Docket No. 06-6216

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

GREG HAMPEL, ED SWAYA and VNH-S,

Plaintiffs - Appellants,

and

Heather Finstuen, Anne Magro, SGF-M, KBF-M,
Lucy Doel, Jennifer Doel and ED,

Plaintiffs,

versus

DREW EDMONDSON, In His Official Capacity as Attorney General of Oklahoma, BRAD HENRY, In His Official Capacity as Governor of Oklahoma, and DR. MIKE CRUTCHER, In His Official Capacity as Commissioner of Health of Oklahoma,

Defendants – Appellees.

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 Court's November Session

APPELLANTS' OPENING BRIEF

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 APPELLANTS

September 22, 2006
(One Attachment – Digital Format)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OTHER AUTHORITIES

PRIOR OR RELATED APPEALS

This action previously was the subject of an interlocutory appeal, Docket No. 04-6395, brought by Defendants Brad Henry and Drew Edmondson challenging 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 of the prior interlocutory appeal with prejudice. As a result, 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 Defendant Dr. Mike Crutcher under Docket No. 06-6213. By Order dated July 6, 2006, Crutcher'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.

APPELLANTS' OPENING BRIEF

I. JURISDICTIONAL STATEMENT

The district court had jurisdiction under 42 U.S.C. §§ 1983 & 1988 and 28 U.S.C. § 1331. It granted in part and denied in part the parties' cross motions for summary judgment on May 19, 2006, Jnt. App. at 281-311, 314, and entered Judgment on the same date finally disposing of all claims, Jnt. App. at 312-13.

Defendant Mike Crutcher timely filed his notice of appeal (docketed in this Court under 06-6213) on June 16, 2006, pursuant to Fed. R. App. P. 4(a)(1)(A). Jnt. App. at 315-16, 351-52.[1] Plaintiffs Greg Hampel, Ed Swaya and VNH-S timely filed their notice of appeal (docketed in this Court under 06-6216) on June 26, 2006, pursuant to Fed. R. App. P. 4(a)(1)(3). Jnt. App. at 353-54. This Court has jurisdiction under 28 U.S.C. § 1291.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the District Court committed reversible error in finding that the Hampel-Swaya family faced no actual, non-speculative harm that would be remedied by this action sufficient to grant them standing.

---

[1] The two Notices of Appeal filed by Appellant Crutcher are explained by the district court clerk's docket annotation of June 19, 2006, showing that the Notice dated June 16, 2006 (Document Number 86) was filed incorrectly. The document was reentered as Document Number 89 on June 19, but was deemed filed as of June 16, 2006. Jnt. App. at 10.

B. Whether the District Court committed reversible error in finding that OKLA. STAT. tit. 10, § 7502-1.4 (Supp. 2004) does not violate the constitutionally protected right to travel.

III. STATEMENT OF THE CASE

Appellants Greg Hampel and Ed Swaya, a committed same-sex couple, and their adopted Oklahoma-born daughter, VNH-S ("V"), reside in Washington State, but wish to travel to Oklahoma. The Hampel-Swaya family, along with two other same-sex couples and their children, filed suit pursuant to 42 U.S.C. § 1983 against Oklahoma Governor Brad Henry (the "Governor") and Oklahoma Attorney General Drew Edmondson (the "Attorney General"),[2] seeking an injunction barring the enforcement of OKLA. STAT. tit. 10, § 7502-1.4 (Supp. 2004) (the "Adoption Invalidation Law"). Jnt. App. at 12. The challenged statute 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.

Both sides filed cross-motions for summary judgment. Jnt. App. at 61, 168. After the motions were filed, the parties stipulated that the Court would resolve

---

[2] Subsequently, Dr. Mike Crutcher, the Commissioner of the Oklahoma Department of Health was added as a defendant. A claim for relief was asserted against him by co-plaintiffs, the Doel family, seeking issuance of a birth certificate for their daughter. Jnt. App. at 23.

remaining issues of fact, if any, on the same summary judgment record under Fed. R. Civ. P. Rule 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. Jnt. App. at 310-11. Based upon these holdings, the district court granted relief to the other plaintiff families. The court also held, however, that the Hampel-Swaya family lacked standing to challenge the law on any grounds, Jnt. App. at 289-90, 310, and, therefore, declined to analyze their claim for infringement of the constitutional right to travel.[3] Jnt. App. at 309.

The Governor and Attorney General chose not to appeal the decision and it became final as to them. Defendant Mike Crutcher, the Oklahoma Commissioner of Health (the "Commissioner"), appealed not only the district court's order directing the Department of Health (the "Department") to issue birth certificates, but also the district court's injunctive order and its judgment on the full merits as to the non-appealing parties. Jnt. App. at 315-18. The Hampel-Swaya family timely cross-appealed their dismissal for lack of standing as to all claims, as well as the

[3] The district court found that the Adoption Invalidation Law as applied to the other plaintiff families, residents of Oklahoma, did not infringe on their constitutional right to travel. The court, however, indicated that a different analysis would be required to address the right-to-travel claims of the Hampel-Swaya family, who are not Oklahoma residents. Jnt. App. at 309.

district court's ruling on their right to travel claim. Jnt. App. at 319-20.

