

# GAY MARRIAGE IS LEGALIZED, NOW WHAT?: DISCRIMINATORY ADOPTION REGULATIONS

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## ABSTRACT

“First comes love, then comes marriage, then comes the baby in the carriage.” This children’s riddle shows that the right to marry and start a family is granted to many, but not all. Following the Supreme Court’s ruling in *Obergefell v. Hodges* on June 26, 2015, many same-sex couples were finally granted the right to marry. Yet, many of these couples who sought to grow their family through adoption have faced discrimination. While the right to same-sex marriage was ruled fundamental, not all states would allow same-sex couples to adopt children. In this Note, I explore the differences in discriminatory regulations and law of married different-sex versus same-sex couples. I also explore the discriminatory differences between unmarried different-sex couples and same-sex couples. Drawing on *Obergefell*, I conclude that it is unconstitutional for laws to discriminate on grounds of sexual orientation, sex, and marital status against same-sex couples in adoption.

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\* Class of 2017, University of Southern California Gould School of Law; B.A. Sociology, University of California, Los Angeles. This Note is dedicated to all couples, of all sexes and orientations, that have been deprived of their constitutional rights to love, marriage, and family. Thank you to my Professor and Note supervisor, David B. Cruz, for all his valuable input as I drafted this article. Dear thanks to my husband, Leon, for his continuous support and love. Lastly, thank you to my parents and brothers who have generously and unconditionally supported me every step of the way.

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## I. INTRODUCTION

While acts and statutes such as the Defense of Marriage Act (“DOMA”)<sup>1</sup> have effectively stripped same-sex couples of the right to marry throughout recent history, these statutes are legally inoperative today since the Supreme Court in *Obergefell v. Hodges* held that same-sex

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<sup>1</sup> 1 U.S.C. § 7 Defense of Marriage Act 1 (1996).

marriage is now constitutional.<sup>2</sup> Yet, in the wake of the legalization of same-sex marriages, adoption laws and regulations remain that discriminate married and unmarried same-sex couples.<sup>3</sup> In this Note, I will argue that this landmark case and other constitutional authorities lend insight into adoption laws discriminating on the basis of sexual orientation, sex, and marital status.

“The history of marriage is one of both continuity and change.”<sup>4</sup> Marriage was once viewed as an arrangement by a couple’s parents, and later transformed to a voluntary contract between a man and a woman.<sup>5</sup> As the role and status of women began to evolve, women started to gain legal, political, and property rights,<sup>6</sup> and these developments have worked to transform the institution of marriage from one century to the next.

Likewise, for much of the twentieth century, homosexuality was treated as a mental disorder, as published in the American Psychiatric Association’s (“APA”) first Diagnostic and Statistical Manual of Mental Disorders (“DSM”).<sup>7</sup> It was not until after 1973 that psychiatrists and the public recognized that sexual orientation is both a normal expression of human sexuality and an immutable characteristic.<sup>8</sup>

When it comes to different-sex couples, all states allow married couples to adopt children if the adoption agency determines they are “fit” parents.<sup>9</sup> While it may not be as easy for unmarried different-sex couples to adopt, it is still possible in some states for them to jointly adopt.<sup>10</sup> These states include California, Connecticut, Illinois, Indiana, Massachusetts, New Jersey, New York, Oregon, Vermont, and Washington, D.C.<sup>11</sup>

The Equal Protection Clause of the Fourteenth Amendment states that no state shall deny a person “the equal protection of the laws.”<sup>12</sup>

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<sup>2</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>3</sup> Rebecca Beitsch, *Despite Same-Sex Marriage Ruling, Gay Adoption Rights Uncertain in Some States*, HUFFPOST POLITICS (Aug. 19, 2015, 10:48 AM), [http://www.huffingtonpost.com/entry/gay-adoption-rights\\_55d49470e4b055a6dab22ea3](http://www.huffingtonpost.com/entry/gay-adoption-rights_55d49470e4b055a6dab22ea3).

<sup>4</sup> *Obergefell*, 135 S. Ct. at 2595.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 2596.

<sup>8</sup> *Id.*

<sup>9</sup> *Who Can Adopt a Child?*, NOLO LAW FOR ALL, <http://www.nolo.com/legal-encyclopedia/who-can-adopt-child-30291.html>.

<sup>10</sup> *Adoption*, UNMARRIED EQUALITY, <http://www.unmarried.org/parents-children/adoption/>.

<sup>11</sup> *Id.*

<sup>12</sup> U.S. CONST. amend. XIV, § 1.

Therefore, in this Note, I will rely on the principles of the Equal Protection Clause laid out in *Obergefell* and other authorities to argue that it is unconstitutional for states to bar unmarried same-sex couples from adopting while allowing unmarried different-sex couples to adopt.

Likewise, laws remain that prevent same-sex couples from adopting despite the nationally recognized right for these couple to marry. For example, the discriminatory Utah state law HB 393, the Marriage Sovereignty Bill of Utah,<sup>13</sup> essentially bars same-sex couples from adopting children.<sup>14</sup> Some individual states have treated same-sex couples differently from different-sex couples on the basis of sexual orientation, sex, marital status, or all of these characteristics.<sup>15</sup>

Massachusetts was the first state to legalize same-sex marriage in 2004.<sup>16</sup> Then, in 2013, the U.S. Supreme Court held in *Windsor v. United States* that DOMA was no longer constitutional, which prompted an “unprecedented wave” of lawsuits in each state where same-sex couples were barred from legally getting married.<sup>17</sup>

Author Gary Gates writes that many homosexual people who engage in different-sex relationships do so for social acceptance and to have the opportunity to have children and family.<sup>18</sup> This is counterproductive to the normative social value of maintaining a “normal” family structure, because many of these couples get divorced and eventually engage in same-sex relationships.<sup>19</sup> Around 2006, social acceptance of gays and lesbians began to shift resulting in generally less social stigma towards people who were “coming out.”<sup>20</sup> As a result of this shift in social consciousness, Gary Gates writes, less gay and lesbian individuals today are entering different-sex relationships and are rather raising children on their own or in same-sex relationships.<sup>21</sup>

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<sup>13</sup> Robert Boyd, ‘Marriage Sovereignty’ Bill Proposed in Utah Could Infringe on Rights of Same-Sex Couples, FOX 13 (FEB 18, 2016), <http://fox13now.com/2016/02/18/marriage-sovereignty-bill-proposed-in-utah-could-infringe-on-rights-of-same-sex-couples/>.

<sup>14</sup> *Id.*

<sup>15</sup> Gary J. Gates, *Marriage and Family: LGBT Individuals and Same-Sex Couples*, Vol. 25 No. 2 THE FUTURE OF CHILDREN 67, (Fall 2015), <https://www.princeton.edu/futureofchildren/publications/docs/MarriageandFamily.pdf>.

