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INTRODUCTION

*In any discussion of adoption . . . we must not lose sight of its primary goal: to provide a permanent, secure, and loving home for a child whose birth parents are unable or unwilling to meet the child's needs. Throughout the process of change, we must never cease to ask the basic question: "Is it well with the child?"*¹

"Kenny" became a ward of the state when he was eight years old, after he was removed from his biological family because of unstable living conditions.² By the age of fifteen, he had spent seven years moving around the foster care system, living with numerous foster families and in group homes.³ After experiencing constant bullying in one of the group homes, Kenny decided life would be better on the streets.⁴ Shortly thereafter, he got in touch with Lutheran Child and Family Services of Illinois (LCFS), which began trying to find him a more suitable and stable home.⁵ Matt Nalett, from Chicago, met Kenny at a meeting with a teenage homeless group that he regularly attended.⁶ Nalett, along with his partner Fred Steinhauer, reached out to LCFS about becoming Kenny's foster parents.⁷ Steinhauer and Nalett passed a home inspection, met with child welfare workers and Kenny's therapist, and cleared all the necessary background checks.⁸ But just before everything was finalized, LCFS informed the couple that they could not be Kenny's foster parents

1. Sanford N. Katz, *Rewriting the Adoption Story*, 5 FAM. ADVOC. 9, 10 (1982).

2. Michael A. Jones, *What's Worse than Homelessness? Gay Foster Parents, Apparently*, WGLB (Nov. 11, 2010), <http://wglb-tv.blogspot.com/2010/11/gay-rights-gay-rights-homepage-view.html?m=0> [<https://perma.cc/NGC8-V3WG>]; see also *Illinois Investigating Foster Care Groups that Discriminate Against Gay Parents*, CHICAGOPRIDE.COM (Mar. 2, 2011), <http://chicago.gopride.com/news/article.cfm/articleid/16924609> [<https://perma.cc/FPB7-W7KA>].

3. Jones, *supra* note 2.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* At the time of these events in 2010, Steinhauer and Nalett had been together for seven years and had legally married in Canada. *Missouri Synod Lutheran Church Bans Adoption*, GLAAD (Nov. 12, 2010), <https://www.glaad.org/2010/11/12/missouri-synod-lutheran-church-bans-adoption> [<https://perma.cc/8V4Z-95TE>].

8. Jones, *supra* note 2.

because of its policy against placing children into foster families where parents are gay, lesbian, bisexual, or transgender.⁹

As a same-sex couple, Nalett and Steinhauer are not alone in facing barriers to becoming foster or adoptive parents.¹⁰ And although same-sex adoption is now legal in all fifty states and the District of Columbia, some states have passed or proposed religious freedom laws that, in practice, allow private adoption agencies to discriminate against same-sex couples based on the agencies' religious and/or moral convictions.¹¹ By refusing to facilitate same-sex adoptions, private agencies narrow the pool of prospective adoptive parents who are desperately needed for more than 100,000 children who are eligible for adoption in the United States.¹² Policies that hinder adoption by otherwise-qualified same-sex couples, simply because of their sexual orientation, are particularly unfortunate, given that same-sex couples are an important source of adoptive parents.

9. *Id.* LCFS's policies have since changed. It now assists "both single adults and couples residing in Illinois to complete an adoption regardless of their race, creed, religious affiliation or sexual orientation." *Adoption*, LUTHERAN CHILD & FAM. SERVS. OF ILL., <https://www.lcfs.org/adoption> [<https://perma.cc/JVB5-QTMU>] (last visited July 16, 2018). And although Illinois has a law providing protections to religious objectors, it also has a law that bans discrimination based on sexual orientation. 775 ILL. COMP. STAT. ANN. 5/§ 1-102(A) (West 2015). In fact, as discussed *infra*, many Catholic Charities in Illinois closed down rather than comply with a requirement that they consider same-sex couples in order to receive state funds. Laurie Goodstein, *Bishops Say Rules on Gay Parents Limit Freedom of Religion*, N.Y. TIMES, Dec. 29, 2011, at A16; *see also Adoption and Foster Care*, FAM. EQUAL. COUNCIL, http://www.familyequality.org/_asset/0rq050/Adoption-and-Foster-Care-FINAL.pdf [<https://perma.cc/ZN3T-TC8L>] (last visited July 16, 2018).

10. *See, e.g.*, ABBIE E. GOLDBERG, GAY DADS: TRANSITIONS TO ADOPTIVE FATHERHOOD 65–72 (2012) (relating gay male couples' negative experiences and interactions with adoption agencies); Abbie E. Goldberg, Jordan B. Downing & Christine C. Sauck, *Choices, Challenges, and Tensions: Perspectives of Lesbian Prospective Adoptive Parents*, 10 ADOPTION Q. 33, 45–59 (2007) (describing barriers faced by lesbian couples trying to adopt); Richard Christopher Meza & Cynthia Anna Lopez, *Exploring the Experiences of Same-Sex Foster and Adoptive Parents*, CAL. ST. UNIV. SAN BERNARDINO: ELEC. THESES, PROJECTS, & DISSERTATIONS 8 (2016), <http://scholarworks.lib.csusb.edu/cgi/viewcontent.cgi?article=1387&context=etd> [<https://web.archive.org/web/20171023022424/http://scholarworks.lib.csusb.edu/cgi/viewcontent.cgi?article=1387&context=etd>] (describing how one same-sex couple was denied foster care certification because of their same-sex lifestyle); Goodstein, *supra* note 9 (relating the experience of Tim Kee, who was turned away by Catholic Charities in Illinois when he and his longtime partner, Rick Wade, tried to adopt a child); Alana Semuels, *Should Adoption Agencies Be Allowed to Discriminate Against Gay Parents?*, ATLANTIC (Sept. 23, 2015), <https://www.theatlantic.com/politics/archive/2015/09/the-problem-with-religious-freedom-laws/406423/> [<https://perma.cc/5P3A-KUVG>] (describing Clint McCormack's experience with a religious adoption agency in Michigan that "was very rude" and "basically hung up" on his phone call when he asked whether the agency would help him and his same-sex partner foster a child); Rebecca Beitsch, *Despite Same-Sex Marriage Ruling, Gay Adoption Rights Uncertain in Some States*, PEW CHARITABLE TRUSTS: STATELINE (Aug. 19, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/08/19/despite-same-sex-marriage-ruling-gay-adoption-rights-uncertain-in-some-states> [<https://perma.cc/7BBY-HF7N>] (recounting how one couple found they were limited in which adoption agencies/contractors they could work with because some refused adoption by gays and lesbians).

11. *See infra* notes 113–17 and accompanying text.

12. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, THE AFCARS REPORT NO. 23: PRELIMINARY FY ESTIMATES AS OF JUNE 2016 1, 4 (2016), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport23.pdf> [<https://perma.cc/6PGS-26W9>].

For example, not only are same-sex couples more likely to adopt than heterosexual couples, they are particularly more likely to adopt “hard-to-place” children, such as those with special needs.¹³ And the longer children remain in the system, the less likely they are to be adopted, and the more likely they are to suffer adverse outcomes, some of which may last a lifetime. Compelling longitudinal studies from a multi-university research team based at the University of Chicago report that not only are children once thought hard to place in foster care likely to remain in foster care for significant lengths of time, but most will “age out,” meaning they will never have a permanent home.¹⁴ For these children, according to Professor Mark Courtney, the study’s lead author, the outcomes are grim. By twenty-three years old, less than half the children they tracked throughout foster care were employed, nearly 25% were homeless, and more than 75% of the young women had been pregnant since leaving foster care.¹⁵ And by the age of twenty-six, over 80% of the young men had been arrested.¹⁶

Therefore, policies that narrow the pool of prospective parents because they refuse to consider otherwise-qualified parents solely based on sexual orientation are problematic. Indeed, such policies are adverse to a primary goal of the child welfare system. At the core of child protection is acting in the best interests of the child, which involves providing for the child’s “safety, permanency, and . . . well-being.”¹⁷ Discriminatory policies, which exclude otherwise-qualified men and women based exclusively on their sexuality, violate this principle and cannot be justified in law.

Many private adoption agencies qualify for exemption from federal income tax as religious or charitable institutions under section 501(c)(3) of the Internal Revenue Code,¹⁸ and are also eligible to receive tax-deductible contributions pursuant to section 170 of the Code.¹⁹ In 1971, the Internal Revenue Service (IRS) issued Revenue Ruling 71-447, which stated that private schools with racially discriminatory policies are not “charitable” within the common law concepts

13. See, e.g., SARAH KAYE & KATHERINE A. KUVALANKA, STATE GAY ADOPTION LAWS AND PERMANENCY FOR FOSTER YOUTH, MD. FAMILY POLY IMPACT SEMINAR (2006), <https://sph.umd.edu/sites/default/files/files/GayadoptionbriefFINAL0806.pdf> [<https://perma.cc/K9JQ-JCZ2>] (noting that “[s]ame-sex couples are also more likely than their heterosexual counterparts to be raising children with disabilities, indicating that gay men and lesbians may be more willing to adopt ‘hard-to-place’ youth from foster care, such as those with physical or mental disabilities”); June Carbone, *The Role of Adoption in Winning Public Recognition for Adult Partnerships*, 35 CAP. UNIV. L. REV. 341, 394 (2006).

14. MARK E. COURTNEY, SHERRI TERAQ & NOEL BOST, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: CONDITIONS OF YOUTH PREPARING TO LEAVE STATE CARE: EXECUTIVE SUMMARY (2004).

15. MARK E. COURTNEY ET AL., EXECUTIVE SUMMARY: MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGES 23 AND 24, at 6–7 (2010).

16. MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26, at 93 (2011).

17. *National Goals*, CHILD & FAM. SERVS. REVS., <https://training.cfsrportal.org/section-2-understanding-child-welfare-system/2988> [<https://perma.cc/4EA2-QZ55>] (last visited July 16, 2018).

18. 26 U.S.C. § 501(c)(3) (2018).

19. *Id.* § 170.

reflected in sections 170 and 501(c)(3).²⁰ Pursuant to the common law charity concept, “[a]ll charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy.”²¹ Because racial discrimination is contrary to federal public policy, the IRS concluded that private schools with racially discriminatory policies are not “charitable” and thus do not qualify for an exemption from federal income tax.²² In 1983, in *Bob Jones University v. United States*, the Supreme Court affirmed the IRS’s position, holding that “an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.”²³ The Court also held that the religion clauses of the First Amendment did not prohibit the IRS from revoking the tax-exempt status of a religious university whose practices are contrary to a compelling governmental policy, such as eradicating racial discrimination in education.²⁴

The IRS’s conclusion in Revenue Ruling 71-447 and the Court’s decision in *Bob Jones* have not been expanded outside of the context of racial discrimination in education.²⁵ *Bob Jones* has been described as “a historical anomaly”²⁶ and potentially “too extraordinary to matter much.”²⁷ Despite the “extraordinary” nature of the case, this Article argues that the holding in *Bob Jones* should be extended to private adoption agencies that refuse to facilitate adoptions by same-sex couples, because such policies are contrary to the established public policy of the best interests of the child. This Article recognizes that we may not yet be able to say that there is an “established public policy” against sexual orientation discrimination, given that all three branches of the federal government have not been as consistent and “unmistakably clear” in condemning sexual orientation discrimination as they have been in condemning racial discrimination.²⁸

This Article, however, takes a different approach, and argues that the established public policy at issue here is the best interests of the child, which includes the importance of ensuring that children have safe, permanent homes. In light of this established public policy, which all three branches of the federal

20. Rev. Rul. 71-447, 1971-2 C.B. 230.

21. *Id.*

22. *Id.*

23. *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983).

24. *Id.* at 604.

25. See Internal Revenue Service, *Field Service Advisory*, 1997 WL 33314892 (Apr. 23, 1997) (“Currently the sole basis for revocation of exemption on public policy grounds is engaging in racial discrimination.”); Timothy J. Tracey, *Bob Jonesing: Same-Sex Marriage and the Hankering to Strip Religious Institutions of Their Tax-Exempt Status*, FIU L. REV. 85, 90 (2015).

26. Tracey, *supra* note 25, at 90.

27. Olati Johnson, *The Story of Bob Jones University v. United States: Race, Religion, and Congress’ Extraordinary Acquiescence* 29 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 10-229, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1552173 [<https://perma.cc/4WPF-9KQG>]; see also Tracey, *supra* note 25, at 91 (noting that *Bob Jones* “sits alongside the myriad of other court decisions from the civil rights era where the Supreme Court was willing to go to extraordinary lengths to eradicate race discrimination”).

28. *Bob Jones Univ.*, 461 U.S. at 598–99.

government have recognized and support, this Article ultimately argues that, consistent with the holding in *Bob Jones*, private adoption agencies that refuse to facilitate adoptions by same-sex parents, thereby narrowing the pool of qualified prospective parents and reducing the number of children who are adopted, act contrary to the established public policy of acting in the best interests of the child.

This Article proceeds in five Parts. Part I first provides general information about the child welfare system, adoption, private adoption agencies, and the “best interests of the child” standard. Part II describes the emergence of state laws that allow private agencies to refuse to facilitate adoption by same-sex couples. Part III provides an overview of federal income tax exemptions and then summarizes the Supreme Court’s decision in *Bob Jones University v. United States*. Part IV applies the analysis and holdings of *Bob Jones* to private adoption agencies that discriminate against same-sex couples, and ultimately argues that such policies are contrary to the established public policy of the best interests of the child. As a result, this Article argues that the IRS should conclude that these agencies do not qualify for exemption from federal income tax. Part V concludes by offering a potential compromise and additional policies the government should consider.

I. ADOPTION, PRIVATE ADOPTION AGENCIES, AND THE BEST INTERESTS OF THE CHILD

Section A provides information about adoption generally and, specifically, adoption by same-sex couples. It discusses research regarding the adverse outcomes suffered by children who remain in the child welfare system and the growing evidence that children raised by same-sex parents fare just as well as those raised by heterosexual parents. Section B then provides an overview of the best interests standard.

A. Adoption

1. Legal Framework and Adoption Procedures

Federal laws and regulations provide general standards and guidelines for child protection, child welfare, and adoption.²⁹ Each state has its own laws and regulations governing child welfare matters.³⁰ For example, every state has laws providing for the termination of parental rights by a court.³¹ The termination of

29. *Federal and State Laws and Regulations*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/management/administration/requirements/laws/> [https://perma.cc/FA32-EMP3] (last visited July 16, 2018); *see also, e.g.*, Child Abuse Prevention and Treatment and Adoption Reform, 42 U.S.C. §§ 5101 *et seq.*; Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997); Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980).

30. *Federal and State Laws and Regulations*, *supra* note 29.

31. U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD WELFARE INFO. GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS (2013), <https://www.childwelfare.gov/pubPDFs/groundtermin.pdf> [https://perma.cc/853Y-FUSX].

parental rights, which can be voluntary or involuntary, ends the legal parent-child relationship.³² After a court terminates parental rights, a child is legally free to be adopted.³³ A primary goal of adoption is to secure “a more stable, permanent family environment that can meet the child’s long-term parenting needs.”³⁴

Adoption laws allow an adult lacking a biological relationship with a child to legally assume the role of a parent.³⁵ Adoptions can occur in a variety of circumstances and through a variety of mechanisms. An adoption may be domestic or international; an infant may be adopted shortly after birth or an older child may be adopted from foster care; the adoption may be open or closed; and a public or private agency may be used to facilitate the adoption.³⁶

2. Public Adoption, Private Adoption, and Faith-Based Adoption Agencies

Public adoption agencies receive funding from local, state, and/or federal sources, and typically have both a foster care and adoption component.³⁷ Private adoption agencies, which may be for-profit or not-for-profit, are usually funded with money paid by families using their services and they may also receive foundation grants.³⁸ In adoptions facilitated by a private agency, the child may go directly to an adoptive home, avoiding foster care entirely.³⁹ In privately arranged adoptions, although state involvement is generally limited to the judicial process through which an adoption is finalized,⁴⁰ some private agencies also contract with the state and thus receive funds from the government to provide services.⁴¹

32. *Id.* Involuntary termination usually requires a finding that the parent is unfit and that severing the parent-child relationship is in the child’s best interest. *Id.* at 2.

33. *Adoption Laws*, NAT’L ADOPTION CTR., <http://www.adopt.org/adoption-laws> [<https://perma.cc/Z6ZG-HRZN>] (last visited July 16, 2018).

34. U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD WELFARE INFO. GATEWAY, *supra* note 31; *Adoption Laws*, *supra* note 33.

35. *Adoption Laws*, *supra* note 33.

36. *Id.*

37. See *How States Fund Child Welfare Activities*, CHILD TRENDS, INC. (2016), <https://www.childtrends.org/wp-content/uploads/2016/01/2016-05HowStatesFundChildWelfare.pdf> [<https://perma.cc/A4RT-VA83>]; *Which Is the Best Adoption Agency or Professional for You?*, ADOPTION NETWORK L. CTR., <https://adoptionnetwork.com/adoption-agencies> [<https://perma.cc/H4CR-YUAL>] (last visited July 16, 2018).

38. *Which Is the Best Adoption Agency or Professional For You?*, *supra* note 37.

39. THEODORE J. STEIN, CHILD WELFARE AND THE LAW 137 (3d ed. 2007).

40. *Id.*

41. See *id.* at 25 (discussing 42 U.S.C. § 604a–b (2012), which gives states permission to use federal funds to contract with faith-based organizations to provide social services); Press Release, Human Rights Campaign, Leading Child Welfare Orgs Blast Adoption Bill Empowering Taxpayer-Funded Discrimination (Apr. 24, 2015), <http://www.hrc.org/press/leading-child-welfare-orgs-blast-adoption-bill-empowering-taxpayer-funded-d> [<https://perma.cc/73DA-GFEF>] (noting that many of Alabama’s private adoption agencies have large public contracts and are thus “taxpayer-funded”); Jim Vertuno, *Texas Adoption Agency ‘Religious Refusal’ Closer to Law*, U.S. NEWS & WORLD REP. (May 22, 2017), <https://www.usnews.com/news/best-states/texas/articles/2017-05-21/texas-adoption-agency-religious-refusal-closer-to-law> [<https://web.archive.org/web/20170620133618/https://www.usnews.com/news/best-states/texas/articles/2017-05-21/texas->

Indeed, “government contracting with private, not-for-profit firms is normative in child welfare” and authorized by law.⁴² In 1996, for example, as part of that year’s welfare reform amendments, the federal government gave states permission to use federal funds to contract with charitable, religious, and private organizations to provide social services.⁴³ This initiative provides that states can “contract with religious organizations . . . on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.”⁴⁴ In 2003, for example, Child Protective Services of Texas contracted with private agencies to care for approximately 75% of the children in foster care and also contracted with private agencies to provide adoption services.⁴⁵

When considering same-sex adoption, an important characteristic of private adoption agencies is the fact that many are affiliated with a particular religion.⁴⁶ In Alabama and Texas for instance, an estimated 30% and 25% of placement agencies, respectively, are faith-based.⁴⁷ Private agencies tend to use a more selective process in child placement, and faith-based agencies often cite religion to justify their consideration of factors such as the prospective parents’ marital status, sexual orientation, and religious affiliation.⁴⁸ America World Adoption Association, for example, is a Christian-based, non-profit organization whose mission is “[t]o build Christian families according to God’s design of adoption.”⁴⁹ The Association

adoption-agency-religious-refusal-closer-to-law] (noting that private foster care and adoption agencies in Texas are paid by the state to place children with families).