IV. STATEMENT OF FACTS

Greg Hampel and Ed Swaya have lived together as a committed couple in Washington State for over eleven years. Jnt. App. at 72, 108 & 112. In 2002, they jointly adopted V, a little girl who was born in Oklahoma, in an "open adoption" in Washington State. Jnt. App. at 72, 108, 112, 116-17 & 282. The two men agreed to maintain regular contact with V's mother and to bring V to Oklahoma to visit her birth mother and to learn about her heritage.[4] *Id*.

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[5] listing them as her legal parents. Jnt. App. at 72, 108, 112 & 282-3. The Department refused to issue a fully accurate birth certificate, instead issuing one that listed Hampel as V's only parent. Jnt. App. at 78, 108, 113, 119 & 283.

---

[4] "Generally speaking, an 'open adoption' is one where the birth parents continue to maintain a relationship with the child. Many private adoptions, especially where a grandparent or other relative adopts the child, are open adoptions." *Moore v. Asente*, 110 S.W.3d 336, 351 n.43 (Ky. 2003).

[5] 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."

Hampel and Swaya contested the Department's action and, as a result, the Commissioner's predecessor sought an opinion from the Attorney General, "regarding whether the State Department of Health's Vital Records Service must provide a birth certificate for an Oklahoma child adopted by an out-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 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 legal ties that protect plaintiff parents and their children in the rest of the country. The Adoption Invalidation Law affirmatively ***forbids*** police, courts, health officials, child welfare officials and other representatives of the State from recognizing their parent-child relationships. Jnt. App. at 74, 109 113 & 283. Hampel and Swaya fear that bringing their daughter to see her birth mother and maternal relatives, as well as the town where she was born, would put their family at unnecessary risk of harm. Jnt. App. at 74-75, 109-10, 113-14 & 283.

Hampel and Swaya view the open adoption of their daughter as a relationship of trust with V's birth mother. V's birth mother terminated her parental rights with the understanding that V's adoptive fathers actively would support a continuing relationship between V and her birth mother. Jnt. App. at 74-75, 109, 113 & 283-84. Yet despite promising the birth mother that she would be

able to visit V in Oklahoma on an annual basis, they have not been able to bring V to Oklahoma to fulfill that promise because to do so would expose her to the risk of being rendered a legal orphan by the Adoption Invalidation Law. Jnt. App. at 74-75, 109 & 113-14. To make matters worse, V's maternal grandfather does not travel outside the state of Oklahoma. The Adoption Invalidation Law leaves Hampel and Swaya unable to visit him. Jnt. App. at 75, 109 & 113-14.

Oklahoma's refusal to recognize Hampel and Swaya as V's parents, and her as their child, injures V by denying vital protections that flow from a legal parent-child relationship and exist for other Oklahoma and non-Oklahoma children of different-sex parents or single parents. Jnt. App. at 75, 110 & 114. The Adoption Invalidation Law effectively bars V from visiting her birth family in Oklahoma during her formative years, inflicting an immediate and concrete injury on V and her parents and abridging their family and parental autonomy. Jnt. App. at 75, 110 & 114. The Hampel-Swaya family already would have, but has not traveled to Oklahoma since the Adoption Invalidation Law went into effect solely because of the risk it imposes of leaving them without any legally recognized parent-child bond. Jnt. App. at 75, 110, 114 & 283-84.

V. SUMMARY OF THE ARGUMENT

The State of Oklahoma has enacted a discriminatory and unconstitutional statute that purports to sever the ties between certain children and their parents. The Adoption Invalidation Law commands that

> [T]his 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.

OKLA. STAT., tit. 10, § 7502-1.4 (A) (Supp. 2004).

The district court correctly found on behalf of the other Plaintiffs that this attempt retroactively to nullify parental ties legally established by judicial decree in other states runs afoul of the Full Faith and Credit, Due Process and Equal Protection Clauses of the United States Constitution. The court erred, however, in failing to recognize that the Hampel-Swaya family has suffered an imminent and particularized injury from these constitutional violations as well, and from denial of the Hampel-Swaya family's right to travel to and throughout Oklahoma.

The Hampel-Swaya family does not seek to challenge Oklahoma's laws governing adoptions that take place in that State. They merely ask that Oklahoma respect their valid, legal adoption of their daughter V when they travel to Oklahoma. They seek assurance that their rights and responsibilities as parents, as well as the protections afforded their daughter by way of that legal relationship, will not be callously stripped from them the moment they cross the Oklahoma

border. As citizens of the United States, they are free to travel together as a family and this right should be respected for them as it is for other parents with adoptive children.