<sup>16</sup> *Id.* at 68.

<sup>17</sup> *Id.* at 69.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Gates, *supra* note 15, at 73.

<sup>21</sup> *Id.*

After the Supreme Court's decision in *Obergefell*, it is now unconstitutional for states to discriminate against same-sex *married* couples regarding adoption.<sup>22</sup> However, discrimination still persists against *unmarried* same-sex couples, because a state does not allow these couples to adopt children while allowing unmarried different-sex couples to adopt, if they are simply deemed as "fit" parents.<sup>23</sup> In this Note, I will argue that laws that discriminate against married or unmarried same-sex couples and parents or unmarried same-sex couples on the basis of sexual orientation, sex, or marital status should all be deemed unconstitutional under the Equal Protection Clause.

## II. MARRIED SAME-SEX COUPLES

Each state has differences with regards to determining parental fitness.<sup>24</sup> In order to maintain the protection of family integrity and protection of children against various social issues, the courts are required to look at both the "fit" of the parents to the child, and if it is in the "best interests of the child" to be adopted into a particular family, where the child can properly grow and flourish with minimal hardships.<sup>25</sup> Many states that do not allow same-sex couples to adopt, argue that a child's adoption into a household of a same-sex couple is not in the "best interest of the child."<sup>26</sup>

Florida and Utah, before their bans were ruled constitutional, were the only states that specifically prohibited lesbian women and gay men from adopting children.<sup>27</sup> In other states, there are no laws specifically banning lesbian women and gay men from adopting, but a lesbian or gay person seeking to adopt a child would be faced with issues in the state courts.<sup>28</sup> State court judges tend to use a prospective parent's sexual orientation in order to find that parent unfit.<sup>29</sup> Adoption agencies tend to favor married

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<sup>22</sup> Ariane de Vogue & Jeremy Diamond, *Supreme Court Rules in Favor of Same-Sex Marriage Nationwide*, CNN POLITICS, (June 27, 2015), <http://www.cnn.com/2015/06/26/politics/supreme-court-same-sex-marriage-ruling/>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Annete R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of The Child: A False Dichotomy in The Context of Adoption*, 2 DUKE JOURNAL OF GENDER LAW AND POLICY 63, 64 (1995), <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1211&context=djglp>.

<sup>26</sup> *Id.* See also *Adoption*, *supra* note 10.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Douglas NeJaime, *Marriage Equality and The New Parenthood*, 129 HARV. L. REV. 1185 (2016).

different-sex couples over heterosexual single individuals, but, surprisingly, favor heterosexual single individuals over married same-sex couples.<sup>30</sup> This bias is unfair, because in many situations same-sex couples provide more stable homes for adopted children than do single heterosexual individuals.<sup>31</sup>

On June 26, 2015, the U.S. Supreme Court in a landmark case of *Obergefell v. Hodges*,<sup>32</sup> held that “[t]he right to marry is a fundamental right inherent in” one’s liberty, and “under the Due Process Clause and Equal Protection Clauses of the Fourteenth Amendment, couples of the same-sex may not be deprived of that right and that liberty.”<sup>33</sup> As a result, a discriminatory ban against married same-sex couples from adopting violated the equality guarantee of the U.S. Constitution, as applied in *Obergefell*.<sup>34</sup> As a result of the decision in *Obergefell*, the right to marry, regardless of one’s sex or sexual orientation, is now treated as a fundamental right that is inherent in each individual in the U.S.<sup>35</sup>

Some states, however, still place a ban on same-sex couples adopting children, even when same-sex marriage is now legal in every state. In these states, married couples may adopt children if they are deemed as “fit” parents or if adoption is deemed to be in the “best interest” of the child.<sup>36</sup> Mississippi is the only state in the nation that still has laws banning same-sex couples from adopting children without regard to their qualifications as parents when adoption is in the best interest of the child.<sup>37</sup> The Campaign for Southern Equality, Family Equality Council, and four same-sex couples brought a suit in *Campaign for Southern Equality v. Mississippi Department of Human Services*, to overturn Mississippi’s ban on adoption by same-sex couples.<sup>38</sup> Although the Mississippi court has not yet come to a decision, the lawsuit asserts that,

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<sup>30</sup> *Id.* See also CARLOS A. BALL, SAME-SEX MARRIAGE AND CHILDREN (2014).

<sup>31</sup> W. Bradford Wilcox & Robert I. Lerman, *For Richer, for Poorer: How Family Structures Economic Success in America*, AMERICAN ENTERPRISE INSTITUTE (Oct. 28, 2014), <http://www.aei.org/publication/for-richer-for-poorer-how-family-structures-economic-success-in-america/>.

<sup>32</sup> *Obergefell*, 135 S. Ct. at 2591.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* See also NeJaime, *supra* note 29.

<sup>35</sup> *Obergefell*, 135 S. Ct. at 2591.

<sup>36</sup> NeJaime, *supra* note 29.

<sup>37</sup> Beitsch, *supra* note 3.

<sup>38</sup> Civil Action Brief, *Campaign for Southern Equality v. Mississippi Department of Human Services*, (Aug. 12, 2015), <http://www.southernequality.org/wp-content/uploads/2015/08/15-08-12-COMPLAINT.pdf>.

“[t]he Mississippi Adoption Ban writes inequality into Mississippi law by requiring that married gay and lesbian couples be treated differently than all other married couples in Mississippi, unequivocally barring them from adoption without regard to their circumstances or qualifications as parents.”<sup>39</sup>

Mississippi’s law banning same-sex couples from adopting children is a clear violation of a same-sex couple’s right to have a family and have children. Adoption is often the one of the only means for same-sex couples to have children, alongside medically assisted insemination and surrogacy.<sup>40</sup> Same-sex married couples should also be allowed to adopt children if they are deemed as “fit” parents, according to the same standards applied to different-sex married couples, and if adoption is deemed to be in the child’s best interest. Since same-sex married couples in Mississippi are still banned from adopting, the state law is treating different-sex couples and same-sex couples unequally, which is a clear violation of the Equal Protection Clause of the Fourteenth Amendment.

