, if a religious agency suspects a child is LGBTQ, the practical effects of this legislation allows the agency to withhold adoption services. Rejecting LGBTQ foster children materially harms these youth

216. 134 S. Ct. 2751 (2014).

217. Memorandum from Gary J. Gates & Taylor N.T. Brown, Williams Inst., to Adam Zemke, Mich. Representative, Regarding the Children and Families Impacted and the Fiscal Implications of Michigan HB 4188, 4189, 4190 (Apr. 21, 2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Michigan-adoption-memo-May-2015.pdf> [<https://perma.cc/8WVU-UHSM>].

because it not only decreases the child's chances of finding an adoptive home, it increases the amount of time they spend in foster care.

2. *Dignitary Harms*

Complicity-based conscience claims also inflict dignitary harms on LGBTQ couples and foster youth because agencies' moral condemnation of persons with these identities is both demeaning and stigmatizing. Specifically in the LGBTQ context, the stigmatization and rejection of these individuals reflects widely understood messages about contested sexual norms. Thus, when agencies engage in discrimination and refuse to provide services across a range of settings, these refusals create a social meaning on a larger scale.

Like DOMA in *Windsor*, Michigan House Bill 4189 and other adoption-specific religious exemption laws' "avowed purpose and practical effect are to impose a disadvantage, a separate status, and . . . stigma"²¹⁸ on same-sex couples—specifically those who seek to form families through adoption. Moreover, the Court's holding in *Obergefell* expressly addresses the impact of dignitary harms on same-sex individuals and their families.²¹⁹ In *Obergefell*, Justice Kennedy recognized the importance of safeguarding same-sex families and acknowledged that when same-sex families are treated differently from their heterosexual counterparts, children suffer from the stigma of knowing that their families are somehow lesser.²²⁰ Thus, the Court's recognition of the need to protect the "related rights of childrearing, procreation, and education" can be interpreted to include same-sex couples seeking to form families through adoption.²²¹

218. *United States v. Windsor*, 133 S. Ct. 2675, 2681 (2013).

219. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015).

220. *Id.* (describing the ways in which children with same-sex parents are harmed and humiliated by the stigma the anti-marriage laws imposed upon their families).

221. *Id.*; Fred Barbash, *Federal Judge Voids Mississippi Ban on Same-Sex Couple Adoptions*, WASH. POST (Apr. 1, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/04/01/federal-judge-voids-mississippi-ban-on-same-sex-couple-adoptions/?utm_term=.38cd3a551cb4 [https://perma.cc/N3G6-KQGZ]. Judge Daniel P. Jordan III of the U.S. District Court for the Southern District of Mississippi invalidated Mississippi's same-sex adoption ban after the Supreme Court's decision in *Obergefell*. *See Campaign for Southern Equality v. Mississippi Dep't of Human Servs.*, 175 F. Supp. 3d 691 (S.D. Miss. 2016). Judge Jordan explained how the Court extended its holding to marriage related benefits, which includes the right to adopt. Barbash, *supra*. Moreover, the Court did so even though some urged for restraint while marriage-related-benefits cases worked their way through the lower courts. Citing *Obergefell*, Judge Jordan stated: "Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific

Significantly, the U.S. Supreme Court, lower courts, and interdisciplinary professionals alike have determined that same-sex families and traditional conjugal families are equal in the eyes of the law and recognize that a child's well-being is affected not by their parents' genders or sexual orientations, but rather by parent-child relationships, parental capacity, and social and economic security.²²²

CONCLUSION

Given the detrimental effects of religious accommodation in foster care adoption, states should not be permitted to enact legislation allowing private agencies with state contracts to discriminate against LGBTQ individuals on the basis of sexual orientation. More importantly, what happens in Michigan has not stayed in Michigan. Several states have already enacted similar legislation in an effort to restrict LGBTQ adoption, and religious accommodations in foster care adoption will delay and deny the permanent placement of children in the child welfare system. With over 400,000 children are waiting in limbo for foster care placements; deterring prospective LGBTQ parents from adopting by restricting access to foster care and adoption services deprives too many children of safety and permanency. Studies continually show that LGBTQ families can provide safe and loving homes for foster children in the child welfare system. Thus, Michigan and states that are continuing to propose and pass similar adoption-specific religious exemption legislation should reconsider these laws because they are constitutionally unsound and because the foster care crisis requires it.

public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage." *Id.* (quoting *Campaign for Southern Equality*, 175 F. Supp. 3d at 710).

222. See Rich Barlow, *Gay Parents as Good as Straight Ones*, B.U. TODAY (Apr. 11, 2013), <http://www.bu.edu/today/2013/gay-parents-as-good-as-straight-ones> [<https://perma.cc/5A2F-MXWD>]; see also Rachel H. Farr et al., *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, 14 APPLIED DEVELOPMENTAL SCI. 164, 176–77 (2010) (explaining how the results of this study provided no justifications for denying lesbian and gay adults from adopting children). Rachel Farr and her co-authors also describe a study that found the likelihood of adoption from foster care increased for children living in areas that allowed same-sex couples and LGBTQ individuals to adopt while fewer children were adopted from foster care in states that barred same-sex and LGBTQ adoption. Farr et al., *supra*, at 176–77.