Docket No. 06-6213

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

HEATHER FINSTUEN, ANNE MAGRO, SGF-M, KBF-M, LUCY DOEL, JENNIFER DOEL and ED,

Plaintiffs - Appellees,

and

Greg Hampel, Ed Swaya and VNH-S,

Plaintiffs,

versus

DR. MIKE CRUTCHER, In His Official Capacity As Commissioner Of Health Of Oklahoma,

Defendant - Appellant,

and

Drew Edmondson, In His Official Capacity As Attorney General Of Oklahoma and Brad Henry, In His Official Capacity As Governor Of Oklahoma,

Defendants.

APPELLEES' PRINCIPAL BRIEF

On Appeal from Final Judgment
U.S. District Court for the Western District of Oklahoma, No. CIV-04-1152-C
The Honorable Robin J. Cauthron, District Judge

Oral Argument Set for November 13, 2006 at 1:00 pm, Courtroom IV, 6th Submission

Sandy Ingraham (OBA No. 15322)

Ingraham & Associates, P.L.L.C.
Route 2, Box 369-B
McLoud, OK 74851
(405) 964-2072; Fax: (405) 964-2058
E-Mail: ingraham@mcloudteleco.com

Kenneth D. Upton, Jr. (OBA No. 12906)
F. Brian Chase (LaBA No. 23450)
Lambda Legal Defense & Education Fund, Inc.
3500 Oak Lawn Avenue, Suite 500,
Dallas, TX 75219
(214) 219-8585; Fax: (214) 219-4455
E-Mail: kupton@lambdalegal.org
bchase@lambdalegal.org

ATTORNEYS FOR APPELLEES

October 17, 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OTHER AUTHORITIES

PRIOR OR RELATED APPEALS

This action was the subject of an interlocutory appeal, Docket No. 04-6395, brought by Defendants Brad Henry and Drew Edmondson that challenged the

district court's denial of their motion to dismiss based upon Eleventh Amendment immunity. Before briefing and panel consideration, the parties stipulated to dismissal with prejudice. This Court's Order filed April 29, 2005, dismissed the appeal and the case was remanded.

The judgment below currently is subject to a related appeal by Plaintiffs Greg Hampel, Ed Swaya and VNH-S under Docket No. 06-6216. By Order dated July 6, 2006, the Hampel-Swaya family's related appeal and this appeal are consolidated for the purposes of panel consideration only. A Joint Appendix serves as the record in both appeals.

APPELLEES' PRINCIPAL BRIEF

I. STATEMENT OF THE CASE

Plaintiffs are three same-sex couples with children. In each family, the children are the legal children of both members of the couple, with one or both parent-child relationships established through final adoption decrees. Those decrees were entered in New Jersey, California and Washington State. Plaintiffs challenge a statute that directs officials of the State of Oklahoma to treat adoption decrees issued by courts outside Oklahoma as nullities when the adoptive parents are a same-sex couple.

The Finstuen-Magro and Doel families (Appellees here) along with the Hampel-Swaya family (Appellants in related appeal 06-6216), filed suit pursuant to 42 U.S.C. § 1983 (1996) against Oklahoma Governor Brad Henry ("Governor") and Oklahoma Attorney General Drew Edmondson ("Attorney General"), seeking a permanent injunction barring the enforcement of OKLA. STAT. tit. 10, § 7502-1.4 (Supp. 2004) (the "Adoption Invalidation Law"). Jnt. App. at 12.

Subsequently, Dr. Mike Crutcher, the Commissioner ("Commissioner") of the Oklahoma Department of Health ("Department") was added as a defendant. Jnt. App. at 23. The sole claim asserted against the Commissioner was by the Doel family. They sought issuance of an accurate birth certificate for their Oklahoma-born daughter, E. Jnt. App. at 44 & 51. No other relief was sought or granted

against the Commissioner, except an order directing him to issue birth certificates. Jnt. App. at 311.

Both sides filed cross-motions for summary judgment. Jnt. App. at 61, 168. The parties then stipulated that the Court would resolve remaining issues of fact, if any, on the same summary judgment record under FED. R. CIV. P. 52. Jnt. App. at 240-42. The district court acknowledged this authority in its Memorandum Opinion and Order, Jnt. App. at 281, n.1.

The district court held that the Adoption Invalidation Law violates the Full Faith and Credit, Equal Protection and Due Process Clauses of the United States Constitution, but does not violate the right to travel. Jnt. App. at 310-11. Based upon these holdings, the district court granted relief to the Finstuen-Magro and Doel families.[1]

The Governor and Attorney General, the defendants charged with enforcing the Adoption Invalidation Law, chose not to appeal the decision and it became final as to them. The Commissioner appealed the district court's order directing the Department to issue birth certificates. The Commissioner also attempts to appeal the district court's injunctive order and its judgment on the full merits

[1] The court also held that the Hampel-Swaya family lacked standing to challenge the law on any grounds, Jnt. App. at 289-90 & 310, and, therefore, dismissed their claims. Jnt. App. at 309.

issued against the ***non***-appealing parties. Jnt. App. at 315-18.

II. STATEMENT OF FACTS

A. The Genesis of Oklahoma's Adoption Invalidation Law.

In 2002, Greg Hampel and Ed Swaya, who have lived together as a committed couple in Washington State for over eleven years, jointly adopted V. Jnt. App. at 72, 108, 112, 116-17 & 282. Because V was born in Oklahoma, her birth certificate was issued by the Department. Once her adoption was completed, Hampel and Swaya wrote to the Department to obtain a supplementary birth certificate listing them as her legal parents.[2] Jnt. App. at 72, 108, 112 & 282-3. The Department refused to issue a fully accurate birth certificate, instead issuing an inaccurate one that listed Hampel as V's only parent. Jnt. App. at 78, 108, 113, 119 & 283.

Hampel and Swaya contested the Department's action. As a result, the Commissioner's predecessor sought an opinion from Attorney General Edmondson, "regarding whether the State Department of Health's Vital Records Service must provide a birth certificate for an Oklahoma child adopted by an out-

---

[2] OKLA. STAT. tit. 10, § 7505-6.6(B) (2001) provides "[t]he State Registrar, upon receipt of a certificate of a decree of adoption, shall prepare a supplementary birth certificate in the new name of the adopted person with the names of the adoptive parents listed as the parents."

of-state same gender couple in accordance with an out-of-state court decree authorizing such adoption." Jnt. App. at 73, 109, 113, 121 & 283.

The Attorney General issued an opinion recognizing that the Full Faith and Credit Clause of the United States Constitution required full recognition of the out-of-state adoption order and, accordingly, that the Department should issue a birth certificate listing both Hampel and Swaya as V's parents. Jnt. App. at 73, 125 & 283. On April 6, 2004, the Department issued a replacement birth certificate for V accurately listing both Hampel and Swaya as her parents. Jnt. App. at 73, 109, 113, 128 & 283.

The Attorney General's actions drew the ire of the Oklahoma Legislature. Jnt. App. at 129-30. Lawmakers drew up the Adoption Invalidation Law as a direct response to the issuance of V's supplementary birth certificate, Jnt. App. at 283, and, within weeks, the legislature had adopted and passed House Bill No. 1821, 2004 Okla. Session Laws § 176 (codified at OKLA. STAT. tit. 10, § 7502-1.4 (Supp. 2004)). The Adoption Invalidation Law, italicized below, amended Oklahoma's Adoption Code to provide that

> The courts of this state shall recognize a decree, judgment, or final order creating the relationship of parent and child by adoption, issued by a court or other governmental authority with appropriate jurisdiction in a foreign country or in another state or territory of the United States. The rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though the decree, judgment, or final order were issued by a court of this state. ***Except that, this state, any of its agencies, or any court of this state***

> ***shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.***

The Governor signed the bill into law on May 3, 2004, and it took effect on July 1, 2004. Jnt. App. at 73-74.

The Adoption Invalidation Law threatens the welfare of plaintiff parents and their children because it affirmatively ***forbids*** police, courts, health officials, child welfare officials and other representatives of the State from recognizing their adoptive parent-child relationships. Jnt. App. at 74, 109 113 & 283.

B. Lucy Doel, Jennifer Doel and ED.[3]

Lucy Doel and Jennifer Doel are lesbian women who have been in a committed relationship for more than ten years and currently live in Oklahoma. Jnt. App. at 75, 132, 137 & 284. E was born in Oklahoma on July 20, 2000. At that time, Lucy and Jennifer resided in California as registered domestic partners. Jnt. App. at 76, 132 & 137. Lucy adopted E in a proceeding before the Los Angeles Superior Court, which issued an Order of Adoption on January 25, 2002. Jennifer was not a petitioner. Jnt. App. at 76, 142 & 284. Jennifer later adopted E

[3] The "Doels" proceed *via* pseudonyms for their family's protection. Jnt. App. at 35-38.

with Lucy's consent in a valid "stepparent adoption"[4] proceeding before the Los Angeles Superior Court, which issued an Order of Adoption on June 14, 2002, under which Lucy retained her own parental rights. Jnt. App. at 76, 145 & 284.

In 2002, Lucy and Jennifer moved to Oklahoma to raise E in what they thought would be a safer environment, and to be closer to their families. They have established community and professional ties in Oklahoma that are important to the welfare of their family. Jnt. App. at 76, 132, 137 & 284.

On February 27, 2004, the Department issued a new birth certificate for E that listed Lucy as E's only parent, despite the Department having been provided both parents' information and all other necessary information. Jnt. App. at 76, 133, 138 & 284. Both before[5] and after the Adoption Invalidation Law took effect,

---

[4] California law allows registered domestic partners to use a broad "stepparent adoption" procedure to effect what usually are called "second parent adoptions" – the adoption of a child by one's non-marital partner without surrender or termination of one's parental rights – in many jurisdictions. Jennifer could have obtained a second parent adoption in California achieving the same result had the couple not been registered domestic partners. *Sharon S. v. Sup. Ct. of San Diego*, 73 P.3d 554, 571 (Cal. 2003).