In reaching its erroneous conclusion as to lack of standing, the district court focused on the fact that the Hampel-Swaya family now has an accurate birth certificate that lists both men as V's parents. But there is no exemption from the Adoption Invalidation Law for those with birth certificates. The court also wrongly reasoned that their request for protection of their legal status within Oklahoma is premature because any harms from the current law are speculative and depend on future, uncertain events. In fact, the Hampel-Swaya family ***already*** has foregone traveling to Oklahoma and reconnecting with V's roots because of the Adoption Invalidation Law and their harm is ongoing. The court confused the harm from the State's refusal to recognize a final judgment creating a legal parent-child relationship with the harm of failing to provide an accurate birth certificate. Both result in immediate, concrete injury. Obtaining birth certificates remedies that documentary deprivation, but does not prevent the denial of their legal status commanded by the Adoption Invalidation Law.

In right to travel cases the federal courts have never required that citizens who effectively have been barred from traveling to a specific state actually cross the border and suffer the negative consequences prior to filing a suit to enforce

their rights. There are no decisions suggesting that the Hampel-Swaya family must cross the Oklahoma border and allow their daughter to suffer physical injury, traumatic separation from her family, denial of her family ties or economic harm in order to assert their rights to travel under the United States Constitution. Accordingly, the district court erred in holding that the Hampel-Swaya family lacks standing to sue.

The right to travel, the freedom of United States citizens to move from one state to another, is central to our federal system of government. A law violates the right to travel where it deters travel or unreasonably burdens or restricts movement between the states. It is undisputed that this mean-spirited law actually has deterred the Hampel-Swaya family from visiting Oklahoma. A law need only interfere in some substantial way with the right to enter a state in order to run afoul of the right to travel. A self-executing law that prohibits State officials and courts from respecting the existing parent-child relationships of same-sex couples and their adopted children when present in or dealing with the State causes such a substantial interference. Absent a compelling State interest that the law is narrowly tailored to address, the law fails constitutional scrutiny. Here, the Commissioner made no attempt to articulate an interest that could satisfy this burden and, accordingly, the Adoption Invalidation Law is unconstitutional because it violates the right to travel.

VI. ARGUMENT

A. Standard of Review

A dismissal for lack of standing is a determination of law that, on appeal, is reviewed *de novo*. *Aid for Women v. Foulston*, 441 F.3d 1101, 1109 (10th Cir. 2006). Likewise, 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).

B. The Hampel-Swaya Family Has Suffered An Imminent And Particularized Injury And, Therefore, Has Standing To Bring A Right To Travel Claim.

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. 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, but the court wrongly held the Hampel-Swaya family did not satisfy the injury-in-fact requirement. Jnt. App. at 287.

The record shows that the Hampel-Swaya family's grievances are concrete and particularized. Both Hampel and Swaya have legal parent-child relationships with V that were established through a final adoption decree. They assert an invasion by the Defendants of their parental rights and the rights of their child to recognition of her parent-child ties. This is a specific interest that is neither generalized nor shared by others. Nor is their intention to travel to Oklahoma hypothetical. But for the law, they would have done so already. Jnt. App. at 74-75, 109-10, 113-14 & 283-84. On the undisputed record before it, the district court found that both men have a specific reason to visit and ***would*** visit Oklahoma but for the Adoption Invalidation Law. Jnt. App. at 283-84.

The harm is "actual" because the Adoption Invalidation Law is in force, is self-executing and has caused the Hampel-Swaya family to avoid travel to Oklahoma to avoid harm. The district court appeared to believe that Hampel and

Swaya were not reasonable in assuming the law's enforcement and were required to test it by entering Oklahoma. The Supreme Court has held that "[t]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement. *Shapiro v. Thompson*, 349 U.S. 618, 634 (1969). The challenged law does not admit of discretion or require additional and specific enforcement action, such as judicial or administrative proceedings to cause harm. Rather, the statute on its face mandates State officials to withhold recognition of V's legal relationship with her parents without the necessity of further inquiry or finding.

The Adoption Invalidation Law's mandate that the State shall not recognize the adoptive parent-child relationships of same-sex couples and their children finalized in other jurisdictions creates a classification that denies plaintiff parents equal access to scores of significant constitutional, statutory and common law benefits, rights, protections and defenses under Oklahoma law.[6] Likewise, V is

---

[6] In Oklahoma, these rights and obligations include, without limitation: the right to make routine health care decisions for their child, OKLA. STAT. tit. 10, § 170.1 (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); standing before a court and priority appointment in

—continued

disqualified from accessing legal rights and the benefit of legal obligations imposed on her parents.[7] The law does not even state who assumes these rights and obligations in the stead of the children's legal parents. For all practical purposes, V would be rendered a legal orphan in the State's eyes upon entering Oklahoma.

—*continuation*
guardianship proceedings related to their child, OKLA. STAT. tit. 10, § 21.1 (Supp. 2004) & OKLA. STAT. tit. 30, § 2-106 (2001); the right to court appointed counsel in matters related to adjudication of parental rights, OKLA. STAT. tit. 10, § 24 (2001); and 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 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, 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 (Supp. 2005), 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).

