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ADOPTION AND FOSTER CARE PLACEMENT POLICIES:  
LEGISLATIVELY PROMOTING THE BEST INTEREST OF  
CHILDREN AMIDST COMPETING INTERESTS OF  
RELIGIOUS FREEDOM AND EQUAL PROTECTION FOR  
SAME-SEX COUPLES

*Samantha R. Lyew\**

INTRODUCTION

Nearly 400,000 American children are in the foster care system. 101,666 of those children are waiting to be adopted.<sup>1</sup> Each child comprising those statistics lacks a permanent home, and thousands of individuals in the United States have graciously opened their homes to accommodate them.<sup>2</sup> The numbers continue to rise each year,<sup>3</sup> however, and permanent placements for these children—whether it be with a foster family or through adoption—are desperately sought, especially placements for those so-called hard-to-place children.

Since the 1980s, the stigma associated with homosexuality has slowly eroded as a result of LGBT advocacy groups' efforts within both the legal and cultural contexts.<sup>4</sup> Opportunities for same-sex couples to expand their families became available as distinctions characterizing the traditional family unit were blurred, and popular culture became more accepting of the non-traditional family unit.<sup>5</sup>

For same-sex couples, adoption and foster care are the most common means for familial expansion, helping to alleviate the overburdened foster care system.<sup>6</sup> Same-sex married couples are raising an estimated 58,000 adopted and foster children,<sup>7</sup> and

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1. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, ADMINISTRATION ON CHILDREN, YOUTH, AND FAMILIES, CHILDREN'S BUREAU, ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM, FY 2012 DATA (2012), <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport20.pdf> [hereinafter THE AFCARS REPORT].

2. *Id.*

3. *Id.*

4. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. (forthcoming 2016) (explaining the history and progression of the LGBT movement and its relevance to current increased cultural acceptance of LGBT individuals).

5. *Id.* at 7.

6. *Id.*

7. Brief for Gary J. Gates as Amicus Curiae Supporting Petitioners, *Obergefell v. Hodges*, 135 S. Ct.

same-sex couples are more likely than opposite-sex couples to adopt foster children.<sup>8</sup> The legal and procedural hurdles for same-sex couples seeking to adopt or foster children vary by state and are highly dependent upon the type of agency utilized by the couple to facilitate the placement. Agencies may be public or private and act as intermediaries between placement families and children.<sup>9</sup>

While public agencies take a broad, more generalized approach to child placement, private agencies typically invoke a more selective process. Factors under consideration in the placement process of private agencies may include marital status, sexual orientation, religious affiliation, and the like.<sup>10</sup> These private agencies have made the process more challenging for those who do not fit the traditional mold of a Christian, heterosexual married couple, but in the wake of landmark cases such as *Obergefell v. Hodges*<sup>11</sup> and *Burwell v. Hobby Lobby*,<sup>12</sup> the religious and moral objections underlying the selective processes employed by these agencies have been challenged. Concurrently, states have been working to further their own policy objectives through such processes as legislation and popular referendum.<sup>13</sup> State treatment of same-sex couples seeking to foster or adopt children falls across the spectrum—from one extreme prohibiting child placement with same-sex couples, to treading a middle ground of indifference, to the opposite extreme promoting child placement with same-sex couples.<sup>14</sup>

These state-specific policies are largely influenced by competing claims of religious objections, steeped in the constitutional protection of religious freedom, with the ever-emerging rights<sup>15</sup> of same-sex couples. The merits of both claims will not be undermined here; however, both sides often overlook what should be the focus of policy objectives—promoting the best interest of children. There is no doubt that children do best when they are adopted out of the foster care system or are placed

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2584 (2015) (Nos. 14-556, 14-562, 14-571, and 14-574) (citing statistics regarding same-sex adoption in support of marriage equality).

8. *Baskin v. Bogan*, 766 F.3d 648, 663 (7th Cir. 2014) (citing Gary J. Gates, *LGBT Parenting in the United States*, THE WILLIAMS INST. 1 (Feb. 2013), <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-parenting-in-the-united-states/>).

9. *What Are the Different Types of Adoption?*, ADOPTION.COM (Apr. 14, 2014), <http://adoption.com/what-are-the-different-types-of-adoption>.

10. *See Agency Requirements*, AMERICA WORLD ADOPTION ASS'N, <http://www.awaa.org/programs/agencyrequirements.aspx>, for a list of eligibility requirements requiring, among others, that applicants be at least 25 years old, agree to the AWAA Statement of Faith, and have no less than 2 divorces per spouse. Standards such as these are present in both public and private placement agencies.

11. 135 S. Ct. 2584 (2015).

12. 134 S. Ct. 2751 (2014).

13. *See* Janell Ross, *Houston Decided it Had a Problem: Its LGBT Nondiscrimination Law*, THE WASH. POST (Nov. 4, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/11/04/houston-decided-it-had-a-problem-its-lgbt-nondiscrimination-law/> (discussing an attempt to pass, through popular referendum, an anti-discrimination law extending civil rights protection to specified classes, including protection on the basis of sexual and gender identity).

14. *See* MISS. CODE ANN. § 93-17-3 (statute banning adoption by couples of the same gender); Houston Equal Rights Ordinance, Ord. No. 2014-530 (proposed ordinance banning discrimination on the basis of sexual and gender identity).

15. “Rights” of same-sex couples as used herein refer to the right not to be discriminated against, to be treated equally.

with a committed<sup>16</sup> foster family, rather than live in a group home or institution.<sup>17</sup>

Advocates for same-sex couples seek to advance open access to adoption and foster care for all couples, usually at the expense of religiously affiliated placement agencies shutting down rather than sacrifice their religious beliefs preventing them from placing children with same-sex couples.<sup>18</sup> The aftermath following the elimination of these types of placement agencies has been drastic.<sup>19</sup> Conversely, advocates for religious freedom seek to advance religious freedom at the expense of abstaining from working with same-sex couples, thereby reducing the number of available adoptive and foster care families in which to place children.

This Note will begin with Part I giving the foundational premise that children thrive in families, followed by Part II giving a general overview of adoption and foster care, including underlying procedural aspects in the United States. Part III will explore what the “best interest” of children actually entails; revealing present deficiencies as further explained in Part IV. Part IV will examine state policy initiatives and the legislative means used to advance them. It will present correlating, investigative case studies of various jurisdictions across the United States, exposing the reality and resulting effects of competing interests. Part V will propose alternatives to the existing deficient statutes.

Specifically, Part V will propose amendments to conscience clauses and religious freedom (RFRA) laws<sup>20</sup> protecting the religious freedom, in this case, of religiously affiliated placement agencies. These proposed amendments would include two provisions. First, it would require placement agencies with religious and moral objections to disclose the names of other agencies open to placing children with same-sex couples. Second, it would institute exceptions for situations involving hard-to-place children.

Part V will also propose amendments to anti-discrimination statutes, which may protect same-sex couples from discriminatory actions of religiously affiliated placement agencies. These amendments would include religious exceptions in certain circumstances. Overall, these amendment proposals for various statutory frameworks will further the best interest of children, which ultimately entails providing every child with the most stable family situation possible—placement in a home with either adoptive or committed foster care parents, regardless of sexual orientation.<sup>21</sup> In this way, the rights of children to “grow up in a family environment, in an atmosphere of happiness, love, and understanding”<sup>22</sup> will be of utmost importance, superior to both

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16. The term “committed” will be used throughout this paper to describe parents who understand the difficulties of foster care so that despite the probable, uniquely challenging nature of parenting foster children, these parents will remain vigilant in their efforts to provide love and care.

17. *Baskin v. Bogan*, 766 F.3d 648, 663 (7th Cir. 2014)

18. Maggie Gallagher, *Banned in Boston*, THE WEEKLY STANDARD (May 15, 2006), <http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp?page=3> (reporting on Catholic Charities of Boston discontinuing its adoption services in wake of Boston’s anti-discrimination statute, which would have required them to act against their religious beliefs through placement of children with same-sex couples).

19. *Id.*

20. See discussion *infra* Part IV.B.1-2 (discussing Michigan’s passage of legislation resembling the Religious Freedom and Restoration Act (RFRA)); e.g., *infra* note 90.