[5] In an attempt to supplement his record below post judgment, the Commissioner attached two documents to his motion for stay below and contended for the first time, as here, that the Adoption Invalidation Law really didn't have any bearing on the Department's refusal to issue an accurate supplementary birth certificate. By including the Motion for Stay in the Joint Appendix, he now improperly attempts to supplement the record on appeal. The Commissioner may not attempt to incorporate evidence that was not in the summary judgment record before the district court by including it in the appellate appendix. *Cruz v. Webb*, 11 F.3d 1277 (Table), 2000 WL 531626 (10th Cir. 2000). On appeal, this Court will "consider[] only the record evidence that was before

—continued

Jennifer and Lucy sought to have E's birth certificate accurately reflect both Jennifer and Lucy as E's parents but the Department has refused to do so. Jnt. App. at 76-77, 148 & 284. The district court found that because of Oklahoma's Adoption Invalidation Law, E and her parents continue to be denied their legal right to a birth certificate that accurately reflects both of her parent-child relationships. Jnt. App. at 284.

Birth certificates are commonly requested as proof of parent-child relationships in many contexts. E, Jennifer and Lucy have been and continue to be denied the ability to provide that proof. Absent state recognition of the relationship she has with both of her parents, E has not been, and continues not to be, afforded the same protections granted other children. Jnt. App. at 77, 133 & 138.

Lucy and Jennifer's decision-making with regard to E has been, and continues to be, impaired daily as a result of the Adoption Invalidation Law. The point was recently highlighted when E had an emergency medical event. Lucy and Jennifer were told by the EMT that only "the mother" could ride with E in the ambulance to the emergency room. They met a similar response from emergency

---

—continuation

the district court. [The appealing party] may not rely on evidence that is not in the record in arguing that there are genuine issues of material facts precluding summary judgment." *Id.* (citing *Allen v. Minnstar, Inc.*, 8 F.3d 1470, 1475 (10th Cir.1993)).

room personnel. Although the emergency room ultimately admitted both parents after they explained their situation, both realized that their legal rights to protect their child and to direct her upbringing were jeopardized by Oklahoma's Adoption Invalidation Law. Jnt. App. at 77-78, 133-34, 138-39 & 284.

Unlike other parents', Lucy and Jennifer's control over their child's life, care and upbringing is, at best, subject to the discretion of strangers. Lucy, Jennifer and E cannot rely on assistance and/or enforcement of their parental and family rights from the State of Oklahoma. This is a risk that other parents do not face. Jnt. App. at 78, 134 & 139.

C. Heather Finstuen, Anne Magro, SGF-M and KBF-M.

Anne Magro and Heather Finstuen are lesbian women who have lived together for over thirteen years in a loving and committed relationship. SGF-M ("S") and KBF-M ("K") are the birth daughters of Anne Magro. They were born in Summit, New Jersey, on August 6, 1998. Jnt. App. at 79, 156, 160 & 284.

Finstuen adopted S and K with Magro's consent in a second-parent adoption proceeding before the Essex County, New Jersey Surrogate's Court. That court issued a Final Judgment of Adoption on June 16, 2000, that also preserved Magro's existing parental rights. Finstuen was the sole petitioner. Jnt. App. at 79, 164-67 & 284. On November 1, 2000, the New Jersey Department of Health and Senior Services issued amended birth certificates for S and K that reflect both

Anne Magro and Heather Finstuen as the girls' parents. Jnt. App. at 79, 156, 160 & 285.

In July of 2000, Magro and Finstuen moved to Oklahoma with their daughters to pursue professional opportunities. Jnt. App. at 79, 156, 160, 284-85. Because of Oklahoma's Adoption Invalidation Law, Finstuen's and Magro's decision-making is impaired on a daily basis. They must take into account the possibility of non-recognition of Finstuen's relationship with their children by innumerable persons in innumerable transactions, including in hospitals, schools or courts. For example, although Finstuen is their legal parent, she has avoided signing forms of legal significance for the children in Oklahoma, such as permission slips and/or release forms associated with school and extra-curricular activities (for example, T-Ball, soccer, gymnastics); Girl Scout/Summer Camp authorization forms; and, medical and dental release forms for the children's care. When their daughter K had surgery, Finstuen avoided signing any legal documents associated with her hospital stay and worried that, if K were in intensive care for any reason (where visits are limited to "immediate family members"), Finstuen could be excluded. Finstuen has not signed any of the enrollment documents pertaining to the children's schooling. She does not feel she should take the risk that any document she signs pertaining to the children's care or control will be

deemed legally invalid. Yet Magro may be unavailable to sign documents in an emergency, causing the family great concern. Jnt. App. at 79-80, 157, 161, 285.

Oklahoma's Adoption Invalidation Law has practical and emotional consequences for Finstuen and Magro. It compelled them to have extensive conversations with their extended family to try to head off concerns about the children if something happens to Magro. Both have increasing emotional anxiety about whether Finstuen's parenthood will be respected in that event or she will be denied rights of care and control over the children's upbringing. Jnt. App. at 80, 157 & 161. The Adoption Invalidation Law forces Finstuen and Magro to consider extraordinary and expensive measures to protect their children that should not be necessary, such as guardianships and powers of attorney. Jnt. App. at 80, 157-58 & 161-62.

III. SUMMARY OF THE ARGUMENT

The Commissioner's arguments on appeal can be divided into three areas. First are those arguments appropriate for appellate consideration. Second are those arguments that would have been appropriate for appellate consideration, but are waived for failure to assert them in the district court. The final group comprises arguments that are invalid because the Commissioner may not raise them.

With respect to arguments properly raised on appeal, the Commissioner seeks to avoid being compelled to issue accurate supplementary birth certificates to

the plaintiff families. Plaintiffs established parent-child relationships through adoption decrees. Adoption decrees are final judgments, not subject to modification, that are entitled to full faith and credit under the United States Constitution. There was no challenge in the district court to the validity of the out-of-state court proceedings or any suggestion the adoption decrees were invalid, as the district court noted. Its ruling that the Adoption Invalidation Law's attempt to nullify these established relationships violates full faith and credit was correct.

The Doels and other families who brought this action clearly had constitutional standing to do so. They each suffered current and concrete injuries resulting from the Adoption Invalidation Law's self-executing mandate that withholds recognition of their legal parent-child relationships when in Oklahoma. The law affirmatively forbids police, courts, health officials, child welfare officials and other representatives of the State from recognizing their parent-child relationships.

In the second group, the Commissioner attempts to raise several issues for the first time on appeal. He contends that the Doel and Finstuen-Magro families lack prudential standing because they do not fall within the zone of interest of the Adoption Invalidation Law. He further claims that a different statute governing the issuance of ***original*** birth certificates, not the Adoption Invalidation Law, provides the legal impediment to issuing an accurate supplementary birth certificate to the

Doel family. The Commissioner then claims that the adoption decrees at issue are jurisdictionally invalid and not binding on him or are otherwise subject to collateral attack. All of these issues are waived. Further, they lack merit. These families meet prudential standing requirements; the birth certificate statute on which the Commissioner relies does not control the issuance of supplementary birth certificates; and there is no basis for this Court to allow the jurisdiction supporting these adoption decrees to be questioned.

In the last group, the Commissioner seeks to attack the district court's core finding that the Adoption Invalidation Law violates the Full Faith and Credit, Equal Protection and Due Process Clauses of the United States Constitution, as well as the court's order enjoining enforcement by the Governor and Attorney General. These are arguments he may not validly raise. The only defendants below with enforcement responsibilities for the Adoption Invalidation Law (the Governor and Attorney General) did not appeal the district court's order finding the law unconstitutional and enjoining its enforcement. The scope of what the Commissioner may appeal is thus limited to whether the district court's order that his Department issue a valid birth certificate to the Doel family was erroneous.

Additionally, the district court properly held that the Adoption Invalidation Law violates the equal protection guarantee of the Fourteenth Amendment. Similar to illegitimacy laws, the statute singles out adopted children of same-sex

couples, denies them family autonomy and penalizes them for the status or conduct of their parents without substantially advancing any important governmental interest. The law also singles out same-sex couples who adopt and infringes on their fundamental rights of parental and family autonomy without any compelling justification. The district court also found that the law fails even rational basis scrutiny because it targets an unpopular group, gay and lesbian couples who parent, and singles them out for disparate treatment for the sole purpose of making them unequal to everyone else. This can never be a legitimate purpose.

Finally, the district court held that the Adoption Invalidation Law substantially interferes with the fundamental liberty interests these families have in the parental and family autonomy guaranteed by the Fourteenth Amendment's Due Process Clause. The Commissioner's only response is the erroneous one that parent-child relationships established through adoption proceedings do not enjoy the same constitutional protection as biological relationships. All legal parents have a fundamental liberty interest in the care, custody and rearing of their children that merits both procedural and substantive protection under the Due Process Clause of the Fourteenth Amendment.

The decision of the district court should be affirmed.

IV. ARGUMENT

A. Standard of Review

A district court's grant of summary judgment is reviewed *de novo*. *Argo v. Blue Cross & Blue Shield of Kansas, Inc*., 452 F.3d 1193, 1199 (10th Cir. 2006). An appellate court will view any factual findings the district court makes under FED. R. CIV. P. 52(a) with deference and such findings will not serve as a basis for reversal unless they are clearly erroneous. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985).