[7] 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."); 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).

Despite this showing, the district court erroneously viewed the Hampel-Swaya family's injury as too speculative because they could pass unnoticed:

> [T]hey have an Oklahoma birth certificate identifying both men as parents to V. There is no suggestion V's Oklahoma birth certificate has been revoked or rescinded. The plain language of the Amendment would not affect a birth certificate issued by Oklahoma, as the Amendment only targets documents issued by other states. Further, before there would be any need for any person to see a copy of V's birth certificate during a visit to Oklahoma, some significant and unforeseen event would first have to take place. Thus, the harm the Hampel[-Swaya] family has alleged in this case hinges on possible events or potential outcomes that are purely speculative. [8]

Jnt. App. at 289.

The district court's view that issuance of a birth certificate remedied or mitigated the loss of parent-child status mandated by the Adoption Invalidation Law was error. Even if the two men could present the birth certificate to establish parentage, the Adoption Invalidation Law makes no exception for those families with Oklahoma birth certificates. Nor is any official likely to assume from the birth certificate that V is the biological rather than adoptive child of both of her

---

[8] In discussing what the district court perceived as the speculative nature of the Hampel-Swaya family's claims, the court seemed to presume that because V has an Oklahoma birth certificate, restoring recognition of their parent-child status would not necessarily provide additional relief. However, standing precedent establishes that a claim for change in or recognition of legal status alone can support standing when non-parties are otherwise required or likely to respect that status. *Utah v. Evans*, 536 U.S. 452, 464 (2002); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 & n.9 (10th Cir. 2005).

two fathers.[9] In any event, to have standing the Hampel-Swaya family need not enter Oklahoma to test the district court's assumption. They are inhibited from traveling ***right now*** by the law's mandatory non-recognition of V's parentage. The Adoption Invalidation Law ***requires*** State officials to disregard V's relationship with her parents, notwithstanding their possession of an Oklahoma-issued birth certificate. This truth renders the family's mere presence in Oklahoma a real threat to V's safety and well-being and her parents fundamental rights, risks they reasonably are not required to take in order to challenge the law.

Oklahoma has erected a barrier making it more difficult for members of one group entering Oklahoma to obtain benefits or protections provided to others. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (The "injury in fact" stems from imposition of the barrier, not the ultimate inability to obtain the 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*)). This type of constitutional injury has "long been recognized as judicially cognizable." *Heckler v. Mathews*, 465 U.S.

---

[9] An Oklahoma birth certificate does not create or irrefutably confirm a parent-child relationship. It "is only 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). If anything, the birth record that reflects Hampel and Swaya as V's parents, by calling attention to these facts, exacerbates the likelihood of the Adoption Invalidation Law being applied to them.

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 is a significant barrier to plaintiffs' ability to access the rights and responsibilities that different-sex parents and their children traveling to Oklahoma may take for granted. But the harm does not stop there. The law substantially interferes with – by refusing to acknowledge – the liberty interest that plaintiff parents have in their parental autonomy, including the fundamental right to make decisions concerning the care, custody, and control of their child. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000). The law has interfered with how Hampel and Swaya have chosen to raise their child and, specifically, has deterred their decision to bring V to Oklahoma to associate with her birth mother and biological family. Such interference is also an injury in fact.

The Adoption Invalidation Law stands as a barrier to the Hampel-Swaya family's right to travel from state to state and their right freely to enter Oklahoma, causing serious injury sufficient to grant them standing to challenge the law. *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 257 (1974) (finding a violation of the right to travel even though "there is no evidence in the record before us that anyone was actually deterred from traveling by the challenged restriction.") In

making a right to travel claim "[i]t is not necessary for 'standing' purposes that the plaintiffs introduce any evidence relating to any individual who was actually excluded by [government action]." *Constr. Indus. Ass'n of Sonoma County v. City of Petaluma*, 375 F. Supp. 574, 582 (N.D.Cal. 1974) (citing *Memorial Hospital*). *See also Shapiro v. Thompson*, 349 U.S. 618 (1969)) (no finding of actual deterrence of travel necessary to strike down duration of residency requirement for state assistance).

Here, the undisputed evidence showed and the district court found that the Hampel-Swaya family actually ***has*** been deterred from traveling to Oklahoma because of the harm inflicted by the Adoption Invalidation law. The Adoption Invalidation Law, and that law alone, caused them to forego taking their daughter to Oklahoma to visit her birth mother and biological grandfather, as well as other extended family. This restriction on their right to travel constitutes an actual, non-hypothetical injury sufficient to grant them standing.

