Case No. 11-46

In The
Supreme Court of the United States

OREN ADAR, Individually and as Parent and Next Friend of J.C.A.-S., a minor; MICKEY RAY SMITH, Individually and as Parent and Next Friend of J.C.A.-S., a minor,

Petitioners,

v.

DARLENE W. SMITH, In Her Capacity as State Registrar and Director, Office of Vital Records and Statistics, State of Louisiana Department of Health and Hospitals,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* GARY J. GATES AND NAN D. HUNTER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF THE *AMICI CURIAE*

Amici curiae respectfully submit this brief in support of Petitioners pursuant to consent of all parties.[1]

Amicus Gary J. Gates is The Williams Distinguished Scholar at the Williams Institute on Sexual Orientation Law & Public Policy at the UCLA School of Law. He co-authored *The Gay and Lesbian Atlas* (Urban Institute Press, 2004), which summarized the available demographic data on the gay and lesbian population in the United States. Gates' doctoral dissertation included the first significant research study of the demography of the gay and lesbian population using U.S. Census data. Since then, Gates has authored dozens of groundbreaking studies of the demographic characteristics of same-sex couples in the United States, many based on the U.S. Census, and of the lesbian, gay, bisexual and transgender population in the United States. His work on that subject has been

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[1] Counsel of record for all parties have waived the requirement of ten days' notice set by Supreme Court Rule 37 and have consented specifically to the filing of this brief. Email from Kyle Duncan, Appellate Chief, Louisiana Department of Justice to Jennifer Pizer, Legal Director, The Williams Institute (Aug. 8, 2011); Email from Kenneth Upton, Supervising Senior Staff Attorney, Lambda Legal South Central Regional Office to Jennifer Pizer (Aug. 8, 2011). No counsel for a party authored any part of this brief, and no such counsel or party made any financial contribution in connection with the preparation or filing of this brief. No persons other than the *amici* or their counsel have made any financial contribution to this brief's preparation or submission.

featured in many national and international media outlets. Gates holds a Ph.D. in Public Policy and Management from the Heinz College, School of Public Policy and Management at Carnegie Mellon University.

Amicus Nan D. Hunter serves as the Legal Scholarship Director for the Williams Institute. In addition, she is Associate Dean for Graduate Programs and Professor of Law at Georgetown University Law Center. Dean Hunter is co-author of *Sexuality, Gender and the Law* (Foundation Press, 3d. ed., 2011), a leading casebook in this field. Her articles have appeared in numerous law reviews.

As scholars of sexual orientation public policy and law, *amici* Gates and Hunter have substantial interests in the issue before this Court, whether a state may deny legal recognition to an adoption judgment entered by a court of a different state to remain consistent with its policy of disallowing such adoptions within its borders. *Amici* have conducted extensive research and authored numerous studies regarding the demographic characteristics of same-sex couples, of lesbian, gay, bisexual and transgender individuals, and of the children they are raising in the United States. *Amici* are familiar with the issues in this case and the factual context in which they have arisen. As scholars, they believe that the information presented in this brief will assist the Court in its consideration of the decision below in this case, and the populations it likely will affect, including children adopted by same-sex couples and by unmarried, different-sex couples.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Louisiana-born child at the center of this case, J.C.A.-S., does not have a birth certificate identifying his legal parents because his birth state would not have allowed his parents – an unmarried gay male couple – to adopt him. Louisiana's senior official in charge of vital records has concluded that the state's settled requirement that an accurate new birth certificate be issued for a child upon presentation of a valid court judgment of adoption does not apply when Louisiana would have prohibited the adoption within its borders.

Louisiana's restriction of joint adoption to married, different-sex couples is not unique. Like Louisiana, at least five other states prohibit second-parent adoption by an unmarried partner of a child's legal parent by official construction of state law. One additional state expressly limits adoption to married, different-sex couples by statute. Finally, one more state allows adoption by unmarried, different-sex couples, but prohibits adoption by same-sex couples, whether married or unmarried.