This Court generally will not consider issues or arguments raised for the first time on appeal. *Tele-Commc'ns, Inc. v. Comm'r*, 12 F.3d 1005, 1007 (10th Cir. 1993); *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970 (10th Cir.1991) ("The failure to raise the issue with the trial court precludes review except for the most manifest error.") (citing *Gundy v. United States*, 728 F.2d 484, 488 (10th Cir.1984)).

B. Introduction

Adoption is a creature of statute that creates legal parent-child relationships enforceable everywhere under the Full Faith and Credit Clause and assigns the rights and obligations that arise from legal parenthood. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, ch. 11, topic 3, introductory note (1971); *see also* CAL. FAM. CODE § 8616 (1994) ("After adoption, the adopted child and the adoptive parents shall sustain towards each other the legal relationship of parent and child

and have all the rights and are subject to all the duties of that relationship."); N.J. REV. STAT. § 9:3-50(b) (1993) ("The entry of a judgment of adoption shall establish the same relationships, rights, and responsibilities between the child and the adopting parent as if the child were born to the adopting parent in lawful wedlock.").[6] By commanding that the State "shall not recognize an adoption by more than one individual of the same sex from any other state" the Adoption Invalidation Law targets both aspects of the legal status: the relationship itself, and the rights, protections, benefits and obligations that flow therefrom.

An adoption decree accords adoptive parents the fundamental right of parental autonomy *vis-à-vis* the care, custody and control of their children that is fully protected by the Due Process Clause of the Fourteenth Amendment, just as the autonomy of parents of biological children is so protected. *See Troxel v. Granville*, 530 U.S. 57, 65-66 (2001); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 843-44 & n.51 (1977) (noting that adoption is recognized as the legal equivalent of biological parenthood). Additionally, state laws routinely recognize and guard closely the privacy and liberty interests

---

[6] Adoption decrees entered in Oklahoma have the same effect: "After the final decree of adoption is entered, the relation of parent and child and all the rights, duties, and other legal consequences of the natural relation of child and parent shall thereafter exist between the adopted child and the adoptive parents of the child and the kindred of the adoptive parents." OKLA. STAT. tit. 10, § 7505-6.5 (2001).

inherent in the parent-child relationship and the broader family unit. *See, e.g.*, *Davis v. Davis*, 708 P.2d 1102, 1109 (Okla. 1985) ("The integrity of the family unit and preservation of the parent-child relationship command the highest protection in our society. Intrusion upon the privacy and sanctity of that bond can be justified only upon demonstration of a compelling state concern."). The right of parental autonomy and family privacy is fully shared by gay and lesbian parents and their children, *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003), and, as a matter of equal protection, these fundamental rights may not be taken away or infringed for gay parents because of their intimate relationships, sex or sexual orientation.

The rights and obligations flowing from the parent-child relationship are very significant. Under the Adoption Invalidation Law, the State's refusal to recognize a child's adoption strips the parents of numerous important legal rights.[7]

---

[7] In Oklahoma, these rights and obligations include, without limitation, the following statutory rights: the right to make routine health care decisions for their child, OKLA. STAT. tit. 10, § 170.1 (2001); the right to consent to medication of their child by school nurses, *etc.*, OKLA. STAT. tit. 70, § 1-116.2 (Supp. 2004); the right to consent to their child's use of self-medication for asthma during school hours, OKLA. STAT. tit. 70, § 1-116.3 (Supp. 2003); the right to consent to treatment of their child for head lice, OKLA. STAT. tit. 70, § 1210.194(D) (2001); the right to consent, deny consent or withdraw consent to resuscitate their child in the event or cardiac or respiratory arrest, OKLA. STAT. tit. 63, §§ 3131.4 & 3131.7 (2001); the right to consent to an anatomical gift on behalf of their child, OKLA. STAT. tit. 63, §§ 2203 & 2214 (Supp. 2003); eligibility to sit in the "parent" seat on the state committee to determine which textbooks

—continued

—*continuation*

their child will use in school, OKLA. STAT. tit. 70, §§ 16-101 *et seq.* (Supp. 2003); the right to inspect AIDS prevention and sex education materials used by their child's school and to object to their child's receipt of such content, OKLA. STAT. tit. 70, §§ 11-103.3 & 11-105.1 (2001); the right to inspect instructional materials which are used in research or experimental programs with their child in school, OKLA. STAT. tit. 70, § 11-106 (2001); the right to consent before any psychiatric or psychological evaluation, testing or treatment of their child can be done in school, or before their child can be asked questions of a personal or private nature, OKLA. STAT. tit. 70, § 11-107 (2001); the right to receive notice if their child is missing school, OKLA. STAT. tit. 70, § 10-106 (2001); the right to request their child's entrance into kindergarten be delayed until age 6, OKLA. STAT. tit. 70, § 10-105(A) (Supp. 2006); the right to have their child excused from school in an emergency, OKLA. STAT. tit. 70, § 10-105(B)(2) (Supp. 2006); the right to have their child excused from school for religious observations, OKLA. STAT. tit. 70, § 10-105(C) (Supp. 2006); the right to receive notice if their child develops reading problems, OKLA. STAT. tit. 70, § 1210.508E (Supp. 2006); the right to assist with the development of any educational programs used with their child if the child develops reading problems, OKLA. STAT. tit. 70, § 1210.508C (Supp. 2005); the right to seek a waiver of the immunizations required for school admission if such would endanger their child's life or health or violate their religion, OKLA. STAT. tit. 70, §§ 1210.192 & 1210.193 (2001); the right to register their child for school based on their place of residence, OKLA. STAT. tit. 70, § 18-111 (2001); the right to object to a school decision to not promote their child to the next grade level, OKLA. STAT. tit. 70, § 24-114.1 (2001); the right to receive a copy of the educational plan if their child is suspended from school, OKLA. STAT. tit. 70, § 24-101.3 (Supp. 2006); standing before a court and priority appointment in guardianship proceedings related to their child, OKLA. STAT. tit. 10, § 21.1 (Supp. 2004) & OKLA. STAT. tit. 30, § 2-106 (2001); the right to inherit property under intestacy rules, OKLA. STAT. tit. 84, § 213(B) (2001); the right to court appointed counsel in matters related to adjudication of parental rights, OKLA. STAT. tit. 10, § 24 (2001); the right to have their child released into their parental custody in the event the child is picked up by law enforcement officers, OKLA. STAT. tit. 10, § 130.6 (2001); the right to notice if their child is not attending school, OKLA. STAT. tit. 10, § 135 (2001); the right to visit their child when placed in a state or county school or home, OKLA. STAT. tit. 10, § 136 (2001); the right to apply for admission to state testing, treatment or residential care for their child with mental retardation, OKLA. STAT. tit. 10, § 1414 (2001); the right to retain parental rights and authority over a child with mental retardation who is voluntarily institutionalized, OKLA. STAT. tit. 10, § 1415 (2001); the right to have their child fingerprinted for safety and identification purposes and the ability to consent to use of those fingerprints by law enforcement when necessary, OKLA. STAT. tit. 10, §§ 1631,

—*continued*

Likewise, plaintiff children are denied legal rights and the benefit of legal obligations imposed on their parents.[8] The law does not state who assumes these rights and obligations in the stead of the children's legal parents.

The State provides statutory and common law protections to recognized parent-child relationships that help promote stability and protect some of society's most vulnerable at times they may be most at risk. On the other hand, when the State not only fails to acknowledge some parent-child relationships (as on birth

---

—continuation

7005-1.6 & 7307-1.6 (2001); the right for their relatives to be eligible for priority "kinship care" placements if their child is in need of foster placement, OKLA. STAT. tit. 10, § 7004-1.5 (2001); the right to inspect juvenile court records, Oklahoma Department of Human Service records and Department of Juvenile Justice Records pertaining to their child, OKLA. STAT. tit. 10, §§ 7005-1.3 & 7307-1.4 (Supp. 2005), § 7005-1.4 (Supp. 2006), & § 7307-1.5 (2001); the right to the protections and processes of state law before their parental rights can be terminated, OKLA. STAT. tit. 10, §§ 7006-1.1 *et seq.* (2001); and the right to consent or to object to the adoption of their child by another person, OKLA. STAT. tit. 10, § 7503-2.1 (2001).

[8] Some of these rights include: the right to financial support, education and the provision of necessities, OKLA. STAT. tit. 10, §§ 4 & 13 (2001); s*ee also Harbuck v. Oklahoma*, 956 P.2d 921(Okla. Ct. App.1997) ("Parent has statutory and common law duty to support his or her minor children."); the right to inherit property under intestacy rules, OKLA. STAT. tit. 84, § 213(B) (2001), or to make a claim against attempts at disinheritance under pretermitted child statutes, OKLA. STAT. tit. 84, § 131 (2001); and rights to notice of hearings, standing before a court and the right to priority appointment under Oklahoma guardianship statutes to care for a parent, OKLA. STAT. tit. 30, §§ 3-104 & 3-110 (2001); statutory protections making it a felony for parents not to provide for their child, OKLA. STAT. tit. 21, § 852 (2001), or to abandon a child, OKLA. STAT. tit. 21, §§ 851 & 853 (2001); protection of an abandoned child from his parent's objection to a subsequent adoption, OKLA. STAT. tit. 10, § 7505-4.2 (2001); and statutory custody in favor of a relative who has had a child abandoned to his or her care, OKLA. STAT. tit. 10, § 21.1 *et seq* (2001 & Supp. 2004).

certificates), but also goes so far as to refuse legal recognition of the relationships themselves when same-sex couples adopt, the State needlessly and callously compromises the safety and welfare of adoptive children and the parents who care for them.