21. See *Baskin*, 766 F.3d at 663.

22. Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption

religious freedom and the rights of same-sex couples.

### I. CHILD'S BEST INTEREST: A FOUNDATIONAL PREMISE

The foundational premise of this paper is that children thrive in loving, caring families;<sup>23</sup> therefore, family placement is in their best interest. In most family law issues, a child's best interest is placed at the forefront,<sup>24</sup> and that best interest is determined through state-specific statutory determination in each prevailing circumstance.<sup>25</sup> These determinations are similar in that none of them give an exact definition of what a child's "best interest" involves. Instead, they determine that an evaluation of all relevant factors is necessary.<sup>26</sup> When evaluating all relevant factors for child placement decisions, it is almost always the case that it is in the child's best interest to be placed in a family through adoption or with committed foster care parents (as opposed to group homes or institutions) that will provide the love and care lacking in the biological family from which the child was removed.<sup>27</sup>

Placement in a family that can provide love and care is firmly in the child's best interest, but the notion of a proper "family" is highly contested. Cohabitation, same-sex marriage, and other social developments have recently become more commonplace, and advocates exist both for and against the concept of the traditional marital family challenged by these developments.<sup>28</sup>

This Note seeks promotion of a child's best interest regarding placement in a *family* through adoption and committed foster care regardless of the common competing interests of religious freedom and the rights of same-sex couples—not what *type* of family is in a child's best interest. While there may be disagreement regarding the "ideal" family structure for children, whether it be opposite-sex or same-sex parents, there is no doubt that children generally fare better with parents who give them a secure, loving environment.<sup>29</sup> While research proves that marriage most likely brings that sense of stability, unity, and commitment that mere cohabitating lacks,<sup>30</sup> the premise of this Note is that it is in the child's best interest to be placed in a family

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Preamble, Hague Conference on Private International Law, May 29, 1993, S. Treaty Doc. No. 105-51, 1870 U.N.T.S. 167, available at <http://www.hcch.net/upload/conventions/txt33en.pdf>.

23. See generally AMERICAN LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.02(1) (discussing the general proposition that children thrive in families); Sandra Bass et al., *Children, Families, and Foster Care: Analysis and Recommendations*, 14 THE FUTURE OF CHILDREN 5 (2004) (discussing the same general proposition that children thrive in families).

24. The child's best interest standard is used most frequently in custody and visitation issues. It may also extend to a broad range of other children's issues, including adoption and foster care, as emphasized in this article.

25. IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 357 (2014).

26. *Id.*

27. See generally Bass et al., *supra* note 23.

28. See Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167 (2015) (discussing potential legalities surrounding nonmarital families).

29. See Brief for the American Psychological Association et al. as Amici Curiae Supporting Petitioners at 21, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574) (supporting the principle that children thrive in families).

30. *Id.*

which provides a secure, loving environment, regardless of familial structure, because children thrive in families.

## II. GENERAL OVERVIEW OF ADOPTION AND FOSTER CARE IN THE UNITED STATES

### A. Adoption

“[T]he guiding principle of statutes governing the parent-child relationship is the *best interests of the child*...”<sup>31</sup> In cases where the biological parent and/or birth mother is unable or unwilling to fulfill the legal parental role, adoption is one mechanism to remedy that situation in working towards the best interest of the child.<sup>32</sup>

Adoption laws provide a way for an adult lacking a biological link to a child to legally assume the role of a parent.<sup>33</sup> The parent-child relationship created by an adoption is legally identical to that of biological parents.<sup>34</sup> Adoptive children come from a variety of circumstances, including relinquishment of newborns from unmarried women, children in the child welfare system whose parents’ rights were terminated, and foreign-born children placed in institutions.<sup>35</sup> Jurisdiction-specific adoption laws govern the adoption process, along with various restrictions that may be imposed depending on requests from the biological parents and/or the specific placement agency. Examples of such restrictions include a birth mother’s request that her child be adopted by parents of a certain ethnicity or a placement agency requiring adoptive parents to be practicing Christians.<sup>36</sup>

While adoption laws vary among jurisdiction, the following basic process must exist for a child to be adopted. First, the child must be “freed” for adoption—the legal rights of the biological parent(s) are severed (whether voluntarily or involuntarily) and typically given to an agency.<sup>37</sup> Most states have implemented a revocation period where an expectant mother may revoke her prior relinquishment of parental rights.<sup>38</sup> Once that period expires, the agency can then place the child for adoption, and the birth mother no longer has parental rights.<sup>39</sup> The automatic termination of rights protects the adoptive parents from potential claims by the biological parent(s).

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31. In re Adoption of K.S.P., 804 N.E.2d 1253, 1257 (Ind. App. 2004) (emphasis added) (citations omitted).

32. See *infra* Part III.A for a detailed explanation of the best interest of children.

33. ELLMAN ET AL., *supra* note 25, at 681.

34. *Id.*

35. ELLMAN ET AL., *supra* note 25, at 681–84.

36. See *Vela v. Marywood*, 17 S.W.3d 750, 753 (2000) (discussing the adoption criteria sought by plaintiff mother, including desire for an open adoption with a Catholic, Mexican-American couple with no other children).

37. ELLMAN ET AL., *supra* note 25, at 681–84.

38. See ELLMAN ET AL., *supra* note 25, at 690–91 (explaining that states have established different lengths of time for these revocation periods and giving as examples Georgia, which allows a mother to revoke her relinquishment of her rights within 10 days of her signature, and Maryland, which allows revocation within 30 days. Overall, revocation periods have typically been shortened over time in order to provide more stability for the child).

39. *Id.*

In the case of adoption by same-sex couples, second parent adoption slowly became the standard across jurisdictions.<sup>40</sup> In a second parent adoption, the parental rights of the birth mother do not automatically terminate when the child is adopted by her partner. Instead, should both partners in a same-sex relationship agree to be the legal parents of the child, the court will allow the adoptive parent to waive the automatic termination of the birthing partner's parental rights.<sup>41</sup> With marriage equality now extended to same-sex couples from *Obergefell*, second parent adoption, however, will be irrelevant since same-sex couples can now marry.

Over time, adoption of children from the welfare system and foreign-born children has increased, with the total number of adopted children in the United States stabilizing around 127,000.<sup>42</sup> While many "ideal" children are easily placed due to high demand by American parents, hard-to-place children, as the name implies, typically await adoption for long periods of time while living in temporary foster care arrangements.<sup>43</sup> These children are usually older and may have behavior or disability concerns, and same-sex couples have begun to fill the void in adopting and serving as long-term foster parents for these particular children.<sup>44</sup> In fact, same-sex couples are four times more likely to adopt and six times more likely to foster children than opposite-sex couples.<sup>45</sup> Since serving the best interest of children is the intent behind adoption statutes, it is important to ensure that adoption laws are operating accordingly. Unfortunately, incongruence between the intent of adoption laws and their subsequent application prevails.

### B. Foster Care

While states always begin with the presumption that children are best off with their biological parents, evidence demonstrating that the child is not, in fact, best off with his/her biological parents may overcome the presumption in a state's decision to place a child in foster care.<sup>46</sup> Foster care is meant to be a temporary arrangement—when the state places a child in foster care, it is saying that a foster family will provide a better environment than the child's biological parent(s) can and will do so until the parent(s) is ready and able to be reunited with the child.<sup>47</sup>

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40. ELLMAN ET AL., *supra* note 25, at 602.

41. *Id.*

42. ELLMAN ET AL., *supra* note 25, at 681.

43. See Troy D. Farmer, Note, *Protecting the Rights of Hard to Place Children in Adoption*, 72 IND. L.J. 1165, 1166 (1997) (discussing the challenge of hard-to-place children).

44. See June Carbone, *The Role of Adoption in Winning Public Recognition for Adult Partnerships*, 35 CAP. U.L. REV. 341, 394 (2006) (discussing how the fact that same-sex couples tend to adopt and foster hard-to-place children more readily than opposite-sex couples is beneficial to securing legal recognition of same-sex partnerships).

45. Gary J. Gates, *The Real 'Modern Family' in America*, CNN (Mar. 25, 2013), <http://www.cnn.com/2013/03/24/opinion/gates-real-modern-family> (explaining the new reality that many adoptive or foster families include same-sex parents).