42. STEIN, *supra* note 39, at 26.

43. 42 U.S.C. § 604a; STEIN, *supra* note 39, at 25.

44. 42 U.S.C. § 604a(b).

45. CTR. FOR PUB. POLICY PRIORITIES, POLICY BRIEF: PRIVATIZATION OF CHILD PROTECTIVE SERVICES 1 (2005), http://library.cppp.org/files/4/privatization_pb.pdf [<https://perma.cc/F9TT-GJ2J>].

46. Although this article emphasizes faith-based adoption agencies, the proposed policy of this article—that child welfare agencies that discriminate against same-sex prospective parents should be denied tax-exempt status—would apply neutrally, to both faith-based and non-faith-based child welfare agencies that discriminate against same-sex parents. Although most of the agencies affected by the revocation of tax-exempt status would likely be faith-based, the reason for an agency’s discrimination against same-sex prospective parents would be irrelevant when determining its eligibility for a tax exemption.

47. Eva-Marie Ayala & Lauren McGaughy, *Texas Bill to Protect Religious Adoption Agencies that Deny Prospective Parents Likely to Become Law*, DALLAS NEWS, May 21, 2017, <https://www.dallasnews.com/news/texas-legislature/2017/05/21/texas-bill-protect-religious-adoption-agencies-deny-prospective-parents-likely-become-law> [<https://perma.cc/79QW-VHDC>]; Mike Cason, *Bill Allowing Adoption Agencies to Keep Faith-Based Policies Passes*, AL.COM (Apr. 25, 2017), http://www.al.com/news/birmingham/index.ssf/2017/04/bill_allowing_adoption_agencie.html [<https://perma.cc/8QEG-GBJJ>].

48. Samantha R. Lyew, *Adoption and Foster Care Placement Policies: Legislatively Promoting the Best Interest of Children Amidst Competing Interest of Religious Freedom and Equal Protection for Same-Sex Couples*, 42 J. LEGIS. 186, 187 (2016).

49. *Mission + Vision*, AM. WORLD ADOPTION ASS’N, <https://www.awaa.org/about/who-we-are/mission-vision> [<https://perma.cc/6E6Z-W4HU>] (last visited July 16, 2018).

“believe[s] children should only be placed into families that abide by biblically mandated relationships,” which, according to the Association, includes only “heterosexual marriage or single, nonhomosexual parenthood.”⁵⁰ The Association requires adoptive parents to meet a variety of eligibility requirements. Married couples must be married for at least one year before applying, must have no more than two divorces per person, and at least one prospective parent must agree to the Association’s “Statement of Faith.”⁵¹ Although single women are allowed to adopt through the Association, single males are not.⁵² Similarly, Adoption Associates, a private non-profit Michigan adoption agency, will deny applications of prospective parents “who have been divorced more than two times,” “whose sexual orientation is other than heterosexual,” or “who are not married and are cohabitating with another person of the opposite gender.”⁵³ And AIM Adoptions in Texas requires married couples to fall within the agency’s definition of marriage, which it defines as “a God ordained covenant between one man and one woman.”⁵⁴ These are but a few examples of agencies with such policies.⁵⁵

3. Adoption by Gays and Lesbians

The most recent data show that in 2015, approximately 427,910 children were in foster care, and 111,820 children were waiting to be adopted.⁵⁶ This number has been steadily increasing since 2010.⁵⁷ Because same-sex couples cannot biologically conceive a child without outside involvement, adoption is an important option for same-sex couples seeking to raise a child, and provides an alternative to artificial reproduction.⁵⁸

50. *Id.*

51. *Agency Requirements*, AM. WORLD ADOPTION ASS’N, <https://awaa.org/links/agency-requirements/> [<https://perma.cc/XQ7S-ENWY>] (last visited July 16, 2018).

52. *Id.*

53. *Adoption Eligibility*, ADOPTION ASSOCS., <http://www.adoptionassociates.net/about-adoption-associates/agency-policies/> [<https://perma.cc/LFS4-5XGB>] (last visited July 16, 2018).

54. *Common Questions for Adoptive Families*, AIM ADOPTIONS, <http://www.aimadoptions.org/hoping-to-adopt/> [<https://perma.cc/RZ3U-BG79>] (last visited July 16, 2018).

55. *See also, e.g.*, LOVEWELL CHRISTIAN ADOPTION SERVS., ADOPTION SERVICES OVERVIEW (2017), <http://www.lovewelladoptions.com/wp-content/uploads/2015/03/Adoptive-Family-Pre-App.pdf> [<https://perma.cc/5MVB-KTJG>] (requiring prospective parents to be heterosexual singles or heterosexual couples); *Domestic Adoption*, CHRISTIAN ADOPTION SERVS., <http://www.christianadopt.org/domestic-adoption/> [<https://perma.cc/93JK-CSVE>] (last visited July 16, 2018) (requiring adoptive parents to be married, and defining marriage as between “one genetic male and one genetic female”).

56. Children waiting to be adopted “are identified as children who have a goal of adoption and/or whose parents’ parental rights have been terminated.” U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILDREN’S BUREAU, *supra* note 12, at 4 & n.3.

57. *See id.* at 1; U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILDREN’S BUREAU, THE AFCARS REPORT NO. 21: PRELIMINARY FY ESTIMATES AS OF JULY 2014 (2014), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport21.pdf> [<https://perma.cc/TH8T-NMP2>].

58. Alexander Newman, *Same-Sex Parenting Among a Patchwork of Laws: An Analysis of New York Same-Sex Parents’ Options for Gaining Legal Parental Status*, CARDOZO L. REV. DE NOVO 77, 81–82 (2016).

A 2013 report found that same-sex couples raising children are four times more likely than heterosexual couples to be raising an adopted child, with more than 16,000 same-sex couples raising an estimated 22,000 adopted children.⁵⁹ This report also found that same-sex couples are six times more likely than heterosexual couples to be raising foster children.⁶⁰ Among couples with children under the age of eighteen, 2% of same-sex couples are raising a foster child, compared to just 0.3% of heterosexual couples.⁶¹ Approximately 2,600 same-sex couples are raising an estimated 3,400 foster children in the United States.⁶² Some localities⁶³ have partially attributed recent increases in total adoptions to the Supreme Court's 2015 decision in *Obergefell v. Hodges*, which legalized same-sex marriage.⁶⁴ And some hope *Obergefell*, in conjunction with growing societal acceptance of same-sex marriage, will encourage more gay and lesbian couples to consider adoption.⁶⁵ Indeed, research shows that *married* same-sex couples are even more likely to be raising an adopted or foster child, which is likely due, at least in part, to the fact that marriage is associated with certain economic advantages that make it easier to raise a child.⁶⁶ Before the *Obergefell* decision, married same-sex couples were five times more likely to have an adopted or foster child under the age of eighteen compared to married

59. GARY G. GATES, WILLIAMS INST. LGBT PARENTING IN THE UNITED STATES (2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf> [<https://perma.cc/8K9U-GAU2>].

60. *Id.* at 3.

61. *Id.*

62. *Id.*

63. See, e.g., Mark Cavitt, *Number of Foster Care Adoptions Up in Oakland County, Down Statewide*, OAKLAND PRESS NEWS (May 2, 2017, 6:19 PM), <http://www.theoaklandpress.com/general-news/20170502/number-of-foster-care-adoptions-up-in-oakland-county-down-statewide> [<https://web.archive.org/web/20171004051243/http://www.theoaklandpress.com/general-news/20170502/number-of-foster-care-adoptions-up-in-oakland-county-down-statewide>].

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

65. See JILL DAUGHERTY & CASEY COPEN, U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL HEALTH STATISTICS REPORTS NO. 92: TRENDS IN ATTITUDES ABOUT MARRIAGE, CHILDBEARING, AND SEXUAL BEHAVIOR: UNITED STATES, 2002, 2006–2010, AND 2011–2013, at 3–5 (2016), <https://www.cdc.gov/nchs/data/nhsr/nhsr092.pdf> [<https://perma.cc/4RYE-E7NB>]; Tyler Davis, *Groups Encourage More Gay Couples to Adopt Children, Be Foster Parents*, CHI. TRIB., Aug. 22, 2016, <http://www.chicagotribune.com/news/ct-gay-adoption-met-20160814-story.html> [<https://perma.cc/PM6N-5GYH>]; Susan Page, *Poll: Attitudes Toward Gays Changing Fast*, USA TODAY (Dec. 5, 2012), <https://www.usatoday.com/story/news/politics/2012/12/05/poll-from-gay-marriage-to-adoption-attitudes-changing-fast/1748873/> [<https://perma.cc/5WLE-D9YQ>]; Art Swift, *Most Americans Say Same-Sex Couples Entitled to Adopt*, GALLUP (May 30, 2014), http://www.gallup.com/poll/170801/americans-say-sex-couples-entitled-adopt.aspx?g_source=same-sex+adoption&g_medium=search&g_campaign=tiles.

66. See GARY J. GATES, WILLIAMS INST., DEMOGRAPHICS OF MARRIED AND UNMARRIED SAME-SEX COUPLES: ANALYSES OF THE 2013 AMERICAN COMMUNITY SURVEY 4 (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Demographics-Same-Sex-Couples-ACS2013-March-2015.pdf> [<https://perma.cc/W3FL-UAG8>] (“Substantial research suggests that marriage is associated with lower levels of economic vulnerability.”).

heterosexual couples,⁶⁷ and married same-sex couples are more likely to have children than their unmarried counterparts.⁶⁸

Importantly, same-sex couples are more likely to adopt “hard to place children.”⁶⁹ This term encompasses many scenarios, such as sibling groups,⁷⁰ disabled children, older children, children with complex needs or behavioral issues, and children who are ethnic minorities.⁷¹ A 2011 study conducted by the Evan B. Donaldson Adoption Institute found that, of gay and lesbian adoptions at more than 300 agencies, more than half of the children adopted by gays and lesbians had special needs.⁷² Likely in recognition of the fact that “non-heterosexual individuals and couples are important resources for children who linger in foster care,” research has found that the majority of agencies that focus on placing older and special needs children from the foster care system have an affirmative policy about working with non-heterosexual individuals and couples.⁷³ As bluntly observed by Tom McMillen-Oakley, a gay man who has adopted two children with his partner Tod, “the gay

67. Brief for Gary J. Gates as Amicus Curiae in Support of Petitioners at 11–12, *Obergefell*, 1354 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574).

68. GATES, *supra* note 66, at 4.

69. See sources cited *supra* note 13.

70. See, e.g., Sabrina Tavernise, *Adoptions by Gay Couples Rise, Despite Barriers*, N.Y. TIMES, June 14, 2011, at A11 (describing how Matt Lees, with his same-sex partner, adopted five siblings whose drug-addicted mother could not care for them because he did not want to split up the siblings); *Happiness is Adopting a Sibling Group of Three*, GAYS WITH KIDS, <https://gayswithkids.com/2016/04/04/happiness-is-adopting-a-sibling-group-of-three/> [<https://perma.cc/3C69-XUVB>] (last visited July 16, 2018); Jasmin Aline Persch, *Superdads! Couple Adopts 14 Kids from Foster Care*, TODAY (Sept. 23, 2013), <http://www.today.com/news/superdads-couple-adopts-14-kids-foster-care-4B11187918> [<https://perma.cc/NQZ8-CVEM>] (telling the story of Roger and Steven Ham, who adopted, among others, two different sibling groups); *Nate and Stephen Adopted a Sibling Group of Three*, GAYS WITH KIDS, <https://gayswithkids.com/2017/02/20/nate-stephen-adopted-sibling-group-three/> [<https://perma.cc/MC9P-F159>] (last visited July 16, 2018).

71. See Petition for Writ of Certiorari at 27, *consolidated with Obergefell*, 1354 S. Ct. 2584 (No. 15-571) (“[T]ens of thousands of same-sex couples step forward taking in hard-to-place children.”); DAVID BRODZINSKY, EVAN B. DONALDSON ADOPTION INST. THE MODERN ADOPTIVE FAMILIES STUDY 10 (2015) (citing studies suggesting that lesbians and gay men are more likely than heterosexual adults to adopt older, special needs children, and children of different races or ethnicities); DAVID B. BRODZINSKY, EVAN B. DONALDSON ADOPTION INST., EXPANDING RESOURCES FOR CHILDREN III: RESEARCH-BASED BEST PRACTICES IN ADOPTION BY GAYS AND LESBIANS 8 (2011), http://www.adoptioninstitute.org/wp-content/uploads/2013/12/2011_10_Expanding_Resources_BestPractices.pdf [<https://perma.cc/MJ56-GGQK>] [hereinafter BRODZINSKY, EXPANDING RESOURCES FOR CHILDREN III] (noting that children being adopted by lesbian and gay parents are frequently older or have special needs); DAVID M. BRODZINSKY, EVAN B. DONALDSON ADOPTION INST., ADOPTION BY LESBIANS AND GAYS: A NATIONAL SURVEY OF ADOPTION AGENCY POLICIES, PRACTICES, AND ATTITUDES 3 (2003) (observing that the agencies most likely to place children with same-sex couples include those focused on children with special needs); Abbie E. Goldberg, *Lesbian and Heterosexual Preadoptive Couples’ Openness to Transracial Adoption*, 79 AM. J. ORTHOPSYCHIATRY 103, 114 (2009) (finding that lesbians are more open to adopting transracially than heterosexual couples); Cynthia Godsoe, *Good Enough to Parent but Not Good Enough to Marry*, HUFFINGTON POST (June 24, 2013), http://www.huffingtonpost.com/cynthia-godsoe/good-enough-to-parent-but-not-to-marry_b_3491108.html [<https://perma.cc/3CZS-HXQT>].

72. BRODZINSKY, EXPANDING RESOURCES FOR CHILDREN III, *supra* note 71, at 22.

73. *Id.* at 6, 33.

couples come along and pick up the trash that the straight people don't want anymore. We end up taking care of them, It sounds horrible to say, but there are so many kids in need."⁷⁴

4. Harms of Remaining in the System

A key premise of this paper is that most, if not all, can agree that it is in a child's best interest to grow up in a stable, secure, and permanent home.⁷⁵ It follows, therefore, that if a child will not be reunited with his or her biological parents, adoption is the next best option.⁷⁶ And once a child is eligible for adoption, it is ideal for the child to be adopted as quickly as possible, because the longer a child is in foster care, the more likely the child is to experience frequent placement changes, which involves moving from one foster care home to another.⁷⁷

Frequent placement changes are associated with poor developmental outcomes. Children who experience frequent placement changes are more likely to exhibit externalizing and internalizing behavior problems, exhibit attachment difficulties, and perform worse academically due to disruptions in education.⁷⁸ They are more likely to require physical and mental health services, and, among male foster youth, placement instability is associated with higher rates of juvenile delinquency.⁷⁹ The longer a child waits to be adopted and the older the child

74. Semuels, *supra* note 10.

75. See, e.g., JEANNE HOWARD, EVAN B. DONALDSON INST., EXPANDING RESOURCES FOR CHILDREN: IS ADOPTION BY GAYS AND LESBIANS PART OF THE ANSWER FOR BOYS AND GIRLS WHO NEED HOMES? 2 (2006); Richard P. Barth, *Effects of Age and Race on the Odds of Adoption Versus Remaining in Long-Term Out-of-Home Care*, 76 CHILD WELFARE 285, 285 (1997) (noting that "[p]ermanency planning philosophy and law express a preference for adoption over long-term out-of-home care when children cannot be reunified with their families").

76. The Adoption Assistance and Child Welfare Amendments of 1980, for example, stressed permanency planning with a hierarchy of goals, in order of preference: (1) keeping the child in the home, unless it was imperative to remove him or her; (2) timely reunification of the child with his or her family, (3) adoption, (4) guardianship, and (5) long-term foster care. THOMAS McDONALD ET AL., ASSESSING THE LONG-TERM EFFECTS OF FOSTER CARE: A RESEARCH SYNTHESIS 24 (1997); see also Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (requiring states to ensure that "reasonable efforts" are "made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home").

77. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, CHILD WELFARE OUTCOMES 2008–2011: REPORT TO CONGRESS 29 (2012), https://www.acf.hhs.gov/sites/default/files/cb/cwo08_11.pdf [<https://perma.cc/FXB2-C9Q3>]; see also Christian M. Connell et al., *Changes in Placement Among Children in Foster Care: A Longitudinal Study of Child and Case Influences*, 80 SOC. SERV. REV. 398, 399 (2006) (noting that multiple placement changes result in delayed permanency outcomes, such as adoption).

78. Connell et al., *supra* note 77, at 399.

79. *Id.*; see also Rae R. Newton, Alan J. Litrownik & John A. Landsverk, *Children and Youth in Foster Care: Disentangling the Relationship Between Problem Behaviors and Number of Placements*, 24 CHILD ABUSE & NEGLECT 1363, 1371 (2000) (finding "volatile placement histories contribute negatively to both internalizing and externalizing behavior of foster children, and that children who experience numerous changes in placement may be at particularly high risk for these deleterious effects"); David M. Rubin et al., *Placement Stability and Mental Health Costs for Children in Foster Care*,

becomes, the less likely the child is to be adopted.⁸⁰ And youths who “age out” of the foster care system without a permanent family to support them are at high risk for many negative outcomes including poverty, homelessness, incarceration, and criminal justice system involvement,⁸¹ early parenthood,⁸² substance use, and poor educational and vocational outcomes.⁸³

5. *Outcomes of Children Raised by Same-Sex Individuals*

Although the subject of much public and political debate, methodologically-sound research shows that children fare just as well with same-sex parents when compared with children raised by heterosexuals.⁸⁴ In its amicus brief submitted to

113 PEDIATRICS 1336, 1339–40 (2004) (finding that foster care placement instability was associated with increased mental health costs during the first year in foster care).

80. ALICIA GROH, N. AM. COUNCIL ON ADOPTABLE CHILDREN, IT’S TIME TO MAKE OLDER CHILD ADOPTION A REALITY: BECAUSE EVERY CHILD AND YOUTH DESERVES A FAMILY 1 (2009) (“Once waiting children in foster care are nine and older, they are much less likely to be adopted.”).

81. In the Midwest Evaluation of the Adult Functioning of Former Foster Youth Study (the “Midwest Study”), which evaluated the outcomes of former foster youth who age out of the system in Illinois, Iowa, and Wisconsin, the cumulative percentage of young men and women with criminal justice system involvement was considerably higher among the Midwest Study participants than among their same-sex, non-foster care counterparts. COURTNEY ET AL., *supra* note 16, at 93.