Additionally, privacy concerns are heightened in the adoption context. States routinely guard the confidentiality of adoption records, of birth families and of children's adoptive status, giving rise to a reasonable expectation of privacy by adoptive parents and their children as to the details of their parent-child bonds. Every state with a connection to this case requires that all departmental, agency, and court files regarding an adoption shall be confidential and filed under seal. *See, e.g.*, CAL. FAM. CODE § 9200 (1994); N.J. REV. STAT. § 9:3-52 (1993); OKLA. STAT. tit. 10, § 7505-1.1 (2000). Yet, Oklahoma's Adoption Invalidation Law would draw back the curtain on these private details of the families' lives.

The Commissioner's arguments do not release him and the State from the obligation to accord the adoption decrees full faith and credit, nor provide any adequate or legitimate justification for the law's discriminatory treatment of gay families or its trampling of their fundamental liberty interests. Recognizing these constitutional infirmities, the district court easily determined that this pernicious law must be struck down.

C. Issues The Commissioner Properly May Raise on Appeal.

1. This Court Should Affirm The District Court's Directive To The Commissioner That The Department Issue E An Accurate Supplementary Birth Certificate.

a) The Families Have Standing To Challenge Oklahoma's Adoption Invalidation Law Because The Law's Invasion Of Their Parental And Family Autonomy Is Concrete, Actual And Particularized, Satisfying The Injury-In-Fact Requirement.

Assuming the Commissioner properly could raise the issues as to ***all*** Plaintiffs, not only the Doels, but also the Finstuen-Magro families clearly have standing, as does the Hampel-Swaya family.[9] The United States Constitution requires the existence of an actual case or controversy as a prerequisite to the jurisdiction of the federal courts. U.S. CONST. art. III, § 2. The district court properly observed that

> a plaintiff's standing to bring suit in federal court depends on satisfying the following criteria: ***First, the plaintiff must have suffered an "injury in fact"–an invasion of a legally protected interest that is both (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.*** Second, there must be a causal connection between that injury and the challenged action of the defendant–the injury must be "fairly traceable" to the defendant, and not the result of the independent action of some third party. Finally, it must be likely, not merely speculative, that a favorable judgment will redress the plaintiff's injury.

Nova Health Sys. v. Gandy, 416 F.3d 1149, 1154 (10th Cir. 2005) (citing *Lujan v.*

---

[9] *See* Appellants' Opening Brief in related appeal number 06-6216.

Defenders of Wildlife, 504 U.S. 555, 560 (1992)) (emphasis supplied). The parties did not dispute and the district court readily concluded that the second and third elements were satisfied. Jnt. App. at 287. Thus, the parties and the district court focused on the injury-in-fact requirement.

The district court found that the Finstuen-Magro and Doel Families, who brought this action as residents of Oklahoma, met the injury-in-fact element for standing. Specifically, the court noted that Jennifer Doel has been unable to obtain a birth certificate for E identifying Jennifer as a parent, that as a direct result of the amendment E is deprived of the rights that accrue to her as a result of being Jennifer's legally-recognized child, and that the Doels undertook the steps necessary for that legal recognition, but were denied it. Jnt. App. at 288-89.

Similarly, the district court noted that Heather Finstuen's parent-child relationships with S and with K are legally nullified in Oklahoma as a result of the amendment. The court further acknowledged the specific examples in the record of how the Adoption Invalidation Law interferes with her rights and obligations as a parent on a daily basis, as well as the concrete and particularized harm the Amendment causes S and K precluding legal recognition of Ms. Finstuen as their parent. Jnt. App. at 289.

The harm here is "actual" in that the Adoption Invalidation Law, which denies ***recognition*** of a legal status, is in force and is self-executing. Unlike a

criminal statute, for example, it does not require additional and specific enforcement action leading to judicial or administrative proceedings. Rather, the statute on its face withholds complete recognition of plaintiffs' legal relationships without the necessity of any further inquiry or finding. The fact that plaintiffs, living without the State's relationship recognition and the protections it affords, may suffer further economic harm or physical injury in the future does not minimize the State's current interference with their legal relationships. *See, e.g., United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686 (1973) ("In interpreting 'injury in fact' we made it clear that standing was not confined to those who could show 'economic harm'…."). It is not necessary for a tragedy to befall them for these families to show a sufficient injury in fact.

Furthermore, the Adoption Invalidation Law's mandate that the State shall not recognize legal parent-child relationships of same-sex couples who participated in adoption proceedings in other states creates a classification that denies these plaintiffs equal access to scores of statutory and common law benefits, rights, protections and defenses under Oklahoma law. *Supra*, notes 7 & 8. In the context of equal protection challenges, the Supreme Court has held that the injury in fact analysis hinges on whether the government has erected a barrier making it more difficult for members of one group to obtain benefits or protections than it is for members of another group. *Ne. Fla. Chapter of Associated Gen. Contractors of*

Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993) (The "injury in fact" in an equal protection case is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the protection or benefit.). *See also Buchwald v. Univ. of N.M. School of Medicine*, 159 F.3d 487 (10th Cir. 1998) (injury is the imposition of the barrier itself, citing *City of Jacksonville*). These families claim the type of constitutional injury that, according to the Supreme Court, has "long been recognized as judicially cognizable." *Heckler v. Mathews*, 465 U.S. 728, 738 (1984) (citations footnote omitted). *Cf. Romer v. Evans*, 517 U.S. 620, 627-31 (1996) (law that targets certain class of citizens for the purpose of denying them protection of laws effects "literal violation" of equal protection).

On its face, Oklahoma's Adoption Invalidation Law unquestionably serves as a significant barrier to plaintiffs' ability to access the protections, rights and responsibilities that different-sex parents and their children may take for granted. But the harm does not stop there. The law also interferes with the constitutionally protected liberty interest the plaintiff parents have in their parental autonomy, including the fundamental right to make decisions concerning the care, custody, and control of their children. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000). Here, each couple has described steps they have felt compelled to take to protect their children from unnecessary risks of harm because of the Adoption Invalidation Law. Such interference clearly constitutes injury in fact as well.

b) The Commissioner Offers No Valid Justification for Refusing to Issue E's Supplementary Birth Certificate.

In the absence of the Adoption Invalidation Law, the Department, "upon receipt of a certificate of a decree of adoption, ***shall*** prepare a supplementary birth certificate in the new name of the adopted person ***with the names of the adoptive parents listed as the parents***." OKLA. STAT. tit. 10, § 7505-6.6(B) (2001) (emphasis supplied). The statute's directive is non-discretionary. Because the Adoption Invalidation Law has failed constitutional scrutiny, the Commissioner lacks any justification for his Department's refusal to comply with the supplementary birth certificate statute's mandate.

Conjuring new arguments on appeal, the Commissioner now contends that OKLA. STAT. tit. 63, § 1-311(D)(1) (2005), not the Adoption Invalidation Law, prohibits the Department from placing both of E's mothers' names on her birth certificate. Aplt. Br. at 5. He argues that the statute forbids placing a woman's name in the "father" field of the birth certificate – an argument he never presented to the district court prior to entry of judgment. The failure to raise the issue before should preclude any appellate consideration of this claim. *Gundy v. United States*, 728 F.2d at 488.

In fact, the statute he relies upon contains no such proscription. The statute merely states that ***if a mother is married***, her husband's (or the legally-determined father's) name shall be named in the "father" field of the original birth certificate.

Moreover, the issuance of a supplementary birth certificate is controlled by a different provision, OKLA. STAT. tit. 10, § 7505-6.6(B) (2001), not the one the Commissioner relies upon. Even assuming the Commissioner could identify any statutory obstacle from gender restrictions on birth certificate's names, those provisions would suffer from the same defects that render the Adoption Invalidation Law unconstitutional and provide no justification for the Department's position.

Because the Commissioner lacks any justification for refusing to issue an accurate supplementary birth certificate to the Doel family, the district court's judgment directing the Department to do so should be affirmed.[10]

D. Issues The Commissioner Properly Could Have Raised On Appeal, But Are Waived.

1. The Finstuen-Magro And Doel Families Satisfy Prudential Standing Requirements Because Their Interests Are Personal, Not Generalized, And Within The Zone Of Interest Directly Impacted by the Adoption Invalidation Law.

[10] The district court also ordered the Department to issue birth certificates for the Finstuen-Magro children. The State of New Jersey, where their children were born, already has issued supplementary birth certificates accurately reflecting their parent-child relationships. Heather Finstuen and Anne Magro did not request any relief of the Commissioner or the Department and, therefore, do not oppose reversing that part of the district court's order and judgment.

Even if it were to be considered,[11] the Commissioner's contention for the first time on appeal that these families lack "prudential" standing because the Adoption Invalidation Law does not apply to their families, Aplt. Br. at 11-14, is wrong. The Supreme Court has developed three prudential standing limitations. First, the party must assert his or her own rights, not the rights of others. *United Food & Commercial Workers v. Brown Group*, 517 U.S. 544, 557 (1996). Second, the party may not assert a generalized grievance shared in a substantially equal measure by all or a large class of citizens. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99-100 (1979). Finally, the party must raise a claim within the zone of interests protected or directly impacted by the statute in question. *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970). The Supreme Court has explained that the zone-of-interest requirement is "not meant to be

---

[11] The Tenth Circuit apparently has not decided whether prudential standing (as opposed to Article III standing) can be raised for the first time on appeal. The other circuits to have addressed the question disagree on the answer. *Compare Baca v. Ladd*, 77 F.3d 480 (Table), 1996 WL 46567 (5th Cir. 1996) (prudential standing can be waived); *Lindley v. Sullivan*, 889 F.2d 124, 129 (7th Cir.1989) (same); *Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 899 (9th Cir. 2000) (same) *with Animal Legal Def. Fund v. Espy*, 23 F.3d 496, 499 (D.C. Cir.1994) (prudential standing cannot be waived); *Thompson v. County of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994) (same); *Cmty. First Bank v. Nat'l Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994) (same). *See also UPS Worldwide Forwarding, Inc. v. U.S. Postal Service*, 66 F.3d 621, 626 n.6 (3rd Cir. 1995) (noting the split among circuits, but expressly declining to decide the issue); *Wolff v. Cash 4 Titles*, 351 F.3d 1348, 1358 (11th Cir. 2003) (also declining to decide).

especially demanding" and that it generally should not preclude standing. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987).