46. See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982) (holding that clear and convincing evidence must be provided to overcome the presumption and that the standard's requisite burden should be left to state legislatures for precise determination).

47. See Bass et al., *supra* note 23, at 4–29 (discussing foster care, generally).

Children enter the foster care system for many different reasons. For those entering at birth, often the newborn's mother was unable to properly care for the child. Other children enter after an adult, such as a teacher or neighbor, reports suspicion of child maltreatment to child protection services and an investigation confirms the report.<sup>48</sup> Foster care can be provided through non-relative families, relatives, group homes, institutions, or treatment homes.

Once a child is removed from the harmful environment and placed in foster care, a social worker develops a permanency plan, which is reviewed by the court. Permanency plans outline goals for the child after foster care—typically reunification with birth parent(s)—based on an assessment of the child's needs and the familial circumstances.<sup>49</sup> If reunification is not possible, other goals may include adoption, care by relatives, emancipation, guardianship, or long-term foster care.<sup>50</sup>

The Adoption and Safe Families Act of 1997 (ASFA)<sup>51</sup> legislatively imposed changes to the foster care system in order to promote adoption and improve the current foster care system. This sweeping federal legislation reduced the time period for permanent placement decisions, eliminated long-term foster care as a permanent placement option, and incentivized states to promote adoption first and then foster care.<sup>52</sup> While ASFA imposes much-needed reform to the child welfare system, children are still subject to the highly unstable, inconsistent nature that characterizes foster care.

Instability associated with foster care is detrimental to children's behavioral well-being. In a particular study of children in foster care, only half achieved early stability, while just under twenty percent achieved stability later, and almost thirty percent never achieved stability.<sup>53</sup> Those who achieved early stability had no prior experience with the child welfare system.<sup>54</sup> Notably, early stability is attributed to better behavioral outcomes over time, but those who achieved stability later or never at all were more likely to experience behavior problems.<sup>55</sup> The inconsistency that comes with foster care placement only exacerbates a child's baseline vulnerable condition caused by the maltreatment which put them in foster care in the beginning.<sup>56</sup> Therefore, practices that would instill stability and earlier permanence are in the best interest of children.<sup>57</sup> Families willing to foster and ultimately adopt children, especially those who may have unique behavioral or developmental challenges, are necessary.

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48. *Id.* at 6.

49. *Id.*

50. THE AFCARS REPORT, *supra* note 1, at 1.

51. The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

52. *See id.* §§ 673b, 678, 679a, 679b.

53. David M. Rubin et al., *The Impact of Placement Stability on Behavioral Well-being for Children in Foster Care*, 119 PEDIATRICS 336 (2007) (discussing how foster care may contribute to instability for a child, which has negative effects).

54. *Id.*

55. Rubin et al., *supra* note 53, at 337.

56. *E.g.*, Bass et al., *supra* note 23, at 10.

57. *E.g.*, Rubin et al., *supra* note 53, at 341.



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### III. ADVANCING THE BEST INTEREST OF CHILDREN

Literature suggests that should a child's biological family be incapable of providing a loving, caring, and stable environment, then it is in the child's best interest to be placed with adoptive parents followed by placement with committed foster parents.<sup>58</sup>

#### *A. A Child's Best Interest, Devoid of Competing Agendas*

Adoption and foster care are the very best solutions for a child lacking a family.<sup>59</sup> Without a family, children are at risk for remaining in the foster care system indefinitely, which has devastating consequences.<sup>60</sup> In terms of education, outcomes for children in long-term foster care are dismal. Many missed school days from moving homes, uncertainty and discomfort that comes with moving schools, and missing academic records and gaps in teaching all amount to low educational results.<sup>61</sup> In terms of the transition from childhood to adulthood, foster children aging out of the system have little support, which may lead to future criminal activity and unproductive behavior.<sup>62</sup> Adoption and committed foster parents can change this negative outlook.

In advancing the best interest of children, promotion of adoption and foster care by committed parents should take precedent when competing with other interests, such as those commonly involving religious freedom and the rights of same-sex couples. In *Elk Grove Unified School District v. Newdow*, the Court identified the competing interests of the child and her father, the Petitioner, and ultimately held for the child.<sup>63</sup> The Court based its reasoning partially on the fact that it was in the child's best interest not to be the center of a public controversy, prevailing over her father's wishes to restrict the school district from forcing her to say the pledge, which compromised his atheistic beliefs.<sup>64</sup> "Newdow's rights, as in many cases touching upon family relations, *cannot be viewed in isolation*... most importantly, it implicates the interests of a young child who finds herself at the center of a highly public debate involving her custody."<sup>65</sup> The Court recognized that while a father may have a liberty interest in teaching his child according to his atheistic beliefs, this interest exists concurrently with the child's. In balancing these interests, the child's best interest prevails.<sup>66</sup>

*Elk Grove* does not implicate insignificance for interests competing with a child. Nor does it preclude advocating for those competing interests. Instead, it necessarily

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58. See Bass et al., *supra* note 23 and accompanying text.

59. *Id.*; see generally *supra* Part I (discussing the foundational premise that children thrive in families).

60. See Delilah Bruskas, *Children in Foster Care: A Vulnerable Population at Risk*, 21 J. OF CHILD AND ADOLESCENT PSYCHIATRIC NURSING 70 (2008).

61. *Id.* at 71.

62. *Id.*

63. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2014).

64. *Id.*

65. *Elk Grove*, 542 U.S. at 15 (emphasis added).

66. The Supreme Court also uphold children's interests in the following contexts: abortion rights in *Belotti v. Baird*, 443 U.S. 622 (1979); free speech in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); and religious rights in *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

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shifts the child's best interest to the forefront. This is vital because children are the future, and adoption and committed foster care gives them the best chance at achieving well-being and becoming productive citizens.<sup>67</sup> In situations involving competing interests of religious freedom and the rights of same-sex couples, these interests cannot be viewed in isolation. It is not simply a question of preservation of religious freedom, nor is it simply a question of advancing the rights of same-sex couples. The child's interest in being adopted or placed with committed foster parents must be considered first and foremost, which best ensures the opportunity for well-being and development.<sup>68</sup>

### *B. Competing Perspectives and Their Current Deficiencies*

To effectuate the best interest of children, parties involved in the placement process for children with adoptive and committed foster families—including the government, private and public agencies, same-sex and opposite-sex couples, and others—must work together toward that goal. In practice, however, proponents of competing interests often interfere, whether implicitly or explicitly, with the best interests of children in placement with adoptive and committed foster parents. In pursuit of furthering their own objectives, consideration of a child's best interest may be lost.

Debate involving true concern for the best interest of children is rare. Commonly entangled with religious freedom arguments, advocacy for marriage equality, support for the "optimal" family, problems resulting from government's limited financial resources, and public interest concerns, a child's best interest may easily be lost amongst the competing groups pushing to advance one issue or another. Children are unable to advocate for themselves, and the unfortunate, unintended consequence of the passionate, well-intentioned efforts of these groups is that a child's best interests may be pushed to the background.

Adults have oftentimes failed to fill that void absent conflation with various other issues.<sup>69</sup> Presently in adoption and foster care, two interest groups substantially compete, and thus inherently subsume, what should be the superior, primary concern for a child's best interests. These groups are: (1) religious objectors affiliated with private placement agencies, and (2) proponents of rights for same-sex couples. Both groups are deficient in adequately protecting a child's best interest.

#### 1. Religious Objectors

Religious objectors fight for the rights of those agencies who, according to their religious convictions, wish to withhold child placement from certain potential adoptive parents—typically, same-sex couples. Claiming to uphold and protect the right to religious freedom, this group does so at the cost of either decreasing the pool of

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67. See Bass et al., *supra* note 23 (discussing the significant connection between foster care and adoption and children's wellbeing).

68. *Id.*

69. See generally Gallagher, *supra* note 18 (providing an example in which advocates for anti-discrimination legislation failed to consider the interests of children).

potential adoptive parents or losing the chance to place children at all, should the state consequently refuse to grant them operating licenses.