C. Defendants Violate Plaintiffs' Right To Travel.

"Freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 901-02 (1986) (holding that New York's restriction of civil service preference for veterans to those who entered armed forces while residing in New York State

was an unconstitutional infringement on the right to travel). The principle that United States citizens are free to migrate from one state to another and to settle wherever they choose is central to our national heritage and system of government. The Supreme Court has made clear that a state law need only interfere in some ***substantial*** way with the right to cross state borders to violate the right to travel. *Saenz,* 526 U.S. at 505.[10] The right to travel from state to state with one's child falls squarely within the right to travel, and any state action that interferes with that right without sufficient legal justification is constitutionally infirm. *See, e.g., Watt v. Watt*, 971 P.2d 608, 615-16 (Wyo. 1999) (depriving a mother of custody because of her decision to move out of state infringed upon her right to travel without sufficient justification; inherent in the right to travel is [the] custodial parent's right to have the children move with that parent); *Jaramillo v. Jaramillo,* 823 P.2d 229, 305-06 (N.M. 1995), ("[I]t makes no difference that the parent who wishes to relocate is not prohibited outright from doing so; a legal rule that operates to chill the exercise of the right, absent a sufficient state interest for doing so, is as impermissible as one that bans exercise of the right altogether."); *Wohlert v. Toal*,

---

[10] For example, a law banning travel with an indigent person functions as a barrier to travel. *Edwards v. California*, 314 U.S. 160 (1941). Likewise, a law depriving African-Americans of the right to use the streets and highways violates the right to go from one place to another. *United States v. Guest,* 383 U.S. 745 (1966). This is true even though the statutory schemes in *Edwards* and *Guest* contained no explicit ban on interstate travel, but simply burdened the right.

No. 02-1981, 670 N.W. 2d 432 (Table), 2003 WL 22017200, at *2 (Iowa App. Aug. 27, 2003) ("[t]he freedom to travel, including the right to relocate, is a fundamental right" and "[a]ny infringement upon this fundamental right must be justified by a compelling state interest.") (citing *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250 (1974)).

The Supreme Court has identified three components of the right to interstate travel: "(1) the right of a citizen of one State to enter and to leave another state; (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State; and (3) for those travelers who elect to become permanent residents [of a State], the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). The first two, relevant here, the district court declined to consider.

The Adoption Invalidation Law on its face strongly discourages a specified class of out-of-state citizens from entering the State of Oklahoma by threatening the security of adopted children and the rights of their parents if they come to Oklahoma. The Supreme Court has made it clear that a statute based on the "objective to inhibit migration into the state would encounter 'insurmountable constitutional difficulties.'" *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 620 (1985) (quoting *Zobel v. Williams*, 457 U.S 55, 62, n.9 (1982)).The Adoption Invalidation Law is just such a statute. A state law violates the right to travel

where it (1) deters such travel, (2) has the objective of impeding travel, or (3) uses any classification which serves to penalize the exercise of that right." *Buchwald v. Univ. of N.M. School of Medicine,* 159 F.3d 487, 497 (10th Cir. 1998) (citing *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986)).

The Adoption Invalidation Law violates every variant of the test articulated in *Buchwald*. The law actually has deterred travel by the Hampel-Swaya family. Its objective is to deter gay or lesbian couples from coming to Oklahoma with their adopted children or to adopt Oklahoma-born children in the first place. Jnt. App. at 130 ("[Bill sponsor] Balkman said the legislation would protect Oklahoma children from being targeted for adoption by gay couples across the nation.") The law also creates a classification of same-sex couples who adopt children and penalizes these families by negating their legal ties if they dare set foot in the state of Oklahoma.

Many states allow same-sex couples to adopt children.[11] It is difficult to

---

[11] Courts in more than half the states have permitted second-parent or joint adoptions by lesbian and gay couples. *See, e.g.*, CAL. FAM. CODE §§ 8600-01 (2004); *Sharon S. v. Superior Court of San Diego*, 73 P.3d 554 (Cal. 2003); CONN. GEN. STAT. § 45a-726a (1996); *In re Hart*, 806 A.2d 1179, 1186 (Del. Fam. Ct. 2001); *In re M.M.D.*, 662 A.2d 837, 840 (D.C. 1995); *In re Petition of KM*, 274 Ill.App.3d 189, 194 (1995); IND. CODE ANN § 31-19-2-2 (1997); *In re Infant Girl W.*, 845 N.E.2d 229 (Ind. App. 2006), *transfer denied*, 851 N.E.2d 961 (Ind. 2006); *In re Tammy*, 619 N.E.2d 315, 315-16 (Mass. 1993); N.J. STAT. ANN. § 9:3-43 (2002); *In re Jacob*, 660 N.E.2d 397, 398 (N.Y. 1995); *In re Adoption of R.B.F.*, 803 A.2d 1195, 1202-03 (Pa. 2002); & VT. STAT. tit. 15A, § 1-102 (1995).

imagine how Oklahoma could craft a stronger determent to same-sex couples and their children to travel to Oklahoma than by threatening to dishonor their parent-child relationships if they do so. The Constitution does not permit the State to place such a burden on the right to interstate travel.

Here, the Adoption Invalidation Law already has caused the Hampel-Swaya family to cancel planned travel to Oklahoma. The undisputed evidence showed that the Hampel-Swaya family would have traveled to Oklahoma already but for the Adoption Invalidation Law. Jnt. App. at 74-75, 109-10, 113-14 & 283-84. Hampel, Swaya and V cannot safely enter Oklahoma despite the fact that they made a commitment to V's birth mother to do so. This too establishes a violation of the right to travel under the test articulated in *Buchwald*.