The Commissioner does not seriously dispute the first two elements. The grievances presented are not "generalized" in any sense. These families comprise same-sex couples with existing, legal parent-child relationships established through final adoption decrees, and their children. They assert an invasion of their own rights (the right to recognition and enforcement of their existing parent-child relationships), not a general interest in the State's interference with the rights of others. Nor is their connection to Oklahoma tenuous. Each brought this action as a resident of Oklahoma.

Rather, on appeal the Commissioner focuses on the third element, arguing that the Finstuen-Magro and Doel families do not meet the zone-of-interest requirement because they "stipulated" below that the statute could be construed not to apply to them. Aplt. Br. at 8 & 11. Even if they had, this does not deprive them of standing. *Cicchetti v. Lucey*, 514 F.2d 362, 364 (1st Cir. 1975) ("A party is not necessarily deprived of standing because his complaint alleges that a statute does not apply to him and alternatively that it is unconstitutional if it does apply ….") Further, ***none*** of the defendants below, including the Commissioner joined in urging a construction of the Adoption Invalidation Law that clearly would exclude some same-sex couples and their adoptive children from the statute's impact.

Moreover, the Commissioner misrepresents these families' positions below. The Finstuen-Magro and Doel families suggested to the district court that the statute might be construed to exclude second parent adoptions of a partner's biological child or sequential (as opposed to joint) adoptions. Jnt. App. at 85-86. But they also pointed out that even if the district court determined the Adoption Invalidation Law was not ***intended*** to apply to them, such a construction would not completely obviate the harm, as evidenced by the State's refusal to issue accurate birth certificates to such families (as with the Doel family).[12]

Even for same-sex couples who do have accurate certificates for their children, State officials may easily assume that these families fall within the Adoption Invalidation Law. Birth certificates do not distinguish between a biological parent and an adoptive parent, nor do they indicate whether there were individual or joint adoption proceedings. The Adoption Invalidation Law makes it impossible for these families to prove to any State official that they fall outside the law's scope without invading the confidentiality that surrounds adoption

---

[12] While an Oklahoma birth certificate does not create or irrefutably confirm a parent-child relationship, it is "prima facie evidence of facts recited therein." 32A C.J.S. *Evidence* § 1041 (2006). *See also*, 41 AM. JUR. 2D *Illegitimate Children* § 29 (2006); *In re Marriott's Estate,* 515 P.2d 571 (Okla. 1973). Governmental entities typically rely on birth certificates as proof of a child's identity and parentage. S*ee, e.g., Tarter v. Medley*, 356 S.W.2d 255, 258 (Ky. App. 1962); *In re Smith*, 474 N.E.3d 632 (Ohio Ct. App. 1984); *In the Interest of M.W.T.*, 12 S.W.3d 598, 601 (Tex. Ct. App. 2000).

proceedings or private facts concerning the basis for the parent-child relationship (and carrying relevant documents on their person).

The Commissioner also argues that the children of these families lack standing to challenge the Adoption Invalidation Law because it "[i]s directed at adoptive parents, not children." Aplt. Br. At 13-14. In fact, the non-recognition mandated by the law targets the adoption itself and, it follows, the resulting parent-child relationship. To suggest that only parents, not children, are affected by the law is fatuous.

The Commissioner's reliance on *Smelt v. County of Orange*, 447 F.3d 673, 682-683 (9th Cir. 2006), and *Bishop v. Oklahoma*, — F.Supp.2d —, 2006 WL 2376247 (N.D. Okla. 2006), does not bolster his position as to standing either. In *Smelt*, a same-sex couple sought to challenge a provision of the so-called federal Defense of Marriage Act (DOMA) indicating that no state is required to give full faith and credit to another state's decision to treat a same-sex relationship as marriage. The court held the plaintiffs lacked standing because no state had determined the couple was married and they had not expressed the intent to change residency to a place where they could legally marry. Similarly in *Bishop*, the district court rejected plaintiffs' challenges to the non-recognition provisions of the federal DOMA and its state counterpart on standing grounds because the plaintiffs had entered into civil unions or foreign (Canadian) marriages, but had not obtained

a marriage license or married in a jurisdiction subject to full faith and credit, *i.e.*, a state within the United States.

In this case, the adoptions are domestic and final and it is families with ***existing*** legal relationships who bring suit. The statute's non-recognition interferes substantially with the fundamental liberty interest in parental and family autonomy each is constitutionally guaranteed. This key distinction renders *Smelt* and *Bishop* inapposite.

2. The Commissioner's Focus On Issue Preclusion And The Jurisdictional Bases Of These Families' Adoption Decrees Is Misplaced; The Commissioner Made No Attempt In This Action Collaterally To Attack Any Specific Judgment.

On appeal, the Commissioner attempts to offer a new rationale as to why the Department is excused from recognizing the Finstuen-Magro and Doel adoption decrees. He argues that because he was not a party to the adoption proceedings, he is not bound by the decrees and may collaterally attack them as invalid. Not only is this argument waived, *Gundy v. United States*, 728 F.2d at 488, it would render every adoption decree unenforceable across state lines unless the adoption court for some reason could acquire jurisdiction over the vital records officers of every state and make them parties. Moreover, this contention is diametrically opposed to the positions taken in the district court by all the defendants, as expressly noted in the court's Memorandum Opinion and Order. Jnt. App. at 290 ("There is no challenge to the validity of those court proceedings or any suggestion those judgments are in

any way invalid.").

It is true that before giving full faith and credit to a particular judgment, a ***court*** may inquire into the jurisdictional basis of the foreign decree. *Underwriters Assur Co. v. N.C. Guaranty Assn.*, 455 U.S. 691, 704 (1982). Here, however, the Commissioner failed even to raise the issue by asserting below a claim collaterally attacking any specific judgment.[13] Additionally, the Commissioner's collateral attack analysis of the decrees involved in this case simply is wrong. Aplt. Br. at 28-29.

Whether the foreign adoption decrees are subject to collateral attack on jurisdictional grounds is determined by the law where the decrees were rendered, not Oklahoma law. *See, e.g.*, *Russell v. Bridgens*, 264 Neb. 217, 647 N.W.2d 56 (2002). So in this case, for the Commissioner to attack successfully the Doel adoption decree, for example, the Commissioner would have the burden of showing that the invalidity (want of jurisdiction) appears ***affirmatively*** on the face the adoption decree and, contrary to the Commissioner's erroneous statement, a California decree may be silent as to jurisdictional facts, yet is presumptively valid.

---

[13] The Commissioner's standing to bring such individual challenges based solely on his interest in issuing birth certificates – a purely ministerial act – is questionable. A judgment to determine or change a person's status generally is conclusive upon all persons not a party to the action, with limited exceptions not applicable here. *See* RESTATEMENT (SECOND) OF JUDGMENTS, § 31(2) (1982).

See, e.g., *Est. of Keet*, 15 Cal.2d 328, 333, 100 P.2d 1045, 1047 (1940); *Rico v. Nasser Bros. Realty Co.*, 58 Cal.App.2d 878, 882, 137 P.2d 861, 863-64 (1943). Additionally, any direct or collateral attack on an adoption decree is barred (except for fraud) after one year from entry of the adoption order. CAL. FAM. CODE § 9102 (1994). In short, had the Commissioner asserted such a claim, his burden would have been exceedingly high.

Finally, any challenge the Commissioner might have brought against these adoption decrees is entirely beside the point. The issue before the Court is whether the Adoption Invalidation Law itself, as opposed to an attack in a judicial proceeding, can nullify adoption decrees and withhold recognition of parent-child relationships without violating the Full Faith and Credit Clause. Clearly, it cannot and the Commissioner offers no basis for reversing the district court's holding on this issue.

E. Issues the Commissioner Attempts To Raise on Appeal That Are Outside the Proper Scope of Appellate Review.

1. The Potential Relief Available To The Commissioner Is Limited Because the District Court's Order Commands the Department to Issue a Valid Supplemental Birth Certificate, Nothing More.

The Department oversees vital records, including the issuance of birth certificates. The Commissioner is the state official who "serve[s] as the executive officer and supervise[s] the activities of the State Department of Health, and act[s]

for the Department in all matters except as may be otherwise provided in this Code; … and enforce[s] rules and standards adopted by the State Board of Health." OKLA. STAT. tit. 63, § 1 106(B)(2) (Supp. 2004). Jnt. App. at 44. The Department of Health is responsible for issuing birth certificates, OKLA. STAT. tit. 63, § 1 316 (2001), like the one denied to Jennifer and Lucy Doel for their daughter E. The relief request against the Commissioner in the Second Amended Complaint was specific and limited. Plaintiffs asked the district court to:

> [Enter] an injunction requiring Defendant Crutcher and the Oklahoma State Department of Health to issue an amended birth certificate to ED. identifying Lucy Doel and Jennifer Doel as her parents ….

Jnt App. at 51, ¶ F. The district court did so.

The Commissioner was sued for a purpose different from the two original defendants. The Governor was sued as the official vested by the Oklahoma Constitution with "supreme executive power" and deemed the "chief magistrate" in the state. OKLA. CONST. art. VI § 2. Similarly, the Attorney General is the chief law enforcement officer of the State and, pursuant to OKLA. STAT. tit. 74 § 18.14 (2001), is charged with enforcing the laws of the State of Oklahoma. Jnt. App. at 44. Unlike these two primary defendants, the Commissioner bears no such legal responsibility. His obligation is to follow rather than enforce the law.

