

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

APRIL DEBOER, individually and as parent
and next friend of N.D.-R, R.D.-R., and J.D.-R,
minors, and JAYNE ROWSE, individually and as parent
and next friend of N.D.-R, R.D.-R., and J.D.-R,
minors,

Plaintiffs,

ED Mi No. 12-10285

-vs-

RICHARD SNYDER, in his official capacity as
Governor of the State of Michigan, and
BILL SCHUETTE, in his official capacity as
Michigan Attorney General,

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

PARTIES

1. Plaintiffs April DeBoer and Jayne Rowse are citizens and residents of Hazel Park, Michigan, in the Eastern District of Michigan, Southern Division. DeBoer and Rowse each appear individually and as parent and next friend of N.D.-R (“N”), R.D.-R. (“R”), and J.D.-R (“J”), minors.

2. Defendant Richard Snyder is sued in his official capacity as Governor of the State of Michigan. Governor Snyder is a person within the meaning of 42 U.S.C. §1983, and he is, was, and will be acting under color of state law at all times relevant to this Complaint.

3. Defendant Bill Schuette is sued in his official capacity as Michigan Attorney General. Schuette is a person within the meaning of 42 U.S.C. §1983, and he is, was, and will be acting

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

APRIL DEBOER, individually and as parent
and next friend of N.D.-R, R.D.-R., and J.D.-R,
minors, and JAYNE ROWSE, individually and
as parent and next friend of N.D.-R, R.D.-R.,
and J.D.-R, minors,

Plaintiffs,

v.

Case No. 12-10285
Honorable Bernard A. Friedman

RICHARD SNYDER, in his official capacity as
Governor of the State of Michigan,
BILL SCHUETTE, in his official capacity as
Michigan Attorney General, and
BILL BULLARD, JR., in his official capacity as
Oakland County Clerk,

Defendants.

**MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL
LIBERTIES FUND OF MICHIGAN, HUMAN RIGHTS CAMPAIGN FUND, LAMBDA
LEGAL DEFENSE AND EDUCATION FUND, INC., NATIONAL CENTER FOR
LESBIAN RIGHTS, FAMILY EQUALITY COUNCIL, AFFIRMATIONS COMMUNITY
CENTER, EQUALITY MICHIGAN, RUTH ELLIS CENTER, AND KICK FOR LEAVE
TO FILE *AMICUS CURIAE* BRIEF**

The American Civil Liberties Union, the American Civil Liberties Fund of Michigan,
Human Rights Campaign Fund, Lambda Legal Defense and Education Fund, Inc., National
Center for Lesbian Rights, Family Equality Council, Affirmations Community Center, Equality
Michigan, Ruth Ellis Center and KICK file this motion for leave to file an *amicus curiae* brief
for the reasons that follow here and in the brief that follows:

1. The *American Civil Liberties Union* (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The *ACLU Fund of Michigan* is one of its statewide affiliates. The ACLU and the ACLU Fund of Michigan advocate for equal rights of lesbian, gay, bisexual and transgender ("LGBT") people, and have significant experience litigating cases involving both parenting rights and relationship protections. Accordingly, this case is of significant concern to the ACLU and its members.
2. *Human Rights Campaign* ("HRC"), the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where LGBT people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. HRC has over 1.5 million members and supporters, including more than 65,000 in the State of Michigan, all committed to making fair treatment in parenting laws a reality.
3. *Lambda Legal Defense and Education Fund, Inc.* ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of LGBT people, and people with HIV. Lambda Legal works to ensure that children reared by lesbian and gay adults benefit from the same respect and protection for their primary relationships as do other children, including by having their relationships with their parents recognized and safeguarded. Lambda Legal also works to ensure the freedom to marry for lesbian and gay couples.
4. *National Center for Lesbian Rights* ("NCLR") is a national legal non-profit organization, founded in 1977, that is committed to advancing the civil and constitutional rights of LGBT people and their families through litigation, policy, and public education. NCLR has a strong interest in ensuring that same-sex parents and the children they are raising are able to establish and protect their parent-child relationships legally through adoption. NCLR has

litigated cases across the country involving the constitutional rights of LGBT parents and their families, including numerous other cases involving the ability of same-sex parents to adopt.