While advocating for religiously affiliated agencies to stay open and place children with families fulfilling certain requirements, usually heterosexual marriage, same-sex couples may be deterred from adoption if a private agency refuses to work with them. Reducing placement options according to a couple's sexual orientation is not in the best interest of children.<sup>70</sup> Not only does simply decreasing the number of potential adoptive parents bode negatively for children's chances for family placement, but it also contributes to the often tragic outcome for those hard-to-place children (children with special needs, older children, and homosexual children) whom same-sex couples are more likely to adopt.<sup>71</sup> Children lacking placement often end up in group homes, various foster care homes, and institutions—options that are more detrimental to a child's development than adoption or committed foster care.<sup>72</sup> Conscience clauses and RFRA statutes contribute to, and may even result in, those negative consequences.

In an alternative scenario, a religiously affiliated agency could refuse to place children with same-sex couples, thereby losing its license for violating anti-discrimination statutes. These agencies would forfeit the opportunity to place children overall—even non-controversial placements with opposite-sex parents.

## 2. Proponents for Same-Sex Couples

Proponents for same-sex couples' rights to adopt and foster children do so with good intentions. Anti-discrimination statutes are typically used to protect these rights, but they do so at the cost of terminating placement services of private agencies with religious objections.<sup>73</sup> Preventing discrimination has several positive outcomes: same-sex couples can enjoy the freedom to adopt and foster children as opposite-sex couples enjoy, and children are more likely to be placed if there are more interested adoptive couples, especially since same-sex couples are four and a half times more likely to adopt and foster children and hard-to-place children than opposite-sex couples.<sup>74</sup>

In theory, anti-discrimination statutes seem reasonable—mandating equal treatment while at the same time increasing children's potential for adoption and foster care placement.<sup>75</sup> In practice, however, these statutes have concurrently caused harm for children, when religiously affiliated placement agencies close rather than sacrifice their religious convictions to comply with anti-discrimination statutes.<sup>76</sup> Whether or

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70. Brief for the Donaldson Adoption Institute et al. as Amici Curiae, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2014) (arguing that children thrive in families; therefore, a same-sex couple seeking to adopt or foster children should not be prevented from doing so).

71. *Id.*

72. *Id.*

73. *Id.*

74. Abbie E. Goldberg et al., *Research Report on LGB Parent-Families*, THE WILLIAMS INST. (July 2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgb-parent-families-execsum-july-2014.pdf> (explaining results from a study on LGB parent-families).

75. See Brief for the Donaldson Adoption Institute et al., *supra* note 70.

76. See Gallagher, *supra* note 18 and accompanying text.

not one believes in the rationale behind this decision, it can be agreed upon that without the adoption services of Catholic Charities, children have fewer advocates.<sup>77</sup>

Proponents of anti-discrimination statutes seek tolerance for their belief in equal treatment of same-sex couples, but at the expense of intolerance for the beliefs of religiously affiliated agencies who would sooner close their doors than act contrary to their religious convictions.<sup>78</sup> This essentially trades the best interest of children—adoption placement or foster care, regardless of beliefs surrounding homosexual behavior—for the best interest of same-sex couples in equal treatment.

While many issues are certainly worthy of recognition and advocacy, they do so at the cost of the children's best interest. Both sides fail to embrace the best interest of children, resulting in couples without children, closed private agencies, frustrated parties... but most importantly, children without families.

#### IV. CURRENT STATUTORY FRAMEWORKS AND CORRESPONDING CASE STUDIES

Laws governing adoption and foster care exist at the federal, state, and local levels. These laws are facially purposed to promote the best interest of children, but with states as “laboratories for democracy,”<sup>79</sup> each has unique ways of accomplishing that task. Justice Brandeis explained that these state-specific experiments were of no risk to the rest of the country,<sup>80</sup> but in the case of children placed in the foster care system or awaiting adoption, these laws are burdened with an increased impact—an impact with the potential to change the life of a child forever.

With this in mind, states legislatively determine methods to promote the best interests of its children. The following mechanisms are among those commonly employed.

##### A. Conscience Clauses

###### 1. Overview

Generally, a conscience clause is “a clause in an act or law providing exemptions on the grounds of conscience or belief.”<sup>81</sup> Also termed “refusal clauses,” their use began within the medical profession for those who refused to perform services legalized by the *Roe v. Wade*<sup>82</sup> decision which interfered with their religious and moral beliefs.<sup>83</sup> Over time, conscience clauses have been used to protect the consciences of those within institutions, medical fields, and related situations which could otherwise require one to act in opposition to his or her religious convictions.

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77. *Id.*

78. *E.g.*, Gallagher, *supra* note 18.

79. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

80. *Id.*

81. *Conscience Clause*, THE OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/39460?redirectedFrom=conscience+clause#eid8572513>.

82. *Roe v. Wade*, 410 U.S. 113 (1973).

83. Tom C.W. Lin, *Treating an Unhealthy Conscience: A Prescription for Medical Conscience Clauses*, 31 VT. L. REV. 105 (2006) (discussing the history of conscience clauses within the healthcare context).

In the context of adoption and foster care, a conscience clause enables placement agencies to act upon their religious beliefs in child placement. For example, an agency may require adoptive parents or be of a specific religion or identify with a certain sexual orientation. This is permissible because placement agencies may act in accordance with their conscience without fear of government interference. Since many placement agencies are religiously affiliated and thus religiously motivated, allowing them to operate according to their conscience, as provided by conscience clauses, increases the number of agencies working to place children.

## 2. Virginia Case Study

While the federal government has enacted conscience clauses, states have also widely adopted this measure. In April 2012, Virginia Governor Robert McDonnell signed into law Virginia House Bill 189 amending the Code of Virginia.<sup>84</sup> This addition notably includes a conscience clause relating to private child placement agencies, which, as generally stated in the previous section, allows placement agencies to refuse to “perform, assist, counsel, recommend, consent to, refer, or participate” in any child placement with an adoptive or foster care family that violates an agency’s religious convictions.<sup>85</sup> The law also protects these agencies from possible adverse state action and lawsuits in response to their religiously or morally influenced actions.<sup>86</sup>

The conscience clause addition effectively protects the rights of 77 private agencies (as opposed to the state’s 120 public social services departments) located throughout the state to refuse placement on the basis of religious convictions. These agencies were responsible for placing 557 children of the 2,503 total placements in 2011.<sup>87</sup> Yet, with protection of these agencies’ rights comes the potential for refusing placement in same-sex couples’ homes, and fewer options for placement may lead to the negative outcome of alternative placement in group homes or institutions. This is not in the best interest of children since children do better with adoptive or committed foster care parents than in group homes or institutions.<sup>88</sup>

### *B. Religious Freedom Restoration Acts*

#### 1. Overview

The federal government first enacted the Religious Freedom Restoration Act of

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84. VA H.B. 189.

85. VA. CODE ANN. § 63.2-1709.3

86. *Id.*

87. *E.g.*, Anita Kumar, *Virginia Adding “Conscience Clause” to Adoption Laws*, THE WASHINGTON POST (Feb. 7, 2012), [https://www.washingtonpost.com/local/dc-politics/virginia-adding-conscience-clause-to-adoption-laws/2012/02/03/gIQAUI6gxQ\\_story.html](https://www.washingtonpost.com/local/dc-politics/virginia-adding-conscience-clause-to-adoption-laws/2012/02/03/gIQAUI6gxQ_story.html).

88. *See* Letter from Gary J. Gates, PhD, Williams Distinguished Scholar, Williams Inst., UCLA Law School to A. Donald McEachin, Senator, 9<sup>th</sup> District, Commonwealth of Virginia (Feb. 6, 2012) (on file with the Williams Inst.) (expressing opposition to Virginia’s conscience clause legislation because it would allow placement agencies to refuse child placement with same-sex couples, decreasing the chance of child placement in a family).