The Governor and Attorney General did not appeal the Court's broader rulings and they have become final. The Commissioner's appeal is limited to

whether the Department must issue a birth certificate for E. An order granting an injunction against the Governor and Attorney General may not be circumvented by subordinate executive officers subject to their control, in privity with them or identified with them in interest who have actual notice of the decree. FED. R. CIV. P. 65(d). To hold otherwise would permit a defendant to nullify a decree by carrying out prohibited acts through "aiders and abettors." *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 13-14 (1945); *Cf. Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 536 (1985) (appeal by single defendant school board member in official capacity not sufficient to overturn injunction against entire board); *Kendall-Jackson Winery, Ltd. v. Branson*, 212 F.3d 995 (7th Cir. 2000) (where both Illinois Liquor Commission and distributors enjoined, an appeal by distributors alone was insufficient to bring relief from injunction).

Because the district court's order enjoining enforcement of the Adoption Invalidation Law by the most senior executive officials of the State is final as to them, the Commissioner, a subordinate executive officer, is precluded from challenging the district court order or enforcing the enjoined law. Thus, the Commissioner may not validly raise the remaining issues, addressed below.

2. The Full Faith And Credit Clause Of The U.S. Constitution Compels Oklahoma To Recognize And Give Effect To Final Decrees Of Adoption From Other States.

Even if properly considered, the many faulty full faith and credit arguments

raised by the Commissioner on appeal must be rejected as incompatible with basic principles.

a) The Full Faith and Credit Clause Places An Exacting Obligation On States.

The United States Constitution commands that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state." U.S. CONST. art. IV, § 1. Congress has decreed that judgments "shall have the same full faith and credit given to them in every court within the United States … as they have by law or usage in the courts of such State … from which they are taken." 28 U.S.C. § 1738 (1948). Under these laws, the judgment of a state court is to be given the same credit, validity and effect in every other court of the United States as it is given in the state in which it was entered. *Underwriters Assur. Co. v. N.C. Guar. Assn.*, 455 U.S. 691 (1982).

The Supreme Court has explained that the "animating purpose" of the full faith and credit command is:

> to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

Baker v. Gen. Motors Corp., 522 U.S. 222, 232, (1998) (quoting *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935)).

In the context of judgments, the full faith and credit obligation is an exacting one under which a final judgment rendered in one state by a court of competent jurisdiction gains nationwide force. *Baker*, 522 U.S. at 233; *see also Matsushita Elec. Indust. Co. v. Epstein*, 516 U.S. 367, 373 (1996) (federal court may not withhold full faith and credit from a state-court judgment approving a class-action settlement simply because the settlement releases claims within the exclusive jurisdiction of the federal courts); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 485 (1982) (according state court judgment dismissing employment discrimination claim full faith and credit to bar federal Title VII suit).

Consistent with the "exacting obligation" standard, the Supreme Court has rejected any notion that a state may disregard the full faith and credit obligation simply because the state finds the policy behind the out-of-state judgment inconsistent with or contrary to its own policies. The Court has stated:

> [O]ur decisions support no roving "public policy exception" to the full faith and credit due *judgments*. *See* [*Estin v. Estin*, 334 U.S. 541, 546 (1948)] (Full Faith and Credit Clause "ordered submission … even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it."); *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908) (judgment of Missouri court entitled to full faith and credit in Mississippi even if Missouri judgment rested on a misapprehension of Mississippi law).

Baker, 522 U.S. 222, 233-34. *See also Williams v. North Carolina*, 317 U.S. 287 (1942) (requiring North Carolina to recognize the change in marital status effected by a Nevada divorce decree that would not have been granted under the laws of North Carolina).

Indeed, in the rare instances in which courts have avoided enforcement of an out-of-state judgment,[14] it was because the original court purported to accomplish an act that was within the *exclusive* province of the state being asked to enforce the judgment. *Baker*, 522 U.S. at 235. So, for example, the Court has declined to require courts of State A to allow judgments of State B to control the transfer of real property in State A. *Hood v. McGehee*, 237 U.S. 611 (1915);[15] *Fall v. Eastin*,

---

[14] Proper full faith and credit analysis distinguishes between public acts and judicial proceedings. *Baker*, 522 U.S. at 232 ("Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments."); *Magnolia Pet. Co. v. Hunt*, 320 U.S. 430, 437 (1943) ("The full faith and credit clause and the Act of Congress implementing it have, for most purposes, placed a judgment on a different footing from a statute of one state, judicial recognition of which is sought in another."). *See Nevada v. Hall*, 440 U.S. 410, 422 (1979).

[15] In *Hood*, the Supreme Court let stand an Alabama decision that, consistent with full faith and credit requirements, recognized the parent-child status created by a Louisiana adoption decree, but denied the adoptive children a full faith and credit right to inherit real property located in Alabama in light of a law that treated children adopted outside Alabama differently than children adopted within Alabama for inheritance purposes. (The Supreme Court did not address any challenge to the Alabama statute under the Equal Protection Clause.) Although not expressly overruled, the decision's precedential force has been called into question by the Supreme Court and commentators. *See Williams*, 317 U.S. at 294 n.5 (treating *Hood* as anomalous and as resting on the doctrine that "the state where the land is located is 'sole mistress' of its rules of real

—continued

215 U.S. 1 (1909). Similarly, a court lacks authority to enter an enforceable order shielding a witness from another jurisdiction's subpoena power in a case involving persons and causes outside the original state's governance. *Baker*, 522 U.S. at 240. These cases turn on the original court's authority to enter the judgment in the first instance, not the effect given to a judgment within the originating court's authority. A state decree of adoption affecting the ***legal status*** of persons properly within the state's jurisdiction does not fall within this limited exception. *Williams*, 317 U.S. at 298 (state has authority over legal status of persons domiciled within its borders).

b) The Adoption Decrees Establishing The Plaintiffs' Parent-Child Relationships Are Valid, Final Judgments Warranting Constitutional Recognition.

The full faith and credit precedent applicable generally to judicial proceedings is applicable specifically to adoption proceedings. Adoption is accomplished through judicial proceedings that result in final decrees that are not susceptible to modification. 1-4 ADOPTION LAW & PRACTICE, § 4.02 (Matthew Bender, 2003). The existence of a final decree of adoption precludes the choice of law problems that might arise in other types of domestic relations disputes. Ralph

---

—continuation

property" rather than on established full faith and credit principles); EUGENE F. SCOLES *ET AL.*, CONFLICT OF LAWS 678 n.1 (3d ed. 2000) (stating that *Hood* probably would not be followed today).

U. Whitten, *Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases*, 31 CAP. U.L. REV. 803, 804 (2003).[16]

Consistent with well-established federal law, Oklahoma's own jurisprudence had long acknowledged that the United States Constitution "requires full faith and credit be accorded a final judgment of a sister state court having jurisdiction of the parties and of the issues determined." *Smith v. Shelter Mut. Ins. Co.*, 867 P.2d 1260, 1265 (Okla. 1994) (citations footnote omitted). Moreover, "the full faith and credit clause requires that a valid judgment from one state be enforced or recognized in other states regardless of the public policy of the other state." *Id.* at 1266 (footnote omitted). The Oklahoma Supreme Court has applied this constitutional mandate with full force in the context of final decrees of adoption rendered in other states. *Conville v. Bakke*, 400 P.2d 179, 185 (Okla. 1965) (noting the constitutional hurdle imposed by full faith and credit requirements in an action

---

[16] Scholars uniformly have observed that every state must recognize a valid adoption decree rendered in another state, and an adopted child may change residence or domicile without affecting the validity of his or her adoption. EUGENE F. SCOLES *ET AL.*, CONFLICT OF LAWS 678 (3d ed. 2000) ("An adoption decree entered by a court of competent jurisdiction will ordinarily be recognized everywhere."); JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 716 & nn.2-3 (1935) (reporting that an adopted child "will be treated in every other state … just as adopted children are treated in such other state," and citing cases); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 31(1)(a) (1982) ("A judgment in an action whose purpose is to determine or change a person's status is conclusive upon the parties to the action with respect to the existence of the status, and rights and obligations incident to the status which under the procedures governing the action are ordinarily determined therein….").

attempting to avoid the effect of a final adoption decree entered in a Missouri proceeding); *Ex parte Moulin*, 203 Okla. 99, 101, 217 P.2d 1029, 1031 (1950) (where validity not in question, Arkansas adoption decree entitled to full faith and credit under the Federal Constitution).

Indeed, prior to the Oklahoma legislature's enactment of the Adoption Invalidation Law, the full faith and credit requirement pertaining to out-of-state adoptions was codified in Oklahoma's Adoption Code and provided:

> The courts of this state shall recognize a decree, judgment, or final order creating the relationship of parent and child by adoption, issued by a court or other governmental authority with appropriate jurisdiction … in another state or territory of the United States. The rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though the decree, judgment, or final order were issued by a court of this state.

OKLA. STAT. tit. 10, § 7502-1.4(A) (2001).

Given the State's clearly expressed recognition of the binding effect of the Full Faith and Credit Clause on out-of-state adoption proceedings, it comes as no surprise that the Oklahoma Attorney General properly advised the Department that it was required to issue an amended birth certificate that accurately reflected both Greg Hampel and Ed Swaya as V's parents pursuant to a valid decree of adoption issued in a Washington state judicial proceeding. 2004 OK AG 8 at ¶ 16. Within weeks of the issuance of the amended birth certificate, however, the Oklahoma

legislature responded to the Attorney General's Opinion by passing the Adoption Invalidation Law challenged in this action. A state legislature may not exempt a state from the full faith and credit requirement.[17] Accordingly, the district court properly struck down the Adoption Invalidation Law.