5. **Family Equality Council**, founded in 1979, is the national organization representing the approximately one million same-sex headed families, raising approximately two million children across the US, including over 15,000 in Michigan – nearly 20% of whom are raising children. FEC works to achieve social and legal equality for LGBT families by providing direct support, educating the American public, and advancing policy reform that ensures full recognition and protection under the law. Family Equality Council and its supporters are deeply concerned with protecting the rights of LGBT parents and their children in Michigan and across the nation, which must include access to adoption, which is in the best interests of the children.

6. **Affirmations** is metro Detroit's community center for lesbian, gay, bisexual & transgender (LGBT) people and their allies. Open since 1989 and located in Ferndale, a suburb of Detroit, Affirmations provides a welcoming space where people of all sexual orientations, gender identities & expressions, and cultures can find support and unconditional acceptance, and where they can learn, grow, socialize and have fun. Center members include LGBT parents and their children and the Center is concerned that their families have the legal protections associated with adoption.

7. **Equality Michigan** is Michigan's only statewide anti-violence and advocacy organization working primarily for Michigan's lesbian, gay, bisexual and transgender communities. The organization works to create change on a local and state level that advances equality and legal protections for LGBT communities. For years Equality Michigan has advocated for public policy reform that ensures that children of same-sex couples are afforded the same legal protections as children of heterosexual parents, through legal adoption.

8. **The Ruth Ellis Center** is the only mission specific agency in the entire Midwest dedicated to Lesbian, Gay, Bi-attractional, Transgender and Questioning (LGBTQ) youth. The Center provides short-term and long-term residential safe space and support services for runaway, homeless, and at-risk LGBTQ youth in Detroit and Southeastern Michigan. The Center is also working to secure adoptive and foster placements for LGBTQ youth without families. The Center supports adoption rights for LGBT couples and believes that it is the best interest of their children to have the legal, emotional and financial stability that adoption affords.

9. **KICK**, the Agency for LGBT African Americans, is a non-profit organization founded in 2003 with the help of Detroit LGBT residents. Together, their aim is to continue to implement LGBT affirming programs, services, projects and special events, and to partner with other social justice organizations and allies with similar beliefs. KICK supports policies and programs that support LGBT families and believes that LGBT parent-child relationships should be protected under the law, through adoption.

10. Courts have found it appropriate to allow an *amicus brief* when “the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Ryan v Commodity Futures Trading Commission*, 125 F. 3d 1062, 1063 (7th Cir. 1997); *Gabriel Technologies Corp v Qualcomm Inc*, 2012 WL 849167 (S.D. Cal. March 12, 2012). Plaintiffs have stated two claims- that a categorical denial to parents in same-sex relationships of the opportunity to petition for adoption of children they are raising with their partner is unconstitutional, as is excluding same-sex couples like Plaintiffs from marriage. As national and state-based organizations dedicated to advancing legal rights for LGBT people and families, amici are uniquely situated to address the intersection of these two claims. Amici’s brief explains why denying second parent adoptions to same-sex couples violates constitutional

guarantees of equal protection and due process, separate and apart from the question of whether the state may constitutionally deny marriage licenses to same-sex couples. Amici believe that this Court may conclude that denying same-sex couples the ability to obtain second parent adoptions is unconstitutional without addressing the issue of whether Michigan may deny same-sex couples the right to marry.

11. Pursuant to Local Rule 7.1(a), the ACLU (amici) has contacted the parties' counsel to seek their consent for this filing. All the parties have consented.

12. If this motion is granted, amici will file the brief that is attached hereto as Exhibit A.

WHEREFORE, for the foregoing reasons, and for the reasons stated in the accompanying brief, amici respectfully request this Court to file the attached brief *amicus curiae*.

Respectfully submitted,

/s/ Jay D. Kaplan

Jay D. Kaplan

Michael J. Steinberg

Kary L. Moss

American Civil Liberties Union \

Fund of Michigan

2966 Woodward Avenue

Detroit, MI 48201

313-578-6812

Kaplan@aclumich.org

msteinberg@aclumich.org

kmoss@aclumich.org

/s/ Rose Saxe

Rose Saxe

Senior Staff Attorney

ACLU LGBT & AIDS Project

125 Broad Street, 18th Fl.

New York NY 10004

212.549.2605

rsaxe@aclu.org

Attorneys for Amici

DATED: December 21, 2012

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

APRIL DEBOER, individually and as parent
and next friend of N.D.-R, R.D.-R., and J.D.-R,
minors, and JAYNE ROWSE, individually and
as parent and next friend of N.D.-R, R.D.-R.,
and J.D.-R, minors,

Plaintiffs,

v.