82. In the Midwest Study, by the age of 23 or 24, more than 75% of female participants had ever been pregnant, compared with only 40% of their non-foster care counterparts, and almost two-thirds of those who had been pregnant indicated that their most recent pregnancy had been unplanned. COURTNEY ET AL., *supra* note 15, at 6. At the age of 26, nearly three-quarters of these women reported that their last pregnancy had been unplanned, compared with just over half of their counterparts. They were also less likely to report using birth control, less likely to report being married to their partner, and less likely to report wanting to become pregnant the last time they conceived. COURTNEY ET AL., *supra* note 16, at 74–75.

83. See JEANNE HOWARD & MADELYN FREUNDLICH, EXPANDING RESOURCES FOR WAITING CHILDREN II: ELIMINATING LEGAL AND PRACTICE BARRIERS TO GAY AND LESBIAN ADOPTIONS FROM FOSTER CARE 4 (2008); Anne Dworsky, Laura Napolitano & Mark Courtney, *Homelessness During the Transition from Foster Care to Adulthood*, 103 AM. J. PUB. HEALTH S318 (2013); Johanna K.P. Greeson et al., *Development & Maintenance of Social Support Among Aged Out Foster Youth who Received Independent Living Services: Results from the Multi-Site Evaluation of Foster Youths Programs*, 53 CHILD. & YOUTH SERVS. REV. 1, 1–2 (2015) (collecting research); Yvonne A. Unrau, Sarah A. Font & Glinda Rawls, *Readiness for College Engagement Among Students who Have Aged Out of Foster Care*, 34 CHILD. & YOUTH SERVS. REV. 76, 76 (2012) (citing research finding more negative outcomes for former foster youth); Nicholas Zill, *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption*, 35 ADOPTION ADVOC. 1, 6 (May 2011).

84. A 2012 article by Mark Regnerus, which argued that children of gay parents fare worse than children raised by heterosexual parents, has been intensely criticized by other researchers and found “not worthy of serious consideration” by Judge Friedman of the United States District Court for the Eastern District of Michigan. *Deboer v. Snyder*, 973 F. Supp. 2d 757, 766 (E.D. Mich. 2014). A group of over two hundred scholars signed a letter questioning the study’s integrity and faulting its methodologies. See Gary J. Gates et al., *Letter to the Editors and Advisory Editors of Social Science Research*, 41 SOC. SCI. RES. 1350 (2012); James D. Wright, *Introductory Remarks*, 41 SOC. SCI. RES. 1339, 1344 (2013) (mentioning the letter from Gates and colleagues); see also Brief of the American Psychological Association et al. as Amici Curiae Supporting Petitioners at 26 n.48, *Obergefell v. Hodges*, 1354 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574) (asserting that “[t]he handful of sources [including the Regnerus study] that suggest that same-sex parenting may have negative effects on children suffer from serious methodological flaws and do not reflect the current state of scientific knowledge”); Brief of Amicus Curiae American Sociological Association in Support of Petitioners at

the Supreme Court on behalf of the petitioners in *Obergefell*, the American Sociological Association stated the following:

The clear and consistent social science consensus is that children raised by same-sex parents fare just as well as children raised by different-sex parents. Decades of methodologically sound social science research, including multiple nationally representative studies and expert evidence introduced in courts around the country, confirm that positive child wellbeing is the product of stability in the relationship between the two parents, stability in the relationship between the parents and the child, and sufficient parental socioeconomic resources. The wellbeing of children does not depend on the sex or sexual orientation of their parents.⁸⁵

Not only are children of same-sex parents at no disadvantage compared to children of heterosexual parents, a few studies have found that children of same-sex parents fare *better* on some measures than their peers, including school involvement and ability to discuss sexual development with their parents.⁸⁶ There is also evidence that same-sex parents are more involved and exhibit more equality in parenting.⁸⁷

In light of this research, a wide range of professional and child advocacy groups in the United States have issued formal statements of support for adoption by homosexual individuals and same-sex couples who demonstrate the ability to be successful parents. These organizations include some of the most well-regarded, child-focused associations in the country: the American Academy of Child and Adolescent Psychiatry, the American Academy of Family Physicians, the American Academy of Pediatrics, the American Bar Association, the American Medical

21–27, *Obergefell*, 1354 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1048442 at *21–*27 (disavowing the results of the Regnerus study, citing numerous flaws); Simon Cheng & Brian Powell, *Measurement, Methods, and Divergent Patterns: Reassessing the Effects of Same-Sex Marriage*, 52 SOC. SCI. RES. 615, 616 (2015) (concluding that the results of the Regnerus study are “so fragile . . . that they are due primarily to the methodological choices made by Regnerus”); Andrew J. Perrin, Philip N. Cohen & Neal Caren, *Are Children of Parents who Had Same-Sex Relationships Disadvantaged?: A Scientific Evaluation of the No-Differences Hypothesis*, 17 J. GAY & LESBIAN MENTAL HEALTH 327, 334 (2013) (finding that “due to major deficiencies of the data, significant untested assumptions, poor data analysis, unmeasurable recall and selection bias, and lack of consideration of appropriate alternative hypotheses, there is insufficient evidence to confirm [Regnerus’] hypothesis” that “children from same-sex families display disadvantages”).

85. Brief of Amicus Curiae American Sociological Association, *supra* note 84, at 2; *see also* Wendy D. Manning, Marshal Neal Fetto & Esther Lamidi, *Child Well-Being in Same-Sex Parent Families: Review of Research Prepared for American Sociological Association Amicus Brief*, 33 POPULATION RES. POL’Y REV. 485 (2014).

86. HOWARD & FREUNDLICH, *supra* note 83, at 14; *see also* BRODZINSKY, EXPANDING RESOURCES FOR CHILDREN III, *supra* note 71, at 56–57 (suggesting that LGBT individuals’ experiences with prejudice may make them better able to help children from the child welfare system “cope with personal and societal challenges”).

87. HOWARD & FREUNDLICH, *supra* note 83, at 14; *see also* Rachel H. Farr & Charlotte J. Patterson, *Coparenting Among Lesbian, Gay, and Heterosexual Couples: Associations with Adopted Children’s Outcomes*, 84 CHILD DEV. 1226, 1236 (2013) (finding that gay and lesbian couples were more likely than heterosexual couples to divide child-care tasks evenly).

Association, the American Psychiatric Association, the American Psychoanalytic Association, the American Psychological Association, the Child Welfare League of America, the National Adoption Center, the National Association of Social Workers, the North American Council on Adoptable Children, and Voices for Adoption.⁸⁸

Because most—if not all—can agree that placing a child in a permanent, stable, and loving home is in the child’s best interest, it logically follows that agencies’ placement policies should ensure that the greatest number of prospective adoptive parents is considered. Indeed, there is a “nearly universal professional consensus that the pool of potential adoptive parents must be expanded to keep pace with the growing number of children in foster care who are legally free for adoption.”⁸⁹ The higher likelihood that same-sex couples will adopt, combined with their willingness to adopt hard-to-place children, cannot, and should not, be ignored, and supports government policies that encourage adoption agencies to consider same-sex couples when making placement decisions.

B. *The Best Interests of the Child*

The “best interests of the child” standard is a governing principle in matters dealing with children.⁹⁰ In the context of child custody determinations, including

88. HOWARD & FREUNDLICH, *supra* note 83, at 42–44. The only similar professional organization that has opposed same-sex adoptions is the American College of Pediatricians, a group formed in 2002 when some members broke away from the American Academy of Pediatrics in opposition to its affirmation of parenting and adopting by same-sex individuals. *Id.* at 15. The organization is well recognized as a socially conservative group, and although the exact number of members is unknown, reports suggest around 200, much smaller than organizations such as the American Academy of Pediatrics, which has approximately 66,000 members. See Gabe Mutcherson, *Hate Group Masquerades as Pediatrics Organization to Attack Trans Kids*, HUM. RTS. CAMPAIGN (Apr. 1, 2016), <http://www.hrc.org/blog/hate-group-masquerades-as-pediatrics-organization-to-attack-trans-kids> [<https://perma.cc/LD9L-2AVX>]; Ryan Lenz, *American College of Pediatricians Defames Gays and Lesbians in the Name of Protecting Children*, S. POVERTY L. CTR (Mar. 1, 2012), <https://www.splcenter.org/fighting-hate/intelligence-report/2012/american-college-pediatricians-defames-gays-and-lesbians-name-protecting-children> [<https://perma.cc/ZEW5-8R89>]; *About the AAP*, AM. ACAD. OF PEDIATRICS, <https://www.aap.org/en-us/about-the-aap/Pages/About-the-AAP.aspx> [<https://perma.cc/A694-5ZCX>] (last visited July 16, 2018); see also Brief of Amici Curiae National Association of Social Workers et al., State ex rel. Kutil v. Blake, 679 S.E.2d 310 (W. Va. 2009), No. 34618, 2009 WL 722989 at *15 n.4 (describing the American College of Pediatricians as a “small faction” whose “views are out of step with the research-based positions of the [American Academy of Pediatrics] and other medical and child welfare authorities”).

89. HOWARD & FREUNDLICH, *supra* note 83, at 4.

90. June Carbone, *Legal Applications of the “Best Interest of the Child” Standard: Judicial Rationalization or a Measure of Institutional Competence?*, 134 PEDIATRICS S111, S112 (2014); Marja E. Selmann, *For the Sake of the Child: Moving Toward Uniformity in Adoption Law*, 69 WASH. L. REV. 841, 842 (1994) (“From the earliest statutes to the present, adoption law has purportedly focused on ‘the best interests of the child’”); Twila L. Perry, *Power, Possibility and Choice: The Racial Identity of Transracially Adopted Children*, 9 MICH. J. RACE & L. 215, 217 (2003) (reviewing HAWLEY FOGG-DAVIS, *THE ETHICS OF TRANSRACIAL ADOPTION* (2002)) (“[T]he longstanding common law principle applied in child placement decisions is the best interests of the child rule.”).

adoption and foster care, the standard is a primary, if not controlling, factor.⁹¹ All states and the District of Columbia have statutes requiring the consideration of the child's best interests whenever certain types of decisions are made regarding child custody and placement.⁹² Some states list specific factors to be considered, such as Maryland, which lists six factors that must be considered in determining a child's placement, including, *inter alia*, "the child's ability to be safe and healthy in the home of the child's parent."⁹³ Other state laws, like Michigan's, list specific factors along with a broad catchall statement that decision-makers should consider "any other factor . . . considered . . . relevant to a particular child custody dispute."⁹⁴ Other statutes simply provide general guidance, giving even more discretion to courts and child welfare agencies to determine what is in a child's best interest. Alabama's statute, for example, states that the purpose of its law "is to facilitate the care, protection, and discipline of children who come under the jurisdiction of the juvenile court."⁹⁵

The application of the best interests standard is, necessarily, context specific.⁹⁶ As with any flexible standard applied on a case-by-case basis, there are

91. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause."); Eileen M. Blackwood, *Race as a Factor in Custody and Adoption Disputes: Palmore v. Sidoti*, 71 CORNELL L. REV. 1, 209, 209 (1985) ("Most courts and state agencies resolve child custody or adoption disputes by selecting the situation which will serve the best interests of the child."); Henry H. Foster, Jr., *Adoption and Child Custody: Best Interests of the Child?*, 22 BUFF. L. REV. 1, 3 (1972) ("The best interests of the child is said to control parental disputes over custody and visitation."); Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 749 (1956) (noting that the best interests standard is consistently followed by American courts in the context of adoption).

92. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD (2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf [<https://perma.cc/33AC-6DL6>] (collecting and discussing state statutes); see also Selmann, *supra* note 90, at 843.

93. MD. CODE ANN., FAM. LAW § 5-525(f)(1)(i) (2016); see also TEX. FAM. CODE ANN. § 263.307(b) (West 2015).

94. MICH. COMP. LAWS § 722.23 (2016); see also GA. CODE ANN. § 15-11-26(20) (2014); N.D. CENT. CODE § 14-09-06.2(1)(m) (2013).

95. ALA. CODE § 12-15-101 (2017). Similarly, New York's relevant law states that "in determining reasonable efforts to be made with respect to a child, and in making such reasonable efforts, the child's health and safety shall be the paramount concern." N.Y. SOC. SERV. LAW § 358-a(3)(c) (2010); see also MISS. CODE ANN. § 43-21-103 (West 2017) ("This chapter shall be liberally construed to the end that each child . . . shall receive such care, guidance, and control . . . as is conducive toward the goal of the child becoming a 'responsible, accountable, and productive citizen.'").

96. See, e.g., *In re Adoption of Luke*, 640 N.W.2d 374, 389 (Neb. 2002) (noting that "whether a particular adoption is in the best interests of the child" is a "fact-specific inquiry"); *In re A.V.D.*, 815 P.2d 277, 283 (Wash. Ct. App. 1991) (stating that each case involving a determination of the best interests of the child "must be decided on its own facts and circumstances"); *Matter of L.W.*, 613 A.2d 350, 355 (D.C. Ct. App. 1992) (a court's inquiry into whether adoption is in the best interests of a child "is fact-specific and practical, not doctrinal"); *In Interest of L.W.F.*, 818 S.W. 2d 727, 734 (Mo. Ct. App. 1991) ("The factors to be considered in determining what is in the best interests of the child are legion. They vary from case to case."); *In re G.E.T.*, 529 So. 2d 524, 526 (La. Ct. App. 1988) ("[W]hether adoption is in the best interest of a child must be decided on the particular facts of each case.").

disagreements as to what this standard means.⁹⁷ But a starting point on which most, if not all, can agree, is that “[a]ll children do best when they live in safe, stable, and nurturing families,” whether it be with their biological parents, adoptive parents, or a stable foster care family, as opposed to group homes, institutional care, or frequently moving from one foster care placement to the next.⁹⁸

For the purposes of this article, the relevant disagreement revolves around what “type” of family promotes a child’s best interests.⁹⁹ For many, especially those on the religious right, a “proper” family must include married, heterosexual parents. Pope Francis, for example, has noted the “fundamental” differences between men and women, and believes that “[c]hildren mature seeing their father and mother” in long-lasting heterosexual marriages.¹⁰⁰ In the context of adoption, others assert that it is “common sense that only a man can stand in for the father and only a woman can stand in for the mother of which the child [has been] [] deprived.”¹⁰¹ Florida Senator Marco Rubio stated that “the ideal setting for children to grow up is with a mother and a father committed to one another, living together, and sharing the responsibility of raising their children.”¹⁰² And the Family Research Council, a Christian organization, believes that adoption policies should “include a primary preference for placing children with a married mother and father.”¹⁰³

The belief in the importance of a child being raised by a married heterosexual couple is so strong that when same-sex marriage became legal in Massachusetts in 2006, the Archdiocese of Boston announced, after Governor Mitt Romney denied its request for an exemption from the state’s non-discrimination statute, that it would terminate its adoption services.¹⁰⁴ Similarly, in 2011, most of the Catholic

97. Heather J. Langemak, *The “Best Interest of the Child”: Is a Categorical Ban on Homosexual Adoption an Appropriate Means to this End?*, 83 MARQ. L. REV. 825, 825 (2000) (discussing how “there is no perfect equation” for determining the best interests of the child).

98. Sandra Bass, Margie K. Shields & Richard E. Behrman, *Children, Families, and Foster Care: Analysis and Recommendations*, 14 FUTURE OF CHILD 5 (2004); see also Lyew, *supra* note 48, at 189 (citing *id.*).

99. See Lyew, *supra* note 48, at 189 (“[T]he notion of a proper family is highly contested.”).

100. Rosie Scammell, *Children Need Heterosexual Parents, Says Pope After Gay Pride March*, WASH. POST, June 15, 2015, https://www.washingtonpost.com/national/religion/children-need-heterosexual-parents-says-pope-after-gay-pride-march/2015/06/15/2e7867aa-1384-11e5-8457-4b431bf7ed4c_story.html?utm_term=.522a7f2a628a.

101. William B. May, *Penalized for Putting ‘Best Interest of the Child’ First*, NAT’L CATH. REG., May 28, 2011, <http://www.ncregister.com/daily-news/penalized-for-putting-best-interest-of-the-child-first> [<https://perma.cc/B8E6-4UHN>].

102. Press Release, Marco Rubio, U.S. Senator for Florida, Rubio Delivers Address on Values at Catholic University (July 23, 2014), <https://www.rubio.senate.gov/public/index.cfm/press-releases?ID=11F4CF83-B8AF-443D-89C9-A1C611896F82> [<https://web.archive.org/web/20170623014406/https://www.rubio.senate.gov/public/index.cfm/press-releases?ID=11F4CF83-B8AF-443D-89C9-A1C611896F82>] (providing text of Rubio’s address).

103. *Family Structure*, FAM. RES. COUNCIL, <http://www.frc.org/family-structure> [<https://perma.cc/ZF9L-3A54>] (last visited July 16, 2018).

104. Lyew, *supra* note 48, at 201; Samantha Schmidt, *As ‘A Matter of Conscience,’ a Kentucky Judge Refuses to Hear Adoption Cases Involving Gay Parents*, WASH. POST, May 1, 2017, https://www.washingtonpost.com/news/morning-mix/wp/2017/05/01/as-a-matter-of-conscience-a-kentucky-judge-refuses-to-hear-adoption-cases-involving-gay-parents/?utm_term=.308284858e06;

Charities in Illinois chose to close, rather than comply with a requirement to consider same-sex couples as potential foster and adoptive parents in order to receive state funds.¹⁰⁵ And recently, Judge W. Mitchell Nance, a family court judge in Kentucky, announced that he will no longer hear adoption cases involving gay parents because he “believes as a matter of conscience that (although adoption of a child by a practicing homosexual is not expressly prohibited by law) under no circumstances would . . . ‘the best interest of the child . . . be promoted by the adoption’ . . . [of the child] by a practicing homosexual.”¹⁰⁶

On the opposite side of this debate are those who argue that same-sex couples can provide the same loving, stable homes and family environments as heterosexual couples. This is a position that, as discussed above, is supported by much research and the vast majority of professional organizations. As stated by the American Psychological Association and others, “[a]ssertions that heterosexual couples are better parents than same-sex couples, or that the children of lesbian or gay parents fare worse than children of heterosexual parents, are not supported by the cumulative scientific evidence.”¹⁰⁷ On the contrary, “the vast majority of scientific studies that have directly compared these groups have found that gay and lesbian parents are as fit and capable as heterosexual parents, and that their children are as psychologically healthy and well adjusted.”¹⁰⁸ Those who support same-sex adoption, such as Christine James-Brown, the president and CEO of the Child Welfare League of America, argue that a person’s sexual orientation is “completely unrelated to an individual’s ability to be a good parent,” and that turning away qualified same-sex couples may leave more children “left with no family at all.”¹⁰⁹

Peggy Dekeyser, *Will the Catholic Church Be Forced Out of Adoption and Foster Care?*, CATHOLIC LIFE, <http://catholiclife.diolc.org/2016/01/15/will-the-catholic-church-be-forced-out-of-adoption-and-foster-care/> [<https://perma.cc/9CG5-R5SG>] (last visited July 16, 2018).