1993 (RFRA)<sup>89</sup> under President Bill Clinton. President Clinton explained the law as one which legislatively enacted the requirement for a high level of proof before the federal government could interfere with one's free exercise of religion.<sup>90</sup> The purposes of the law, as given in the text, include reestablishment of the compelling interest test set forth in *Wisconsin v. Yoder*<sup>91</sup> and *Sherbert v. Warner*<sup>92</sup> and provision of a defense to those whose religious freedom was substantially burdened by the government.<sup>93</sup>

The reinstated compelling interest test provides that government may only burden the exercise of religion if that burden is in furtherance of a compelling government interest which is narrowly tailored to be the least restrictive means in furthering that interest.<sup>94</sup> After the federal government enacted RFRA, states followed suit in enacting their own versions of RFRA legislation to protect their citizens against state infringement of religious freedom.<sup>95</sup> Several of these RFRA laws have been challenged as allowing and furthering discrimination, which is also constitutionally protected against under the Fourteenth Amendment.

RFRA laws may be used to protect the religiously motivated actions of placement agencies. Requiring the government to present compelling justification against religiously affiliated actions of placement agencies prevents an arbitrary government decision which may infringe on religious freedom. Meeting the standard of compelling justification imposes a challenging obstacle on government decisions because few interests exist which are so compelling as to overcome the interest of allowing agencies to place children in families. This allows placement agencies to continue their work placing children in families.

## 2. Michigan Case Study

In June 2015, Michigan Governor Rick Snyder signed into law Michigan House Bill 4188, a religious freedom adoption law.<sup>96</sup> The law emulates the federal RFRA statute, as discussed generally in the previous section. It protects the religious freedom of placement agencies as given by the United States Constitution, which recognizes religious freedom as an inherent, fundamental, and unalienable right.<sup>97</sup> The relevant implication of Michigan's statute to child placement agencies is that the state

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89. 42 U.S.C.S. § 2000bb (2016).

90. Bill Clinton, *Remember When Democrats Used to Support Religious Freedom? Remarks on Signing the Religious Freedom Restoration Act of 1993*, THE FEDERALIST (March 26, 2015), <http://thefederalist.com/2015/03/26/remember-when-democrats-used-to-support-religious-freedom/> (containing a transcript of then-President Clinton's speech at the signing ceremony for the federal RFRA in 1993).

91. *Wisconsin v. Yoder*, 406 U.S. 205 (1971).

92. *Sherbert v. Verner*, 374 U.S. 398 (1963).

93. See *Wisconsin*, 406 U.S. 205.

94. *Id.*

95. Currently, 20 states have RFRA statutes—Connecticut, Rhode Island, Florida, Illinois, Alabama, Arizona, South Carolina, Texas, Idaho, New Mexico, Oklahoma, Pennsylvania, Missouri, Virginia, Tennessee, Louisiana, Kentucky, Kansas, Mississippi, and Indiana.

96. David Eggert, *New Michigan Law Lets Adoption Agencies Decline Referrals*, VALLEY CENTRAL (Jun. 12, 2015, 12:15 AM), <http://valleycentral.com/news/politics/new-michigan-law-lets-adoption-agencies-decline-referrals-08-25-2015?id=1216742> (reporting on Michigan's passage of a religious freedom adoption law).

97. 2015 MI H.B. 4188, codified at M.C.L. 722.111-722.128, 14(e)-(f)

government cannot substantially burden their right to free exercise of religion—denying placement on the basis of religious objections, usually in situations involving same-sex couples. Legislation similar to Virginia’s conscience clause is pending in the Michigan state legislature, as well.

Two private, faith-based agencies together facilitate 25-30% of Michigan’s foster care adoptions, and they were a powerful force behind the enactment of the new law.<sup>98</sup> Like Virginia’s governor, Governor Snyder and supporting groups claim to be acting in the best interest of children by protecting private agencies so that the highest number of children may be placed in families. Conversely, opponents such as the ACLU of Michigan claim that agencies receiving state funding, which include the private agencies invoking protection under the new religious freedom adoption law, are therefore obligated to act in the best interest of children, which means placement in a family regardless of the sexual orientation of the adoptive parents.<sup>99</sup>

### C. Adoption Bans

#### 1. Overview

Adoption bans legislatively prohibit adoption in certain circumstances, whether that be adoption by unmarried couples, same-sex couples, etc. This measure is uncommon due to its broad, typically over-inclusive reach, but it still exists in some states. The Arkansas Supreme Court recently struck down its state-wide adoption ban because it was a discriminatory barrier that infringed on the privacy of individuals.<sup>100</sup> Similarly, Florida’s Governor Rick Scott recently signed a bill repealing adoption bans for same-sex couples.<sup>101</sup>

Those who believe children do best with opposite-sex parents praise adoption bans as promoting the best interest of children, but since it is in the best interest for children to be adopted or placed with committed foster parents, is this type of law truly advancing their best interest?

#### 2. Mississippi Case Study

In 2000, then-Governor Ronnie Musgrove of Mississippi signed a bill which entirely banned same-gender adoptions.<sup>102</sup> Same-sex couples have evaded the law by having only one parent legally adopt the child, but then the other parent is legally a complete stranger to the child.<sup>103</sup> This is alarming since same-sex couples in Mississippi comprise the largest percentage, 29% as of 2014, of same-sex couples in the

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98. *Id.*

99. *Id.*

100. Ark. Dep’t of Human Servs. v. Cole, 380 S.W.3d 429 (Ark. 2011).

101. See generally Michael K. Lavers, *Florida Gay Adoption Ban Repealed*, WASH. BLADE (June 12, 2015), <http://www.washingtonblade.com/2015/06/12/florida-gay-adoption-ban-repealed/> (reporting on Florida’s passage of a law overturning the ban on same-sex adoption).

102. See MISS. CODE ANN., *supra* note 14.

103. Tamar Lewin, *Mississippi Ban on Adoptions by Same-Sex Couples is Challenged*, THE NEW YORK TIMES (Aug. 12, 2015), [http://www.nytimes.com/2015/08/13/us/mississippi-ban-on-adoptions-same-sex-couples-challenged.html?\\_r=0](http://www.nytimes.com/2015/08/13/us/mississippi-ban-on-adoptions-same-sex-couples-challenged.html?_r=0) (explaining how same-sex couples in Mississippi have circumvented the law in order

nation who are raising children under 18.<sup>104</sup> While lawsuits challenging the ban are pending,<sup>105</sup> the *Obergefell*<sup>106</sup> decision recognizing the right to same-sex marriage enables a claim for a right to same-sex adoption indistinguishable. In addition, the trajectory in both Arkansas and Florida is predictive of what will likely unfold in Mississippi.

Governor Musgrove later wrote an opinion piece expressing regret for passing the law.<sup>107</sup> He explained his realization that a child's best interests should be of utmost importance, rather than religious objections or deep-rooted prejudice.<sup>108</sup>

States believing that children do best with opposite-sex parents believe adoption bans will promote the best interest of children; however, that proposition has been debunked in recent studies.<sup>109</sup> There is no evidence that children of same-sex parents have stifled educational or academic outcomes, and children of same-sex parents demonstrate little difference compared to children of opposite-sex parents in terms of social functioning, including self-esteem and psychological adjustment.<sup>110</sup> Since children of same-sex parents have been found to be well-adjusted compared to their counterparts, adoption bans purporting to promote the best interest of children are misguided—preventing children from being adopted by same-sex parents is not in their best interest. Children need parents to facilitate their development, and both same-sex and opposite parents are fully capable of that task.<sup>111</sup>

#### D. Anti-Discrimination Laws

##### 1. Overview

The Fourteenth Amendment guarantee of equal treatment under the law prompted Title VII of the federal Civil Rights Act,<sup>112</sup> prohibiting employment discrimination on the basis of race. Discrimination on the basis of sexual orientation was addressed by the Supreme Court in *Lawrence v. Texas*.<sup>113</sup> The anti-sodomy law was struck down, and the Court opined that such a law was an “invitation to subject homosexual persons to discrimination.”<sup>114</sup> There is no federal statute, however, prohibiting discrimination on the basis of sexual orientation because sexual orientation is not considered a protected class.

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to adopt and foster children).

104. *Id.*

105. *See e.g.* Campaign for Southern Equality v. Miss. Dep't of Human Services, No. 3517:cv 578DPJ-FKB (S.D. Miss. filed Aug. 12, 2015).

106. *Obergefell*, 135 S. Ct. 2584.