Many American families include adopted children whose legal relationships with their parents would not be recognized by these states if they followed Louisana's position in this case. According to 2009 data from the U.S. Census Bureau, an estimated 47,000 unmarried, different-sex couples currently are raising over 64,000 adopted children in the United States. Additionally, an estimated 20,000 same-sex couples are raising nearly 30,000 adopted

children.[2] These couples are geographically diverse and live in every state in the United States. While it cannot be determined how many of these children have been adopted by both members of these couples rather than by only one member, these are the best data available for describing the families potentially affected by laws and policies such as Louisiana's.

On average, individuals in same-sex or unmarried, different-sex couples raising adopted children are more likely to be racial and ethnic minorities than individuals raising adopted children as a whole in the United States. Parents in these families are younger and more likely to be employed, but have lower household incomes than families with adopted children generally. As a practical matter, given the highly mobile nature of American society today, families in this national population can be potentially affected by laws such as Louisiana's, under the Fifth Circuit's rule in this case, even though they live in states without such laws. The decision below opens the door to government officials potentially not recognizing parental ties established by out-of-state adoption judgments in various other circumstances beyond issuance, or not, of accurate birth certificates. This might create not just problems for families that live in or move to Louisiana, but also for families that visit or travel through Louisiana and other states that follow the path lighted by the decision below.

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[2] More specific figures are provided in the Appendix to this brief.

State-issued statistics project that nearly 25 million tourists will visit Louisiana next year. Overall, the eight states that do not recognize adoptions by unmarried, different-sex parents and same-sex parents record more than 300 million tourist visits annually. Undoubtedly, many more pass through en route to other states. Even when in a state just temporarily, a child's legal relationship with his or her parents can become relevant for many reasons, including if a parent must make a medical decision on the child's behalf following an accident or in a health crisis, or if a child simply becomes lost and must be identified to be released from the relevant local authorities. Further, if the child dies during such a trip, only adoptive parents whose legal status is recognized will likely be able to recover their child's body, and make decisions about anatomical gifts and disposition of their child's remains. Moreover, if the child's injury or death was caused by wrongful conduct of another, only parents with recognized legal ties to the child will have standing to file tort claims against those responsible. Whenever those in authority or otherwise responsible in such a situation are public officials or employees, the rule adopted by the court below could prevent parental care and decision-making, perhaps causing delay at an already difficult time, or leaving the family in limbo as actual, legal relationships are ignored.

In sum, the issues presented – about which the federal circuits now are divided[3] – warrant review by this Court.

ARGUMENT

I. NEARLY 67,000 SAME-SEX AND UNMARRIED, DIFFERENT-SEX COUPLES ARE RAISING APPROXIMATELY 94,000 ADOPTED CHILDREN IN THE UNITED STATES.

Data from the 2009 American Community Survey, administered by the United States Census Bureau, provide estimates of the number of same-sex and unmarried, different-sex couples and their children.[4] The data suggest that there are approximately 6 million unmarried, different-sex couples residing in the United States. Of these couples, an estimated 2.5 million are raising 4.8 million children. More than 64,000 of these children are adopted.

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[3] Compare the decision below with *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007) (holding that "final adoption orders by a state court of competent jurisdiction are judgments that must be given full faith and credit under the Constitution by every other state in the nation.").

[4] The Census Bureau eventually will release 2010 Census data tabulating the number of same-sex and unmarried, different-sex couples in the United States who are raising adopted children. However, these data have not yet been released. Data from the 2009 American Community Survey Public Use Microdata Sample are the most recent data available for these analyses.

Among the more than 580,000 same-sex couples in the United States, an estimated 110,000 are raising children. Many of these same-sex couples have adopted their children: an estimated 20,000 same-sex couples are raising nearly 30,000 adopted children.[5] In total, Census Bureau data estimate that nearly 94,000 adopted children are living with approximately 67,000 same-sex or unmarried, different-sex couples. While the legal relationships between these adopted children and each member of these couples cannot be ascertained from the American Community Survey data, these are the best data available for describing the families potentially affected by Louisiana's adoption-related laws and policies and similar laws of other states.[6]

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[5] Moreover, Census Bureau data suggest that the number of adoptions by same-sex couples is increasing. Between 2000 and 2009, the number of same-sex couples raising an adopted child nearly doubled, from 10,700 to nearly 20,000 couples.