105. Goodstein, *supra* note 9.

106. *In re Undersigned Judge’s Sua Sponte Recusal and Disqualification in Adoption Actions Involving a Homosexual Party or Parties*, General Order No. 17-01 (Ky. Ct. of Justice Second Division (Family Court), Apr. 27, 2017) (ellipses omitted) (quoting Ky. Rev. Stat. § 199.520(1)), <https://www.scribd.com/document/346920688/Judge-W-Mitchell-Nance-Order>.

107. Brief of the American Psychological Association et al., *supra* note 84, at 22.

108. *Id.* at 22–23; see also *Professional Organizations on LGBTQ Parenting*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/professional-organizations-on-lgbt-parenting> [<https://perma.cc/BG8M-6S7U>] (last visited July 16, 2018) (compiling the positions of various professional organizations such as the American Medical Association, the National Adoption Center, and the National Association of Social Workers, which support the view that sexual orientation is irrelevant to the ability to be a good parent).

109. Christine James-Brown, *My Voice: SB 149 ‘Devastating’ to Foster Care System*, ARGUS LEADER, Feb. 28, 2017, <http://www.argusleader.com/story/opinion/voices/2017/02/28/voice-sb-devastating-foster-care-system/98539476/> [<https://perma.cc/8C7F-J7WA>]; see also Nico Lang, *LGBT Families Under Attack: Alabama Law Would Make It Legal to Stop Same-Sex Couples from Adopting*, SALON (Apr. 24, 2017), <http://www.salon.com/2017/04/24/sweet-home-alabama-not-for-same-sex-couples-adopting-if-bill-becomes-law/> [<https://web.archive.org/web/20180522132005/http://www.salon.com/2017/04/24/sweet-home-alabama-not-for-same-sex-couples-adopting-if-bill-becomes-law/>] (citing child advocates who argue that Alabama HB 24 “would do the most harm to the . . . children in Alabama’s child welfare system who are waiting for loving and stable families . . .”).

Advocates of same-sex adoption assert that laws allowing agencies to turn away same-sex couples are contrary to the best interests standard. Randall Marshall, Legal Director for the American Civil Liberties Union (“ACLU”) of Alabama, stated that Alabama House Bill 24, discussed in the next section, “turn[s] the whole standard of what’s in a child’s best interests on its head in order to vindicate somebody’s perceived religious belief. . . . We can’t afford to lose any loving, qualified families who want to adopt.”¹¹⁰ Mary Pollack, Vice President of Michigan’s chapter of the National Organization for Women, argues that “[c]hild placement agencies, whether religiously affiliated or not, should have as their main purpose the best interest of the children, not the best interest of their own religion.”¹¹¹ And Anthony Siegrist, a teenager who was adopted by a lesbian couple at the age of thirteen after spending four years in foster care, gives his personal take of such laws, stating that they are “cruel” and “allow[] agencies to put their own interests above the needs of the children in their care.”¹¹²

II. STATE LAWS

As of May 2016, after a federal judge permanently enjoined Mississippi’s ban on same-sex adoption,¹¹³ same-sex adoption is legal in all fifty states and the District of Columbia.¹¹⁴ Some states, however, have passed religious freedom laws

110. Lang, *supra* note 109.

111. Chad Livengood & Gary Heinlein, *Plan Would Let Adoption Agencies Deny Gay Couples*, DET. NEWS, Mar. 17, 2015, <http://www.detroitnews.com/story/news/politics/2015/03/17/religious-belief-adoption-bills-stir-controversy/24913253/> [https://perma.cc/GCN6-VZC3]; *see also* Stu Whitney, *Whitney: Same-Sex Couple Beats the Odds with Adoption Journey*, ARGUS LEADER, Apr. 11, 2017, <http://www.argusleader.com/story/news/columnists/stu-whitney/2017/04/11/same-sex-adoption-south-dakota-gay-couple-sioux-falls-stu-whitney/100283254/> [https://perma.cc/MRH8-WTED] (“If the law is not in the best interest of the child and more in the best interest of the agency, what are we doing?” (quoting Larry Sandal, who adopted a child with his husband)).

112. Anthony Sigrist, *Florida Politicians Want to Pass an Adoption Discrimination Bill that Could Have Denied Me My Perfect Family*, AM. C.L. UNION (Apr. 9, 2015), <https://www.aclu.org/blog/speak-freely/florida-politicians-want-pass-adoption-discrimination-bill-could-have-denied-me-my> [https://perma.cc/R3TH-LG3K]; *see also* Marci A. Hamilton, *The Children Be Damned . . .*, VERDICT (Mar. 30, 2017), <https://verdict.justia.com/2017/03/30/children-damned> [https://perma.cc/2KZQ-465Y] (noting that refusing to allow same-sex couples to adopt threatens children by narrowing the pathways to adoption).

113. *See* MISS. CODE ANN. § 93-17-3(5) (2014) (“Adoption by couples of the same gender is prohibited.”). After the government did not appeal a district court’s preliminary injunction of the law, on May 13, 2016, the United States District Court for the Southern District of Mississippi permanently enjoined the Executive Director of the Mississippi Department of Human Services from enforcing section 93-17-3(5). Order Granting Motion to Convert Preliminary Injunction Order into Permanent Injunction and Final Judgment, *Campaign for S. Equal. v. Miss. Dep’t of Human Servs.*, No. 3:15-cv-00578-DPJ-FKB (S.D. Miss. May 13, 2016); *see also* Campaign for S. Equal. v. Miss. Dep’t of Human Servs., 175 F. Supp. 3d 691 (S.D. Miss. 2016) (granting preliminary injunction); *Mississippi’s Gay Adoption Ban is Dead*, CLARION LEDGER, May 3, 2016, <http://www.clarionledger.com/story/news/2016/05/03/mississippi-gay-adoption-ban-dead/83884788/> [https://perma.cc/E9ZH-YD4U] (“Mississippi’s ban against gay couples adopting children is dead after the state didn’t appeal a federal judge’s injunction . . .”).

114. *Foster and Adoption Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws [https://perma.cc/E447-USCN]

prohibiting “adverse” or “discriminatory” actions against private adoption agencies based on the agencies’ religious beliefs, or, even broader, the agencies’ “moral” convictions.¹¹⁵ In practice, these laws allow private adoption agencies to refuse to place children with couples that do not practice the agency’s particular religion, unmarried couples, and, importantly, same-sex couples.¹¹⁶

Some of these laws, such as Alabama’s, specifically note that the agencies protected by the laws are those that do not receive federal or state funds, whereas others, such as Texas, appear to include agencies that receive public funds.¹¹⁷ Supporters of these laws believe they are necessary to protect the religious liberties of these agencies,¹¹⁸ whereas opponents view them as “prioritiz[ing] the personal beliefs of service providers over the best interests of children, decreas[ing] the pool of otherwise qualified prospective parents, and increas[ing] wait times for children in care and the number of children who ‘age out’ of the foster care system.”¹¹⁹

Of the seven laws described in this Section, four have been passed in the last two years, perhaps in response to *Obergefell*. As noted by Professor Ira Lupu, a constitutional law expert at George Washington University School of Law, although the Supreme Court’s decision in *Obergefell* “energize[d] an already growing

(last updated July 16, 2018); Nidhi Prakash, *Same-Sex Adoption is Finally Legal in All 50 States*, DONALDSON ADOPTION INST. (May 3, 2016), <https://www.adoptioninstitute.org/news/same-sex-adoption-is-finally-legal-in-all-50-states/> [<https://perma.cc/S8KX-VVZV>].

115. See, e.g., Miss. H.B. 1523, § 3(2), 2016 Reg. Sess.; An Act to provide certain protections to faith-based or religious child-placement agencies, 2017 S.D. Sen. Bill No. 149, 92nd Leg. Assemb. (Mar. 10, 2017).

116. Libby Skarin, Policy Director at ACLU South Dakota, for example, stated that under such bills, “[a]nything . . . could qualify as a ‘religious belief,’” and although often intended to target LGBT people, the bills could “allow these agencies to turn away anyone who doesn’t fit into what their religious beliefs are, whether we’re talking about a single parent who wants to adopt, someone who’s been divorced, an interfaith couple, people who are of the ‘wrong religion.’” Elizabeth Strassner, *Legal Experts Say South Dakota’s New Adoption Law Could Devastate LGBT Families*, BUSTLE (Mar. 22, 2017), <https://www.bustle.com/p/legal-experts-say-south-dakotas-new-adoption-law-could-devastate-lgbt-families-45765> [<https://web.archive.org/web/20170822013433/https://www.bustle.com/p/legal-experts-say-south-dakotas-new-adoption-law-could-devastate-lgbt-families-45765>].

117. Ala. H.B. No. 24, 2017 Reg. Sess. (May 3, 2017); Protection of Rights of Conscience for Child Welfare Services Providers, Tex. H.B. No. 3859, 85th Legis. Reg. Sess. (May 24, 2017).

118. See, e.g., SARAH TORRE & RYAN T. ANDERSON, HERITAGE FOUND., ADOPTION, FOSTER CARE, AND CONSCIENCE PROTECTION, (2014), http://thf_media.s3.amazonaws.com/2014/pdf/BG2869.pdf [https://web.archive.org/web/20150930221952/http://thf_media.s3.amazonaws.com/2014/pdf/BG2869.pdf].

119. Phil Bryant (@PhilBryantMS), TWITTER (Apr. 5, 2016, 9:21 AM), <https://twitter.com/PhilBryantMS/status/717386566897963008/photo/1> [<https://perma.cc/69VL-TCFB>] (providing Mississippi Governor Phil Bryant’s statement that he signed “HB 1523 into law to protect sincerely held religious beliefs and moral convictions of individuals, organizations, and private associations from discriminatory action by state government or its political subdivisions This bill merely reinforces the rights which currently exist to the exercise of religious freedom as stated in the First Amendment”); Shelbi Day & Arielle Gingold, *Religious Exemptions for Child Welfare Agencies: A License to Discriminate Against LGBTQ Parents and Children*, FAM. EQUAL. COUNCIL (May 20, 2017), http://www.familyequality.org/equal_family_blog/2017/05/20/2170/religious_exemptions_for_child_welfare_agencies_a_license_to_discriminate_against_lgbtq_parents_and_children [<https://perma.cc/83W5-3RGY>].

movement to expand the coverage of laws prohibiting discrimination based on sexual orientation or gender identity,” it also “simultaneously invigorate[d] religious resistance to that movement” through, among other things, religious freedom laws like the ones described in this Section.¹²⁰ This Section describes seven of these laws. Importantly, however, the laws discussed in this Section are not exhaustive,¹²¹ and it is likely others states will enact or propose similar legislation in the future.¹²²

A. Texas

On June 15, 2017, Texas Governor Gregg Abbott signed House Bill 3859 into law.¹²³ It is titled “Protection of Rights of Conscience for Child Welfare Services Providers,” and provides, *inter alia*, that:

A governmental entity or any person that contracts with this state or operates under governmental authority to refer or place children for child welfare services may not discriminate or take any adverse action against a

120. Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L.L. REV. 1, 2 (2015); see also Ray Sanchez, *Why the Onslaught of Religious Freedom Laws?*, CNN (Apr. 7, 2016), <http://www.cnn.com/2016/04/06/us/religious-freedom-laws-why-now/index.html> [<https://web.archive.org/web/20171215015317/http://www.cnn.com/2016/04/06/us/religious-freedom-laws-why-now/index.html>] (calling it “the season of so-called religious freedom bills”).

121. See also CONN. GEN. STAT. ANN. § 46b-35b (West 2017) (providing that Connecticut’s marriage equality law did not “affect the manner in which a religious organization may provide adoption, foster care or social services if such religious organization does not receive state or federal funds for that specific program or purpose”); MINN. STAT. ANN. § 517.201 (West 2017) (stating that the marriage equality law “must not be construed to affect the manner in which a religious [organization] . . . provides adoption, foster care, or social services, if that [organization] . . . does not receive public funds for that specific program or purpose”).

122. Indeed, during final editing of this article, Kansas and Oklahoma both enacted laws that, among other things, allow child placement agencies to refuse to facilitate or otherwise participate in the placement of a child for foster care or adoption when the proposed placement will violate the agency’s moral or religious beliefs. These laws also protect such agencies from adverse state and administrative actions based on such refusal. See Adoption Protection Act, S.B. 284, 2017–2018 Reg. Sess. (Kan. 2018); S.B. 1140, 2018 Reg. Sess. (Okla. 2018); Jacey Fortin, *Oklahoma Passes Adoption Law that L.G.B.T. Groups Call Discriminatory*, N.Y. TIMES, May 12, 2018, <https://www.nytimes.com/2018/05/12/us/oklahoma-gay-adoption-bill.html>; Nick Morrow, *Discrimination in Kansas: Kansas Governor Signs Anti-LGBTQ Bill*, HUM. RTS. CAMPAIGN (May 18, 2018), <https://www.hrc.org/blog/discrimination-in-kansas-governor-signs-anti-lgbtq-bill> [<https://perma.cc/K7JW-YA4W>]; see also Emily Cadei, *Religious Freedom Efforts: Next Front Opens in Battle on Gay Marriage*, NEWSWEEK (Mar. 15, 2017), <http://www.newsweek.com/state-religious-freedom-laws-568299> [<https://web.archive.org/web/20180603171253/http://www.newsweek.com/state-religious-freedom-laws-568299>] (discussing how “state-level lawmakers are pursuing dozens of pieces of legislation that would . . . allow[] individuals or groups to cite their religious beliefs while refusing services to people”); Laura Syddell, *LGBTQ Advocates Fear ‘Religious Freedom’ Bills Moving Forward in States*, NAT’L PUB. RADIO (Feb. 26, 2017), <http://www.npr.org/2017/02/26/515585721/lgbtq-advocates-fear-religious-freedom-bills-moving-forward-in-states> [<https://web.archive.org/web/20170701224945/http://www.npr.org/2017/02/26/515585721/lgbtq-advocates-fear-religious-freedom-bills-moving-forward-in-states>] (noting “renewed efforts at the state level to pass so-called religious freedom bills”).

123. H. Journal, 85-6042, 85th Reg. Sess., at 6063–65 (Tex. 2017); Marissa Evans, *Abbott OKs Religious Refusal of Adoptions in Texas*, TEX. TRIB. (June 15, 2017), <https://www.texastribune.org/2017/06/15/abbott-signs-religious-protections-child-welfare-agencies/> [<https://perma.cc/2SRT-6SQG>].

child welfare services provider on the basis, wholly or partly, that the provider . . . has declined or will decline to provide, facilitate, or refer a person for child welfare services that conflict with, or under circumstances that conflict with, the provider's sincerely held religious beliefs[.]¹²⁴

“Child welfare services” include providing foster and adoptive homes, promoting foster parenting and adoption, recruiting foster and adoptive parents, licensing foster homes, assisting adoptions or supporting adoptive families, performing or assisting home studies, and placing children in foster and adoptive homes.¹²⁵ An “adverse action” is defined as “any action that directly or indirectly adversely affects the person against whom the adverse action is taken, places the person in a worse position than the person was in before the adverse action was taken, or is likely to deter a reasonable person from acting or refusing to act.”¹²⁶ In a list of examples of “adverse actions,” the bill does not specifically mention tax-exempt status or other tax benefits.¹²⁷

Republican Senator Charles Perry, the bill's sponsor, insisted that the bill is “not meant to discriminate’ against anyone and that the ‘best interest of the child’ would always be top priority.”¹²⁸ He warned Texas legislators that voting down the bill could “alienate faith-based providers from wanting to help and could inadvertently undo the Legislature’s recent work on child welfare bills.¹²⁹ In practice, the bill will even allow *publicly*-funded foster care and adoption agencies to refuse to place children with unmarried couples, same-sex couples, and couples that do not practice the agency’s particular religion.¹³⁰ Indeed, “[m]any Texas adoption agencies admit they don’t work with adoptive parents who are single, gay or non-Christian, and the bill could keep them from being sued.”¹³¹ Democrat Senator José Rodríguez, discussing the bill, stated that while it “might be good politics in a very narrow sense . . . it is not good public policy.”¹³²

B. Alabama

On May 3, 2017, Alabama’s governor signed House Bill 24 into law.¹³³ The law, entitled the “Alabama Child Placing Inclusion Act,” prohibits the state from

124. Protection of Rights of Conscience for Child Welfare Services Providers, H.B. 3859, 85th Leg., Reg. Sess. (Tex. 2017).

125. *Id.*

126. *Id.*

127. *See id.*

128. Marissa Evans, *Senate Passes Religious Protections for Child Welfare Agencies*, TEX. TRIB. (May 21, 2017), <https://www.texastribune.org/2017/05/21/senate-passes-religious-protections-child-welfare-agencies/> [<https://perma.cc/XYG4-XM53>].

129. *Id.*

130. *See id.*; Vertuno, *supra* note 41.

131. Vertuno, *supra* note 41.

132. S. Journal 85-2444, 61st Reg. Sess., at 2445 (Tex. 2017), <http://www.journals.senate.state.tx.us/sjml/85r/pdf/85RSJ05-22-F1.pdf> [<https://perma.cc/4GN4-ZXAQ>].

133. Nick Morrow, *Alabama’s Anti-LGBTQ H.B. 24 Signed into Law*, HUM. RTS. CAMPAIGN (May 3, 2017), <http://www.hrc.org/blog/alabamas-anti-lgbtq-hb-24-signed-into-law> [<https://perma.cc/9BDL-SJBR>].

discriminating against or taking adverse actions against a provider of child placement services “on the basis that the provider declines to provide a child-placing service or carry out an activity that conflicts with the religious beliefs of the provider.”¹³⁴ For purposes of the law, a child-placing agency is “[a] private child-care facility which receives no federal or state funds” and “adverse actions” include taking an enforcement action against a child-placing agency; refusing to issue or renew an agency’s license; or revoking or suspending a license.¹³⁵ The Act does not specifically discuss tax exemptions or other tax benefits.