107. Ronnie Musgrove, *Portman's Conversion Should Be a Lesson*, THE HUFFINGTON POST (Mar. 20, 2013), [http://www.huffingtonpost.com/ronnie-musgrove/portmans-conversion-shoul\\_b\\_2918493.html](http://www.huffingtonpost.com/ronnie-musgrove/portmans-conversion-shoul_b_2918493.html).

108. *Id.*

109. Goldberg et al., *supra* note 74 (citing studies which reject the commonly-held belief that children do best with opposite-sex couples).

110. *Id.* at 3.

111. Goldberg et al., *supra* note 74, at 15-25 (discussing the wellbeing of children in same-sex homes).

112. 42 U.S.C.S. § 2000e (2016)

113. *Lawrence v. Texas*, 539 U.S. 558 (2003).

114. *Id.* at 575.



To address this void, some states have expanded their anti-discrimination laws to include a prohibition on sexual orientation discrimination, which may reach beyond the usual context of employment.<sup>115</sup> State laws may provide insulation from sexual orientation discrimination within employment, housing, credit, services, or places of public accommodation.<sup>116</sup>

Twenty states<sup>117</sup> currently have statutes prohibiting discrimination on the basis of sexual orientation, ranging from prohibition in very limited contexts, such as with government contractors, to general bans outright.<sup>118</sup> These laws purport to advance equality by prohibiting unequal treatment of individuals based on their sexual orientation, but they may also conflict with other established rights and freedoms, forcing difficult policy decisions.

## 2. Boston Case Study

In 1989, Massachusetts became the second state to pass an anti-discrimination law for sexual orientation.<sup>119</sup> In the absence of a RFRA-like statute like that in Michigan or conscience clauses relevant to child placement agencies like that in Virginia, Massachusetts is essentially devoid of protection for religious freedom for child placement agencies with religious or moral objections to certain placements.

This resulted in Catholic Charities of Boston ending its adoption services in 2006. The private agency had religious objections to placing children with same-sex couples, and Catholic teaching would not overlook religious restrictions in order to continue operation. In Massachusetts, adoption agencies must be licensed by the state. So when the state refused to issue licenses to agencies like Catholic Charities for defying the anti-discrimination statutes,<sup>120</sup> those agencies ceased their adoption services.<sup>121</sup> The best interest of Boston's children entails placement in a family, not the closing of Catholic Charities' adoption services so that same-sex couples escape discrimination.

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115. See Joel M. Nolan, Comment, *Chipping Away at the Iceberg: How Massachusetts Anti-Discrimination Law Can Survive ERISA Preemption and Mandate the Extension of Employee Benefits to All Married Spouses Without Regard to Sexual Orientation*, 42 NEW ENG. L. REV. 109, 110 (2007) (discussing the context of the state of Massachusetts).

116. See *Anti-Discrimination Law in Massachusetts*, GAY & LESBIAN ADVOCATES & DEFENDERS, <https://www.glad.org/rights/massachusetts/c/anti-discrimination-law-in-massachusetts> (last updated Feb. 2014).

117. Twenty states have statutes preventing discrimination on the basis of sexual orientation: California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. See THE BECKET FUND FOR RELIGIOUS LIBERTY, ISSUES BRIEF: SAME-SEX MARRIAGE AND STATE ANTI-DISCRIMINATION LAWS 3 (2009).

118. *Id.*

119. See Gallagher, *supra* note 18 and accompanying text.

120. MASS. GEN. LAWS ANN. Ch. 151B §4 (West 2004); see also Gallagher, *supra* note 18 and accompanying text.

121. See Gallagher, *supra* note 18 and accompanying text.

## E. Executive Order

### 1. Overview

An executive order enables an executive, such as the President or a state governor, to circumvent the normal legislative process in making decisions which implicate the executive's enumerated powers.<sup>122</sup> In the case of the Presidency, administrative functions, certain war-time directives, execution of foreign policy, and federal law enforcement all fall within those enumerated powers.<sup>123</sup> Likewise, state governors are given certain enumerated powers in his/her respective state constitution, from which they may accordingly issue executive orders.

The constitutional mandate for a separation of powers gives rise to the validity of the executive order, but despite this fact, its usage has been controversial since the founding of the United States.<sup>124</sup> While Congress can challenge an order, it rarely does so since the executive authority to issue such orders has been broadly interpreted so as to limit Congress's interference with the functioning of the executive branch.<sup>125</sup>

It is uncommon for an executive order to be used in family law matters like adoption or foster care; however, in terms of public policy, executive orders are very effective in clearly and directly furthering policy initiatives.

### 2. Arizona Case Study

In Arizona, Governor Douglas Ducey issued an executive order permitting same-sex married couples to adopt and foster children.<sup>126</sup> This order followed reports that the Arizona Department of Child Safety (DCS), upon the legal advice of Attorney General Brnovich, was refusing to place children with same-sex married adoptive parents until the Supreme Court issued a decision on same-sex marriage. Nevertheless, Governor Ducey did not waiver in his support for adoption, which stems from his own adoption experience as a child, and instead reversed the DCS policy in direct opposition to Attorney General Brnovich's legal advice.

The underlying objective of Governor Ducey's executive order was to promote the best interest of children—placing them with loving families.<sup>127</sup> This order is one of the few that achieves its stated purpose of advancing children's best interests. It was directed at a government agency, the DCS, and so it did not impinge on any religious objections that may exist with private placement agencies which could cause them to shut down. The order for the DCS to continue adoption placements for

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122. See generally Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. LAW & POL. 267, 278-79 (2001) (explaining the history and use of executive orders).

123. *Id.* at 276-78.

124. See Gaziano, *supra* note 122, at 282.

125. *Id.*; see generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring) (explaining the appropriate circumstances for use of an executive order).

126. See Alia Beard Rau & Yvonne Wingett Sanchez, *Ducey: Arizona Gay Couples Can Again Adopt, Foster Together*, THE ARIZONA REPUBLIC (Apr. 23, 2015), <http://www.usatoday.com/story/news/politics/2015/04/23/ariz-same-sex-couples-adoption-foster/26228671/> (reporting on an executive order in Arizona overturning the ban on same-sex adoption).

127. *Id.*

same-sex *married* couples also demonstrates the underlying commitment to the best interest of children,<sup>128</sup> since it is undisputed that children's wellbeing positively correlates with the stability that married parents often provide.<sup>129</sup>

## V. AMENDMENT PROPOSALS TO EXISTING STATUTORY FRAMEWORKS

Overall, both proponents for religious freedom and proponents for same-sex couples' rights can approach their advocacy efforts in a way that would consider and thus protect the best interest of children, first and foremost. State legislatures can implement reform that statutorily protects the best interest of children. Reform is necessary on both sides of the debate—for those measures placing religious liberty at the forefront and, conversely, for those measures placing rights of equality for same-sex couples at the forefront.

### A. Amendments to Conscience Clauses and RFRA Statutes

For those states that currently have conscience clauses or RFRA statutes protecting religious liberty, the problem lies therein with the potential for religious placement agencies to turn away prospective same-sex parents, decreasing the chances for children to get placed. In order to both protect religious freedom and advance the best interests of children, states should pass an amendment to these statutes, if they do not already contain such an amendment, requiring placement agencies to act in the best interest of children.<sup>130</sup> This involves adherence to the following proposals.

#### 1. Disclosure Requirement

A disclosure requirement would mandate that placement agencies, should they refuse placement to prospective parents on grounds of sincere religious objection, provide a list of reasonable alternative agencies which would be willing to work with the couple. This disclosure requirement serves a two-fold purpose. First, it facilitates the process for same-sex couples to continue working towards adoption or foster care. Second, agencies willing to work with same-sex couples will be able to place more children in loving families.

Professor Wilson implies this type of disclosure requirement when she likened the same-sex adoption controversy with the abortion debate following *Roe*,<sup>131</sup> where healthcare providers with religious objections to providing abortion services were

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128. See generally Huntington, *supra* note 28; see *supra* Part III.A.

129. See generally ELLMAN ET AL., *supra* note 25, at 549 (explaining how marriage promotes stability and well-being for children).

130. See *supra* Part I and II (discussing the standard for a child's best interest as deriving from numerous studies and research, which defines it as placement in a family, regardless of the sexual orientation of the parents).