Somewhat different legal problems for same-sex couples in Ohio exemplify similar discrimination and injustice.<sup>41</sup> Ohio allows same-sex parents to adopt, yet, does not recognize second parent adoption,<sup>42</sup> which is a way for a same-sex parent to adopt his or her partner’s biological or adoptive child in order to become co-parents.<sup>43</sup> Furthermore, an Ohio case, *Henry v. Himes*,<sup>44</sup> which was later merged with *Obergefell v. Himes*,<sup>45</sup> dealt with Ohio’s refusal to recognize legal out-of-state marriages of same-sex couples.<sup>46</sup> *Henry* also dealt with Ohio’s refusal to grant accurate birth certificates listing both parents to a child of a legally married same-sex couple.<sup>47</sup> As a result, the Court of Appeals in *Henry* held that courts should apply the heightened scrutiny test to Ohio’s discrimination against

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<sup>39</sup> *Id.* at 4.

<sup>40</sup> S.C., *How Same-Sex Couples Have Children*, THE ECONOMIST, (Aug. 3, 2014, 11:50 PM), <http://www.economist.com/blogs/economist-explains/2014/08/economist-explains-0>.

<sup>41</sup> Joan M. Burda, *Ohio Law*, LGBT LAW, <http://www.lgbtlaw.com/ohio-law.html>.

<sup>42</sup> *Id.*

<sup>43</sup> *Adoption by LGBT Parents*, NATIONAL CENTER FOR LESBIAN RIGHTS, 1 [http://www.nclrights.org/wp-content/uploads/2013/07/2PA\\_state\\_list.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf).

<sup>44</sup> *Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio, 2014).

<sup>45</sup> Amicus Brief, *Obergefell v. Himes*, 14-3057 (May 1, 2014).

<sup>46</sup> Lambda Legal, *Sixth Circuit Hears Arguments in Six Cases Seeking Recognition of Marriage and Adoption for Same-Sex Couples*, (Aug. 6, 2014), [http://www.lambdalegal.org/blog/20140806\\_6th-circuit-hears-arguments-in-6-marriage-cases](http://www.lambdalegal.org/blog/20140806_6th-circuit-hears-arguments-in-6-marriage-cases).

<sup>47</sup> *Id.*

same-sex married couples.<sup>48</sup>

The logic underlying *Obergefell*'s uniform ban on laws that infringe on the fundamental right to marry should equally extend to laws that discriminate against married same-sex couples in adoption. *Obergefell* held that "[t]he right of same-sex couples to marry is part of the liberty promised" in the Fourteenth Amendment's "guarantee of the equal protection of the laws."<sup>49</sup> Since both the liberty and equality of same-sex couples were significantly burdened, the Court struck down same-sex marriage bans and held that same-sex couples may exercise their fundamental right to marriage in all fifty states.<sup>50</sup> Under the same reasoning, the denial of adoption rights to married same-sex couples constitutes a clear violation of these couples' rights under the equal protection clause.<sup>51</sup>

Adoption laws that discriminate against married same-sex parents should be held to the standard of strict scrutiny in legal challenges, since *Obergefell* held marriage as a fundamental right. In *United States v. Carolene Products Co.*, the U.S. Supreme Court introduced and established different levels of scrutiny.<sup>52</sup> The Court held that strict scrutiny, which is the highest (strictest) level of scrutiny, is applied to laws that deprive a person of a fundamental right,<sup>53</sup> and courts have generally applied strict scrutiny in such situations.<sup>54</sup> Similarly, if adoption laws that discriminate against same-sex married couples do not survive strict scrutiny, the law should be determined to be unconstitutional, and the state with such law(s) shall cease to discriminate same-sex married couples from adopting children.

#### A. APPLYING STRICT SCRUTINY STANDARD TO MARRIED SAME-SEX COUPLES

##### 1. Purpose

To survive strict scrutiny, the law at issue must be "narrowly

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<sup>48</sup> *Id.*

<sup>49</sup> *Obergefell*, 135 S. Ct. at 2602.

<sup>50</sup> *Id.*

<sup>51</sup> See NeJaime, *supra* note 29.

<sup>52</sup> *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

<sup>53</sup> *Id.*

<sup>54</sup> *United States v. Virginia*, 518 U.S. 515, 568 (1996).



tailored” to a “compelling state interest.”<sup>55</sup> First, the court must look at the purpose of the law at issue and determine, whether it relates to a compelling state interest.<sup>56</sup> Here, one state interest for laws banning same-sex couples from adopting is that society wants to preserve the family structure of a traditional husband (man), wife (woman), and children to maintain stability in the home with regards to the parents’ relationship.<sup>57</sup> For many people, the normative understanding of “family” may not include the idea of same-sex parents.<sup>58</sup> Although legally speaking, the right to marry now includes same-sex marriages, social understanding and acceptance still needs to incorporate this definition to alleviate the social stigma against same-sex couples who seek to marry and adopt children.<sup>59</sup>

## 2. Fit

Next, a court must determine whether the law in question fits (is “narrowly tailored”) to its purpose (“state interest”).<sup>60</sup> In adjudicating adoption and custody rights, the court uses the “best interest of the child” standard, and whether or not the parent(s) is/are “fit” parents.<sup>61</sup> Sexual orientation of the parents is often an issue that arises in the determination of the child’s best interests.<sup>62</sup> Although maintaining a normative family structure is a professed state interest, this interest should not be a compelling interest because having a non-conforming family structure does not pose any detriment to any societal function.<sup>63</sup> Being gay or lesbian does not render one’s ability to raise a family or children any worse than different-sex parents.<sup>64</sup> Same-sex parents are not a detriment to a child’s life, and therefore, controlling the sexual orientation of prospective adoptive parents

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<sup>55</sup> Cornell University, *Strict Scrutiny*, LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/strict\\_scrutiny](https://www.law.cornell.edu/wex/strict_scrutiny).

<sup>56</sup> *Id.*

<sup>57</sup> Cynthia Godsoe, *Adopting the Gay Family*, 90 TUL. L. REV. 331 (2015).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Cornell, *supra* note 55.

<sup>61</sup> WILLIAM B. RUBENSTEIN ET AL., CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 814 (American Case Book Series 5th ed. 2014).

<sup>62</sup> *Id.* at 813.

<sup>63</sup> Godsoe, *supra* note 57.

<sup>64</sup> *Id.* (“[O]pponents of same-sex marriage have framed virtually all their arguments around the marriage-parenthood connection, arguing that expanding marriage will harm children. These arguments continued to be pressed in recent state and federal cases, despite being disproven by research.”)

is not a compelling state interest.<sup>65</sup> While the state-interest of maintaining family stability may be compelling, laws that discriminate same-sex couples from adoption are not narrowly tailored to this interest, because research has demonstrated that they are equally as stable as different-sex parents.<sup>66</sup> As such, these discriminatory laws would fail the court's strict security test and be deemed unconstitutional.