3. The Adoption Invalidation Law Fails to Accord Plaintiffs Equal Protection of Their Fundamental Rights and Discriminates on the Basis of Sex and Sexual Orientation in Violation of the Fourteenth Amendment.

Even if properly considered, the equal protections arguments raised by the Commissioner on appeal must be rejected as incompatible with basic principles.

The Fourteenth Amendment to the United States Constitution provides that no state shall deny to any person the equal protection of the laws. U.S. CONST. amend. XIV, § 1. Yet, Oklahoma's Adoption Invalidation Law does just that. Oklahoma recognizes and treats as valid adoptions by individuals or by more than one individual of different sexes from any other state or foreign jurisdiction, but refuses to recognize or treat as valid adoptions by same-sex couples. OKLA. STAT. tit. 10, § 7502-1.4(A) (Supp. 2004). The statute creates an underclass of parents in

[17] U.S. CONST. art. VI, cl. 2, provides "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be Supreme Law of the Land; and the judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

same-sex relationships and of their adopted children and treats both groups differently from and worse than other adoptive families, going so far as to nullify their legal ties when in Oklahoma or in dealings with State officials and agencies. By refusing to recognize and give effect to the adoptions of the Finstuen-Magro and Doel children in birth records and otherwise because their parents are lesbians and in constitutionally protected intimate same-sex relationships, the Adoption Invalidation Law senselessly exposes these children and parents to grave harms without any compelling, important or even legitimate justification.

a) The Adoption Invalidation Law Unlawfully Discriminates Against Children Based On Their Parent's Sexual Orientation or Unmarried Intimate Relationship.

In assessing the equal protection challenges of the children, the district court held that the Adoption Invalidation Law "has the same effect as statutes which affected an illegitimate child's rights." Jnt. App. at 298. Accordingly, the court properly applied heightened scrutiny in analyzing the law's classification. The Commissioner urges a less stringent standard, drawing on non-analogous cases that refused to recognize as "quasi-suspect" a classification based on mental retardation or one comprising distant relatives. Aplt. Br. at 38-42. The Commissioner's effort is misguided. The district court aptly analogized and subjected the classification here to well-established standards governing "illegitimacy" laws.

On its face and in daily operation, the Adoption Invalidation Law singles out and denies legal benefits to a subset of children: adopted children of unmarried same-sex parents. The Supreme Court has long held that disparate treatment of children of unmarried parents based on the conduct or status of their parents violates the Equal Protection Clause. *See, e.g.*, *Levy v. Louisiana*, 391 U.S. 68 (1968) (invalidating provision denying children of unmarried parents the right to claim for wrongful death); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) ("imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."); *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) ("visiting condemnation upon the child in order to express society's disapproval of the parents' liaisons 'is illogical and unjust'"). In this series of cases, the Supreme Court has struck down as unconstitutional state laws that burdened or disadvantaged children born to unmarried couples. As the Court explained in *Pickett v. Brown*, 462 U.S. 1, 7 (1983):

> Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual–as well as unjust–way of deterring the parent ... the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where–as in this case–the classification is justified by no legitimate state interest, compelling or otherwise.

See also Gomez v. Perez, 409 U.S. 535, 538 (1973) ("a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.")

The Adoption Invalidation Law fits into this sad lineage. It penalizes the Finstuen-Magro and Doel children and exposes them to countless risks simply to make a statement of disapproval of their unmarried lesbian parents. Differential treatment of children based upon their parents' conduct or status triggers heightened scrutiny, under which the state must show at least that the classification is substantially related to an important and legitimate state interest. *Pickett v. Brown*, 462 U.S. 1, 8 (1983). The State has not and cannot meet this test.

b) The Adoption Invalidation Law Unlawfully Discriminates Against Same-Sex Couples Who Parent.

The Adoption Invalidation Law substantially infringes on the parents' fundamental right of parental autonomy, threatening to deny it altogether. By treating these families' adoption decrees as invalid, the State leaves them without any ability to act for their children, or any legally enforceable parental status. The law also invidiously discriminates against these parents by targeting same-sex couples and their relationships. As in *Lawrence v. Texas*, 539 U.S. 558 (2003), the State is unconstitutionally subjecting plaintiff gay and lesbian parents to penalties for exercising their constitutionally protected fundamental liberty interest in having an intimate adult same-sex relationship when it imposes no such penalty on other

adoptive parents exercising their fundamental relationship rights. Indeed, the penalty of non-recognition of parental status imposed here is far worse than the misdemeanor penalties imposed in *Lawrence*.

Because Oklahoma's discriminatory classification impinges on these parents' fundamental liberty interests, including their interest in the care, custody and control of their children, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), the law is subject to strict scrutiny, *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (when challenged law invades a fundamental right, analysis of the law's discriminatory classification is subject to most stringent analysis).[18]

Even were no fundamental right involved, Oklahoma may not constitutionally discriminate against these parents in the exercise of their parental and relationship rights because of their sexual orientation and membership in same-sex couples. *Lawrence*, 539 U.S at 580 (O'Connor, concurring) ("We have been most likely to apply rational basis review to hold a law unconstitutional under

---

[18] As a predicate to considering the families' substantive due process claims, the district court expressly identified their parental and family autonomy as giving rise to a fundamental liberty interest of constitutional dimension. Jnt. App. at 304-07. This finding is sufficient to trigger strict scrutiny of a classification that impinges on that right in the equal protection context. The district court, however, never reached that point in its equal protection analysis because it found that the statute targets gay and lesbian couples for the sole purpose of disadvantaging them as a group, which is not even a legitimate purpose under the more deferential rational basis review. *See* Section IV.E.3(c), *infra*.

the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships."). The Supreme Court strongly has protected parents from disparate treatment based upon personal characteristics. *See, e.g.*, *Palmore v. Sidoti*, 466 U.S. 429 (1984) (strict scrutiny applied to reverse a custody decree that divested a mother of custody of her infant child because of her remarriage to a person of a different race); *Caban v. Mohammed*, 441 U.S. 380 (1979) (heightened scrutiny applied to strike down sex-based classification in law permitting unwed mothers, but not fathers, to block adoption of a child by withholding consent). *See also Shahar v. Bowers*, 114 F.3d 1097, 1110 n.26 (11th Cir. 1997) (*en banc*) (acknowledging that across-the-board denial of legal protection to a group because of their sexual orientation violates Equal Protection (citing *Palmore*)), *cert. denied*, 522 U.S. 1049 (1998).

c) The Adoption Law Cannot Survive Any Tier of Equal Protection Scrutiny Or Be Justified By an Illegitimate Purpose, Such as to Discriminate Against Gay People or Their Children.

The targets and effects of the Adoption Invalidation Law cause it to trigger strict and/or heightened (intermediate) scrutiny under federal equal protection law. To satisfy strict scrutiny, as for discriminatory infringements of fundamental rights, the State must be able to demonstrate an actual compelling governmental interest which the measure's classification is in fact narrowly tailored to serve. *Edwards v. Valdez*, 789 F.2d 1477, 1483 (10th Cir.1986). It can identify no such

interest and certainly none which this broad law advances in a measured way. Similarly, when heightened scrutiny is applied to the line-drawing in the law, as in response to its targeting of children based on their parents' status, the law must fail because it does not serve an actual important government purpose, nor is it substantially related to such a purpose. *Pickett v. Brown*, 462 U.S. 1, 8 (1983). More is required than the "mere incantation of a proper purpose." *Trimble v. Gordon*, 430 U.S. 762, 769 (1977).

Even when rational basis review is given to the challenged classification, it cannot survive because it bears no rational relationship to a legitimate governmental interest. As the Supreme Court reiterated in *Romer v. Evans*, 517 U.S. 620, 632 (1996), "even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification to be adopted and the object to be obtained." The explanations offered "must find some footing in the realities of the subject addressed by the legislature," *Heller v. Doe*, 509 U.S. 312, 321 (1993), which in this case is adoption.

The Oklahoma Adoption Code, of which the Adoption Invalidation Law is a part, is intended to "ensure and promote the best interests of the child" and "affirm that the parent-child relationship is fundamental and that all adoption laws should be fair to the child and to each parent of the child." OKLA. STAT. tit. 10, § 7501-

1.2(A). The Adoption Invalidation Law does not rationally further the Code's purpose. To the contrary, Oklahoma has decided that children who happen to have been adopted by same-sex couples shall be deprived of all the legal protections and benefits of being someone's legal child and of legal recognition of the relationship they have with their parents simply because of the sex and sexual orientation of their parents. *Trimble*, 430 U.S. at 769-70 (characterizing penalizing a child to deter the child's parent as illogical, ineffectual and unjust). By threatening to render these children legal orphans without a permanent legal connection to the parents who have raised them, the State inflicts not just "incidental disadvantages," *Romer*, 517 U.S. at 635, but violates their right of equal protection from harm. *Id*. at 632-34; *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996).

The Commissioner insists that the Adoption Invalidation Law rationally advances the purpose of providing "the opportunity for optimal rearing of its children in a traditional home with a female and male parent." Aplt. Br. at 39 & 44. In support of his position, the Commissioner cites cases discussing restrictions on the right to adopt. He then contends there is no legal difference in restrictions concerning the right to adopt and restrictions on recognition of completed adoptions. The district court properly rejected this illogical position, pointing out the key difference: a permanent parent-child relationship had already been formed

in the context of recognition. Jnt. App. at 296. The statute has no ability to alter the make up of these families; it only makes them less equal in the eyes of the law.