Case No. 12-10285
Honorable Bernard A. Friedman

RICHARD SNYDER, in his official capacity as
Governor of the State of Michigan,
BILL SCHUETTE, in his official capacity as
Michigan Attorney General, and
BILL BULLARD, JR., in his official capacity as
Oakland County Clerk,

Defendants.

**BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, ACLU FUND OF
MICHIGAN, HUMAN RIGHTS CAMPAIGN, LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC., NATIONAL CENTER FOR LESBIAN RIGHTS, FAMILY
EQUALITY COUNCIL, AFFIRMATIONS COMMUNITY CENTER, EQUALITY
MICHIGAN, RUTH ELLIS CENTER AND KICK**

TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICI.....1

SUMMARY OF ARGUMENT3

DISCUSSION5

I. DENYING PLAINTIFFS ELIGIBILITY TO PETITION FOR ADOPTION OF THE CHILDREN THEY ARE RAISING WITH THEIR PARTNER VIOLATES THE CONSTITUTION AND DOES NOT TURN ON WHETHER SAME-SEX COUPLES ARE ALLOWED TO MARRY.....5

II. GRANTING ELIGIBILITY TO PETITION FOR SECOND PARENT ADOPTIONS TO PLAINTIFFS AND OTHERS LIKE THEM SERVES THE BEST INTERESTS OF CHILDREN, WITHOUT REGARD TO WHETHER THE PARENTS ARE MARRIED.10

CONCLUSION.....13

INDEX OF AUTHORITIES

Cases

Alaska Civil Liberties Union v. Alaska, 122 P.3d 781, 788–89 (Alaska 2005)..... 6

Bettelon v. Metalock Repair Serv., 137 Mich. App. 448, 451, 358 N.W.2d 608, 609 (1984)..... 7

Collins v. Brewer, 727 F. Supp. 2d 797, 803 (D. Ariz. 2010) 6

Diaz v. Brewer, 656 F.3d 1008 (9th Cir. 2011) 6

Dragovich v. U.S. Dep’t of the Treasury,848 F. Supp. 2d 1091, 1098 (N.D. Cal. 2012)..... 6

Gill v. Office of Personnel Mgmt., 699 F. Supp. 2d 374, 388 (D. Mass. 2010) 12

Hansen v. McClellan, 2006 WL 3524059 Mich. App., 2006. Dec. 7, 2006..... 6

Hollingsworth v. Perry, No. 12-144 (cert. granted Dec. 7, 2012) 4, 12, 13

In re Adoption of B.L.V.B., 628 A.2d 1271 (Vt. 1993)..... 8, 12

In re Adoption of John Doe & James Doe, 2008 WL 5006172, at *28 (Fla. Cir. Ct., Miami-Dade Cnty., Nov. 25, 2008)..... 12

In re Adoption of K.S.P., 804 N.E.2d 1253 (Ind. Ct. App. 2004)..... 8

In re Adoption of M.M.G.C., 785 N.E.2d 267, 270-71 (Ind. Ct. App. 2003)..... 12

In re Adoption of Two Children By H.N.R., 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995).... 8, 9

In re Adoption of X.X.G. & N.R.G., 45 So. 3d 79 (Fla. App. 2010) 12

In re Adams, 189 Mich. App. 540; 473 N.W.2d 712 (1991) 8

In re Hart, 806 A.2d 1179 (Del. Fam. Ct. 2001) 8, 9

In re Jacob, 660 N.E.2d 397 (N.Y. 1995)..... 8

In re M.M.D., 662 A.2d 837, 860 (D.C. Ct. App. 1995)..... 11

In re Tammy, 619 N.E.2d 315, 315- 316 (Mass. 1993) 8

Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010)..... 4, 12, 13

Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003) 8

Usitalo v Landon, 2012 WL 6177046 Mich. App. 2012 6

Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972)..... 9

Statutes

Colo. Rev. Stat. § 19-5-203(1)(d.5) 11

Conn. Gen. Stat. § 45a-726a (1996) 10

M.C.L. § 551.1 12

M.C.L. §§ 710.24(1) 8

M.C.L. §§ 710.46 12

MCL 551.1 9

MCL 722.24 10

Mont. Code Ann. § 42-4-302(c)(2)..... 10

STATEMENT OF INTEREST OF AMICI

The *American Civil Liberties Union* (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The *ACLU Fund of Michigan* is one of its statewide affiliates. The ACLU and the ACLU Fund of Michigan advocate for equal rights of lesbian, gay, bisexual and transgender ("LGBT") people, and have significant experience litigating cases involving both parenting rights and relationship protections. Accordingly, this case is of significant concern to the ACLU and its members.