For example, the legislature in Florida argued that it has a compelling state interest in banning same-sex couples from adopting because adoption agencies want what is in the best interests of the child.<sup>67</sup> As John Stemberger, President of the Florida Family Policy Council, stated, "What's clear with the research is that what's best for children is it is best to have mothers and fathers."<sup>68</sup> In a landmark Florida state case, *In Re Gill*,<sup>69</sup> which lifted Florida's ban on adoptions by same-sex couples, the Florida Department of Children and Families argued that homosexuality is immoral, and therefore, the state's ban served an interest in upholding morality.<sup>70</sup> Yet, Judge Lederman of the Circuit Court ruled that same-sex parents may be "lawful foster parents in Florida and care for the most fragile children[.]" and therefore, "the exclusion forbidding homosexuals to adopt children did not further the public morality interest."<sup>71</sup>

#### B. BANS ON SAME-SEX PARENTS ADOPTING DO NOT SURVIVE THE STRICT SCRUTINY TEST

The court in *In Re Gill* ruled that the law banning same-sex couples from adopting was unconstitutional because it did not further a public moral interest.<sup>72</sup> It may be a state interest to give adoptive children what is in their "best interest," but it is not a compelling state interest to strip same-sex couples of the opportunity to expand their family and adopt children. Being gay or lesbian does not render members of a same-sex couple incapable of being a prospective adoptive parent, or render them incapable

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Sam Levine, *Florida House Approves Bill To Let Adoption Agencies Refuse Gay Parents*, THE HUFFINGTON POST (Apr. 9, 2015, 7:07 PM), [http://www.huffingtonpost.com/2015/04/09/florida-gay-adoption-bill\\_n\\_7037076.html](http://www.huffingtonpost.com/2015/04/09/florida-gay-adoption-bill_n_7037076.html).

<sup>68</sup> *Id.*

<sup>69</sup> *In Re Gill*, 45 So. 3d 79 (Fla. 2010).

<sup>70</sup> *Id.*

<sup>71</sup> *In Re Gill*, Lederman, C.S., Final Judgment of Adoption, 51.

<sup>72</sup> *Id.*

of providing for a family.<sup>73</sup> Therefore, it would not be reasonable to consider a couple's sexual orientation when determining whether it is in the child's best interest to be adopted by that couple.<sup>74</sup>

Although laws banning same-sex couples from adopting do not advance a compelling state interest, let us assume for the sake of argument that such laws do advance a compelling state interest. A court would then be required to look at whether the law is narrowly tailored to fit that compelling state interest.<sup>75</sup> The Department of Children and Families conceded that same-sex and different-sex parents make equally good parents, and scientific research has established that there is no difference in quality of parenting by same-sex couples or difference in the adjustment of their children compared to children raised by a different-sex couple.<sup>76</sup> In addition, sociologists Judith Stacey and Timothy J. Biblarz conducted a study to determine how and if a parent's sexual orientation affect a child's development, and they concluded that "the results demonstrate no difference on any measures between the heterosexual and homosexual parents regarding parenting styles, emotional adjustment, and sexual orientation of the child(ren)."<sup>77</sup>

These studies show that adoption discrimination laws are not narrowly tailored to the state's interest of finding a good home for the child and maintaining a normative family structure, because there is no proven difference to a child's well-being between different-sex and same-sex parents.<sup>78</sup> Therefore, it is unreasonable for a court to conclude that a lesbian, gay, bisexual, or transgender ("LGBT") person would not be a "fit" parent on the basis of his or her sexual orientation.<sup>79</sup> Moreover, adoption agencies can still find "fit" or "unfit" parents among same-sex couples, just as agencies would for different-sex couples.<sup>80</sup> As these studies exemplify, same-sex couples are also capable, like different-sex couples, of providing a stable and nurturing environment for the prospective adoptive child.<sup>81</sup>

Adoption agencies can and should examine same-sex couples with the same standards and qualifications as they do for different-sex couples in

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<sup>73</sup> Godsoe, *supra* note 57.

<sup>74</sup> *Id.*

<sup>75</sup> Cornell, *supra* note 55.

<sup>76</sup> Ann K. Wooster, *Adoption of Child by Same-Sex Partners*, 61 A.L.R. 6th 1 (2011).

<sup>77</sup> RUBENSTEIN ET AL., *supra* note 61, at 817.

<sup>78</sup> See NeJaime, *supra* note 29.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> RUBENSTEIN ET AL., *supra* note 61, at 817.

order to determine who is a “fit” parent.<sup>82</sup> Allowing a “fit” parent to adopt a child would fulfill the “best interests of the child” standard, which in turn meets the state’s interest of finding a suitable home for the child.<sup>83</sup> Since parenting style is shown not to be correlated with one’s sexual orientation, sexual orientation should not be a basis in discriminating against a prospective parent.<sup>84</sup> Same-sex couples should be held to the same standard as different-sex couples when determining whether they would be a right “fit” for the prospective child. For these reasons, adoption discrimination laws against married same-sex couples do not survive strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment, and are, therefore, unconstitutional.

### III. UNMARRIED SAME-SEX COUPLES

The sexual orientation, sex, or marital status of the prospective adoptive parents should not be the criterion by which adoption placement decisions are made. In this section, I will argue that it is unconstitutional to discriminate against unmarried same-sex couples because it treats same-sex unmarried couples differently than different-sex unmarried couples, which is a violation of the Equal Protection Clause of the Fourteenth Amendment.

#### A. EQUAL PROTECTION VIOLATION DUE TO SEXUAL ORIENTATION DISCRIMINATION

Discrimination against same-sex unmarried couples who seek to adopt a child contradicts all four principles *Obergefell* established to demonstrate that marriage is a fundamental right under the U.S. Constitution, regardless of sexual orientation: (1) “the right to personal choice regarding marriage is inherent in the concept of individual autonomy”<sup>85</sup>; (2) “the right to marry supports a two-person union unlike any other in its importance to the committed individuals”<sup>86</sup>; (3) marriage “safeguards children and families, and thus draws meaning from related rights of childrearing, procreation, and education”<sup>87</sup>; and (4) “marriage is a

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<sup>82</sup> NOLO, *supra* note 9. See also NeJaime, *supra* note 29.

<sup>83</sup> Godsoe, *supra* note 57.

<sup>84</sup> Wooster, *supra* note 76.

<sup>85</sup> *Obergefell*, 135 S. Ct. at 2589-90.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

keystone of the Nation's social order.”<sup>88</sup>

Same-sex unions, regardless of the decision to officially marry, embody these same four principles and should be considered as fundamental as marriage is in the context of adoption. Under these principles, sexual orientation discrimination in general for adoption laws should require a strict scrutiny analysis, triggered by the fundamental right of marriage.