[6] More specifically, it should be noted that not necessarily all of these children have been adopted legally by both members of these couples. The American Community Survey data only capture the relationship between one partner in the couple (the reference person) and all other household members, including any children. This also means that some adopted children are not identified as adopted. For example, children may not be identified as adopted if a child's adoptive parent is not the reference person and the reference person does not identify a partner or spouse's adopted child as his or her own adopted child, perhaps opting instead to identify the child as a "step-child" or "unrelated child." Alternatively, if the reference person gave birth to the child and then the nonmarital partner adopted the child, the reference person might not identify the child as adopted. The relationship between adopted children and their same-sex or unmarried, different-sex parents also would not be

These same-sex couples and unmarried, different-sex couples with adopted children live in every state of the Union. These families are racially and ethnically diverse and also are younger. The adults in these couples are younger than the typical person raising an adopted child, and the adopted children being raised by these couples are younger than adopted children in general. The children in these families are also just as likely to be disabled as adopted children in general. Individuals in same-sex or unmarried, different-sex couples raising adopted children also contribute to the U.S. economy, and some of them have served in the armed forces.

Partners in these couples are more likely to be racial or ethnic minorities. An estimated 71% of all individuals in couples raising adopted children are white, compared to only 58% of individuals in same-sex and unmarried, different-sex couples who are raising adopted children. An estimated 24% of all individuals in couples raising adopted children are either African-American or Latino or Latina. Among individuals in same-sex or unmarried, different-sex couples raising adopted children, an estimated 37% are either African-American or Latino or Latina. Similarly, the *adopted children* being raised by same-sex and unmarried, different-sex partner

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identified if neither member of the couple is the reference person (for example, if the reference person is a parent of one member of the couple). In such cases, the Census form would capture no information about the couple's relationship with each other or about their relationships with any children in the home.

couples are less likely to be white and more likely to be Latino or African-American than adopted children in general.

The adult members of these couples have an average age of 40 as compared to an average age of 48 among all individuals raising adopted children. The adopted children being raised by these couples are also younger than adopted children in general, with an average age of 10 years compared to 14 years among all adopted children. Notably, an estimated 13% of adopted children being raised by same-sex or unmarried, different-sex couples are disabled, which is similar to the percentage of adopted children overall who are disabled.

Individuals in same-sex and unmarried, different-sex couples raising adopted children have higher levels of employment when compared to all individuals raising adopted children. An estimated 92% of individuals in same-sex or unmarried, different-sex couples raising adopted children are employed compared to 84% of all individuals in couples raising adopted children. Despite these higher rates of employment, these same-sex and unmarried, different-sex couples have fewer economic resources than the average family with an adopted child. While the estimated median annual income of these families is $60,000, the median income of all households with adopted children is nearly 25% higher, at $73,000.

Furthermore, in more than 10% of the households headed by a same-sex or an unmarried, different-sex couple in which adopted children are

being raised, at least one member of the couple served in the U.S. military.

II. EIGHT STATES CURRENTLY DO NOT ALLOW SAME-SEX AND/OR UNMAR-RIED, DIFFERENT-SEX COUPLES TO ADOPT.

Numerous states limit joint adoption to married couples,[7] and most of those limit marriage to heterosexual couples. However, unmarried partners may also both become parents in a two-step process: after one partner adopts the child as a single individual, the nonmarital partner generally may apply to adopt separately, in a second-parent adoption proceeding, without displacing the parental rights of the first parent.[8]

Besides Louisiana, five other states – namely Kentucky, Nebraska, Ohio, Wisconsin, and Michigan – have read their statutes as prohibiting second-parent or step-parent adoptions by unmarried

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[7] *See, e.g.*, ALASKA STAT. § 25.23.020 (certain unmarried adults singly or "a husband and wife together" may adopt); IOWA CODE ANN. § 600.4 (note, however, that same-sex couples are permitted to marry in Iowa); KAN. STAT. ANN. § 59-2113; ME. REV. STAT. ANN. tit. 18-A, § 9-301; W. VA. CODE, § 48-22-201; N.H. REV. STAT. ANN. § 170-B:4; N.D. CENT. CODE § 14-15-03.