Human Rights Campaign ("HRC"), the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where LGBT people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. HRC has over 1.5 million members and supporters, including more than 65,000 in the State of Michigan, all committed to making fair treatment in parenting laws a reality.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of LGBT people, and people with HIV. Lambda Legal works to ensure that children reared by lesbian and gay adults benefit from the same respect and protection for their primary relationships as do other children, including by having their relationships with their parents recognized and safeguarded. Lambda Legal also works to ensure the freedom to marry for lesbian and gay couples.

National Center for Lesbian Rights ("NCLR") is a national legal non-profit organization, founded in 1977, that is committed to advancing the civil and constitutional rights of LGBT people and their families through litigation, policy, and public education. NCLR has a strong interest in ensuring that same-sex parents and the children they are raising are able to

establish and protect their parent-child relationships legally through adoption. NCLR has litigated cases across the country involving the constitutional rights of LGBT parents and their families, including numerous other cases involving the ability of same-sex parents to adopt.

Family Equality Council, founded in 1979, is the national organization representing the approximately one million same-sex headed families, raising approximately two million children across the US, including over 15,000 in Michigan – nearly 20% of whom are raising children. FEC works to achieve social and legal equality for LGBT families by providing direct support, educating the American public, and advancing policy reform that ensures full recognition and protection under the law. Family Equality Council and its supporters are deeply concerned with protecting the rights of LGBT parents and their children in Michigan and across the nation, which must include access to adoption, which is in the best interests of the children.

Affirmations is metro Detroit's community center for lesbian, gay, bisexual & transgender (LGBT) people and their allies. Open since 1989 and located in Ferndale, a suburb of Detroit, Affirmations provides a welcoming space where people of all sexual orientations, gender identities & expressions, and cultures can find support and unconditional acceptance, and where they can learn, grow, socialize and have fun. Center members include LGBT parents and their children and the Center is concerned that their families have the legal protections associated with adoption.

Equality Michigan is Michigan's only statewide anti-violence and advocacy organization working primarily for Michigan's lesbian, gay, bisexual and transgender communities. The organization works to create change on a local and state level that advances equality and legal protections for LGBT communities. For years Equality Michigan has advocated for public

policy reform that ensures that children of same-sex couples are afforded the same legal protections as children of heterosexual parents, through legal adoption.

The Ruth Ellis Center is the only mission specific agency in the entire Midwest dedicated to Lesbian, Gay, Bi-attractional, Transgender and Questioning (LGBTQ) youth. The Center provides short-term and long-term residential safe space and support services for runaway, homeless, and at-risk LGBTQ youth in Detroit and Southeastern Michigan. The Center is also working to secure adoptive and foster placements for LGBTQ youth without families. The Center supports adoption rights for LGBT couples and believes that it is the best interest of their children to have the legal, emotional and financial stability that adoption affords.

KICK, the Agency for LGBT African Americans, is a non-profit organization founded in 2003 with the help of Detroit LGBT residents. Together, their aim is to continue to implement LGBT affirming programs, services, projects and special events, and to partner with other social justice organizations and allies with similar beliefs. KICK supports policies and programs that support LGBT families and believes that LGBT parent-child relationships should be protected under the law, through adoption.

SUMMARY OF ARGUMENT

Amici, Michigan-based and national organizations that advocate for lesbian, gay, bisexual and transgender (LGBT) people, agree with Plaintiffs on both counts of their complaint. The categorical denial to parents in same-sex relationships of the opportunity to petition for adoption of the children they are raising with their partner (also known as a “second parent adoption”) is unconstitutional, as is excluding same-sex couples like Plaintiffs from marriage.

Amici submit this brief to address a question regarding the intersection of those two claims, and to explain why denying second parent adoptions to committed same-sex couples

(who are barred from marriage as a matter of Michigan law) violates constitutional guarantees of equal protection and due process, separate and apart from the question of whether the state may constitutionally deny marriage licenses to same-sex couples. This Court may find that denying same-sex couples the ability to obtain second parent adoptions is unconstitutional without addressing the question of whether Michigan may deny same-sex couples the ability to marry because these two claims are separate.