In truth, the Adoption Invalidation Law is not rationally related to ***any*** purported interest, however illegitimate, in discouraging gay and lesbian parenting or finding non-gay homes for children. *Glona v. American Guar. & Liab. Insur. Co.*, 391 U.S. 73, 75 (1968) (striking down statute giving mother no right of action for death of son born out of wedlock). The Court in *Glona* could see no rational basis to assume "that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served," or that the goal of the State to discourage this perceived "sin" would be defeated, stating that it would be "farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death." Likewise, Oklahoma's harsh refusal to respect extant final adoption decrees, recognized in every other state, that protect a child's relationship with a parent and the benefits that flow from that status is not rationally related to any goal of providing "heterosexual homes" for children as it creates no more such homes. Nor can Oklahoma's Adoption Invalidation Law stop gay and lesbian couples from adopting outside its borders.

More fundamentally, as the *Palmore* Court made clear, a core principle of equal protection jurisprudence is that the Constitution cannot give effect to private

bias and prejudice. *Palmore*, 466 U.S. at 433. This principle applies equally to anti-gay bias and to negative fears and attitudes directed at non-suspect classes. S*ee Romer*, 517 U.S. at 634; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 448-50 (1985) (statutory classifications based on negative attitudes toward disabled persons do not serve a legitimate governmental interest and fail even the most deferential standard of review); *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (same principle).

The Adoption Invalidation Law targets gay and lesbian people and their children on its face, embodying the State's biased view that gay couples as a class are so inferior that they and their children should be singled out for grave harm. The Supreme Court already has held that a purpose to make gay people (and, here, their children) unequal to everyone else cannot be squared with the Equal Protection Clause. *Romer v. Evans*, 517 U.S. 620, 635 (1996); *see also Lawrence v. Texas*, 539 U.S. 558, 584 (2003) (O'Connor, J., concurring) ("A legislative classification that threatens the creation of an underclass … cannot be reconciled with the Equal Protection Clause.").

Romer, *Cleburne* and *Moreno* exemplify three contexts in which the legislative purpose to discriminate for its own sake against a politically unpopular or disfavored class of citizens was plain in the record or judicially inferred. Here, as in those cases, the Court is warranted in paying greater attention to and viewing

with skepticism any other rationales the State may offer in support of the classification; unlike routine cases involving economic classifications, this case involves personal relationships and a politically unpopular group and therefore the deference normally given to the legislature – in the form of the standard that allows the State and the Court to hypothesize *any conceivable* rational basis to which the law *might* relate – gives way to "a more searching form of rational basis review." *Lawrence*, 539 U.S. at 579-80 (O'Connor, J. concurring) (collecting cases); *Cleburne*, 473 U.S. at 449; *see also Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (emphasizing *Cleburne* language that substantiation of explanations for differential treatment grounded in the statutory purposes is required where "negative attitudes" are behind law's passage). The Court should not credit any belated attempts to dress up this discriminatory law in hopes its evident purpose will be disguised.

Given the text of the Adoption Invalidation Law, the circumstances surrounding its enactment in the wake of the Attorney General's birth certificate Opinion, the heartless severity of its adverse impact on same-sex couples and their adoptive children, and the lack of any identifiable compelling or important governmental interest advanced by the classification, the conclusion is inescapable that the law reflects the illegitimate purpose of expressing moral disapproval of and antipathy toward gay people and their relationships. *Romer*, 517 U.S. at 634;

Lawrence, 529 U.S. at 582 (O'Connor, J., concurring). The district court so found.

4. The Adoption Invalidation Law Denies These Families Substantive Due Process By Infringing Their Liberty Interests In Parental And Family Autonomy and In Intimate Relationships.

Even if properly considered, the substantive due process arguments raised by the Commissioner on appeal also must be rejected as incompatible with basic principles.

In addition to its equality guarantee, the Fourteenth Amendment provides that no State shall deprive any person of life, liberty, or property without due process of law. U.S. CONST. amend. XIV, § 1. The Due Process Clause has a substantive component that provides heightened protection against government interference with fundamental rights and liberty interests. *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). These parents have a protected liberty interest in their parental autonomy, including the fundamental right to make decisions concerning the care, custody, and control of their children. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (reviewing the long history of Supreme Court precedent on the subject); s*ee also Davis v. Davis*, 708 P.2d 1102, 1109 & nn. 33 & 34 (Okla. 1985) (interference with parental autonomy and privacy must be justified by compelling state concern). The private realm of the family is sheltered from undue government interference and the Finstuen-Magro and Doel families

each share a fundamental right of family privacy. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-51 (1992). The State can offer no justification, compelling or otherwise, for interfering in the lives of these parents and families.

The interference here is strong. The litany of protections provided to recognized parents and their children under Oklahoma's statutory scheme is both far-reaching and comprehensive. *Supra,* notes 7 and 8. Additionally, by denying not only access to these statutory protections, but also recognition that they have legal parent-child relationships, the State has effectively forced the adult plaintiffs to alter their upbringing of their children to minimize risk. Finstuen no longer signs parental authorizations for their two girls. Jennifer Doel avoids making medical decisions on behalf of her daughter E. The act's invasive reach into the families' lives effectively sends the message that these families are unwanted and, indeed, the Oklahoma residents realize that they may be left with no other choice but to move from Oklahoma for the safety and security of their children and themselves.

Moreover, these adults have in common with all adults a fundamental right of personal autonomy and self-determination in their intimate consensual relationships that the State may not infringe through statutory penalties absent the most compelling justification to which the restriction must be narrowly tailored. *Lawrence*, 539 U.S. at 573-74; *Casey*, 505 U.S. at 851. As discussed above, the

Adoption Invalidation Law penalizes gay and lesbian people for being in same-sex couples by taking away the parental rights of this class of adoptive parents and the rights of their children. Individuals and different-sex couples may have their out-of-state adoptions respected in Oklahoma but those who exercise their right of intimate association with another person of the same sex in a committed personal and family relationship may not. This is a bald deprivation of liberty which the State cannot justify.

The Commissioner argues that the fundamental liberty interest in parental and family autonomy does not extend to parent-child relationships created through adoption. This position is contrary to adoption law in virtually every state (including Oklahoma), through which the resulting status is legally indistinguishable from a biological parent-child relationship. *See* Section IV.B., *supra*. Supreme Court precedent makes short shrift of the Commissioner's premise as well. The Court has refused to distinguish between biological and adoptive parents. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843-44 & n.51 (1977) (noting that adoption is recognized as the legal equivalent of biological parenthood). All legal parents, *i.e.*, persons recognized as parents by state law at the time the status is created, have a fundamental liberty interest in the care, custody and rearing of their children that merits both

procedural protection and substantive protection under the Due Process Clause of the Fourteenth Amendment. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

V. CONCLUSION

The Finstuen-Magro and Doel families have standing to challenge Oklahoma's Adoption Invalidation Law. The district court properly found that the law violated the Full Faith & Credit, Equal Protection and Due Process Clauses of the United States Constitution and, therefore, provides no justification for the Department's refusal to issue a birth certificate reflecting Jennifer and Lucy Doel's parent-child relationship with E.

The district court's judgment should be affirmed.

VI. ORAL ARGUMENT

The Court has set this matter and the related appeal (06-6216) for hearing on November 13, 2006, at 1:00 pm, Courtroom IV, 6th Submission.

VII. CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains **13,889 words**, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

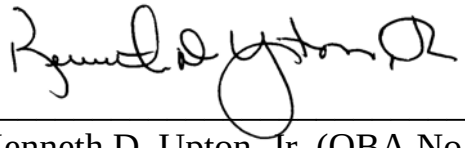
2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this

brief has been prepared in a proportionally spaced typeface using Microsoft® Word 2000, version 9.0.6926 (SP-3), in 14 point Times New Roman font (13 point font for footnotes).

VIII. CERTIFICATE OF DIGITAL SUBMISSION

I certify that (1) all required privacy redactions have been made and, with the exception of those redactions, the copy of this document submitted in Digital Form is an exact copy of the written document filed with the Clerk, and (2) the digital submission has been scanned for viruses with Symantec AntiVirus Corporate Edition, version 8.1.0.825, a commercial virus scanning program, with virus definitions updated 10/14/2006 (rev. 17), and are free of viruses as reported by the software.

Respectfully Submitted,



s/ Kenneth D. Upton, Jr. (OBA No. 12906)
F. Brian Chase (LaBA No. 23450)
Lambda Legal Defense and Education Fund, Inc.
3500 Oak Lawn Avenue, Suite 500
Dallas, TX 75219
Telephone: (214) 219-8585
Fax: (214) 219-4455
E-Mail: kupton@lambdalegal.org
bchase@lambdalegal.org
and

Sandy Ingraham (OBA No. 15322)
Ingraham & Associates, P.L.L.C.
Route 2, Box 369-B
McLoud, OK 74851
Telephone: (405) 964-2072
Fax: (405) 964-2058
E-Mail: ingraham@mcloudteleco.com

ATTORNEYS FOR APPELLANTS

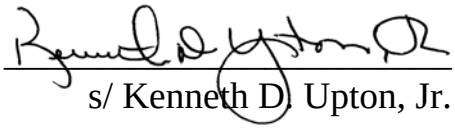
IX. CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2006, a true and correct copy of the above and forgoing document was served by depositing it with FedEx for next-business-day delivery, addressed to:

Martha R. Kulmacz, Esq.
Assistant Attorney General
Oklahoma Attorney General's Office – Litigation Section
4545 North Lincoln Blvd., Suite 260
Oklahoma City, OK 73105-3498
ATTORNEY FOR APPELLEES.

I further certify that on this date I transmitted a digital submission of the foregoing to the following persons in compliance with the Court's Emergency General Order of October 20, 2004, as last amended January 1, 2006: *In Re: Electronic Submission of Selected Documents*:

Clerk of the Tenth Circuit, esubmission@ca10.uscourts.gov
Martha R. Kulmacz, Esq., martha_kulmacz@oag.state.ok.us.



s/ Kenneth D. Upton, Jr.