[8] WILLIAM N. ESKRIDGE JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 830 (3d ed., 2011). This process also can be used to create a secure legal tie between a second, nonbiological parent and a child when a first parent already is legally recognized as such from having a biological connection to the child, regardless of the parents' marital status.

partners, even though no statute explicitly bars such an adoption.[9] Utah explicitly prohibits adoption by

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[9] Appellate or Supreme Court case law in Kentucky, Nebraska, Ohio, and Wisconsin indicates that these states do not allow adoption by same-sex or unmarried, different-sex partners. *See In re Adoption of Luke,* 640 N.W.2d 374, 378 (Neb. 2002) (interpreting Nebraska's adoption law to preclude unmarried adults from adopting a child); *In re Angel Lace M.*, 516 N.W.2d 678, 683 (Wis. 1994) (holding that second-parent adoption was not permitted under stepparent-adoption statutes); *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 815-16 (Ky. Ct. App. 2008) (saying that because the former domestic partner of a child's biological mother was not the stepparent of the child, she could not adopt the child in a second-parent adoption proceeding); *In re Adoption of Doe*, 719 N.E.2d 1071, 1073 (Ohio Ct. App. 1998) (concluding that the adoption of a child by someone who is not the child's stepparent would terminate the original parent's rights). Michigan law on this issue appears to be in flux. By statute, Michigan only provides for joint adoption by married partners. *See* MICH. COMP. LAWS ANN. § 710.24; *In re Adams*, 473 N.W.2d 712 (Mich. App. 1991)(holding that two persons not married to each other may not jointly adopt a child). In 2004, Michigan's Attorney General issued an opinion that same-sex couples who are legally married in another state may not adopt in Michigan as a couple because Michigan does not recognize same-sex couples' marriages from other states, nor does it allow same-sex couples to marry in Michigan. *See* Validity of Out-of-State Same-Sex Marriages in Michigan, Op. Mich. Att'y Gen 7160 (2004) *available at* http://www.ag.state.mi.us/opinion/datafiles/2000s/op10236.htm. Michigan Chief County Judge Archie Brown issued a memo on June 4, 2002, prohibiting judges throughout Washtenaw County from granting second-parent adoptions to the nonmarital partners of biological parents. *See* Memo: Judge Archie C. Brown to Juvenile Division Staff, June 4, 2002, *reported by* Maryanne George, *Court's Ban on Unmarried Adoptions is Challenged,* DETROIT FREE PRESS, Jun. 13, 2002, at B.1. These instructions recently were reiterated in the

unmarried couples.[10] Finally, Mississippi only forbids joint adoption by same-sex couples, regardless of their marital status.[11]

While these states currently do not allow same-sex and/or unmarried, different-sex couples to adopt, in the future additional states may choose to not recognize the rights of unmarried parents with respect to their legally adopted children.[12] Many of the states described here have only explicitly restricted who may adopt in recent years.[13] Further,

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statewide Michigan Judicial Institute's Adoption Benchbook. *See* MICH. JUDICIAL INST., ADOPTION PROCEEDINGS BENCHBOOK at 4-4 (Rev. ed., 2011) *available at* http://www.courts.michigan.gov/mji/Resources/adoption/Adoption-Proceedings.pdf. Finally, while a recently passed Arizona statute places stringent restrictions on adoption by unmarried couples in that state, it does not prohibit such adoptions categorically. ARIZ. REV. STAT. ANN. § 8-103. *See generally* Lynn D. Wardle, *Comparative Perspectives on Adoption of Children by Cohabiting, Nonmarital Couples and Partners*, 63 ARK. L. REV. 31 (2010) (hereinafter, Wardle, *Comparative Perspectives*).

[10] UTAH CODE ANN. § 78B-6-117(3) (providing that a person cohabiting in a nonmarital relationship may not adopt a child).

[11] MISS. CODE ANN. § 93-17-3(5).