In their adoption count, Plaintiffs are seeking the ability to petition for adoption on the same terms already available to stepparents under Michigan law. As discussed below, the relief Plaintiffs seek does not require them to be married, and indeed a number of other states have construed adoption statutes similar to Michigan's to permit a second, unmarried person to petition to adopt a child that he or she is raising with a partner. Existing Michigan domestic relations law confirms that parental status is not tied to marital status. Nevertheless, the State's position is that second parent adoption is not available to same-sex couples. Granting second parent adoptions to gay and lesbian couples, who cannot marry under Michigan law, will further the stability of those families and protect the well-being of the children already being raised by Plaintiffs and others like them.

Accordingly, *amici* respectfully submit that this Court should grant the Plaintiffs' motion for summary judgment on the adoption count and deny the State's cross motion as to that count. Second parent adoptions are the core of the relief sought by Plaintiffs, and can be granted regardless of whether same-sex couples are allowed to marry in Michigan. Moreover, because the Supreme Court has granted review in the case challenging California's exclusion of same-sex couples from marriage, *Hollingsworth v. Perry*, No. 12-144 (cert. granted Dec. 7, 2012), this Court may determine that it is prudent to await decision in that case before addressing Plaintiffs'

marriage count. To the extent the Court reaches the marriage count, however, *amici* agree with Plaintiffs that denial of marriage licenses is unconstitutional.

DISCUSSION

I. Denying Plaintiffs Eligibility to Petition for Adoption of the Children They Are Raising with Their Partner Violates the Constitution and Does Not Turn on Whether Same-Sex Couples Are Allowed to Marry.

In challenging the denial of second parent adoptions, Plaintiffs assert that refusing to grant Plaintiffs family protections otherwise extended to couples headed by different-sex parents violates the federal constitution. *See* Plaintiff's Amended Compl., Dkt. #38, ¶¶ 16-24. Contrary to the State's suggestion, resolution of that claim does not turn on whether or not Plaintiffs can marry. They are separate issues. As discussed below, Michigan law already contemplates parenting by unmarried couples, and courts throughout the country have allowed second parent adoption by unmarried gay and lesbian individuals raising children together with the child's legal parent.

As an illustration, consider a hypothetical state law allowing only married people to work as teachers. An equal protection challenge to such a policy would not require the issuance of marriage licenses to the unmarried individuals who sought to work as teachers – rather, the appropriate relief would be to strike down the discriminatory restriction. Here too, the appropriate relief under the adoption count is simply to allow Plaintiffs to petition for second parent adoptions on the terms otherwise available to step-parents.

Defendants argue that the adoption statutes only allow single individuals or married couples, or the married spouse of a legal parent to adopt. *See* Def. Mot. To Dismiss, Dkt. # 14, at 5-6. While Michigan courts have not conclusively addressed the statutory issue, Defendants'

position is that Plaintiffs are not entitled to the adoptions they seek.¹ Under Defendants' interpretation, because same-sex couples cannot marry in Michigan or have marriages from other states recognized under Michigan law, same-sex couples are precluded from adopting. Because the only group denied the ability to adopt is same-sex couples, denial of second parent adoptions is discrimination based on sexual orientation. *See, e.g., Collins v. Brewer*, 727 F. Supp. 2d 797, 803 (D. Ariz. 2010) (restricting benefits to married people is impermissible sexual orientation discrimination where state law prevents same-sex couples from marrying), *aff'd sub nom. Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011); *Dragovich v. U.S. Dep't of the Treasury*, 848 F. Supp. 2d 1091, 1098 (N.D. Cal. 2012) (same); *Alaska Civil Liberties Union v. Alaska*, 122 P.3d 781, 788–89 (Alaska 2005) (same).