C. South Dakota

On March 10, 2017, South Dakota Governor Dennis Daugaard signed Senate Bill 149 into law.¹³⁶ The “Act to provide certain protections to faith-based or religious child-placement agencies” prohibits the state from discriminating or taking adverse action against a child-placement agency—including those that receive taxpayer money¹³⁷—because “the child-placement agency has declined or will decline to provide any service that conflicts with, or provide any service under circumstances that conflict with the agency’s written sincerely-held religious belief or moral conviction of the child-placement agency.”¹³⁸ The law explicitly addresses tax benefits received by these organizations, stating that “adverse actions” include, among other things, (1) “[a]ltering in any way the tax treatment of, or causing any tax, penalty, or payment to be assessed against, or denying, delaying, revoking, or otherwise making unavailable an exemption from taxation;” and (2) “[d]isallowing, denying, or otherwise making unavailable a deduction for state tax purposes of any charitable contribution made to an organization[.]”¹³⁹

The Human Rights Campaign asserts that Senate Bill 149 will “allow state-licensed and taxpayer-funded child-placement agencies to disregard the best interest of children, and turn away qualified South Dakotans seeking to care for a child in need—including LGBTQ couples.”¹⁴⁰ Libby Skarin, Policy Director of the ACLU

134. Alabama Child Placing Agency Inclusion Act, H.B. 24, 2017 Reg. Sess. (Ala. 2017).

135. *Id.*

136. *South Dakota Becomes First State This Year to Enact Anti-LGBT Legislation*, AM. C.L. UNION (Mar. 10, 2017), <https://www.aclu.org/news/south-dakota-becomes-first-state-year-enact-anti-lgbt-legislation> [<https://perma.cc/QS8N-R8TJ>].

137. *Id.*

138. An Act to Provide Certain Protections to Faith-Based or Religious Child-Placement Agencies, S.B. 149, 2017 Legis. Assemb., 92nd Sess. (S.D. 2017).

139. *Id.* In contrast, the Texas Bill’s definition of “adverse action” does not explicitly prevent denial of tax exemptions or other tax benefits. *See* Tex. H.B. No. 3859. However, its broad definition of “adverse action” could likely be interpreted to include denial of tax-exempt status, in that it defines adverse action as “any action that directly or indirectly adversely affects the person against whom the adverse action is taken, places the person in a worse position than the person was in before the adverse action was taken, or is likely to deter a reasonable person from acting or refusing to act.” *Id.*

140. Allison Turner, *Shameful—South Dakota Governor Signs Anti-LGBTQ “License to Discriminate” Bill into Law*, HUM. RTS. CAMPAIGN (Mar. 10, 2017), <http://www.hrc.org/blog/shameful-south-dakota-governor-signs-anti-lgbtq-license-to-discriminate-bil> [<https://perma.cc/4D72-GZKY>].

of South Dakota, voiced the ACLU's similar "concern[] about how this bill could impact vulnerable kids in our foster care system that deserve to have their best interests considered above the desires of private agencies."¹⁴¹

D. Mississippi

On June 22, 2017, the United States Court of Appeals for the Fifth Circuit reversed a district court's preliminary injunction against the implementation of House Bill 1523, thus allowing the bill to go into effect.¹⁴² This bill has been described as "the worst anti-LGBTQ state law in the U.S."¹⁴³ The law, as relevant to child welfare services, prohibits the state from taking "any discriminatory action against a religious organization that advertises, provides or facilitates adoption or foster care, wholly or partially on the basis that such organization has provided or declined to provide any adoption or foster care service, or related service, based upon or in a manner consistent with a sincerely held religious belief or moral conviction" related to same-sex marriage.¹⁴⁴

Similar to South Dakota's law, a "discriminatory action" includes, *inter alia*, alterations in tax treatment and "disallow[ing], deny[ing] or otherwise mak[ing] unavailable a deduction for state tax purposes of any charitable contribution made to or by such" organizations or persons based on their beliefs related to same-sex marriage.¹⁴⁵

E. North Dakota

North Dakota permits a child placement agency to refuse to participate in a placement that violates the agency's religious or moral convictions or policies.¹⁴⁶ State law prohibits a state or local agency from "deny[ing] a child-placing agency any grant, contract, or participation in a government program because of the child-

141. Governor Daugaard Signs Discriminatory Senate Bill 149, AM. C.L. UNION S.D. (Mar. 10, 2017), <https://www.aclusd.org/en/news/governor-daugaard-signs-discriminatory-senate-bill-149> [<https://perma.cc/A4Z2-EVAF>].

142. Barber v. Bryant, 860 F.3d 345, 350 (5th Cir. 2017); Jerry Mitchell & Geoff Pender, *Controversial HB 1523 Now Mississippi's Law of the Land*, CLARION LEDGER, June 22, 2017, <http://www.clarionledger.com/story/news/2017/06/22/controversial-hb-1523-now-mississippi-law-land/419941001/> [<https://perma.cc/YX5H-HPRM>].

143. Hayley Miller, *Mississippi's H.B. 1523 Cleared to Become the Worst Anti-LGBTQ State Law in the U.S.*, HUM. RTS. CAMPAIGN (June 22, 2017), <https://www.hrc.org/blog/mississippi-h.b.-1523-cleared-to-become-the-worst-anti-lgbtq-state-law-in> [<https://perma.cc/2PT5-CK8T>]; see also Sarah Kaplan, *Mississippi's Senate Just Approved a Sweeping 'Religious Liberty' Bill that Critics Say Is the Worst Yet for LGBT Rights*, WASH. POST, Mar. 31, 2016, https://www.washingtonpost.com/news/morning-mix/wp/2016/03/31/mississippi-senate-just-approved-a-sweeping-religious-liberty-bill-that-critics-say-is-the-worst-yet-for-lgbt-rights/?utm_term=.79cef8c17c1c; Anna Wolfe, *Religious Liberty or Anti-Gay? Appeals Court Will Decide*, USA TODAY, Apr. 2, 2017, <https://www.usatoday.com/story/news/politics/2017/04/02/religious-liberty-anti-gay-appeals-court-will-decide/99955426/> [<https://perma.cc/NR5N-NU3K>].

144. Religious Liberty Accommodations Act, H.B. 1523, § 3(2), 2016 Leg. Reg. Sess. (Miss. 2016).

145. *Id.* § 4(a)-(b).

146. N.D. CENT. CODE ANN. § 50-12-03 (2003).

placing agency's objection to performing, assisting, counseling, recommending, facilitating, referring, or participating in a placement that violates the agency's written religious or moral convictions or policies."¹⁴⁷ The statute specifically states that such a denial by the agency "does not constitute a determination that the proposed adoption is not in the best interest of the minor."¹⁴⁸ The law does not specifically mention tax-exempt status or other tax benefits.

F. Virginia

In March 2012, Virginia Governor Robert McDonnell signed into law House Bill 189, amending the Code of Virginia to include a conscience clause related to private child placement agencies.¹⁴⁹ Under the law, "no private child-placing agency shall be required to perform, assist, counsel, recommend, consent to, refer, or participate in any placement of a child for foster care or adoption when the proposed placement would violate the agency's written religious or moral convictions or policies."¹⁵⁰ The law specifically prevents the state from denying or revoking an agency's license based on the agency's actions or omissions related to its religious or moral convictions, and prohibits a state or local government from denying an "agency any grant, contract, or participation in a government program because of the agency's" actions or omissions related to its religious or moral convictions.¹⁵¹ The law does not explicitly address the tax-exempt status of these agencies and whether the agencies can be denied tax exemptions or other benefits.

G. Michigan

Section 710.23g of Michigan's Probate Code provides that:

[A] child placing agency shall not be required to provide adoption services if those adoption services conflict with, or provide adoption services under circumstances that conflict with, the child placing agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child placing agency. . . . [T]he state or a local unit of government shall not take an adverse action against a child placing agency on the basis that the child placing agency has declined or will decline to provide adoption services that conflict with, or provide adoption services under circumstances that conflict with, the child placing agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child placing agency.¹⁵²

The definition of "adverse action" for purposes of this law does not specifically reference tax benefits or tax exemptions.¹⁵³

147. *Id.* § 50-12-07.1 (2003).

148. *Id.*

149. VA. CODE ANN. § 63.2-1709.3 (2012).

150. *Id.*

151. *Id.*

152. MICH. COMP. L. ANN. § 710.23g (2015).

153. *Id.* § 722.124e(7)(a).

III. TAX-EXEMPT STATUS AND BOB JONES UNIVERSITY V. UNITED STATES

Section A provides a brief overview of federal income tax exemptions for religious and charitable organizations. Section B then discusses the Supreme Court's decision in *Bob Jones University v. United States*, which upheld the IRS's revocation of Bob Jones University's tax-exempt status because the University's practices were contrary to established public policy.

A. Exemption from Federal Income Tax

"To a certain extent, any federal regulation is a policy statement from Congress. In the field of taxation, the Congressional message is either (1) encouragement of an activity through favorable tax treatment, or (2) deterrence of an activity through burdensome tax treatment."¹⁵⁴

"The notion that charitable corporations should be exempt from tax is older than the federal income tax itself."¹⁵⁵ The Internal Revenue Code thus codified a long tradition of exempting religious and charitable organizations from taxation. A key reason for the exemption is to encourage the development of, and donations to, such qualified organizations.¹⁵⁶ And although the government loses tax revenue from exemptions, it is nevertheless "compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds."¹⁵⁷

Churches and religious organizations can qualify for exemption from federal income tax under section 501(c)(3) of the Internal Revenue Code and are generally eligible to receive tax-deductible contributions pursuant to section 170 of the Code.¹⁵⁸ Under section 501(c)(3), the following organizations are tax-exempt:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of

154. Dee Ann Burdette & Nancy Parker, Note, *Bob Jones University v. United States: Paying the Price of Prejudice—Loss of Tax Exempt Status*, 35 MERCER L. REV. 937, 945 (1984).

155. Johnson, *supra* note 27, at 2.

156. See INTERNAL REVENUE SERV., TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS 2 (2015), <https://www.irs.gov/pub/irs-pdf/p1828.pdf> [<https://perma.cc/7BRF-7CIJ>]; see also 26 U.S.C. §§ 170, 501(c)(3); *Bob Jones Univ. v. United States*, 461 U.S. 574, 587–88 (1983) (stating that by enacting § 170 and § 501(c)(3), Congress sought "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"); Brian Galle, *Carrots, Sticks, and Salience*, 67 N.Y.U. TAX L. REV. 53, 67 (2013) (noting that the charitable contribution deduction provided by federal law "encourage[s] donations to charity"). Federal income tax laws have contained exemptions for certain charitable organizations since 1894. U.S. COMM'N ON CIVIL RIGHTS, DISCRIMINATORY RELIGIOUS SCHOOLS AND TAX EXEMPT STATUS 4 (1982); Burdette & Parker, *supra* note 154, at 945.

157. H.R. REP. NO. 75-1860, 3d Cong. Sess., at 19 (1938).

158. INTERNAL REVENUE SERV., *supra* note 156, at 2; see also 26 U.S.C. §§ 170, 501(c)(3).

which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.¹⁵⁹

The IRS has further explained that to qualify for tax-exempt status, the organization must meet the following criteria:

- [1] The organization must be organized and operated exclusively for religious, educational, scientific, or other charitable purposes;
- [2] Net earnings may not inure to the benefit of any private individual or shareholder;
- [3] No substantial part of its activity may be attempting to influence legislation;
- [4] The organization may not intervene in political campaigns; and
- [5] The organization's purposes and activities may not be illegal or violate fundamental public policy.¹⁶⁰

Churches that meet the requirements of section 501(c)(3) are automatically considered tax-exempt and are not required to apply for and obtain recognition of tax-exempt status from the IRS.¹⁶¹ Religious organizations, however, generally must apply to the IRS for tax-exempt status.¹⁶² “Religious organizations . . . typically include nondenominational ministries, interdenominational and ecumenical organizations, and other entities whose principal purpose is the study or advancement of religion.”¹⁶³ The IRS has noted that “[b]ecause activities often serve more than one purpose, an organization that is ‘advancing religion’ . . . may also qualify under [section] 501(c)(3) as [a] charitable or educational organization.”¹⁶⁴

The term “charitable,” as used in section 501(c)(3), is used “in its generally accepted legal sense,” and includes “[r]elief of the poor and distressed or of the underprivileged; advancement of religion; . . . lessening the burdens of Government; and promotion of social welfare[.]”¹⁶⁵ Faith-based adoption agencies thus serve both a religious purpose—*i.e.*, the advancement of an agency’s particular faith—and a charitable purpose, because providing adoption services promotes social welfare and provides relief of the “distressed” (*i.e.*, children in the child welfare system in need of permanent homes). Private adoption agencies also

159. 26 U.S.C. § 501(c)(3).

160. INTERNAL REVENUE SERV., *supra* note 156, at 2.

161. *Id.*

162. *Id.* at 3.

163. *Id.* at 1.

164. INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL 7.25.3.6 (2017); *see also* 26 U.S.C. § 501(d) (2018); 26 C.F.R. § 1.501(d)-1 (2017).

165. 26 C.F.R. § 1.501(c)(3)-1(d)(2) (2018); INTERNAL REVENUE SERV., *supra* note 164, at 7.25.3.5(1).

“lessen[] . . . the burdens of Government”¹⁶⁶ by supplementing publicly-operated foster care and adoption services.¹⁶⁷ Many private adoption agencies, faith-based or not, operate as 501(c)(3) organizations and are thus tax-exempt.¹⁶⁸

In Revenue Ruling 71-447, the IRS formalized a policy first announced in 1970: that sections 170 and 501(c)(3) embrace the common law “charity” concept.¹⁶⁹ As explained by the Supreme Court, “underlying all relevant parts of the Code[] is the intent that entitlement to tax exemption depends on meeting certain common-law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.”¹⁷⁰ Indeed, as early as 1860, the Supreme Court announced that it was “an established principle of American law, that courts of chancery will sustain and protect . . . a gift . . . to public charitable uses, provided [the gift] is consistent with local laws and *public policy*.”¹⁷¹ This view was again reiterated in 1878, when the Court stated that “[a] charitable use, where neither law nor public policy forbids, may be applied to almost any thing that tends to promote the well-doing and well-being of social man.”¹⁷² *Bob Jones University v. United States*, discussed next, is one of the Supreme Court’s most recent reaffirmations of this concept.

B. *Bob Jones University v. United States*

Until 1970, the IRS granted tax-exempt status to private schools without regard to their racial admissions policies, provided that those schools did not receive governmental aid.¹⁷³ In 1970, a three-judge District Court for the District of Columbia issued a preliminary injunction prohibiting the IRS from granting tax-

166. 26 C.F.R. § 1.501(c)(2)(1)(d)(2) (2018).

167. *Bob Jones Univ. v. United States*, 461 U.S. 574, 587–88 (1983).

168. The websites of many faith-based adoption agencies visited indicate their non-profit, tax-exempt status. *See, e.g., About Us*, BETHANY CHRISTIAN SERVS., <https://www.bethany.org/about-us> [<https://perma.cc/EE3H-ERN5>] (last visited July 16, 2018); *About Us*, CHRISTIAN FAM. ADOPTIONS, <https://www.christianfamilyadoptions.org/about1-e20b4> [<https://perma.cc/4YFP-KX7X>] (last visited July 16, 2018); *About Us*, HEAVEN SENT ADOPTION SERVS., <http://www.heavensentadopt.com/about-us/> [<https://perma.cc/2GLD-XEPP>] (last visited July 16, 2018); *About Us*, LOVE BASKET, INC., <http://www.lovebasket.org/about-us/> [<https://perma.cc/3UYT-F35B>] (last visited July 16, 2018); *Donate*, AM. WORLD ADOPTION ASS’N, https://portal.awaa.org/give/general_donation.aspx [<https://perma.cc/4MH5-3ESF>] (last visited July 16, 2018); *Donate*, FAM. CONNECTIONS CHRISTIAN ADOPTIONS, <http://www.fcadoptions.org/donate-now/> [<https://perma.cc/NH3V-EUGZ>] (last visited July 16, 2018); *Frequently Asked Adoption Questions – FAQs: General FAQs*, NIGHTLIGHT CHRISTIAN ADOPTIONS, <https://www.nightlight.org/faqs/> [<https://perma.cc/2AQQ-P4FC>] (last visited July 16, 2018); *Our Mission*, SPENCE-CHAPIN, <https://www.spence-chapin.org/mission/> [<https://perma.cc/2C4E-G8C5>] (last visited July 16, 2018); *What is Agape?*, AGAPE, <https://www.agapeforchildren.org/about> [<https://perma.cc/DPC5-B326>] (last visited July 16, 2018); *Who We Are*, CHRISTIAN ADOPTION SERVS., <http://www.christianadopt.org/direct-services-1/> [<https://perma.cc/7MQB-3U4H>] (last visited July 16, 2018).

169. Rev. Rul. 71-447, 1971-2 C.B. 230.

170. *Bob Jones Univ.*, 461 U.S. at 586.

171. *Perin v. Carey*, 65 U.S. 465, 501 (1860) (emphasis added).

172. *Ould v. Wash. Hosp. for Foundlings*, 95 U.S. 303, 311 (1878).

173. *Bob Jones Univ.*, 461 U.S. at 577–78; U.S. COMM’N ON CIVIL RIGHTS, *supra* note 156, at 10.

exempt status to private schools in Mississippi that had racially discriminatory admissions policies.¹⁷⁴ Subsequently, the court made the injunction permanent.¹⁷⁵ Although the court's order was limited to Mississippi, the opinion made clear that the IRS could apply the principles nationwide, stating that its decision was "not to be misunderstood as laying down a special rule for schools located in Mississippi[,]” and that “[t]he underlying principle is broader, and is applicable to schools outside Mississippi with the same or similar badge of doubt.”¹⁷⁶

In light of this decision and other federal laws that sought to combat racial discrimination, such as the Civil Rights Act of 1964, the IRS announced a change in its long-standing practice of granting tax exemptions under section 501(c)(3) to private educational institutions that practiced racial discrimination.¹⁷⁷ This change was formalized in 1971 in Revenue Ruling 71-447, which addressed “whether a private school that otherwise meets the requirements of section 501(c)(3) . . . will qualify for exemption from Federal income tax if it does not have a racially nondiscriminatory policy as to students.”¹⁷⁸ The Ruling noted that “[a]lthough the operation of private schools on a discriminatory basis is not prohibited by Federal statutory law, the policy of the United States is to discourage discrimination in such schools[,]” and that “[t]he Federal policy against racial discrimination is well-settled in many areas of wide public interest[,]” including education.¹⁷⁹ The IRS concluded that a private school with a racially discriminatory policy “is not ‘charitable’ within the common law concepts reflected in sections 170 and 501(c)(3) of the Code and in other relevant Federal statutes and accordingly does not qualify as an organization exempt from Federal income tax.”¹⁸⁰

At the time of the Supreme Court case, Bob Jones University was a nonprofit corporation that served both educational and religious purposes. Its stated mission was “to conduct an institution of learning, . . . giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures.”¹⁸¹ Teachers were required to be devout Christians, and entering students were “screened as to their religious beliefs, and their public and private conduct [was] strictly regulated by standards promulgated by University authorities.”¹⁸² From its founding in 1927 until 1971, the University excluded blacks from the student body.¹⁸³ From 1971 until

174. *Green v. Kennedy*, 309 F. Supp. 1127, 1140 (D.C. Cir. 1970) (per curiam), *perm. app. granted sub nom.* *Cannon v. Green*, 398 U.S. 956 (1970), *perm. app. granted sub nom.* *Coit v. Green*, 400 U.S. 986 (1971).