Moreover, another way to determine an appropriate level of scrutiny for laws dealing with sexual orientation discrimination is to look at whether sexual orientation classifications are “suspect” or “quasi-suspect.”<sup>89</sup> If an unmarried same-sex couple is classified as “suspect,” the court would then apply the strict scrutiny standard.<sup>90</sup> If an unmarried same-sex couple is classified as “quasi-suspect,” the court will then apply the intermediate scrutiny standard.<sup>91</sup>

The U.S. Supreme Court laid out two factors to recognize as a suspect class and warrant strict scrutiny: (1) the group has suffered a history of invidious discrimination,<sup>92</sup> and (2) the characteristics that distinguish the group's members bear no relation to their ability to perform or contribute to society.<sup>93</sup> The U.S. Supreme Court has also identified the following two factors as additional considerations in recognizing a suspect class: (1) the characteristic that defines the members of the class as a discrete group is immutable or otherwise not within their control,<sup>94</sup> and (2) the group is a minority, or politically powerless.<sup>95</sup> In total, these four factors are weighed in a balancing test to determine whether a group is classified as a suspect class or quasi-suspect class, which in turn determines the level of scrutiny the court will apply to the law at issue.<sup>96</sup>

Sexual orientation satisfies all four factors to be considered a suspect class. First, LGBT people have been stigmatized by society throughout history, and have endured historical persecution.<sup>97</sup> As stated in *Windsor v. United States*, the most telling proof of animus towards the LGBT

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<sup>88</sup> *Id.*

<sup>89</sup> Cornell, *supra* note 55.

<sup>90</sup> *Id.*

<sup>91</sup> *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012).

<sup>92</sup> *See Virginia*, 518 U.S. at 531-32.

<sup>93</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

<sup>94</sup> *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

<sup>95</sup> *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

<sup>96</sup> *Windsor*, 699 F.3d at 182.

<sup>97</sup> *Id.*

community is “that for many years and in many states, homosexual conduct was criminal.”<sup>98</sup> Second, being LGBT does not bear any relation to one’s ability to perform or contribute to society.<sup>99</sup> For example, the court in *City of Cleburne v. Cleburne Living Center* held that “those who are mentally retarded have a reduced ability to cope with and function in the everyday world.”<sup>100</sup> On the contrary, same-sex couples do not possess such impairments.<sup>101</sup> Being non-heterosexual does not impact one’s aptitude or performance and, therefore, does not deter one’s ability to perform in society,<sup>102</sup> unlike someone that is developmentally or intellectually disabled who is not considered a suspect class.

Third, being LGBT is an immutable characteristic, according to Edward Stein’s *Mutability and Innateness Arguments About Lesbian, Gay, and Bisexual Rights*.<sup>103</sup> The test is whether the class exhibits “obvious, immutable, or distinguishing characteristics that define them as a discrete group.”<sup>104</sup> Likewise, many consider members of the LGBT community as a discernable group in regards to non-normative sexual orientation.<sup>105</sup> Sexual orientation is an essential identity and core characteristic of an individual’s selfhood.<sup>106</sup> As such, it would most likely be interpreted as an immutable characteristic.

Last, LGBT individuals are a minority group in society, according to Gary Gates’s study,<sup>107</sup> and remain a politically disempowered minority. Although the LGBT community has achieved much political success in recent years, the community would still be considered a minority group, because they do not have the political representation to protect themselves from wrongful discrimination.<sup>108</sup> Since sexual orientation classifications satisfy these four factors, its class should be recognized as suspect. Therefore, the strict scrutiny standard should apply to laws discriminating

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<sup>98</sup> *Id.*

<sup>99</sup> See Godsoe, *supra* note 57.

<sup>100</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985).

<sup>101</sup> See Godsoe, *supra* note 57.

<sup>102</sup> *Id.*

<sup>103</sup> Edward Stein, *Mutability and Innateness Arguments About Lesbian, Gay, and Bisexual Rights*, 89 CHI-KENT L. REV. 597 (2014).

<sup>104</sup> *Bowen*, 483 U.S. at 603.

<sup>105</sup> *Windsor*, 699 F.3d at 182.

<sup>106</sup> See Godsoe, *supra* note 57.

<sup>107</sup> Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender?*, THE WILLIAMS INSTITUTE (Apr. 2011).

<sup>108</sup> *Id.* at 184.

same-sex couples on the basis of sexual orientation in adoption.

1. Applying Strict Scrutiny Standard Against Sexual Orientation Discrimination

- i. Purpose

Adoption discrimination against unmarried same-sex couples based on sexual orientation discrimination would not survive the strict scrutiny test, because the law is not narrowly tailored to a compelling state interest. The state interest to allow the adoptive child to be adopted to a home with a “stable” family structure has no correlation with a prospective parent’s sexual orientation, regardless of marriage. According to researchers W. Bradford Wilcox and Robert I. Lerman, “[g]rowing up with both parents (in an intact family) is strongly associated with more education and income among today’s young men and women.”<sup>109</sup> This study also notes that “unstable families have aggravated problems associated with poverty, increased inequality, and economic stagnation.”<sup>110</sup> The study, however, does not mention whether the families in the study were headed by different-sex or same-sex couples.<sup>111</sup> Likewise, the *Williams Institute* has found that regardless of marriage status, “research is consistent in indicating that sexuality is not relevant to adults’ . . . parenting capacities,” and that same-sex parents have no impact on child’s “self-esteem, quality of life, psychological adjustment, . . . social functioning” and “academic and educational outcomes.”<sup>112</sup> Moreover, the *William’s Institute* found benefits for children raised by same-sex parents, such as “more expansive [and] less categorical notions of sexuality,” increased social resilience, and more developed empathy for socially marginalized groups.<sup>113</sup> This research suggests that a strong and consistent family unit, regardless of sexual orientation or marriage status, would advance the state interest in insuring the stability of an adopted child’s home. Therefore, adoption

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<sup>109</sup> W. Bradford Wilcox & Robert I. Lerman, *For Richer, for Poorer: How Family Structures Economic Success in America*, AMERICAN ENTERPRISE INSTITUTE (Oct. 28, 2014), <http://www.aei.org/publication/for-richer-for-poorer-how-family-structures-economic-success-in-america/>.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Abbie E. Goldberg, Nanette K. Gartrell, & Gary Gates, *Research Report on LGB-Parent Families*, THE WILLIAMS INSTITUTE, (July 2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/lgb-parent-families-july-2014.pdf>.