The State wrongly conflates the question of whether same-sex couples may adopt with the question of whether same-sex couples must be allowed to marry by arguing that because Plaintiffs are treated the same as unmarried heterosexual couples, the denial of eligibility to petition to adopt is not impermissible discrimination. *See, e.g., State's Mot. To Dismiss*, Dkt. #14, at 4 (“Under Michigan’s Adoption Code, only a single person or a married couple may

¹ Although defendants have taken the contrary position, it should be noted that some Michigan courts have interpreted the adoption law to allow second parent adoption by same-sex partners. *See Usitalo v Landon*, 2012 WL 6177046 Mich. App. 2012. December 11, 2012 (holding that trial judges have subject matter jurisdiction to grant second parent adoptions and those judgments cannot be attacked collaterally many years after they are entered); *Hansen v. McClellan*, 2006 WL 3524059 Mich. App., 2006. Dec. 7, 2006 (same). *See also* M.C.L. §§ 710.24(1) (any “person” may adopt a child). Defendants assert that *In re Adams*, 189 Mich. App. 540; 473 N.W.2d 712 (1991), forecloses the relief sought here. But *Adams* does not address whether a second parent adoption can be granted to same-sex couples – in that case, two individuals who were each married to *another* person sought to jointly adopt. To *amici's* knowledge, no appellate court in Michigan has directly decided the question of whether the state adoption code allows same-sex couples to petition for second parent adoptions. *Cf. Usitalo*, at n.2 (declining to address question).

adopt a child. This restriction does not discriminate based on personality or even sexual orientation. Single people who adopt may reflect a broad spectrum of Michigan's citizenry.”). Rather, while Plaintiffs seek to be treated equally to those families who can obtain step-parent adoptions, the relief sought in Count I does not challenge the constitutionality of Michigan’s marriage amendment. Categorically denying any mechanism for same-sex couples raising children to secure a legal parent-child relationship with both parents denies those families equal protection of the laws.

For the same reason, the relief sought by Plaintiffs in the adoption count does not implicate the marriage amendment to the Michigan Constitution, Const. 1963, art 1, § 25, which limits marriage to different-sex couples.² A second parent adoption does not depend on a marital relationship of adults. The only question before this Court on the adoption count is whether denying equal treatment to similarly-situated families, in terms of the ability to establish a legal parent/child relationship, violates the federal constitution.

Under settled Michigan and federal constitutional law, children cannot be disadvantaged because of their circumstances of birth. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Bettelon v. Metalock Repair Serv.*, 137 Mich. App. 448, 451, 358 N.W.2d 608, 609 (1984). Many unmarried parents are raising children together – including parents who are both

² Section 25 of the Michigan Constitution reads, in full:

To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

This provision limits recognition of marital relationships in Michigan to those involving different-sex couples, but says nothing about parenting relationships. Similarly, MCL 551.1, which defines marriage as a “unique relationship between a man and a woman,” has no impact on parent-child relationships.

biologically related to their children and are thus already legal parents, as well as couples like Plaintiffs who wish to secure the protections of legal parentage. For this reason, the Michigan Child Custody Act, for example, which addresses who may petition for custody of a child, speaks only to the relationship between child and parent: “In all actions involving dispute of a minor child's custody, the court shall declare the child's inherent rights and establish the rights and duties as to the child's custody, support, and parenting time in accordance with this act.” MCL 722.24(1). Parent is defined to mean the natural or adoptive parent of a child, without regard to marital status, sex or sexual orientation. MCL 722.22(h).

As further evidence that marriage is not a predicate to second parent adoption, it is also instructive that while Defendants assert that second parent adoptions are not available in Michigan, courts in many other jurisdictions with adoption statutes similar to Michigan's, such as California, Indiana, New Jersey, New York, Vermont, the District of Columbia and Delaware, have construed those statutes to allow second parent adoption, despite the fact that at the time these decisions were issued, *none* of those states allowed same-sex couples to legally marry. *See, e.g., Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); *In re Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993); *In re Tammy*, 619 N.E.2d 315, 315- 316 (Mass. 1993) *In re Adoption of K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004); *In re Adoption of Two Children By H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); *In re Hart*, 806 A.2d 1179 (Del. Fam. Ct. 2001). In addition, a number of states have passed legislation that expressly permits second parent adoptions, without regard to the marital status of the parents. *See, e.g., Conn. Gen. Stat. § 45a-726a* (1996) (enacted over ten years before same-sex couples could marry in Connecticut); *Mont. Code Ann. § 42-4-302(c)(2)* (“For good cause shown, a court may allow an individual who is not the stepparent but who has the consent of the

custodial parent of a child to file a petition for adoption. The petition must be treated as if the petitioner were a stepparent.”); Colo. Rev. Stat. § 19-5-203(1)(d.5) (expressly allowing second parent adoptions where a child has only one legal parent who consents to the second parent adoption, and outlining procedures to be followed). These statutes and judicial decisions demonstrate that a marital relationship is not required to allow second parent adoptions.