[12] See, for example, ARIZ. REV. STAT. ANN. § 8-103, the recently enacted Arizona law restricting adoption by unmarried couples, referenced in note 9, *supra*, and developments addressed in Wardle, *Comparative Perspectives*, *supra* note 9, at 50 (observing that, while not all changes negatively affect same-sex parents, "in just over one-third of the states that have made recent policy, such adoptions are barred in at least some circumstances.").

[13] As note 9 *supra* indicates, judicial interpretations banning adoption by unmarried couples in Michigan, Kentucky

at least one state appellate court has raised and reserved the question of whether unmarried couples should be considered eligible to adopt together.[14]

III. STATES WITH RESTRICTIVE ADOPTION LAWS RECEIVE HUNDREDS OF MILLIONS OF VISITORS ANNUALLY, POTENTIALLY PLACING AT RISK MANY WHO DEPEND ON FINAL ADOPTION JUDGMENTS TO SECURE THEIR FAMILY TIES.

A. More Than 300 Million People Annually Visit The Identified Eight States That Currently Do Not Allow Adoption By Same-Sex Couples Or By Unmarried, Different-Sex Couples.

Couples raising adopted children can be affected by an adoption law and administrative practice like Louisana's not only if the families currently live in or move to states with such restrictive laws, but also if they travel to or through such states. Nearly 25 million visitors are projected

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and Nebraska date from the past decade. Utah's ban was enacted in 2008, 2008 Utah Laws Ch. 3, § 876; Mississippi's ban was passed in 2000, 2000 Miss. Laws Ch. 535 § 1; and Michigan's Benchbook was published this past year.

[14] *Depew v. Depew*, *Adoption of M.C.D*, 2001 WL 1799554 (Okla. Civ. App., Oct. 26, 2001) (finding that non-cohabiting unmarried, different-sex couples could not adopt together, and noting that cohabiting would not necessarily qualify these individuals to adopt together).

to visit Louisiana in 2012 for tourism.[15] Combined, there are more than 300 million tourist visits to these restrictive states each year.[16]

Further, these tourism statistics necessarily undercount the number of visitors that pass through these states. For example, they do not include those who simply drive through without engaging in tourism-related commerce or individuals who transfer planes at airports in these jurisdictions. However, these visitors also may be subject to state

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[15] UNIV. OF NEW ORLEANS HOSPITALITY RESEARCH CTR., LOUISIANA TOURISM FORECAST: 2009-2013 at 2 (2009), *available at* http://www.crt.state.la.us/TOURISM/RESEARCH/Documents/2009-10/2009%20Forecast.pdf.

[16] The most recent available data from Ohio show that 176 million tourists visited the state in 2007, TOURISM ECONOMICS, THE ECONOMIC IMPACT OF TOURISM IN OHIO 4 ([Utah], 2008), *available at* http://industry.discoverohio.com/_media/30/467.pdf. In 2009, over 19 million tourists travelled to Utah and 75 million travelled to Michigan. ECONOMIC REPORT TO THE GOVERNOR 207 (2010), *available at* http://travel.utah.gov/research_and_planning/documents/2010ERG.pdf; CORPORATE RESEARCH MICH. ECON. DEV. CORP., MICHIGAN TRAVEL ECONOMIC IMPACT AND TRAVEL VOLUMES at slide 8 (2010), *available at* http://ref.michigan.org/cm/attach/7FCE50AA-1D21-411D-A4CE-B2C55EE09612/2009_Travelresearch.pdf.

Similarly, in 2008, Mississippi drew 17 million tourists. *See* CALENDAR YEAR 2007 LOUISIANA TRAVELSAMERICA [*sic.*] VISITOR PROFILE 11 (2007) *available at* http://www.latour.lsu.edu/pdfs/TravelsAmerica_LA_2007.pdf (describing neighboring states' visitor data, including Mississippi's). Recent data from Kentucky, Nebraska and Wisconsin regarding the number of travelers are not readily available.

law and administrative practices in case of an accident or other events while traveling.

While it is not possible to track and quantify how many same-sex and unmarried, different-sex couples with adopted children travel to or through these states each year, given these families' geographic dispersion, range of economic resources, and other types of demographic diversity, it is reasonable to believe that some of them number among the at least 300 million individuals who visit these states annually.