175. *Green v. Connally*, 330 F. Supp. 1150 (D.C. Cir. 1971), *aff'd sub nom.* *Coit v. Green*, 404 U.S. 997 (1971).

176. *Id.* at 1174.

177. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 156, at 6.

178. Rev. Rul. 71-447, 1971-2 C.B. 230.

179. *Id.*

180. *Id.*

181. *Bob Jones Univ. v. United States*, 461 U.S. 574, 579–80 (1983) (citation and quotation marks omitted).

182. *Id.* at 580.

183. *Id.*

May 1975, the University did not accept applications from unmarried blacks, but did accept applications from blacks married within their race.¹⁸⁴ Following the decision by the United States Court of Appeals for the Fourth Circuit in *McCrary v. Runyon*, which prohibited racial exclusion from private schools,¹⁸⁵ the University revised its policy.¹⁸⁶ As of May 29, 1975, the University permitted unmarried blacks to enroll, but continued to have a disciplinary rule prohibiting interracial dating and marriage.¹⁸⁷ The rule read as follows:

There is to be no interracial dating.

1. Students who are partners in an interracial marriage will be expelled.
2. Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled.
3. Students who date outside of their own race will be expelled.
4. Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled.¹⁸⁸

Until 1970, the IRS had extended tax-exempt status under section 501(c)(3) to the University.¹⁸⁹ On November 30, 1970, the IRS notified the University of its policy change, and announced its intention to challenge the tax-exempt status of private schools like the University that had racially discriminatory admissions policies.¹⁹⁰ The University's tax-exempt status was officially revoked on January 19, 1976.¹⁹¹ The University subsequently filed returns under the Federal Unemployment Tax Act for the period from December 1, 1970, to December 31, 1975, and paid a tax of \$21.00 on one employee for the calendar year of 1975.¹⁹²

After its refund request was denied, the University instituted proceedings in the United States District Court for the District of South Carolina to recover the twenty-one dollars it had paid.¹⁹³ The government counterclaimed for unpaid federal unemployment taxes for the taxable years 1971 through 1975, in the amount of \$489,675.59, plus interest.¹⁹⁴

The University set forth two primary arguments to dispute its tax obligations: first, that the IRS exceeded its authority when it interpreted section 501(c)(3) to exclude schools with racially discriminatory policies, and second, that revoking the University's tax-exempt status violated its free exercise rights under the Religion Clauses of the First Amendment.

184. *Id.*

185. *McCrary v. Runyon*, 515 F.2d 1082 (4th Cir. 1975), *aff'd*, 427 U.S. 160 (1976).

186. *Bob Jones Univ.*, 461 U.S. at 580.

187. *Id.*

188. *Id.* at 580–81 (citation omitted).

189. *Id.* at 581.

190. *Id.*

191. *Id.*

192. *Id.* at 581–82.

193. *Id.*

194. *Id.*

In 1978, the district court held that the revocation of the University's tax-exempt status exceeded the powers delegated to the IRS, was improper under IRS rulings and procedures, and violated the University's First Amendment rights.¹⁹⁵ The district court ordered the IRS to refund the twenty-one dollars to the University and rejected the government's counterclaim.¹⁹⁶

The United States Court of Appeals for the Fourth Circuit reversed.¹⁹⁷ The court stated that section 501(c)(3) must be read against the background of charitable trust law, which indicates that to be eligible for tax-exempt status, an organization must not violate public policy.¹⁹⁸ As to the University's First Amendment argument, the Fourth Circuit "assum[ed] that the revocation of [section] 501(c)(3) status [] impinge[d] upon the University's practice to some extent."¹⁹⁹ Nevertheless, the court concluded that "[t]he government interest in eliminating all forms of racial discrimination in education is compelling,"²⁰⁰ and that it "must 'steer clear' of any expression of support for racial discrimination in education."²⁰¹ In light of this compelling interest, and in light of the fact that the government's rule would not prohibit the University from *teaching* (but not enforcing) "the Scriptural doctrine of nonmiscegenation,"²⁰² the court held that the revocation of the University's tax-exempt status violated neither the statutory mandates of section 501(c)(3) nor the First Amendment.²⁰³

The Supreme Court granted certiorari to decide whether the University, a nonprofit private school that prescribes and enforces racially discriminatory admissions standards on the basis of religious doctrine, qualified as a tax-exempt organization under section 501(c)(3).²⁰⁴ The Court ultimately rejected the University's arguments, explaining that a tax-exempt organization must "confer[] a public benefit" and that its "purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred."²⁰⁵ The Court proclaimed that there was "no doubt" that a "national policy" opposed discrimination in education.²⁰⁶ In holding that the IRS did not exceed its authority when it announced its interpretation of sections 170 and 501(c)(3) in Revenue Ruling 71-447, the Court stated that:

In 1970, when the IRS first issued the ruling challenged here, *the position of all three branches of the Federal Government was unmistakably clear*. The correctness of the Commissioner's conclusion that a racially discriminatory

195. Bob Jones Univ. v. United States, 468 F. Supp. 890, 907 (D.S.C. 1978).

196. *Id.*

197. Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1980).

198. *Id.* at 151, 155.

199. *Id.* at 153.

200. *Id.*

201. *Id.* (quoting *Norwood v. Harrison*, 413 U.S. 455, 468 (1973)).

202. *Id.* at 153–54.

203. *Id.* at 150–55.

204. Bob Jones Univ. v. United States, 461 U.S. 574, 577 (1983).

205. *Id.* at 591–92.

206. *Id.* at 598.

private school “is not ‘charitable’ within the common law concepts reflected in . . . the Code,” is wholly consistent with what Congress, the Executive, and the courts had repeatedly declared before 1970. Indeed, it would be anomalous for the Executive, Legislative, and Judicial Branches to reach conclusions that add up to a firm public policy on racial discrimination, and at the same time have the IRS blissfully ignore what all three branches of the Federal Government had declared. Clearly an educational institution engaging in practices affirmatively at odds with this declared position of the whole Government cannot be seen as exercising a “beneficial and stabilizing influenc[e] in community life,” and is not “charitable,” within the meaning of § 170 and § 501(c)(3).²⁰⁷

In addressing the University’s religious freedom argument, the Court acknowledged that “[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools.”²⁰⁸ Nevertheless, the Court held that “[t]he governmental interest at stake [in this case] is compelling. . . . [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education,” and that “interest substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.”²⁰⁹

In sum, the Court held that nonprofit private schools that enforce racially discriminatory policies on the basis of religious doctrine do not qualify as tax-exempt organizations under the Internal Revenue Code, nor are contributions to such institutions deductible as charitable contributions.²¹⁰

IV. REVOKING THE TAX-EXEMPT STATUS OF PRIVATE ADOPTION AGENCIES THAT REFUSE TO CONSIDER SAME-SEX COUPLES

As discussed in Part III, an institution is eligible for a federal tax exemption if it serves a public purpose and is not illegal or contrary to established public policy.²¹¹ Sections A and B first discuss the application of Revenue Ruling 71-447’s two-prong test to private child welfare agencies, with Section B emphasizing the consensus among the three branches of the federal government that child welfare agencies should act in a child’s best interest and that a permanent, stable home is in a child’s best interest. Section C elaborates, explaining why adoption agency policies

207. *Id.* at 598–99 (alteration in original) (emphasis added) (citations omitted).

208. *Id.* at 604.

209. *Id.* The court also held that there were not “less restrictive means . . . available to achieve the governmental interest.” *Id.*

210. Bob Jones University only recently regained its federal tax-exempt status on March 1, 2017. The University dropped its interracial dating ban in 2000, but did not seek to reinstate its tax-exempt status until 2014 when Steve Pettit became the University’s president. Nathaniel Cary, *Bob Jones University Regains Nonprofit Status 17 Years After It Dropped Discriminatory Policy*, USA TODAY, Feb. 16, 2017, <https://www.usatoday.com/story/news/nation-now/2017/02/16/bob-jones-university-regain-nonprofit-status/98020998/> [<https://perma.cc/677C-YM6E>].

211. Rev. Rul. 71-447, 1971-2 C.B. 230; *Bob Jones Univ.*, 461 U.S. at 574, 586; *see also supra* Part III.

that refuse to consider same-sex couples are contrary to the established public policy of the child's best interests and why this justifies revoking the tax-exempt status of adoption agencies with such discriminatory policies.

A. Public Purpose of Adoption Agencies

This Article does not dispute that private adoption agencies serve an important public purpose. Indeed, “[i]t is sometimes overlooked that child welfare services began in the private sector.”²¹² And although the government has taken on an increasingly important role in child welfare, escalating costs and demand have led many states to consider and experiment with privatization of child welfare services.²¹³

Private adoption agencies facilitate foster care and, even more so, the adoption of children into stable and permanent homes. In some cases, the use of private adoption agencies allows a child to bypass the foster care system entirely.²¹⁴ Adoption, as previously discussed, is in a child's best interest and superior to remaining in unstable homes or institutional care.²¹⁵ Additionally, by facilitating adoption, thus removing children from the foster care system—or preventing children from entering foster care in the first place—private agencies reduce the substantial, public costs imposed by the foster care system. Annual state and federal expenditures for foster care total more than nine billion dollars under Title IV-E of the Social Security Act alone, and although the exact amounts are difficult to determine, even more is spent for publicly-subsidized medical care for foster care children, food stamps, Temporary Assistance for Needy Families (i.e., welfare), and child care payments to foster care families.²¹⁶

In comparison, “the child adopted from foster care costs the public only 40% as much as the child who remains in foster care.”²¹⁷ According to a 2011 study, this amounts to a difference in cost per child of \$15,480.²¹⁸ And these savings do not even take into account the significant long-term costs that society is likely to incur because of the negative consequences of remaining in an unstable home or aging

212. ELIZABETH LEE & KARL ENSIGN, U.S. DEP'T OF HEALTH & HUMAN SERVS., ASSESSING SITE READINESS: CONSIDERATIONS ABOUT TRANSITIONING TO A PRIVATIZED CHILD WELFARE SYSTEM 3 (2007), <https://aspe.hhs.gov/system/files/pdf/75181/report.pdf> [<https://perma.cc/5A2P-KH5P>].

213. *Id.*; see also Chris Flaherty, Crystal Collins-Camargo & Elizabeth Lee, *Privatization of Child Welfare Services: Lessons Learned from Experienced States Regarding Site Readiness Assessment and Planning*, 30 CHILD. & YOUTH SERVS. REV. 809, 809 (2008) (“Some states and jurisdictions have responded to [the] pressures of increasing caseloads and costs, as well as heightened accountability, by shifting significant portions of the service array to the private sector.”).

214. STEIN, *supra* note 39, at 137.

215. See *supra* notes 75–83 and accompanying text.

216. Zill, *supra* note 83, at 2.

217. *Id.* at 4.

218. *Id.*

out of the foster care system.²¹⁹ On average, for every young person who ages out of the foster care system, taxpayers and communities pay \$300,000 in social costs over that person's lifetime.²²⁰ These costs include public assistance and incarceration, as well as costs absorbed by society through lost wages if the youth dropped out of high school or is otherwise unemployed.²²¹

Serving a public purpose is necessary but not sufficient to be entitled to a tax exemption—the agency must serve this public purpose in a way that is not contrary to public policy. This, as discussed next, is where private child welfare agencies that discriminate against same-sex prospective parents fail.

B. Established Public Policy: Best Interests of the Child

Despite serving an important public purpose, this Article argues that private adoption agencies that prohibit adoption by same-sex couples do so in a way that is contrary to established public policy.²²² The primary “established public policies” in the context of adoption and relevant to this Article are (1) that all decisions made and actions taken by child welfare agencies must be in the best interests of the child, and (2) that a permanent, stable home is in a child's best interest. Although parental rights are also relevant in child custody determinations,²²³ once the rights of the biological parents are terminated and a child is legally eligible for adoption, the focus shifts primarily to the rights and interests of the child rather than the rights of the biological parents.²²⁴

219. *Id.* at 2, 4–6; *see also* U.S. DEPT OF HEALTH & HUMAN SERVS., CHILD WELFARE INFO. GATEWAY, PREPARING AND SUPPORTING FOSTER PARENTS WHO ADOPT 5 (2013), https://www.childwelfare.gov/pubPDFs/f_fospro.pdf [<https://perma.cc/E5NB-X7PU>] (noting the reduced costs to government when a child moves from foster care to adoption); *supra* notes 75–83 and accompanying text.

220. ANNIE E. CASEY FOUND., AGING OUT OF FOSTER CARE IN AMERICA (2013), <http://www.aecf.org/m/resourcedoc/JCYOI-AgingOutOfFosterCareinAmerica-Handout-2013.pdf> [<https://perma.cc/9VR6-T5PJ>].

221. *Id.*

222. *Cf. Norwood v. Harrison*, 413 U.S. 455, 468–69 (1973) (“Like a sectarian school, a private school—even one that discriminates—fulfills an important educational function; however, the difference is that in the context of this case the legitimate educational function cannot be isolated from discriminatory practices.”).

223. When a biological parent's rights are being terminated involuntarily, for example, the Supreme Court has held that parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. *See Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

224. *Cf. In re Stephanie M.*, 867 P.2d 706, 718 (Cal. 1994) (en banc) (“After the termination of reunification services, the parents’ interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point ‘the focus shifts to the needs of the child for permanency and stability’” (quoting *In re Marilyn H.*, 851 P.2d 826, 835 (Cal. 1993) (en banc))).

As to prospective adoptive parents, there is no constitutional “right to adopt”²²⁵—a prospective parent’s rights vest only when an adoption is finalized.²²⁶ Thus, although an agency should consider prospective parents in a non-discriminatory manner, this Article argues that the focus is first and foremost on the rights of the child pursuant to the best interests standard.²²⁷ And as to the rights of the agencies facilitating adoption, their rights should not be afforded the same weight as the child’s interest in being placed in a permanent, stable home. An agency must be recognized for what it is—a middleman providing a service to, first and foremost, the child, and second, to prospective parents.

In reaching its decision in *Bob Jones*, the Supreme Court emphasized that “the position of all three branches of the Federal Government was unmistakably clear” in opposing racial discrimination in the context of education, meaning that “an educational institution engaging in practices affirmatively at odds with this declared position of the whole Government” is not “charitable” and “cannot be seen as exercising a ‘beneficial and stabilizing influenc[e] in community life.’”²²⁸

Similarly, in the context of child welfare, there is little doubt that the legislative, judicial, and executive branches of the federal government recognize the need to

225. ELIZABETH PRICE FOLEY, *LIBERTY FOR ALL: RECLAIMING INDIVIDUAL PRIVACY IN A NEW ERA OF PUBLIC MORALITY* 135 (2016) (noting that because adoption is a privilege bestowed by statute, there is no constitutional right to adopt a child); *see also* MOVEMENT ADVANCEMENT PROJECT, *AN ALLY’S GUIDE TO TALKING ABOUT ADOPTION BY LGBT PARENTS* (2012), <https://lgbtmap.org/file/allys-guide-talking-about-adoption.pdf> [<https://perma.cc/F6K9-KAMC>] (“Adoption isn’t about ‘rights’; it’s about making sure that kids have strong, secure ties to the parents who love and take care of them.”).

226. *See Adoption Law: United States*, LIBR. CONGRESS, <https://www.loc.gov/law/help/adoption-law/unitedstates.php#f9> [<https://perma.cc/U57V-PS92>] (last updated June 9, 2015); *see, e.g.*, N.Y. DOM. REL. LAW § 117(a).

227. In light of the ever-evolving legal recognition and societal acceptance of LGBTQs, there may also come a time where a very strong argument can be made that the discrimination against same-sex couples in the context of adoption is “contrary to public policy.” Despite recent improvements in LGBTQ rights and acceptance, however, “all three branches of the Federal Government” have not been consistently and “unmistakably clear,” *Bob Jones Univ. v. United States*, 461 U.S. 574, 598–99 (1983), in condemning sexual orientation discrimination. For example, there is currently a circuit split regarding whether Title VII covers discrimination based on sexual orientation. Both the Second Circuit and the Seventh Circuit, sitting en banc, recently held that Title VII covers sexual orientation discrimination. *Zarda v. Altitude Express*, 883 F.3d 100 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc). At this time, precedent in most other circuits maintains the contrary position. *See, e.g.*, *Kalich v. AT & T Mobility*, 679 F.3d 464, 471 (6th Cir. 2012); *Prowel v. Wise Bus. Forms*, 579 F.3d 285, 290–91 (3d Cir. 2009); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Simonton v. Runyon*, 232 F.3d 33, 35–36 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe*, 194 F.3d 252, 259 (1st Cir. 1999); *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam). Although there is no guarantee the Supreme Court will resolve the circuit split, it is more likely to weigh in, now that two courts have held that Title VII covers sexual orientation discrimination. Additionally, the Equal Employment Opportunity Commission determined in 2015 that Title VII bars sexual orientation discrimination. Baldwin, Appeal No. 0120133080 (U.S. Equal Emp’t Opportunity Comm’n July 15, 2015), 2015 WL 4397641.

228. *Bob Jones Univ.*, 461 U.S. at 598–99 (alteration in original) (quoting *Walz v. Tax Comm’n of City of N.Y.*, 397 U.S. 664, 673 (1970)).

protect and promote child welfare pursuant to the best interests standard, and that once a child is eligible for adoption, it is in the child's best interest to be placed in a stable, permanent home as quickly as possible. In fact, there is a longer history of recognizing this policy than there is nondiscrimination in education. Nondiscrimination in education did not receive much governmental attention or support until the mid-twentieth century.²²⁹ But the importance of child welfare and the need for laws to protect the best interests of the child began to be recognized during the mid-to-late-nineteenth century with, among other things, the emergence of the first organized child protection services²³⁰ and the passage of state laws that perceived adoption as a benefit to the *child* rather than as a means of creating an heir or protecting family property.²³¹ Since that time, child protection laws have grown increasingly stronger, and all three branches of the federal government have come to acknowledge and emphasize the public policy of child protection and the best interests standard. The importance of this consensus, as explained in the following Sections, cannot be understated, given the Supreme Court's emphasis on such inter-branch agreement in reaching its decision in *Bob Jones*. This consensus greatly bolsters the argument for denying tax-exempt status to agencies that refuse to consider same-sex couples.

1. Legislative Branch

Adoption in the United States is primarily governed by state law, but a number of federal laws have been enacted that promote, support, and in some cases regulate state adoption and foster care. Although states maintain much discretion in structuring their own laws regarding adoption within the broad parameters of the federal laws, an overarching theme of the federal laws, which is reflected in all state laws, is the focus on the child's best interests.²³² And in recent decades, federal laws have become increasingly important in adoption and child welfare.