Likewise, the law burdens the Hampel-Swaya family's right to enter Oklahoma and be treated as welcome visitors while present in the State. Instead, if they entered the State they would assume the very real risk of harm to their family and parental autonomy and, at best, skulk around the State hoping to go unnoticed by State officials, including those charged with protection of public health and safety who are required to treat these families as having no parent-child relationships. This is not the treatment given "welcome visitors."

Finally, the Adoption Invalidation Law creates a solitary class of children adopted in other states by same-sex couples and treats them differently than other

children in Oklahoma. The district court assumed that "under Oklahoma law, same-sex couples are not permitted to adopt,"[12] and that Plaintiff same-sex couples ***with adoption decrees*** are "on the same footing as all other Oklahoma citizens." Jnt. App. at 309-10. By focusing on the Plaintiff couples' ability to adopt rather than the right to have previously established parent-child relationships respected, the court's analysis of the right-to-travel claims went astray. The law clearly uses a classification which serves to penalize the exercise of the right to travel by out-of-state same-sex couples with adopted children, treating them differently than all other Oklahoma-resident and non-resident parents and their children.

Moreover, Oklahoma adoption decrees generally may not be challenged "on any ground either by a direct or collateral attack more than three (3) months after the entry of the final adoption decree **regardless of whether the decree is void or voidable**". OKLA. STAT. tit. 10, § 7505-7.2 (2001) (emphasis added). When a court in Oklahoma enters an adoption decree, that decree is unassailable once three months have passed, whether or not the decree was properly entered. The Adoption Invalidation Law, however, creates an exception that mandates that state officials must treat adoption decrees issued by other states as void for certain families, regardless how much time has passed. Jnt. App. at 307 ("The

---

[12] The issue of whether same-sex couples may adopt in Oklahoma was not before the district court and there is no authority for the district court's statement.

Amendment attempts to undo [the judicial determination that these adoptions are in the Plaintiff children's best interest] with no consideration of changed circumstances or any other evidence that indicates the earlier decision was in any way incorrect."). Thus, the State treats these traveler families differently and worse than its residents.

Even the Oklahoma Supreme Court has acknowledged the long line of cases recognizing that limitations on a parent's right to travel with a child are disfavored. *Kaiser v. Kaiser*, 23 P.3d 278 (Okla. 2001) (recounting the weight of authority and overturning a lower court ruling preventing a custodial parent from moving to Virginia with her child). It is impermissible to threaten a parent with the loss of parental rights if he or she exercises the right to travel. The Adoption Invalidation Law contains such a threat and is unsalvageable.

A state law affecting the fundamental right to travel is subject to strict scrutiny and must be "shown to be necessary to promote a compelling governmental interest." *Shapiro v. Thompson*, 394 U.S. at 634. The State Defendants made no attempt to articulate such a justification and there is none. The Adoption Invalidation Law poses a direct barrier to the Hampel-Swaya family's right to visit Oklahoma and serves no compelling governmental interest, let alone one for which it is narrowly tailored. The law is, therefore, unconstitutional and the ruling below should be reversed.

VII. CONCLUSION

Appellants respectfully ask the Court to reverse the district court's rulings that the Hampel-Swaya family lacked standing, including standing to bring a right to travel challenge to the Adoption Invalidation Law, and that the law does not violate the right to travel.

VIII. ORAL ARGUMENT

The Court has set this matter and the related appeal (06-6213) for hearing on its November Oral Argument Calendar.

IX. 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 **6,357 words**, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

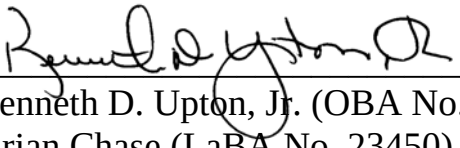
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Word 2000, version 9.0.6926 (SP-3), in 14 point Times New Roman font (13 point font for footnotes).

X. 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 9/20/2006 (rev. 18), 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

XI. CERTIFICATE OF SERVICE

I hereby certify that on September 22, 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.

Attachment
(Pursuant to 10th Cir. R. 28.2 (A) (1))

ORDER AND JUDGMENT APPEALED

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

HEATHER FINSTUEN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. CIV-04-1152-C
	)	
DREW EDMONDSON, in his official capacity as Attorney General of Oklahoma; BRAD HENRY, in his official capacity as Governor of Oklahoma; and DR. MIKE CRUTCHER, in his official capacity as Commissioner of Health of Oklahoma,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiffs' Motion for Summary Judgment. Defendants filed a Response and a Cross-Motion for Summary Judgment. Plaintiffs filed a response to Defendants' motion and these matters are now at issue.[1]

Plaintiffs brought the present action challenging the validity of a 2004 amendment (Amendment) to 10 Okla. Stat. § 7502-1.4(A), a part of Oklahoma's adoption code. That statute states:

> 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

[1] The parties have agreed that to the extent the Court cannot resolve the issues via the summary judgment motions, the Court may issue findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52.