B. In Addition To Accurate Birth Certificates For Children Adopted Out-Of-State, Diverse Other Rights Depend On A Recognized Parent-Child Relationship And May Be Denied When A Family Is In A State That Does Not Recognize Other States' Adoption Judgments.

Petitioners have addressed issues that can arise when parents cannot obtain an accurate birth certificate for their child. (*See, e.g.,* Petition 3-6.) A range of additional issues can arise when the legal relationships between parents and children are not recognized, especially in the context of interstate travel. For example, a family member may experience a health crisis that requires emergency medical care. While not involving interstate recognition of judgments, *Langbehn v. Jackson Memorial Hospital* nonetheless provides a helpful factual illustration of the opportunities and rights that commonly depend on recognition of family relationships in a hospital setting. According to the

complaint in the case, Janice Langbehn and her partner of 18 years, Lisa Pond, traveled in 2007 to Miami, Florida from their home in the state of Washington with their three adopted children to embark on a family cruise.[17] Just as the cruise was about to begin, Pond collapsed from a brain aneurysm and was rushed to a local emergency room. During the nearly eight-hour period from when they arrived at the hospital to when doctors told Langbehn there was no hope for Pond's recovery, Langbehn repeatedly asked that she be allowed to visit with her dying partner, and that the children be allowed to see their mother. The hospital staff refused them, saying that only legally recognized family members were permitted visitation. Even after Langbehn had presented birth certificates showing that she and Pond were the children's adoptive mothers,[18] as well as Pond's healthcare

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[17] *See* Amended Complaint and Jury Demand, *Langbehn v. Jackson Mem'l Hosp.,* No. 08-21813-Civ-Jordan (S.D. Fla. Sep. 2, 2008), *available at* http://www.lambdalegal.org/in-court/legal-docs/langbehn_fl_20080902_complaint-amended.html; Tara Parker-Pope, *Kept From a Dying Partner's Bedside*, N.Y. TIMES, May 19, 2009, at D5, available at http://www.nytimes.com/2009/05/19/health/19well.html.

[18] In one factual similarity with this case, when the Langbehn-Pond family visited Florida, that state prohibited adoption by same-sex partners. *See Lofton v. Sec'y of the Dept' of Children & Family Servs.*, 377 F.3d 1275 (11th Cir. 2004). This ban since has been held unconstitutional. *Florida Dep't of Children and Families v. In re Adoption of X.X.G. and N.R.G.*, 45 So. 3d 79 (Fla. App. 2010). As noted, however, the *Langbehn* case did not involve a dispute about whether an institution in Florida was required to respect out-of-state adoption judgments that would not have been granted in Florida.

proxy, she and the children were kept outside in the waiting room, except for a brief visit while a priest administered last rites. The children only were allowed to see their dying mother after Pond's sister had arrived, by which time Pond had lost consciousness.[19]

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[19] In addition, the hospital staff declined to keep Langbehn informed about Pond's condition, and did not even tell her when they transferred Pond to a different facility, but did offer such information promptly to Pond's sister, although she had not requested it. The Langbehn-Pond family did not obtain redress in court, as the Florida court determined that their tort claims were not actionable. *See* Order Granting Motion to Dismiss, *Langbehn* (Sep. 29, 2009), *available at* http://www.lambdalegal.org/in-court/legal-docs/langbehn_fl_20090929_order-granting-motion-to-dismiss.html. In considering the warning the case can offer to families that travel, it should be noted not just that the claims made by the Langbehn-Pond family were different from those made here, but also that, as a general matter, claims based on legally secured parent-child relationships often have stronger grounding than those based on a nonmarital adult relationship.