<sup>113</sup> *Id.* at 3, 16-25.

laws discriminating based on sexual orientation lack purpose and would fail strict scrutiny on these grounds.

ii. *Fit*

Sexual orientation discrimination against same-sex unmarried couples in adoption also do not fit the state's interest in providing a stable home. According to Michael J. Rosenfeld, "same-sex couples who ha[ve] a marriage-like commitment ha[ve] stable unions regardless of government recognition."<sup>114</sup> A legal union does not determine the longevity and stability of a relationship, whether heterosexual or homosexual,<sup>115</sup> and in turn, stability should not be a reason for discriminating against same-sex couples as prospective adoptive parents.

Moreover, Rosenfeld's study strengthens the idea that discrimination against same-sex unmarried couples is not narrowly tailored, because same-sex couples maintain stable homes regardless of whether their union is legally binding.<sup>116</sup> In fact, according to the American Psychological Association, the divorce rate in America ranges from 40 to 50 percent of married couples.<sup>117</sup> Since same-sex marriage was only recently legalized, same-sex separations are not included in these statistics, and this high percentage of divorces come primarily from different-sex marriages only.<sup>118</sup> Similarly, a couple's sexual orientation is not indicative of stability in the home.<sup>119</sup> For these reasons, sexual orientation discrimination in adoption laws does not survive strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment, and is, therefore, unconstitutional.

## B. EQUAL PROTECTION VIOLATION DUE TO SEX DISCRIMINATION

Discrimination to same-sex couples in adoption can also be considered sex-based discrimination. The courts have a misguided belief that a partnership made up of one man and one woman is better "fit" for parentage than a same-sex partnership.<sup>120</sup> This is considered sex-based

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<sup>114</sup> Michael J. Rosenfeld, *Couple Longevity in the Era of Same-Sex Marriage in the U.S.*, FORTHCOMING, JOURNAL OF MARRIAGE AND FAMILY.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Marriage & Divorce*, AMERICAN PSYCHOLOGICAL ASSOCIATION, <http://www.apa.org/topics/divorce/>.

<sup>118</sup> *Id.*

<sup>119</sup> Rosenfeld, *supra* note 114.

<sup>120</sup> See Godsoe, *supra* note 57.



discrimination because the couple is of the same-sex. Likewise, adoption laws that favor one sex over the other in a same-sex relationship should warrant intermediate scrutiny, because sex<sup>121</sup> classification is considered a quasi-suspect class based on the four-factor suspect-class determination.<sup>122</sup>

First, while sex classification has been a major part of discrimination in many spheres of society, such as the workplace in which employers have and still continue to treat men and women differently, sex discrimination is not as prominent in the family sphere, such as in adoption.<sup>123</sup> Men and women are able to play major roles in a family regardless of their biological sex.<sup>124</sup> Second, being a certain sex does not infringe on one's ability to perform or contribute to society, and despite ongoing discrimination, society at least normatively believes that men and women should be equals.<sup>125</sup> Third, sex is an immutable characteristic, being that it is biological. Like sexual orientation, sex is inherent and essential to an individual's identity and core self-hood.<sup>126</sup> Last, men and women are not classified as members of a minority group since they both are equally prominent in society. Doing a balancing test and weighing the four principles, sex classification would likely be a quasi-suspect class, warranting the intermediate scrutiny standard to laws pertaining to sex-based discrimination.

In *United States v. Virginia*, the Court held that to evaluate a statutory classification based on sex, the Court must apply "a standard that 'lies between the extremes of rational basis review and strict scrutiny.'"<sup>127</sup> Intermediate scrutiny is not as narrow as strict scrutiny, but not as broad as rational basis review.<sup>128</sup> Strict scrutiny is too strong in its standards and

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<sup>121</sup> According to the World Health Organization, "[s]ex refers to the biological and physiological characteristics that define men and women. *Gender* refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for men and women" (emphasis added). Michael Mills, *Sex Difference vs. Gender Difference?*, PSYCHOLOGY TODAY, (Oct. 11, 2011), <https://www.psychologytoday.com/blog/the-how-and-why-sex-differences/201110/sex-difference-vs-gender-difference-oh-im-so-confused>.

<sup>122</sup> *Virginia*, 518 U.S. at 570.

<sup>123</sup> Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311 (1989).

<sup>124</sup> *Id.*

<sup>125</sup> Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and The Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261 (2003).

<sup>126</sup> *Id.*

<sup>127</sup> *Virginia*, 518 U.S. at 570.

<sup>128</sup> *Id.*

rational basis review is too loose<sup>129</sup>; intermediate scrutiny is a level of scrutiny that lies somewhere between the two. Under intermediate scrutiny, the court must ask whether the statutory classification is “substantially related to an important governmental interest.”<sup>130</sup>

1. Applying Intermediate Scrutiny Standard to Sex-Based Discrimination

- i. Purpose

It would not serve an important state interest for adoption laws to discriminate based on sex, since both sexes in same-sex partnerships are equally equipped to parent. States may claim that they hold an important interest in children being raised by both sexes in single partnership; however, this argument falls short on the purpose analysis since research has demonstrated that same-sex couples are equally capable of raising families.<sup>131</sup>

- ii. Fit

Discrimination in the context of same-sex couples adopting can be considered sex-based discrimination, because the courts are discriminating against individuals in a partnership of a single sex. A state interest could be to maintain a stable and caring home for the best interests of the adoptive child, but this too falls short under intermediate scrutiny.

In Andrew Koppelman’s *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, he argued first that laws that discriminate against gay people are sex-based classifications, and second, that “[l]aws that discriminate against gay people are subject to heightened scrutiny.”<sup>132</sup> Koppelman claims that “the purpose being served by laws that discriminate against gays would have to be shown to be not merely rational, but so important that it justifies the reinforcement of sexism.”<sup>133</sup> As sex-based discrimination would not withstand heightened scrutiny, Koppelman argues

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 570-71.

<sup>131</sup> Dalton, *supra* note 125.

<sup>132</sup> Andrew Koppelman, *Discrimination Against Gays is Sex Discrimination*, Marriage and Same-sex Unions: A Debate, 209-217 (Lynn D. Wardle et al. eds.) (2003).

<sup>133</sup> *Id.* at 217.

that this discrimination would be unconstitutional.<sup>134</sup>

Sex-based discrimination against same-sex unmarried couples in adoption is not substantially related to an important state interest of creating a stable home for the adopted child. It is not appropriate for a court to hold that women are better-equipped parents than men, or vice versa. According to Nancy J. Mezey's *LGBT Families*, in different-sex relationships, the couple's gender roles are usually more defined, but in same-sex relationships, the couple's gender roles are not as obvious.<sup>135</sup> Parenting in a same-sex partnership "makes the gender role distinctions between 'mommy' and 'daddy' obsolete."<sup>136</sup> Likewise, as cited in the previous section, established research from the *William's Institute* has found no relationship between parents' sex and the development or wellbeing of child.<sup>137</sup> These studies strengthen the argument that sex-based discrimination against same-sex couples adopting children is not substantially related to an important state interest of maintaining stability.