In reaching their holdings that second parent adoptions were permissible under state law, some of these courts reasoned that because second parent adoptions further the same purpose as step-parent adoptions, statutory provisions that address step-parent adoptions should be broadly construed to permit second parent adoptions as well. *See, e.g., In re Adoption of Two Children By H.N.R.*, 666 A.2d at 539 (“[W]here the mother’s same-sex partner has, with the mother’s consent, participation and cooperation, assumed a full parental role in the life of the mother’s child, and where the child is consequently bonded to the partner in a loving, functional parental relationship, the step-parent provision of [the New Jersey termination statute] should not be narrowly interpreted so as to defeat an adoption that is clearly in the child’s best interests.”); *In re Hart*, 806 A.2d at 1186–88 (reading step-parent exception broadly to further the best interests of the children); *In re M.M.D.*, 662 A.2d 837, 860 (D.C. Ct. App. 1995) (same). Of course, Plaintiffs’ challenge is based on the fact that Defendants do not construe this language to permit same-sex couples to petition for adoptions on the same terms as step-parents. Plaintiffs’ constitutional claim thus is not that they are entitled to *marry* because they are unable to petition for adoption as step-parents, but rather that denying them the opportunity to petition to adopt, while granting that same opportunity to heterosexual couples who can qualify to adopt as step-parents, is unconstitutional.

As the experience of the many other states allowing unmarried individuals to petition for

second parent adoption shows, the relationship between parent and child is not necessarily derived from any marital relationship. Accordingly, this Court need not address Section 25 of the Michigan Constitution or M.C.L. § 551.1 to hold that denying Plaintiffs the opportunity to petition for second parent adoptions violates their constitutional rights, for the reasons set forth by Plaintiffs.

II. Granting eligibility to petition for second parent adoptions to plaintiffs and others like them serves the best interests of children, without regard to whether the parents are married.

As set forth above, there is no inherent connection between marriage and second parent adoption. Numerous jurisdictions have allowed second parent adoptions by unmarried same-sex parents raising children together, and have not experienced any difficulty. The State, however, urges that second parent adoptions should be denied because “Michigan’s adoption code, where only a single person or a married couple may adopt a child, steadfastly maintains its focus on protecting children. It ensures that numerous unmarried people cannot jointly adopt one child, thus creating situations that run quite contrary to the traditional family. . . . [T]his system guards against custody battles among those with varied and uncertain levels of commitment to each other and upholds the state’s overall policy of supporting the traditional family.” State’s Mot. To Dismiss, Dkt. #14, at 20. Because granting Michigan families like Plaintiffs the opportunity to petition for second parent adoptions will indisputably serve the interests of children, *amici* write to address any concern about individuals petitioning to adopt children if they are not in a marital relationship.

First, the relief sought by Plaintiffs on the adoption count, if granted, cannot and will not change the safeguards offered by Michigan adoption law, which already ensures that *no* adoption can be granted unless a court finds that the placement is in the child’s best interests. *See* M.C.L. §§ 710.46 (describing home-study investigation process); 710.51 (providing that a court can only

approve pre-adoptive placement if in the child's best interests); 710.56 (court may only enter an order of adoption six months after the pre-adoptive placement hearing). While the record strongly suggests that the adoptions Plaintiffs seek would be granted as in their children's best interests, resolution of that ultimate question would be up to the courts of the State of Michigan. Plaintiffs are simply asking to be treated the same as other families in this State, and are challenging Defendants' position that currently prevents them from even being considered as suitable adoptive parents for their own children.³

Second, Plaintiffs seek eligibility to petition for second parent adoptions of children they are already raising together with the children's legal parent. Plaintiff parents and their children already are a family – denying the relief sought will do nothing to prevent or even deter children from being adopted into families with two parents who are unable to marry, or prevent children being born to a biological parent who is unable to marry the child's second parent. These children will be raised by their two parents regardless of whether second parent adoptions are granted — albeit without a formal legal parent-child relationship with one of their parents, or the protections and benefits that attach to that legal relationship.⁴

³ As already discussed, same-sex couples cannot marry under current Michigan law. Because they cannot marry and are not allowed to adopt because they are not married, they are denied equal protection. Allowing same-sex couples like Plaintiffs to petition for second parent adoption will resolve the unconstitutional denial of their ability to protect their family relationships through adoption. As a result, this Court does not need to address whether unmarried different sex couples must be allowed to petition to adopt.