In 1980, Congress passed the Adoption Assistance and Child Welfare Act (AACWA), which created fiscal incentives and procedures to promote the adoption of foster children.²³³ Throughout the AACWA, there are references to the "best

229. Concerted efforts began in the 1930s, when lawyers from the National Association for the Advancement of Colored People strategized to bring lawsuits to courts, arguing against "separate but equal" education. These lawsuits culminated in *Brown v. Board of Education*, which outlawed segregation in public schools in 1954. Efforts to achieve integration continued for many years after the Court's ruling. See generally Civil Rights History Project, *School Segregation and Integration*, LIBR. CONGRESS, <https://www.loc.gov/collections/civil-rights-history-project/articles-and-essays/school-segregation-and-integration/> [<https://perma.cc/URW9-3EFM>] (last visited July 16, 2018).

230. See generally John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449 (2008).

231. In 1851, for example, Massachusetts passed a law illustrating this shift. The law gave judges the authority to determine whether adoptive parents were fit to bring up a child. Alice Bussiere, *The Development of Adoption Law*, 1 ADOPTION Q. 3, 3-4 (1998).

232. See *supra* notes 91-95 and accompanying text.

233. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980).

interest” of the child as a key factor in child welfare decisions.²³⁴ In 1996, Congress passed the Child Abuse Prevention and Treatment Act Amendments of 1996, which, among other things, required states receiving federal funds for the development of child abuse and neglect prevention and treatment programs to submit plans that included “provisions and procedures requiring that in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem . . . shall be appointed to represent the child . . . to make recommendations to the court concerning the best interests of the child.”²³⁵

In 1997, Congress passed the Adoption and Safe Families Act (ASFA).²³⁶ In passing the ASFA, Congress clearly and unequivocally established three national goals for children in foster care: safety, permanency, and well-being.²³⁷ The ASFA requires child welfare agencies to, *inter alia*, document the steps they take to find an adoptive family or other permanent living arrangement for a child once it is determined that reunification with the child’s biological parents is not in the child’s best interest.²³⁸ The ASFA was described as “landmark legislation,” which “ensures that the safety and health of children play a paramount role in child welfare decisions.”²³⁹ It “address[ed] criticism that children were lingering in foster care for long periods of time” by “includ[ing] provisions to expedite legal proceedings so that children who cannot return home may be placed for adoption or another permanent arrangement quickly.”²⁴⁰

234. *See, e.g., id.* at 511 (requiring procedures to assure that “each child has a case plan . . . consistent with the best interest and special needs of the child”); *id.* at 519 (“No Federal payment may be made under this part with respect to amounts expended by any State as foster care maintenance payments under this section, in the case of any child who was removed from his or her home pursuant to a voluntary placement agreement as described [earlier in the Act] and has remained in voluntary placement for a period in excess of 180 days, unless there has been a judicial determination . . . to the effect that such placement is in the best interests of the child”).

235. Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, 110 Stat. 3063, 3073–74 (1996).

236. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2116 (1997).

237. Kele Stewart, *The Connection Between Permanency and Education in Child Welfare Policy*, 511 HASTINGS RACE & POVERTY L.J. 511, 535–36 (2012) (“With the passage of ASFA in 1997, rather than focusing exclusively on safety and permanency, well-being was added as a child welfare goal.”).

238. 42 U.S.C. § 675(1)(E); *see also* H.R. Rep. No. 105-77, at 23 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2755 (explaining that the Act “require[s] states to make reasonable efforts to place a child for adoption or in some other permanent placement, in all cases where it is determined that reunification with the parent is not in the best interests of the child”).

239. *Hearing Before the Subcomm. on Human Resources of the Comm. on Ways and Means on Implementation of the Adoption and Safe Families Act of 1997*, 108th Cong. 3–4 (2003) (statement of Rep. Herger, Chairman, Subcomm. on Human Resources of the Comm. on Ways and Means).

240. *Id.*; *see also* Susan Notkin et al., *Preface: The Adoption and Safe Families Act (ASFA): About this Paper Series*, in INTENTION AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 5, 5 (2009) (describing the Act as “the most significant piece of legislation dealing with child welfare in almost twenty years. . . . passed in response to growing concerns that child welfare systems across the country were not providing for the safety, permanency, and wellbeing of affected children in an adequate and timely fashion,” and it sought “to ensure that children did not languish and grow up in foster care but instead were connected with permanent families”).

Testimony before Congress in support of the ASFA and other child welfare reforms illustrates the federal legislature's concern with finding children permanent, stable homes. Congresswoman Barbara B. Kennelly of Connecticut, for example, testified in support of the Adoption Promotion Act, stating that Congress needed to "enact[] legislation that sends a simple, yet strong message about promoting protection and permanency for children."²⁴¹ Susan Badeua, Project Manager for the National Adoption Center, similarly testified in support of child welfare reforms, asserting that they were "needed to insure that all children have the opportunity to grow up in safe, stable and permanent homes," and were "essential in order to ensure that the thousands of children in this country waiting in foster care without permanent homes . . . will be placed in adoptive homes."²⁴² Gary J. Stangler, director of the Missouri Department of Social Services, speaking on behalf of the American Public Welfare Association, testified in support of reforms that require states to "step up efforts at protecting child safety and providing permanency for children in the child welfare system."²⁴³

Other examples of Congress's recognition that permanency is in a child's best interest is the "Stephanie Tubbs Jones Child Welfare Services Program," a program created by Title IV-B of the Social Security Act.²⁴⁴ Two of the stated purposes of the Program are to "protect[] and promot[e] the welfare of all children" and to "promot[e] the safety, permanence, and well-being of children in foster care and adoptive families."²⁴⁵ The "Safe and Timely Interstate Placement of Foster Children Act of 2006" similarly states that "[i]t is the sense of the Congress that . . . the States should recognize and implement the deadlines for the completion and approval of home studies as provided in [another section of the Act] to move children more quickly into safe, permanent homes; and . . . Federal policy should encourage the safe and expedited placement of children into safe, permanent homes."²⁴⁶ Other

241. *Child Welfare Revision: Statement on the Adoption Promotion Act, Hearing on HR 867 Before the Subcomm. on Soc. Sec. & Family Policy of the S. Comm. on Finance*, 105th Cong. (1997), 1997 WL 271624.

242. *Child Welfare Revision: Hearing on S-511, Safe Adoptions and Family Environments (SAFE) Act Before the Subcomm. on Soc. Sec. & Family Policy of the S. Comm. on Finance*, 105th Cong. (1997).

243. *Child Welfare Reform: Hearing on H.R. 867 Before the Subcomm. on Soc. Sec. & Family Policy of the H. Comm. on Fin.*, 105th Cong. 24 (1997) (statement of Gary J. Stangler Director, Missouri Dep't of Soc. Servs.); see also H.R. 867, *The "Adoption Promotion Act of 1997": Hearing Before the Subcomm. on Human Res. of the H. Comm. on Ways & Means*, 105th Cong. 33 (1997) (statement of Jess McDonald, Director, Ill. Dep't of Children and Family Servs.) ("Many children are waiting too long for permanent homes, and foster homes were never intended as a permanent place for children to grow up. We strongly support these principles and the overall goal of the legislation of safety and permanency for children in the child welfare system.").

244. 42 U.S.C. §§ 621–628b.

245. *Id.* §§ 621(1), (4).

246. Safe and Timely Interstate Placement of Foster Children Act of 2006, Pub. L. No. 109-239, 120 Stat. 508 (2006).

recent reforms continue to emphasize the need for permanency and improve incentives for adoption.²⁴⁷

2. Executive Branch

The executive branch, through presidential statements and actions, along with administrative agency statements, has “consistently placed its support behind”²⁴⁸ the best interests standard and the importance of permanent, stable homes for children who will not be reunified with their biological parents.

By signing child welfare legislation into law, numerous presidents—both Republicans and Democrats—have illustrated the executive branch’s recognition of the need for permanent, stable homes.

By signing the AACWA into law, President Jimmy Carter acknowledged that the Act held “the promise of dramatically improving the lives of [children in foster care]. . . . By encouraging States to provide services designed to return children to their families where possible or to place them in permanent family-like settings, we are responding to the need for permanence and stability in children’s lives.”²⁴⁹

President George H.W. Bush, signing into law the “Child Abuse, Domestic Violence, Adoption and Family Services Act of 1992,” stated that the Act was necessary to promote a child’s physical and mental well-being, which “is a crucial element in the achievement of his or her potential.”²⁵⁰

President Clinton made his support for adoption and permanency planning clear in the lead up to the enactment of the ASFA, stating that he was “committed to giving the children waiting in our Nation’s foster care system what every child in America deserves—loving parents and a healthy, stable home. The goal for every child in our Nation’s public welfare system is permanency in a safe and stable home.”²⁵¹ President Clinton also noted that children who cannot be reunified with their biological parents “wait far too long . . . to be placed in permanent homes.”²⁵² Because of this, barriers to permanent placements must be broken down to increase the number of children adopted or permanently placed out of the foster care system.²⁵³ President Clinton described the ASFA as (1)

247. See Child and Family Services Improvement and Innovation Act, Pub. L. No. 112-34, 125 Stat. 369 (2011); Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 111-351, 122 Stat. 3949 (2008).

248. *Bob Jones Univ. v. United States*, 461 U.S. 574, 594 (1983).

249. Jimmy Carter, *Adoption Assistance and Child Welfare Act of 1980 Statement on Signing H.R. 3434 into Law*, AM. PRESIDENCY PROJECT (June 17, 1980), <http://www.presidency.ucsb.edu/ws/?pid=44597> [<https://perma.cc/C7V8-ZQP7>].

250. George Bush, *Statement on Signing the Child Abuse, Domestic Violence, Adoption and Family Services Act of 1992*, AM. PRESIDENCY PROJECT (May 28, 1992), <http://www.presidency.ucsb.edu/ws/index.php?pid=21010> [<https://perma.cc/8QDU-BRYU>].

251. William J. Clinton, *Memorandum on Adoption and Alternate Permanent Placement of Children in the Public Child Welfare System*, AM. PRESIDENCY PROJECT (Dec. 14, 1996), <http://www.presidency.ucsb.edu/ws/index.php?pid=52347> [<https://perma.cc/C7XW-34Y9>].

252. *Id.*

253. *Id.*

making “clear that children’s health and safety are the paramount concerns of our public child welfare system,” (2) “provid[ing] States with financial incentives to increase the number of children adopted each year,” and (3) “help[ing] find safe homes for children much more quickly when” reunification with biological parents is not possible.²⁵⁴

President George W. Bush indicated his support for and recognition of the need for permanent and stable homes by signing into law the Adoption Promotion Act of 2003²⁵⁵ and the Fostering Connection to Success and Increasing Adoptions Act of 2008.²⁵⁶ In signing the Adoption Promotion Act, President Bush stated that the “aim of the [child welfare] system, and the desire of every child is a permanent home,” and that the Act would “help bring that opportunity to many more children of all ages.”²⁵⁷

In 1984, President Reagan proclaimed the first National Adoption Week, stating that it gives the country “an opportunity to reaffirm our commitment to give every child waiting to be adopted the chance to become part of a family.”²⁵⁸ President Reagan stressed the importance of permanency, stating that “[m]ore children with permanent homes mean fewer children with permanent problems.”²⁵⁹ In 1995, President Clinton expanded Adoption Week, making November “National Adoption Month,” to recognize that adoption “places children into loving, permanent homes where they can flourish and grow up to become happy, healthy, productive members of our national community.”²⁶⁰ President George W. Bush and President Obama continued to recognize November as National Adoption Month.²⁶¹ And President Trump continued the executive branch’s recognition of May 2017 as National Foster Care Month, stating that “[e]very child deserves a safe and supportive family,” and that “[e]nsuring that children grow up with the opportunity to reach their full potential is a top priority of [his] Administration.”²⁶²

254. William J. Clinton, *Remarks on Signing the Adoption and Safe Families Act of 1997*, AM. PRESIDENCY PROJECT (Nov. 19, 1997), <http://www.presidency.ucsb.edu/ws/?pid=53586> [<https://perma.cc/UL5R-K5NJJ>].

255. Adoption Promotion Act of 2003, Pub. L. No. 108–145, 117 Stat. 1879 (2003).

256. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 111–351, 122 Stat. 3949 (2008).

257. Press Release, Office of the Press Secretary, President Bush Signs the Adoption Promotion Act of 2003 (Dec. 2, 2003), <https://georgewbush-whitehouse.archives.gov/news/releases/2003/12/20031202-1.html> [<https://perma.cc/M8EP-CMBD>].

258. Proclamation No. 5280, 49 Fed. Reg. 45,411, 45,411 (Nov. 13, 1984).

259. *Id.*

260. Proclamation No. 6846, 60 Fed. Reg. 55,987, 55,987 (Nov. 1, 1995); *see also History of National Adoption Month*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/adoption/nam/about/history/> [<https://perma.cc/GGN7-P74G>].

261. *See, e.g.*, Proclamation No. 9530, 81 Fed. Reg. 76,269 (Oct. 27, 2016); Proclamation No. 8315, 73 Fed. Reg. 65,959 (Oct. 31, 2008). President Obama was the first to specifically reference the sexual orientation of adoptive parents, stating that “[w]ith so many children waiting for loving homes, it is important to ensure that all qualified caregivers are given the opportunity to serve as adoptive parents, regardless of race, religion, sexual orientation, or marital status.” Proclamation No. 8744, 76 Fed. Reg. 68,613 (Nov. 1, 2011).

262. Proclamation No. 9597, 82 Fed. Reg. 20,799, 20,799 (Apr. 28, 2017).

Federal agencies of the executive branch echo the President's recognition of the child's best interests in a number of different contexts, such as adoption and foster care, education, and immigration.

The Children's Bureau, an agency organized under the Administration for Children and Families, which is a division of the Department of Health and Human Services, states that its missions are to "ensur[e] that every child and youth has a permanent family or family connection," and to "stabiliz[e] children's living situations."²⁶³ A publication by the Children's Bureau describes 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."²⁶⁴ And in her congressional testimony on behalf of the Administration for Children and Families regarding the ASFA, then-Secretary of the Administration Olivia Golden acknowledged that the ASFA would further the Administration's "efforts to ensure the safety, permanency and well-being of children in the child welfare system."²⁶⁵

In the educational context, the Department of Health and Human Services and the Department of Education recognize the need for child welfare agencies and educational agencies to work together "to keep children in foster care in the same school when living placements change, if remaining in that school is in their best interest."²⁶⁶ Child welfare agencies and school districts frequently collaborate on these decisions to ensure the school placement is in a child's best interest.²⁶⁷

In the context of immigration proceedings, the Department of Homeland Security, and its predecessor agency, the Immigration and Naturalization Service (INS), have "recognized the unique situation of children appearing in immigrations proceedings designed for adults."²⁶⁸ In 1998, for example, the INS promulgated

263. *What We Do*, CHILDREN'S BUREAU, <https://www.acf.hhs.gov/cb/about/what-we-do> [https://perma.cc/8URF-XEEL] (last visited July 16, 2018).

264. U.S. DEPT OF HEALTH & HUMAN SERVS., CHILD WELFARE INFO. GATEWAY, HOW THE CHILD WELFARE SYSTEM WORKS 1 (2013), <https://www.childwelfare.gov/pubPDFs/cpswork.pdf> [https://perma.cc/J6LG-PXVE].

265. H.R. 867, *The "Adoption Promotion Act of 1997": Hearing Before the Subcomm. on Human Res. of the H. Comm. on Ways and Means*, 105th Cong. 21 (1997) (statement of Olivia A. Golden, Acting Assistant Secretary, Children and Families, U.S. Department of Health and Human Services).

266. U.S. DEPT OF EDUC. & U.S. DEPT OF HEALTH & HUMAN SERVS., NON-REGULATORY GUIDANCE: ENSURING EDUCATIONAL STABILITY FOR CHILDREN IN FOSTER CARE 4 (2016), <https://www2.ed.gov/policy/elsec/leg/essa/edhhsfostercarenonregulatorguide.pdf> [https://perma.cc/6B5M-5CRQ].

267. AM. BAR ASS'N CTR. ON CHILDREN & THE LAW ET AL., SCHOOL STABILITY UNDER FOSTERING CONNECTIONS: STATE LAWS AND POLICIES IMPLEMENTING SCHOOL PLACEMENT DECISIONS (2011), https://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/education/imp_school_selection_final.authcheckdam.pdf [https://perma.cc/3Q3V-WAMJ].

268. INTERAGENCY WORKING GRP. ON UNACCOMPANIED & SEPARATED CHILDREN, SUBCOMM. ON BEST INTERESTS, FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN 12 (2016), <https://www.gcir.org/sites/default/files/resources/2016%20Young%20Center%20Framework%20for%20Considering%20Best%20Interests%20of%20Unaccompanied%20Children.pdf> [https://perma.cc/CR8N-ZXAT].

Guidelines for Children's Asylum Claims, which recognized the "best interests of the child" standard as "a useful measure for determining appropriate interview procedures for child asylum seekers."²⁶⁹

These illustrative, but not exhaustive, examples make clear that the executive branch recognizes and supports policies promoting the best interests standard through, *inter alia*, permanency.

3. Judicial Branch

Although adoption and related proceedings are generally matters of state law, federal courts have illustrated their recognition of and support for the best interests standard. In the context of child welfare, federal courts have typically dealt with cases involving the interplay of parental rights and the child's best interests.²⁷⁰ And although this Article is primarily concerned with the child's rights *after* a biological parent's rights have been terminated and the child is in need of adoptive parents, these cases nevertheless illustrate the judicial branch's recognition of the standard and its importance.

Although "[t]he treatment of children starts with deference toward parental preferences . . . parental rights are not absolute."²⁷¹ In *Prince v. Massachusetts*, for example, a Jehovah's Witness used her nine-year-old niece, of whom she had custody, to sell newspapers, which was a violation of state labor laws.²⁷² In upholding her conviction, the Supreme Court held that:

The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. . . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.²⁷³

The Supreme Court has also referenced the best interests standard when addressing a minor's access to abortion. In *Belotti v. Baird*, for example, the Supreme Court invalidated and enjoined the enforcement of a portion of a state statute because it required parental consent or notification whenever a minor sought an

269. JEFF WEISS, U.S. IMMIGRATION & NATURALIZATION SERVS., OFFICE OF INT'L AFFAIRS, GUIDELINES FOR CHILDREN'S ASYLUM CLAIMS 2 (1998), <https://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf> [<https://web.archive.org/web/20180415192246/https://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf>].

270. *See, e.g.*, *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 823 (1977) (recognizing New York's policy that "parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered").

271. Carbone, *supra* note 90, at S114.

272. *Prince v. Massachusetts*, 321 U.S. 158, 159–60 (1944).