> 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 Amendment is the italicized language. Plaintiffs are three sets of same-sex couples and their children. The adult Plaintiffs have adopted a child or children in another state and seek recognition of that adoption in Oklahoma. Plaintiffs brought the present action arguing the Amendment to § 7502-1.4(A) violates the Full Faith and Credit, Equal Protection, and Due Process Clauses of the United States Constitution and impairs their constitutionally-protected right to travel. Defendants argue that Plaintiffs lack standing to challenge the Amendment and even if they establish standing, the Amendment does not violate the Constitution.

I. FACTS[2]

For ease of addressing the issues, the Court will divide the Plaintiffs into family-based groups.

A. The Hampel/Swaya Family

In August of 2002, Plaintiffs Gregory Hampel and Edmund Swaya, who reside in Washington, adopted V.[3] in the Superior Court of King County, Washington. As part of the adoption proceedings, Hampel and Swaya agreed to bring V. back to Oklahoma to visit her birth family. Because V. was born in Oklahoma, Hampel and Swaya sought to obtain a

[2] Except where indicated otherwise, the following facts are undisputed.

[3] Pursuant to LCvR 5.3(a)(2), the minor Plaintiffs will be referenced by initial.

supplementary birth certificate[4] for V., identifying both of them as V.'s parents. In July of 2003, the Oklahoma Department of Health issued a replacement birth certificate for V., identifying Mr. Hampel as her only parent. Hampel and Swaya contested this result, and Defendant Commissioner of Health sought an opinion from the Oklahoma Attorney General. The Attorney General issued an opinion wherein it was recognized that the Full Faith and Credit Clause of the United States Constitution required full recognition of the out-of-state adoption order and that the Department of Health should issue a birth certificate listing both Mr. Hampel and Mr. Swaya as V.'s parents. On April 6, 2004, the Oklahoma Department of Health issued a replacement birth certificate for V. which listed Mr. Hampel and Mr. Swaya as parents. In response to the Attorney General's opinion in V.'s adoption, the Amendment challenged here was enacted.

Since the enactment of the Amendment, Hampel and Swaya have not returned to Oklahoma because they fear their status as V.'s parents will not be recognized by state officials. Hampel and Swaya further assert that due to the Amendment and their concerns

---

[4] 10 Okla. Stat. § 7505-6.6(B) provides:

> The 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. The city and county of the place of birth, the hospital, and the name of the physician shall not be changed from the information provided on the original certificate of birth. If the adopted person was born in a foreign country, the State Registrar shall prepare a certificate of foreign birth.

about visiting Oklahoma, they have been unable to honor their agreement with V.'s birth mother to bring V. to the state for visits with her extended family.

B. The Doel Family

The Doels are women who now reside in Oklahoma. E. was born on July 20, 2000, and adopted by Lucy Doel in California on January 25, 2002. On June 14, 2002, Jennifer Doel adopted E. in California under that state's stepparent adoption procedure. In 2002, the Doels moved to Oklahoma with E. to raise her in this state. On February 27, 2004, the Oklahoma Department of Health issued a birth certificate for E., identifying Lucy as her only parent. The Doels have been unsuccessful in obtaining a birth certificate from the Department which lists both Lucy and Jennifer as E.'s parents.

The Doels assert the Amendment has affected the manner in which they exercise their obligations as parents of E. As an example, the Doels recite an incident where E. had to be transported to the emergency room by ambulance. According to the Doels, the emergency medical technicians and emergency room personnel initially stated only E.'s mother could ride in the ambulance or be present in the exam room. The medical personnel eventually relented when it was explained that both Lucy and Jennifer were E.'s parents.

C. The Magro/Finstuen Family

Ms. Magro and Ms. Finstuen are women who now live in Oklahoma. On August 6, 1998, Ms. Magro gave birth to S. and K. in New Jersey. On June 16, 2000, Ms. Finstuen adopted S. and K. in a proceeding before the New Jersey Surrogate Court. The adoption proceeding preserved Ms. Magro's existing parental rights. In July of 2000, Ms. Magro and

Ms. Finstuen moved to Oklahoma with S. and K. On November 1, 2000, the New Jersey Department of Health and Senior Services issued amended birth certificates for S. and K., identifying Ms. Magro and Ms. Finstuen as their parents.

Ms. Magro and Ms. Finstuen assert the Amendment interferes with Ms. Finstuen's ability to act as parent to S. and K. on a daily basis. Ms. Finstuen asserts she avoids signing parental permission slips for school and/or extracurricular activities. Similarly, when K. had surgery, Ms. Finstuen avoided signing any documents related to medical care out of concern any signature might be considered invalid.