Separate from whether particular tort claims may succeed in a given state, what matters here is that *Langbehn* was not a one-of-a-kind case factually. Although it did not involve children, allegations similar to Langbehn's were presented in *Flanigan v. Univ. of Maryland Med. Sys. Corp*., (Md. Cir. Ct., Feb. 27, 2002), *available at* http://www.lambdalegal.org/in-court/legal-docs/flanigan_md_20020227_complaint-circuit-court-for-baltimore-city.html. The plaintiff, Bill Flanigan, and his domestic partner had been traveling interstate when the partner became ill and required emergency hospitalization. Flanigan alleged that he then was denied access to his dying partner's bedside, to information about his partner's condition, and the ability to exercise the decision making role reserved to him through his partner's durable power of attorney for health care decisions. In contrast, such information and access

Besides being prohibited from visiting a sick or dying parent as in *Langbehn*, an adopted child may experience distress if he or she is the one ill or injured and, like Lisa Pond, is denied the comfort of having family members present at the hospital bedside because the institution's staff does not recognize a particular adoptive relationship. The child also may be disadvantaged if hospital staff will not provide medical information to, and allow decisions to be made by, the child's parent or parents. *See, e.g.,* La. Rev. Stat. Ann. § 40:1299.53 (providing that parent is responsible for making medical decisions on behalf of child); La. Rev. Stat. Ann. §§ 40:2144, 40:1299.96 (giving parents the authority to access hospital records).

In addition to questions about who may visit a patient, have access to medical information, and make decisions about treatment, still more issues can arise if a sick or injured person dies. These may include the right of surviving family members to decide whether to make anatomical gifts and how to

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allegedly were provided promptly to the partner's mother upon her arrival at the hospital hours after the partner had been admitted. *See also* Tom Pelton, *Complaint Faults Shock Trauma, Man with Power of Attorney was Kept from Mate, File Says*, BALT. SUN, Feb. 28, 2002, *available at* http://articles.baltimoresun.com/2002-02-28/news/0202280424_1_flanigan-daniel-power-of-attorney. The *Flanigan* case reportedly ended with ended with a jury verdict in favor of the hospital. *See* Rebecca K. Glatzer, *Equality At the End: Amending State Surrogacy Statutes to Honor Same-Sex Couples' End-of-Life Decisions*, 13 THE ELDER L.J. 255, 257 n. 9 (2005), *available at* http://www.law.illinois.edu/elderlaw/issues/vol_13/num_1/pdfs/Glatzer.web.pdf.

dispose of the deceased's remains. *See, e.g.,* La. Rev. Stat. Ann. § 17:2354.3 (providing that "reasonably available" parents generally have the highest standing to make anatomical gifts). Similarly, contrary to law and standard practice, adoptive parents' names may not be recorded on their child's death certificate. La. Rev. Stat. Ann. § 40:34 (providing that parents' names are to be recorded on a deceased child's death certificate).

If such problems occur in a public hospital, they may give rise to potential claims under 42 U.S.C. § 1983 against public employees for refusing to recognize a family relationship established by an out-of-state adoption judgment. And yet, if other Louisiana agency heads, including the Secretary of the Department of Health and Hospitals, were to establish policies denying recognition to certain out-of-state adoption judgments as Respondent has done, the rule set by the Fifth Circuit would seem to prevent redress.

The Fifth Circuit's rule also could prevent redress in certain tort actions against public entities by visiting, out-of-state couples. If a child is injured or killed by the wrongful act of a public employee or defective public property, only legally recognized parents generally will have standing to file a tort claim on behalf of the child, a wrongful death claim after the child's death, or a negligent infliction of emotional distress claim for witnessing the death of the child. Similar claims can be filed on behalf of a child if his or her legally recognized parent or parents have been injured or killed. The rule

established by the Fifth Circuit below would not impede such claims as long as they are filed directly in court. But, states commonly limit their waivers of sovereign immunity for tort claims with a requirement that such claims first be submitted to an administrative tribunal,[20] and state legislatures may provide that such tribunals have authority to make binding determinations concerning standing and perhaps other matters.[21] If a hearing officer

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[20] *See, e.g.*, LA. REV. STAT. ANN. § 40:1299.39.1 (setting administrative review for medical malpractice claims against the state); KY. REV. STAT. §§ 44.070, *et seq*. (administrative review for claims against state); CAL. GOV'T CODE § 900 (same); N.Y. GEN. MUN. LAW §§ 50-e, 50-h (permitting administrative review for claims against non-state wide public entities).