Although gender roles may be somewhat related to parenting, there is no clear distinction in which a specific sex or gender fosters a better home for the adopted child.<sup>138</sup> Since gender roles are not determinative of the strength of a same-sex couple's parenting, laws discriminating on the basis of sex in adoption are unconstitutional and do not survive intermediate scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

### C. EQUAL PROTECTION VIOLATION DUE TO MARITAL STATUS DISCRIMINATION

Although the U.S. Supreme Court has never held that marital status is a classification triggering heightened equal protection scrutiny,<sup>139</sup> the recent decision in *Obergefell* gave courts a new framework for assessing the constitutionality of laws regarding marital status. For adoption laws that discriminate on the basis of marital status, whether a couple is married or unmarried, courts should be guided by *Obergefell*'s four central principles laid out in the first section of this Note.<sup>140</sup> Inherent in these four principles

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<sup>134</sup> *Id.*

<sup>135</sup> NANCY J. MEZEY, *LGBT FAMILIES* 101 (2015).

<sup>136</sup> *Id.*

<sup>137</sup> Goldberg, Gartrell, & Gates, *supra* note 112.

<sup>138</sup> *Id.*

<sup>139</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>140</sup> *Obergefell*, 135 S. Ct. at 2589-90 (the four principles are: (1) "the right to personal choice regarding marriage is inherent in the concept of individual autonomy," (2) "the right to marry"

is the notion that marriage is a personal choice between committed individuals that seeks to “safeguard” children and offer families stability.<sup>141</sup> However, given research that demonstrates that committed unmarried couples offer stable families for adoption<sup>142</sup>—unmarried couples that are “fit” as parents regardless of sex—courts could further the logic of *Obergefell*’s principles to find that the choice itself to marry is a fundamental right in which adoption laws cannot discriminate. In this section, I will make the argument that the *Obergefell* principles made the choice to marry a fundamental right, triggering strict scrutiny and, as a result, rule adoption laws that discriminate on the basis of marital status unconstitutional.

I will also argue that courts should not use rational basis “with a bite” as an appropriate standard of review, because marital status discrimination does not demonstrate animus. Rational basis “with a bite” is usually used in laws that have animus towards a specific group.<sup>143</sup> However, rational basis “with a bite” would not be an appropriate standard of review for marital status classification cases.<sup>144</sup> First, the U.S. Supreme Court has not formally recognized rational basis “with a bite” as a standard, but they have applied it in a few cases including *Eisenstadt v. Baird*,<sup>145</sup> *City of Cleburne v. Cleburne Living Ctr.*,<sup>146</sup> and *Romer v. Evans*.<sup>147</sup> The U.S. Supreme Court seems to apply rational basis “with a bite” only when it discerns animus against a group<sup>148</sup>; laws that are driven by a “bare . . . desire to harm a politically unpopular group.”<sup>149</sup>

Here, there is not enough animus to be shown in laws pertaining to marital discrimination, because these laws simply create an incentive for people to conduct themselves as the legislature reasonably thinks is valuable. State legislatures are not, per se, punishing couples for not being married, but instead are incentivizing marriage. Although states are

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“supports a two-person union unlike any other in its importance to the committed individuals,” (3) marriage “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education,” and lastly (4) marriage is a keystone of social order.).

<sup>141</sup> *Id.*

<sup>142</sup> See Wooster, *supra* note 76; Appell & Boyer, *supra* note 25.

<sup>143</sup> Kenji Yoshino, *Why The Court Can Strike Down Marriage Restrictions Under Rational-Basis Review*, 37 N.Y.U. REV. L. & SOC. CHANGE 331, 333 (2013).

<sup>144</sup> *Id.* at 36

<sup>145</sup> *Eisenstadt*, 405 U.S. at 438.

<sup>146</sup> *City of Cleburne*, 473 U.S. at 432.

<sup>147</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>148</sup> Yoshino, *supra* note 143.

<sup>149</sup> *Id.* at 335.

limiting the rights that unmarried couples have, this does not reflect a form of animus to be interdicted under standard of rational basis “with a bite.” Since there is no animus, per se, rational basis “with a bite” is not an appropriate level of scrutiny to be applied to laws pertaining to marital status discrimination, and instead, the strict scrutiny standard would be the appropriate standard under the guiding principles of *Obergefell*.

1. Applying Strict Scrutiny Standard Against Marital Status Discrimination

- i. Purpose

Adoption laws that discriminate based on marital status should trigger the strict scrutiny standard of review under the Equal Protection Clause of the Fourteenth Amendment, because the government should not deprive a couple of the right to have a family when “fit,” married or unmarried, couples are equally capable of raising a family.<sup>150</sup> The underlying logic of marriage exemplified in *Obergefell*’s four principles—family security, individual freedom, and child’s well-being, for example—should be extended to adoption laws that discriminate on marital status when married or unmarried parents are equally “fit.” The logic and values that deemed the right to marry a fundamental right should equally apply in this context and trigger strict scrutiny. As such, states do not have a compelling interest that is narrowly tailored to discriminate against unmarried couples in adoption when the couple is equally “fit” to married parents.

- ii. Fit

While the fundamental right to marry, regardless of the couple’s sexual orientation and sex, was provided as the central holding in *Obergefell*, the Court also held that, “[s]ame-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit.”<sup>151</sup> Marriage is an individual choice, and couples should not be discriminated against for their choice to raise families without a legal union. While a legal union may demonstrate commitment to maintain a stable

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<sup>150</sup> *Obergefell*, 135 S. Ct. at 2590; Mary Parke, *Are Married Parents Really Better for Children? What Research Says About the Effects of Family Structure on Child Well-Being*, CENTER FOR LAW AND SOCIAL POLICY (May 2003), <http://www.clasp.org/resources-and-publications/states/0086.pdf>.