⁴ The State's claim that second-parent adoptions should be denied because "[l]egal recognition of adoptions by same-sex couples . . . flatly contradicts the purpose for which the states passed adoption laws in the first place – replicating the natural family" thus ignores both the reality of Plaintiffs' family and others like them, and the underlying purposes of Michigan's adoption laws. State Def. Mot. To Dismiss, Dkt. #44, at 19. Michigan's adoption laws are designed to assure security and permanence for children who, for whatever reason, cannot be raised by both their biological parents. It cannot rationally be said to advance Plaintiffs' children's interests to deny them legal protections in the hopes that some other children someday might be adopted by married heterosexual couples.

As the Indiana Court of Appeals recognized, “[a]llowing a second parent to share legal responsibility for the financial, spiritual, educational, and emotional well-being of the child in a stable, supportive, and nurturing environment can *only* be in the best interest of that child.” *In re Adoption of M.M.G.C.*, 785 N.E.2d 267, 270-71 (Ind. Ct. App. 2003) (emphasis added). The Vermont Supreme Court similarly found that while the legislature had not contemplated second parent adoptions, it would never have intended to “defeat[] adoptions that are otherwise indisputably in the best interests of children.” *In re Adoption of B.L.V.B.*, 628 A.2d at 1274. As that court noted: “To deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest.” *Id.* at 1275.

Finally, as numerous courts have recognized, any preference for married heterosexual parents as superior parents to gay and lesbian parents finds no footing in factual reality. *See, e.g., Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 388 (D. Mass. 2010) (“[C]hildren raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents.”), *aff’d on other grounds*, 682 F.3d 1 (1st Cir. 2012); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010) (same), *aff’d on other grounds sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, No. 12-144 (Dec. 7, 2012); *In re Adoption of John Doe & James Doe*, 2008 WL 5006172, at *28 (Fla. Cir. Ct., Miami-Dade Cnty., Nov. 25, 2008) (same), *aff’d sub nom. In re Adoption of X.X.G. & N.R.G.*, 45 So. 3d 79 (Fla. App. 2010).

In short, regardless of whether same-sex couples can or cannot legally marry, there is no nexus between Michigan’s denial of second parent adoption and *any* interest in children’s welfare. Any adoption petition — including step-parent adoptions or the second parent adoptions sought here — can only be granted following safeguards that ensure that any particular

adoption is in the child's best interests. Defendants' refusal to even consider whether children who are already being raised by their second parents should be allowed a legal relationship with both their parents does not advance the well-being of Michigan children; to the contrary, it harms them.

CONCLUSION

For the reasons set forth above and in Plaintiffs' briefs, *amici* respectfully submit that this Court should grant the Plaintiffs' motion for summary judgment on the adoption count and deny the State's cross motion as to that count. Second parent adoptions can be granted regardless of whether same-sex couples are allowed to marry in Michigan. As Plaintiffs argued in their motion for leave to amend the complaint, the adoptions are at the core of the relief they seek. Because granting Plaintiffs' motion on the adoption count will offer critically important protections to Plaintiffs and others similarly situated in this State, *amici* urge the Court to rule for Plaintiffs on Count I irrespective of any holding on the marriage count. To the extent the Court addresses the marriage count, *amici* agree with Plaintiffs that the denial of marriage licenses to Plaintiffs and others similarly situated is unconstitutional.⁵

Respectfully submitted,

/s/ Jay D. Kaplan

Jay D. Kaplan

Michael J. Steinberg

Kary L. Moss

American Civil Liberties Union \

⁵ As noted above, the Supreme Court recently granted certiorari in *Hollingsworth v. Perry*, No. 12-144 (Dec. 7, 2012) (granting review of question whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman). Accordingly, this Court may wish to reserve judgment on the marriage count pending a decision in *Perry*.

Fund of Michigan
2966 Woodward Avenue
Detroit, MI 48201
313-578-6812
Kaplan@aclumich.org
msteinberg@aclumich.org
kmoss@aclumich.org

/s/ Rose Saxe
Rose Saxe
Senior Staff Attorney
ACLU LGBT & AIDS Project
125 Broad Street, 18th Fl.
New York NY 10004
212.549.2605
rsaxe@aclu.org

Attorneys for Amici

DATED: December 21, 2012