[21] For example, in Kentucky, in which the legislature has the authority to determine how and when to waive state sovereign immunity, KY. CONST. § 231, a Board of Claims is given authority "to investigate, hear proof, and to compensate persons for damages sustained to either person or property as a proximate result of negligence on the part of the Commonwealth" in the first instance. KY. REV. STAT. §§ 44.070, *et seq*. Kentucky courts may hear appeals from the Board's determination. However, on appeal, KY. REV. STAT. § 44.140 provides that the powers of the court are limited:

> The court sitting without a jury shall hear the cause upon the record before it, and dispose of the appeal in a summary manner, being limited to determining: Whether or not the board acted without or in excess of its powers; the award was procured by fraud; the award is not in conformity to the provisions [that established the Board and its jurisdiction and designate its judgments as exclusive]; and whether the findings of fact support the award.

determines that the relationship between an adopted child and his or her adoptive parents should not be recognized because the adoption would not have been permitted in that state, the rule established below may prevent such a suit from proceeding.

CONCLUSION

U.S. Census data indicate that nearly 100,000 adopted children are being raised by same-sex couples or unmarried, different-sex couples. While it is impossible to know how many of these were joint adoptions as opposed to other types of adoptions, or how many of these families in a given year will visit a state that restricts adoption to married, different-sex couples, it is reasonable to believe that many families will travel and could face difficult obstacles if state agencies need not recognize out-of-state adoption judgments, per the rule adopted by the

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While not all the other states that prohibit adoption by same-sex and/or unmarried, different-sex couples currently limit the powers of their courts in such a manner, the legislatures in many of these states have broad discretion to modify state law to bind judges to follow administrative findings in similar ways. *See* NEB. REV. ST. CONST. art. V, § 22 (giving the Nebraska legislature the same powers the Kentucky legislature enjoys regarding state sovereign immunity); WIS. CONST. art. IV, § 27 (same for Wisconsin legislature); UTAH CODE ANN. § 63G-7-101 (legislatively waiving immunity under certain conditions); MICH. COMP. LAWS ANN. § 691.1407 (same); MISS. CODE ANN. §§ 11-46-1 *et seq*. (same). Accordingly, in some of these states, the factfinding powers of the courts are limited, for example, by precluding jury trials. *See, e.g.,* NEB. REV. STAT. § 81-8,214; MISS. CODE ANN. §§ 11-46-13.

Fifth Circuit below. Given the number of families potentially affected adversely not just when seeking documents from their children's birth states but when traveling, and the inconsistency of the Fifth Circuit's analysis with prior law, in particular with the Tenth Circuit's recent decision addressing very similar issues, *amici curiae* respectfully suggest that the decision below is worthy of this Court's review and accordingly support the petition for a writ of *certiorari*.

Respectfully submitted,

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APPENDIX

All Data Drawn from 2009 Public Use Microdata Sample

Table 1: Number of Same-Sex Couple Headed Households (SSHH) and Unmarried Different-Sex Couple Headed Households (UDSHH).

	SSHH	UDSHH	Total HH
Total Couples	581,300	5,920,821	6,502,121
Number Raising Children	109,872	2,592,811	2,702,683
Number of Children	200,509	4,818,379	5,018,888
Number with Adopted Children	19,729	46,780	66,509
Number of Adopted Children	29,512	64,115	93,627

Table 2: Comparative Demographic Characteristics of Households with Adopted Children

	SS & UDS HH	All HHs
Parent Race/Ethnicity		
White	58.2%	71.0%
African-American	15.2%	12.6%
Latino	22.1%	11.2%
American Ind./Alaska Native	1.9%	1.0%
Asian/Pacific Islander	0.6%	2.8%
Other	2.1%	1.4%
Adopted Child Race/Ethnicity		
White	45.1%	53.0%
African-American	17.4%	15.2%
Latino	28.8%	16.9%
American Ind./Alaska Native	0.9%	1.3%
Asian/Pacific Islander	2.9%	8.8%
Other	4.9%	4.8%
Age of Parents	40.1	47.9
Age of Adopted Children	10.2	14.1
Households With a Disabled Adopted Child	12.6%	12.9%
Neither Partner Employed	8.3%	15.6%
Both Partners Employed	52.8%	40.0%
Median Household Income	$60,000	$73,000