<sup>151</sup> *Obergefell*, 135 S. Ct. at 2620.

family, unmarried parents who are equally “fit” to provide a nurturing and stable home should not be penalized for their choice to remain unmarried.<sup>152</sup> In general, same-sex married couples are more stable than different-sex married couples.<sup>153</sup> While marriage imbues certain economic and social rights and privileges,<sup>154</sup> many same-sex couples have raised stable and nurturing homes before they had the right to marry.<sup>155</sup> While unmarried parents do not have access to the same privileges as married parents, unmarried couples who are equally “fit” should be treated as similarly situated to married couples. Even after *Obergefell* gave all couples the right to marry regardless of sex, courts should still find equally “fit” unmarried couples as similarly situated since the choice to marry was held as an individual and personal fundamental right.<sup>156</sup>

Unmarried same-sex couples are particularly discriminated against from familial employment benefits accessible to married spouses.<sup>157</sup> As Lambda Legal wrote in the 2000 amicus curiae brief submitted to the Seventh Circuit in *Irizarry v. Board of Education of the City of Chicago*, “[i]t is unjust to use marriage as the sole trigger for familial employment benefits, denying to unmarried families fundamental protections of which they have equal need.”<sup>158</sup> While same-sex couples did not yet have the right to marry at the time of this case, if we interpret *Obergefell* as holding a fundamental right to an individual’s choice to marry, then discrimination from familial benefits should be found unconstitutional for similarly situated unmarried families. In these cases, the Equal Protection Clause would bar states from treating similarly situated “fit” unmarried and married families differently in regard to adoption and familial benefits.

States usually give married couples privileges that unmarried couples do not receive, as a way to incentivize people to get married.<sup>159</sup> A state is constitutionally allowed to implement these laws because they are

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<sup>152</sup> Parke, *supra* note 150.

<sup>153</sup> Sunnive Brydum, *Report: Same-Sex Couples Less Likely to Divorce*, ADVOCATE (Dec. 13, 2014, 7:00 AM), <http://www.advocate.com/politics/marriage-equality/2014/12/13/report-same-sex-couples-less-likely-divorce> (The average divorce rate for same-sex couples was 1.1% annually, compared to an annual average 2% divorce rate for different-sex couples).

<sup>154</sup> Parke, *supra* note 150.

<sup>155</sup> See Godsoe, *supra* note 57.

<sup>156</sup> *Obergefell*, 135 S. Ct. at 2589-90.

<sup>157</sup> Nancy D. Polikoff, “Two Parts of the Landscape of Family in America”: Maintaining Both Spousal and Domestic Partner Employee Benefits for Both Same-Sex and Different-Sex Couples, 81 FORDHAM L. REV. 735, 744 (2012).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

not seeking to punish a couple for not being married, but rather incentivizing unmarried couples to get married through offering additional privileges.<sup>160</sup> While this rationale may make even more legal sense after *Obergefell* held marriage as a fundamental right for all couples, adoption laws should be treated differently. Adoption is contrary to the idea of giving privileges to married couples to incentivize marriage. Rather, adopting, especially for same-sex couples, is not a privilege that is not given to unmarried couples; instead, the state is treating the marital status as a means to discriminate against a couple, in order to prohibit them from adopting children. These laws strip rights from similarly situated “fit” couples based on their individual choice to marry—especially from same-sex couples in which adoption is often the only means to a family—instead of incentivizing marriage through offering privileges.

Before *Obergefell*, there was a clear marital status discrimination against same-sex couples, because laws would penalize same-sex couples for not being married, when they were not legally allowed to marry in the first place.<sup>161</sup> It is the jurisdiction’s public policy to promote marriage, as stated in *Irizarry*.<sup>162</sup> However, if we interpret *Obergefell* as holding for every individual’s fundamental right to marry, similarly situated unmarried couples are discriminated against by the current adoption laws, because they are being treated differently than equally “fit” married couples. This discrimination is particularly true for unmarried same-sex couples because adoption is often their only means to raising a family.<sup>163</sup> In these cases, marriage would not be a same-sex couple’s individual choice but rather a prerequisite to be treated equally, despite being equally “fit” and able to raise a stable family.

#### IV. CONCLUSION

States’ laws and policies banning same-sex couples from adopting is unconstitutional. First, looking at married same-sex couples, it is clear that bans on same-sex married couples from adopting children are plainly unconstitutional, if they too are considered as “fit” parents, under the same standards applied to married different-sex couples. Banning same-sex married couples from adopting when different-sex married couples may

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<sup>160</sup> *Id.*

<sup>161</sup> Prof. Nancy D. Polikoff, *What Marriage Equality Arguments Portend For Domestic Partner Employee Benefits*, 37 N.Y.U. REV. L. & SOC. CHANGE 49, 50 (2013).

<sup>162</sup> *Irizarry v. Bd. of Educ.*, 251 F.3d 604 (7th Cir., 2001).

<sup>163</sup> S.C., *supra* note 40. See also Godsoe, *supra* note 57.

adopt clearly contravenes the Equal Protection Clause of the Fourteenth Amendment. The disparate treatment of two similarly situated groups of people is a clear violation of equality and, therefore, unconstitutional. Laws banning same-sex married couples from adopting also do not survive the strict scrutiny test and would, therefore, be unconstitutional.

Second, looking at unmarried same-sex couples, there are three ways in which states discriminate against unmarried same-sex couples: sexual orientation discrimination, sex discrimination, and marital status discrimination. Both sexual orientation discrimination and marital status discrimination warrant strict scrutiny for reasons contemplated above. As concluded, laws banning unmarried same-sex couples from adopting do not survive strict scrutiny and, therefore, are unconstitutional.

To enforce a slightly looser standard, sex-based discrimination would likely warrant intermediate scrutiny review, based on how courts have approached sex-based discrimination in the past. Laws banning unmarried same-sex couples from adopting, however, also do not survive intermediate scrutiny and, therefore, are unconstitutional.

If the U.S. were to implement a federal law that lifted bans on same-sex couples adopting children, it would create more family units, and fewer children would be in the foster care system.<sup>164</sup> This would open up many more homes for foster children, and also allow more same-sex couples to start a family.<sup>165</sup> With more and more same-sex couples adopting children and starting families, the normative understanding of a family will change and become more inclusive.

In conclusion, under each form of discrimination, laws that treat same-sex couples differently than different-sex couples, whether married or unmarried, are in violation of the Equal Protection Clause and are unconstitutional.

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<sup>164</sup> See Lifelong Adoptions, *LGBT Adoption Statistics*, LIFELONG ADOPTIONS (2017), <https://www.lifelongadoptions.com/lgbt-adoption/lgbt-adoption-statistics>; Danielle Berger, *Breaking down barriers So Foster Kids Can Find a Family*, CNN (Apr. 12, 2012) <http://www.cnn.com/2012/04/12/us/cnnheroes-wing-kovarik-gay-adoption/> (“[W]ing-Kovarik has had his two boys, Chris and Shawn, since 2002, and he can’t imagine sitting idle while there are so many other foster children who are still stuck in the system.”); Elizabeth Gettelman, *Banning Gay Adoption Would Cost Foster Care System \$130 Million*, MOTHER JONES (Mar. 27, 2007 1:00 PM), <http://www.motherjones.com/mojo/2007/03/banning-gay-adoption-would-cost-foster-care-system-130-million>.

<sup>165</sup> *Id.*