131. *Roe v. Wade*, 410 U.S. 113 (1973); Mark Strasser, *Conscience Clauses and the Placement of Children*, 13 UTAH L. REV. 985, 993 (2013) (referring to Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes over Same-Sex Adoption*, 22 BYU J. PUB. L. 475, 492 (2008)).

permitted to decline if they provided a referral to one who would provide the service.<sup>132</sup> Required disclosure in the realm of placement agencies would accomplish the same objective—allowing religious objectors to practice their sincerely held beliefs without completely barring same-sex couples from adoption and foster care.<sup>133</sup>

Michigan's new religious freedom adoption law discussed *supra*<sup>134</sup> includes a similar type of disclosure requirement, which provides that an agency declining to place a child for religious reasons must (1) refer the applicant(s) to an agency willing to provide placement services, and (2) refer the applicant to the state department's website listing alternative child placement agencies.<sup>135</sup> Disclosure requirements modeling those in Michigan would be extremely effective in ensuring that families who seek to adopt or foster children are able to do so, thus increasing a child's chance for placement in a family.

## 2. Exceptions

The amendment would also include two provisions resulting in possible exceptions to the disclosure requirement previously discussed. The first exception is for hard-to-place children. Since those children are already less likely to be placed regardless of restrictions an agency may impose,<sup>136</sup> special consideration should be given.<sup>137</sup> While agencies have much discretion in the placement process, the amendment would encourage additional steps be taken in ensuring the placement of hard-to-place children. Other steps may include more detailed disclosure of alternative agencies to same-sex couples looking to adopt a hard-to-place child, or disclosure to a birth mother of a hard-to-place child that a non-religious agency may be a better choice in finding a forever home for her child.

Second, there should be a provision for children who demonstrate maturity and sincere understanding regarding their own religious beliefs, which may not preclude their placement with a same-sex couple.<sup>138</sup> While the agency may disagree according to its own religious convictions to placement with a same-sex couple, a child who is of a mature age, demonstrates true understanding of the situation and his or her own religious beliefs, and does not object to placement with a same-sex couple should be transferred to an agency without religiously-imposed limitations on placement.<sup>139</sup> This would likely be a rarely granted exception, but is, nevertheless, worth mentioning in order to best facilitate a child's best interest and family placement.

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132. See Wilson, *supra* note 131, at 478-482 (comparing religious objection of provision of abortion services to religious objection of child placement with same-sex couples).

133. *Id.* at 494.

134. See *supra* Part IV.B.2.

135. MICH. COMP. LAWS ANN. §722.124e, Sec. 14(e)(4)(a)-(b) (West 2015).

136. See Gates, *supra* note 45, at 1166.

137. See Wilson, *supra* note 131, at 495 (suggesting deep consideration be given regarding the impact of any proposed state action on the hardest-to-place children).

138. The reasoning for this provision is based on the reasoning given in Justice Douglas' dissent in *Yoder*, which is discussed in-depth *infra* Part V.B.1. His dissent encourages protection of a mature child's religious belief, which also encompasses the absence of religious belief. See *infra* Part V.B.1 and *Wisconsin v. Yoder*, 406 U.S. 205 (1971) (Douglas, J., dissenting).

139. See *infra* Part V.B.1.

### 3. Addressing Counterarguments

While religiously affiliated agencies may have concerns with seemingly facilitating the process for same-sex couples to become parents, merely informing prospective same-sex parents of other agencies that would serve them strikes a reasonable balance in advancing the best interest of children and protecting religious freedom. Religiously affiliated agencies should be given discretion in choosing how informative to be—ranging from simply giving the couple a list of alternative agencies to full counseling on how best to proceed.

Likewise, same-sex couples and their advocates may have concerns that conscience clauses and RFRA-type laws perpetuate discrimination on the basis of sexual orientation. Limiting protection only for those sincerely-held *religious* objections, and not simply moral objections, may curb some of this concern. The majority opinion in *Yoder* granted an exception to the Old Order Amish concerning compulsory attendance in school until age 16.<sup>140</sup> This exception was granted after an abundance of evidence was shown which demonstrated and explained Amish beliefs (and the sources of those beliefs) precluding school attendance after the eighth grade.<sup>141</sup> The record also demonstrated a profound negative impact on the community of Old Order Amish—probable extinction—should Amish children be required to comply with Wisconsin’s compulsory school attendance law.<sup>142</sup> Profound negative impact has already been seen in the closing of Catholic Charities’ adoption services in Boston.<sup>143</sup> This response could potentially be elicited in any state which enacts anti-discrimination legislation like that to which Catholic Charities of Boston was subjected. Requiring a certain high threshold of evidence proving legitimacy of religious objection, like the majority in *Yoder* required, will limit arbitrary objections claiming a religiously based objection.

In summary, an amendment to conscience clause and RFRA statutes should include (1) required disclosure to same-sex couples of agencies that will work with them, and (2) provisions requiring: (a) more informative disclosure to same-sex couples and birth parents when hard-to-place children are involved, and (b) the option for a child who does not share a religiously affiliated agency’s objection to placement with a same-sex couple to be transferred to an agency that is open to such placement. This allows religiously affiliated placement agencies to continue placing children according to their religious convictions, while also preserving the opportunity for same-sex couples to adopt. It also encourages best practices for hard-to-place children and mature children who do not have religious objections to placement with a same-sex couple, resulting in an increased likelihood for placement.

#### *B. Amendments to Anti-Discrimination Laws*

For states with laws prohibiting discrimination on the basis of sexual orientation,

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140. See *Yoder*, 406 U.S. 205.

141. *Id.* at 217.

142. See *Yoder*, 406 U.S. 205 at 218.

143. See generally Gallagher, *supra* note 18 (providing an example in which advocates for anti-discrimination legislation failed to consider the interests of children).

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the problem lies therein with refusal to grant operating licenses to agencies which violate those statutes. Intolerance for religiously affiliated placement agencies, to the extent that they must close down for lack of a license, lessens the likelihood for children to be placed since one less agency will be working on their behalf. In order to both further the best interest of children while protecting same-sex couples from discrimination, states should pass an amendment to these statutes which allows for religious exceptions in certain circumstances and provides for their continued tax-exempt status.

### 1. Religious Exemptions

Religious exemptions should be given in certain circumstances—one being for religiously affiliated agencies that were in operation before the anti-discrimination law was passed. That exemption would include, however, the preservation of the provisions given in the previous section—disclosure of alternative agencies to same-sex couples and disclosure to birth parents of hard-to-place children of the agency’s religious beliefs and the resulting probable consequences.<sup>144</sup>

A second circumstance justifying an exemption exists when the child’s best interest requires placement with opposite-sex parents. This determination, similar to that *supra* Part V.A.2, may be made either by an older child who has sincere religious convictions or by the state through its social workers and guardian *ad litem*s. In *Yoder*,<sup>145</sup> the Court dealt with a conflict between a couple’s Amish faith forbidding education past the eighth grade and a state law requiring education up to age sixteen.<sup>146</sup> While the Court ultimately held for the parental autonomy of the Amish couple, Justice Douglas’ well-known dissent suggested that older children have a legally protected interest regarding their own welfare that may be in opposition to that of their parents.<sup>147</sup> This interest would then demand a hearing before a State took action on their behalf.

Justice Douglas’ dissent, while not controlling, should be readily considered in its application to the adoption and foster care context where a child in middle or high school may have formed sincere religious beliefs opposed to placement with a same-sex couple. In this type of circumstance, those beliefs should be honored. “Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child’s rights to permit such an imposition... Religion is an individual experience.”<sup>148</sup> Justice Douglas posited that a mature child’s religious freedom was subject to constitutional protection, and religious exemptions to anti-discrimination statutes would accomplish that prerogative. This exemption, however would still be subject to a high threshold of evidence proving the religious belief to be sincerely held, as discussed *supra*.<sup>149</sup>

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144. See *supra* Part V.A.1.

145. *Yoder*, 406 U.S. 205.

146. *Id.*

147. *Yoder*, 406 U.S. 205 at 242-43.