273. *Id.* at 166–67, 170.

abortion and did not “afford[] the pregnant minor an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interests.”²⁷⁴ The Court also noted that “the State is entitled to adjust its legal system to account for children’s vulnerability and their needs for ‘concern, . . . sympathy, and . . . paternal attention.’”²⁷⁵

Decisions from lower federal courts also confirm the judicial branch’s recognition of the best interests standard and the state’s interest in protecting child welfare.²⁷⁶ For example, almost one hundred years ago, in *Snow v. Snow*, the United States Court of Appeals for the District of Columbia held that “[t]he disposition of the custody of the child rests in the sound discretion of the court, subject to the rule that [the child’s] welfare is the paramount thing to be considered.”²⁷⁷ The court reaffirmed this principle in *Bartlett v. Bartlett*, stating that “the welfare of the child is the primary criterion in custody cases,” and that this is a principle that “has been reaffirmed many times in this court.”²⁷⁸ The welfare of the child, rather than “the adversary rights of the parents” is “the paramount consideration.”²⁷⁹

In light of all of the above, there is little, if any, doubt that the three branches of the federal government recognize the best interests standard and the importance of promoting adoption and permanency for adoption-eligible children. The next Section explains why private agencies that refuse to facilitate adoption by same-sex couples act contrary to this public policy, therefore supporting denying these agencies tax-exempt status.

C. Refusing to Facilitate Same-Sex Adoption is Contrary to Established Public Policy

As previously explained in detail above, gay and lesbian couples are more likely to adopt than heterosexual couples, and are particularly more likely to adopt hard-to-place children.²⁸⁰ Same-sex couples are thus an important source of adoptive

274. *Belotti v. Baird*, 443 U.S. 622, 651 (1979) (plurality opinion); *see also* *Lambert v. Wicklund*, 520 U.S. 292, 298–99 (1997) (per curiam) (upholding statute containing a judicial bypass provision allowing waiver of parental notification requirement if parental notification of abortion was not in minor’s best interests); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 508 (1990) (upholding statute that requires juvenile court to authorize minor’s consent to abortion upon determining that parental notification of the abortion is not in the minor’s best interests).

275. *Belotti*, 443 U.S. at 635 (plurality opinion) (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971)) (omissions in original).

276. *See, e.g., N.E. v. Hedges*, 391 F.3d 832, 835–36 (6th Cir. 2004) (acknowledging that American courts have generally recognized that children’s welfare, rather than parental rights, is “the most important factor” when the state acts pursuant to its *parens patriae* authority); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1460 (8th Cir. 1995) (“As for immature minors whose best interests would be served by having an abortion, ‘the justification for any rule requiring parental involvement in the abortion decision rests entirely on the best interests of the child’” (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 454 (1990))); *Doe v. Staples*, 706 F.2d 985, 990 (6th Cir. 1983) (noting “that the interest of [the county’s child welfare department] in the child’s welfare and public safety is a very important interest”).

277. *Snow v. Snow*, 280 F. 1013, 1014 (D.C. Cir. 1922).

278. *Bartlett v. Bartlett*, 221 F.2d 508, 511 (D.C. Cir. 1954).

279. *Id.* at 511–12.

280. *See supra* notes 56–73 and accompanying text.

parents. The value of qualified adoptive parents of any sexual orientation, particularly those who adopt hard-to-place children, is undeniable, given the negative consequences of remaining in an unstable home, unstable foster placements, and/or aging out of the foster care system.²⁸¹

Agency policies that preclude otherwise-qualified couples from adopting children in need of permanent homes violates the previously discussed established public policies of child welfare and the best interests of the child, both of which support the importance of permanent, stable homes. Refusing to consider otherwise qualified prospective parents solely because of their sexual orientation narrows the pool of prospective parents and reduces the number of children who will find “forever homes,” thus increasing the likelihood of a lifetime of struggle²⁸² and potentially perpetuating the generational cycle of foster care.²⁸³

This Article should not, however, be read as arguing that adoption agencies should give equal consideration to any and all prospective parents that apply. Agencies should, and must, have certain standards. Indeed, lacking any standards for prospective parents would be contrary to the best interests of the child. But qualifications must be relevant to whether prospective parents are likely to have the ability to provide a stable, loving home and meet the child’s needs. Sexual orientation is not such a factor, given (1) the growing evidence that children fare just as well with same-sex parents when compared with children raised by heterosexuals, and (2) the lack of reliable, methodologically-sound evidence suggesting the contrary.²⁸⁴

The policy proposed by this Article would be faith-neutral and apply equally to faith-based and non-faith-based adoption agencies. Faith-based adoption agencies that are likely to oppose the denial of tax-exempt status on this ground will argue, similar to the argument of Bob Jones University, that, even if such a “policy is valid as to nonreligious [institutions], that policy cannot constitutionally be applied to schools that engage in . . . discrimination on the basis of sincerely held religious beliefs,” because such a policy “violates their free exercise rights under the Religion Clauses of the First Amendment.”²⁸⁵ Although the Supreme Court has

281. See *supra* notes 75–83 and accompanying text.

282. See *supra* notes 75–83 and accompanying text.

283. CHARLYN HARPER BROWNE, CTR. FOR THE STUDY OF SOC. POLICY, EXPECTANT & PARENTING YOUTH IN FOSTER CARE 8–9 (2015), <https://www.cssp.org/reform/child-welfare/expectant-parenting-youth-in-foster-care/tools-resources-research/section-front-image/EPY-developmental-needs-paper-web.pdf> [<https://perma.cc/DGL2-JNPW>] (describing studies that found higher rates of teen pregnancy among foster care youth compared to their peers). Several studies have also found a high risk of children born to adolescent mothers also becoming involved in the child welfare system. *Id.* at 11 (discussing studies). Children of foster care youth “may be an especially vulnerable population,” with one study finding that 22% of teens who gave birth in foster care were investigated for child abuse or neglect and 11% had a child placed in foster care. AMY DWORSKY & JAN DECOURSEY, PREGNANT AND PARENTING FOSTER YOUTH: THEIR NEEDS, THEIR EXPERIENCES 34 (2009).

284. See *supra* notes 84–89 and accompanying text.

285. *Bob Jones Univ. v. United States*, 461 U.S. 574, 602–03 (1983).

interpreted the Free Exercise Clause as providing “substantial protection for lawful conduct grounded in religious belief,”²⁸⁶ the Court has also recognized that “[n]ot all burdens on religion are unconstitutional. . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.”²⁸⁷ The governmental interest in child welfare and the best interests of the child are compelling and well-recognized by all three branches of the federal government and society at large.²⁸⁸ Indeed, in the context of child welfare, the Supreme Court held in *Prince v. Massachusetts* that neutrally-cast child labor laws that prohibit the sale of printed materials on public streets could be applied to prohibit children from dispensing religious literature.²⁸⁹ And in the specific context of adoption, the Court has recognized that once the rights of the child’s biological parents are terminated (and thus the interest in preserving “familial bonds” is no longer relevant), the State’s goal as *parens patriae* shifts to “provid[ing] the child with a permanent home.”²⁹⁰

This Article does not go so far as proposing that the government deny operating licenses to agencies that discriminate against same-sex prospective parents. These agencies would be free to operate and continue denying services to same-sex couples, but would have to do so without the benefit of tax-exempt status. Thus, although “[d]enial of tax benefits will inevitably have a substantial impact on the operation of private [adoption agencies], [it] will not prevent those [agencies] from observing their religious tenets.”²⁹¹

V. COMPROMISES AND ADDITIONAL CONSIDERATIONS

Although this Article strongly favors denying tax-exempt status to private adoption agencies that refuse to consider same-sex parents, it recognizes that such a proposal is controversial and that legislative compromise is often needed to facilitate change, even if that change is less than the ideal. The Article also recognizes that if some private agencies choose to shut down rather than provide services to same-sex couples or operate without tax-exempt status, then the services of public and private agencies that do not discriminate against same-sex parents will be needed more than ever. Therefore, this final Part provides, first in Section A, a possible compromise position that would allow private agencies to refuse to

286. *Id.* at 603.

287. *United States v. Lee*, 455 U.S. 252, 257 (1982) (citations omitted).

288. *See supra* Part IV.B; *cf.* *Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (acknowledging the state’s “urgent interest in the welfare of the child”); *Doe v. Heck*, 327 F.3d 492, 514 (7th Cir. 2003) (“[S]tates have a compelling interest in protecting children from child abuse.”); *Magazu v. Dep’t of Children & Families*, 42 N.E.3d 1107, 1120 (Mass. 2016) (“It cannot be disputed that the State has a compelling interest to protect children from actual or potential harm. This is especially true with respect to foster children whose need for safety, security, and stability is readily apparent” (citation and quotation marks omitted)); *Blixt v. Blixt*, 774 N.E.2d 1054, 1064 (Mass. 2002) (“Hardly a more compelling state interest exists than to keep children safe . . .”).

289. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

290. *Santosky*, 455 U.S. at 766.

291. *Bob Jones Univ. v. United States*, 461 U.S. 574, 603–04 (1983).

consider same-sex couples yet maintain their tax-exempt status, as long as the agency has a written referral agreement with a non-discriminating agency. Section B then proposes that tax revenues earned from taxing adoption agencies that refuse to consider same-sex couples should be ear-marked for use by public child welfare agencies and by non-discriminating private adoption agencies to ensure that these agencies can meet the needs of children who are eligible for adoption.

A. Compromise: Continue Tax Exemptions for Agencies with Written Referral Agreements

A compromise position the IRS could consider is to continue tax exemptions for private adoption agencies that refuse to provide services to same-sex couples if the agencies have a written and workable referral policy with another adoption agency that will provide adoption services to same-sex couples for the same cost. Referrals are used, and sometimes even required, in a variety of domains, and are an important tool to ensure services are provided by individuals or institutions with the requisite knowledge, experience, and competence.²⁹² In legal representation, for example, the Model Rules of Professional Conduct suggest that when determining whether a lawyer can “provide competent representation to a client” on a particular matter, the lawyer should consider “whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question,” particularly if expertise in a particular field of law is required.²⁹³ And just as a lawyer who has a conflict of interest should decline to represent a client and then may refer that client to another, non-conflicted lawyer,²⁹⁴ an adoption agency

292. *Cf.* Johnson by Adler v. Kokemoor, 545 N.W.2d 495, 509 n.34 (Wis. 1996) (“[A] physician’s failure to refer may, under some circumstances, be material to a patient’s exercise of an intelligent and informed consent.”); AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, INC., AICPA CODE OF PROFESSIONAL CONDUCT § 0.300.060.04 (2014) (“Competence . . . establishes the limitations of a member’s capabilities by dictating that consultation or referral may be required when a professional engagement exceeds the personal competence of a member or a member’s firm” (emphasis omitted)); Ellen Wright Clayton et al., *Managing Incidental Genomic Findings: Legal Obligations of Clinicians*, 15 GENETICS MED. 624 (2013) (noting cases that support liability for failure to refer to a clinician with greater expertise); Joel B. Epstein et al., *Failure to Diagnose and Delayed Diagnosis of Cancer*, 140 J. AM. DENTAL ASS’N 1494, 1501 (2009) (discussing how plaintiffs frequently allege “failure to refer” in malpractice suits); Michele P. Ford & Susan S. Hendrick, *Therapists’ Sexual Values for Self and Clients: Implications for Practice and Training*, 34 PROF. PSYCHOL. 80, 85–86 (2003) (reporting that therapists dealt with difficult therapy situations, such as working with uncomfortable sexual issues, by, among other things, referring the client); Bryce L. Jorgensen, Damon L. Rappleyea & Alan C. Taylor, *Understanding Financial Literacy and Competence: Considerations for Training, Collaboration, and Referral for MFTs*, 5 J. FIN. THERAPY 1 (2014) (noting that because financial concerns are common among couples attending marital therapy, marriage and family therapists should consider a referral process and collaboration with financial planners).

293. MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR. ASS’N 2014); *id.* at r. 1.1 cmt. 1 (Legal Knowledge and Skill).

294. *Cf.* N.Y.C. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2016-1 (2016) (“Where an attorney is unable to represent a prospective client due to a conflict of interest . . . the attorney is ethically permitted to refer the prospective client to another attorney or list of attorneys who are competent in the field.”); D.C. Bar Legal Ethics Comm., Ethics Op. 326 (2004) (“When a lawyer is

with a conflict of interest arising from its religious beliefs could decline to provide services to a couple and then refer that couple to an agency ready and able to assist them.

However, unlike in the legal context where a lawyer “may” refer a prospective client to another lawyer (but is not necessarily *required* to), because of the importance of the issues at stake in adoption—the best interests of the child and the need to find permanent homes for adoptable children—private adoption agencies that refuse to provide services to same-sex couples should have a *duty* to implement a referral policy with another agency that will provide the services if they wish to retain their tax-exempt status. Such a referral policy could be similar to those under which religiously affiliated health care providers refer individuals seeking contraception, abortion, or end-of-life services to other providers.²⁹⁵ In Illinois, for example, the “Health Care Right of Conscience Act” requires that if a health care facility or provider:

is unable to permit, perform, or participate in a health care service . . . because the health care service is contrary to the conscience of the [facility or provider], then the patient shall either be provided the requested health care service by others in the facility or be notified that the health care will not be provided and be referred, transferred, or given information . . . about other health care providers who they reasonably believe may offer the health care service.²⁹⁶

In the context of end-of-life care, Florida law provides that:

A health care provider or facility that is unwilling to carry out the wishes of the patient or the treatment decision of his or her surrogate or proxy because of moral or ethical beliefs must within 7 days either:

- (a) Transfer the patient to another health care provider or facility . . . [and] shall pay the costs for transporting the patient to another health care provider or facility; or
- (b) If the patient has not been transferred, carry out the wishes of the patient or the patient’s surrogate or proxy.²⁹⁷

The compromise proposed by this Article, however, would be stronger than the Illinois health care law and would, like Florida’s law, require the agency to pay any increase in costs that result from the referral. It would not only require the agency to provide couples with information about other agencies that will provide the desired services, but would also require an existing agreement with another agency. The agreement would have to be in existence and in writing for an agency to qualify for tax-exempt status. The agency may not simply state that it will refer

approached by a potential client about a representation adverse to an existing client, after declining the case, the lawyer may refer the potential client to another lawyer.”).

295. Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 840 (2007).

296. 745 ILL. COMP. STAT. 70/6.1 (2017).

297. FLA. STAT. § 765.1105(2) (2015).

to another agency if necessary—the process for doing so must already exist and another, non-discriminating agency, must agree to accept such referrals. The written, signed agreement must be provided to the IRS when the agency applies for tax-exempt status. The agency should also be required to affirm the continued existence of the agreement on a yearly basis. Only those agencies with such a referral agreement would remain eligible for tax-exempt status despite their refusal to consider same-sex prospective parents. This compromise would allow private agencies to provide only those services that align with their religious beliefs while at the same time ensuring that the pool of qualified prospective parents is as large as possible.

B. *Ear Mark Tax Revenues*

Tax revenues can go into a general fund, to be used for a variety of purposes, or can be “earmarked” (i.e., set aside) for specific purposes.²⁹⁸ “Earmarking refers to the practice of dedicating a specific stream of tax revenue to a specific expenditure purpose.”²⁹⁹ A well-known example of earmarking is the dedication of highway revenues—such as gas taxes and motor vehicle registration fees—for highway and street construction and maintenance.³⁰⁰ Other examples of earmarking include the use of lottery proceeds for education,³⁰¹ and the use of payroll taxes to fund Social Security.³⁰²

To encourage agencies to provide equal services to heterosexual and same-sex prospective parents, and to provide financial assistance to agencies that do not discriminate against prospective parents based on their sexual orientations, revenues earned from taxing the private agencies that are no longer eligible for tax-exempt status could be earmarked as funds to be given to the non-discriminating agencies. This increase in funding would allow the non-discriminating agencies to increase their services, thus combating any loss of services from faith-based agencies that choose to shut down rather than operate without tax-exempt status.

Such selective funding of non-discriminating agencies would not violate the Constitution. As stated by the Supreme Court, “[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an

298. ROBERT W. MCGEE, *THE PHILOSOPHY OF TAXATION AND PUBLIC FINANCE* 163 (2004).

299. Frederick Stocker & Steven Maguire, *Earmarking of Taxes*, in *THE ENCYCLOPEDIA OF TAXATION & TAX POLICY* 89, 89 (Joseph J. Cordes, Robert D. Ebel & Jane G. Gravelle eds., 2d ed. 2005).

300. *Id.*

301. *Id.* at 90.

302. See Tony Nitti, *Dear America: Your Higher Payroll Taxes Are Not the Result of a Tax Increase*, *FORBES* (Jan. 14, 2013), <https://www.forbes.com/sites/anthonyntitti/2013/01/14/dear-america-your-higher-payroll-taxes-are-not-the-result-of-a-tax-increase/#7c0d2ab1392f> [<https://perma.cc/BF2F-HVM9>] (noting that payroll taxes are earmarked for Social Security); *Social Security U.S.A.—The Program & Its Administration*, SOC. SECURITY, <https://www.ssa.gov/history/ssa/usa1964-1.html> [<https://perma.cc/ZM6D-ZAPG>] (last visited July 16, 2018) (“During working years employees, their employers, and self-employed people pay social security taxes which go into special funds[.]”).

alternative program which seeks to deal with the problem in another way.”³⁰³ In this context, the Government could selectively fund inclusive, non-discriminatory adoption agencies because such agencies, by broadening the pool of prospective parents, promote the public’s interest in child welfare by increasing the chances that a child will be adopted into a permanent home.³⁰⁴

CONCLUSION

This Article has argued that despite the “extraordinary” nature of the Supreme Court’s decision in *Bob Jones University*, the holding of that case should be extended to private adoption agencies that discriminate against same-sex couples. The Article recognizes that such private adoption agencies serve an important public purpose, but argues that they do so in a way that is contrary to the established public policy of the best interests of the child. By narrowing the pool of prospective parents by refusing to consider otherwise-qualified parents based solely on their sexual orientation, these agencies act contrary to the compelling interest of finding a child a permanent, stable home as quickly as possible once a child is eligible for adoption. Because these agencies act contrary to an established public policy that is recognized by all three branches of the federal government, this Article has argued that these agencies should not be eligible for exemptions from federal income tax.

303. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

304. *Cf.* Fla. Dep’t of Children & Families v. Adoption of X.X.G., 45 So. 3d 79, 95 (Fla. Dist. Ct. App. 2010) (noting, in a case that struck down Florida’s law that categorically excluded homosexuals from adopting, that Florida’s Department of Children and Families agreed “that having a bigger pool of qualified adoptive parents would help DCF find families for” hard-to-place children); *Firm’s Pro Bono Work Supports Efforts to Expand Pool of Adoptive Parents*, WILMERHALE (Jan. 16, 2011), <https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=87163> [<https://perma.cc/GBF9-23LT>] (“Experts say this law [banning homosexuals from adopting] doesn’t aid child welfare; in fact, it is detrimental to child welfare. You are keeping the pool of potential parents smaller for no reason. The alternative is that many of these kids are going to stay in foster care, where outcomes can be much worse.”).