148. *Id.*

149. See discussion *supra* Part V.A.3.

## 2. Tax-Exempt Status

Notwithstanding anti-discrimination statutes, states should continue to grant tax-exempt status to charitable organizations utilizing the religious exemption in jurisdictions with anti-discrimination statutes, as explained in the previous section. Without these exemptions, most of those organizations would be unable to remain open, and their closure would negatively affect the best interest of children. Following the Church Amendment model,<sup>150</sup> which allowed religiously affiliated hospitals receiving federal funding to refrain from performing abortions after *Roe*,<sup>151</sup> the state should preserve religiously affiliated placement agencies' tax-exempt status regardless of religiously motivated restrictions that may violate the anti-discrimination statutes in place.

Tax-exempt status is governed by Section 501(c)(3),<sup>152</sup> which has been held to apply to those charitable organizations that serve a public purpose and do not conflict with public policy.<sup>153</sup> As explained by the Court, "Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind."<sup>154</sup>

In *Bob Jones Univ. v. United States*, the racial discrimination practiced in the admissions process at Bob Jones was affirmed as failing to serve a public purpose and as contrary to public policy.<sup>155</sup> Therefore, it was not awarded tax exemption under Section 501(c)(3).<sup>156</sup> In contrast, however, religiously affiliated child placement agencies do serve several public purposes. First and most importantly, these agencies facilitate placement of children with families to advance their best interest. Second, placing children in families may reduce the financial expense for the state. The foster care system in Virginia, for example, spends thirty-thousand dollars per foster child and an extra two thousand dollars per foster child in state-run group homes each year.<sup>157</sup> Therefore, adoption out of the system would save a considerable amount of money for the state.<sup>158</sup> Lastly, this does not conflict with public policy purporting to advance equality through anti-discrimination statutes, so long as those agencies adhere to the proposed disclosure requirements facilitating adoption or foster care

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150. ROBIN FRETWELL WILSON, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 77, 79 (Douglas Laycock et al. eds., 2008) (explaining the Church Amendment model in the healthcare context which allowed healthcare providers to act upon their religious beliefs by refusing to provide abortion services, while continuing to receive federal funding).

151. *Roe v. Wade*, 410 U.S. 113 (1973).

152. I.R.C. §501(c)(3)

153. *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (holding that racial discrimination in admissions process practiced by Bob Jones University did not serve a public purpose and conflicted with the public policy's objective to abolish racial discrimination).

154. *Id.* at 588.

155. *Id.*

156. I.R.C. §501(c)(3)

157. See Clinton, *supra* note 90 and accompanying text.

158. *Id.*

placement with same-sex couples.<sup>159</sup>

### 3. Addressing Counterarguments

Proponents of anti-discrimination statutes may disagree with the preservation of tax-exempt status for religiously affiliated placement agencies on the grounds that those agencies are practicing discrimination and thus do not fulfill the statutory requirement of a “useful public purpose” necessary to receive a tax exemption.<sup>160</sup> Who decides what a “useful public purpose” may be? This question correlates with the broader question asked by many constitutional theorists—who is ultimately responsible for statutory interpretation and how should statutes be interpreted?<sup>161</sup> These issues are outside the bounds of this paper, but this proposition must be given serious consideration, given its immense significance on all areas of law.

While proponents of anti-discrimination statutes may disagree with certain exemptions for religiously affiliated agencies on the grounds that the exemptions undermine the fundamental purpose of the law itself (that purpose being to eliminate discrimination), the best interest of children should be advanced first and foremost. This may be a subjective policy-driven decision, but the disclosure requirements for religiously affiliated agencies, discussed *supra* Part V.A.1, prevent the occurrence of gross discrimination, allow same-sex couples to be referred to an agency which will assist them, and protect the religious liberty of placement agencies holding sincere religious beliefs preventing them from placing children with same-sex couples. Religious exemptions have been upheld in many contexts, most notably healthcare,<sup>162</sup> where secular legislation burdens religious exercise. Prioritizing a religious exemption in a situation where a religious placement agency was in operation before an anti-discrimination statute was enacted will allow those agencies to remain open, which advances the child’s best interest in family placement above all else.

Religiously affiliated agencies would still be prevented from acting upon their convictions should they open a new operation in a jurisdiction with an anti-discrimination statute already in place. This would likely effect a negative outlook for children because religious agencies would be less willing to open and operate where they may not act according to their religious beliefs, but this is also a policy consideration that a state must understand and prepare to accept when they establish an anti-discrimination statute.

Both circumstances justifying religious exemptions and the preservation of tax-exempt status would ensure advancement of a child’s best interest, while concurrently upholding religious freedom and respecting anti-discrimination statutes.

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159. See discussion *supra* Part V.A.

160. I.R.C. §501(c)(3)

161. See generally MICHAEL J. GERHARDT ET AL., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 13 (4th ed. 2013) (discussing the debate surrounding the appropriate authority to interpret and decide law).

162. See generally *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014) (granting exemption for religious family-owned business in complying with the Patient Protection and Affordable Care Act’s requirement that insurance cover contraception); *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (1974) (upholding the Church Amendment in a sterilization case).



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*C. Urgency for Legislatively Promoting a Child's Best Interest*

The conflict between religious freedom and the rights of same-sex couples in the context of adoption and foster care is extremely polarized politically, oftentimes lacking reasonable discourse regarding the child's interests. This may be a consequence of the considerably strong lobbies for both religious freedom and rights for same-sex couples, or it may be a consequence of the democratic process prompting politicians to work in favor of those with the power to vote for them (which, of course, are not children). Still, it may possibly be a consequence of current popular sentiment which usually sides with either extreme at the expense of children in the middle. Regardless, this problem cannot be resolved if it continues to be a politicized issue involving religious freedom against rights for same-sex couples and vice versa, rather than a children's issue which impacts thousands of children lacking a comparably strong voice.

With more than 400,000 children's lives potentially affected by a state's decision regarding their best interest,<sup>163</sup> amended legislation is necessary. Religiously affiliated agencies have closed or been seriously challenged on the basis of their beliefs.<sup>164</sup> In addition, same-sex couples may abandon their efforts to adopt or foster children as a result of the current barriers discussed *supra*. The rise in the quickly developing field of assisted reproductive technologies<sup>165</sup> aiding familial expansion may be less complex and seemingly less stigmatizing for same-sex couples. Absent legislative reform of the existing deficient statutes and policies, assisted reproductive technologies could result in a significant, detrimental loss of interest by those who otherwise would have fostered or adopted children.

Legislative reform is necessary to ensure that a child's best interest in adoption and committed foster care placement is not extinguished by subsequent consequences such as fewer operating agencies or alternative technological methods lacking such intrusive scrutiny and regulation.<sup>166</sup> Improving existing statutes through the proposed amendments will accomplish several objectives. First, it will allow religious placement agencies to continue their work while abiding by their religious convictions. Second, it will prevent gross discrimination against same-sex couples, reducing the likelihood of diminished interest in adoption and foster care. Overall, it will allow for reasonable facilitation of the child placement process for both same-sex and opposite sex couples seeking to become adoptive and foster parents, while concurrently respecting religious freedom and equal protection for same-sex couples.

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163. See THE AFCARS REPORT, *supra* note 1.

164. See discussion *supra* Part IV.D.2.

165. See ELLMAN ET AL., *supra* note 25, at 703 (discussing the rise in assisted reproductive technology).

166. See e.g., Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J.L. SCI. & TECH. 505, 515-16 (2005) (discussing the potential for same-sex couples to turn to assisted reproductive technology should they face significant obstacles in the adoption or foster care process).

## VI. CONCLUSION

In the context of adoption and foster care placement, the conflict between advocates for religious freedom and advocates for same-sex couples' rights has oftentimes rendered the best interest of children subservient to those competing interests. While this may be an unintended consequence of well-meaning advocacy, the best interest of children should be placed at the forefront since literature and public consensus agree that their well-being and future outlook directly correlate with their placement in a caring, stable, and loving family through adoption or foster care. Most of the existing legislative mechanisms affecting adoption and foster care placement are deficient in promoting the best interest of children; however, amendments to these statutes can remedy their deficiencies so that a child's best interest is of a significant priority, while simultaneously protecting both religious freedom and the rights of same-sex couples.