II. STANDARD OF REVIEW

Summary judgment is appropriate if the pleadings and affidavits show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "[A] motion for summary judgment should be granted only when the moving party has established the absence of any genuine issue as to a material fact." Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 561 F.2d 202, 204 (10th Cir. 1977). The movant bears the initial burden of demonstrating the absence of material fact requiring judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A fact is material if it is essential to the proper disposition of the claim. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the movant carries this initial burden, the nonmovant must then set forth "specific facts" outside the pleadings and admissible into evidence which would convince a rational trier of fact to find for the nonmovant. Fed. R. Civ. P. 56(e). These specific facts may be shown "by any of the kinds of evidentiary

materials listed in Rule 56(c), except the mere pleadings themselves." Celotex, 477 U.S. at 324. Such evidentiary materials include affidavits, deposition transcripts, or specific exhibits. Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1024 (10th Cir. 1992). "The burden is not an onerous one for the nonmoving party in each case, but does not at any point shift from the nonmovant to the district court." Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 672 (10th Cir. 1998). All facts and reasonable inferences therefrom are construed in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

III. ANALYSIS

The Plaintiffs' arguments for their motion are premised on the following four theories: (1) Full Faith and Credit Clause; (2) Equal Protection; (3) Due Process; and (4) Right to Travel. Defendants argue Plaintiffs lack standing to bring the present action and deny that any of the constitutional claims have merit. The Court will address the standing issue first and the claims for relief in turn.

A. Standing

Defendants argue Plaintiffs lack standing as they have failed to demonstrate the existence of a concrete, objective, and palpable injury, either actual or threatened. In response, Plaintiffs argue they have demonstrated that they have suffered actual or threatened injury as a result of the Amendment and that that injury may be redressed by a favorable decision on their claims. According to Plaintiffs, the harm here is actual because the Amendment is self-executing and denies them recognition of their proper legal status.

Article III requires, as an "irreducible constitutional minimum" and threshold prerequisite to jurisdiction, that the matter before a federal court is an actual case or controversy. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983). Thus, a plaintiff's standing to bring suit in federal court depends on the 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) (citations omitted).

Here, the second and third elements are not challenged by Defendants and are clearly met. The Court's December 7, 2004, Order determined that Defendants are the persons charged with enforcement of the Amendment, thus satisfying the second element. As for the third, Plaintiffs seek an Order invalidating the Amendment, enjoining any further application of that law, and directing the state to issue birth certificates identifying each adult as a parent of the appropriate child. Clearly, a favorable judgment will address the harm alleged by Plaintiffs.

The question remaining is whether the undisputed facts demonstrate Plaintiffs have suffered an "injury in fact." Because they seek prospective relief, Plaintiffs must show more than past injury. A showing of continuing, present adverse effects is required. Lyons, 461

U.S. at 102. Plaintiffs cannot show injury in fact with mere allegations of a possible future injury. Instead, Plaintiffs must show any threatened injury is "'certainly impending'" or "'both real and immediate.'" Nova Health, 416 F.3d at 1155 (citations omitted). The reality of future injury and not Plaintiffs' subjective apprehensions is determinative. Lyons, 461 U.S. at 102 n.8.

Defendants argue Plaintiffs have failed to demonstrate anything other than speculative injury. According to Defendants, the assertions made by Plaintiffs only speak of harm that may occur at some point in the future. Although Defendants' arguments are partially correct, as much of the harm asserted by Plaintiffs is speculative, Defendants overlook a critical part of the Amendment's effect on Plaintiffs.

As a direct result of the Amendment, Jennifer Doel has been unable to obtain a birth certificate for her children identifying her as a parent. The undisputed facts are that Jennifer acts as E.'s parent and has been recognized by another state, California, as E.'s parent. Moreover, E. is also a Plaintiff in this matter and as a direct result of the Amendment she is deprived of the rights that accrue to her as a result of being Jennifer's legally-recognized child. Jennifer and E. have asserted facts demonstrating the existence of a parent-child relationship, including an adoption decree, and have expressed a desire for Oklahoma to legally recognize that relationship in the same manner that other out-of-state adoptions are recognized – issuance of a birth certificate identifying Jennifer as E.'s parent. These Plaintiffs have undertaken the steps necessary for that legal recognition; the adoption is

recognized by other states; and it is only the Amendment that prevents that legal recognition in Oklahoma.

A similar result obtains for Ms. Finstuen and S. and K. The undisputed facts demonstrate a parent-child relationship exists, has been recognized by New Jersey, and is legally nullified in Oklahoma only as a result of the Amendment. Ms. Finstuen has also offered specific examples of how the Amendment interferes with her rights and obligations as a parent on a daily basis. This interference will clearly continue as long as the Amendment remains in effect. As was the case with E., S. and K. are also Plaintiffs. The undisputed facts demonstrate the concrete and particularized harm the Amendment causes them by precluding legal recognition of Ms. Finstuen as their parent. As long as the Amendment is in effect, this harm will continue.

By comparison, the Hampel/Swaya family is in a significantly different position. Although Hampel and Swaya assert they cannot travel to Oklahoma with V. because of the Amendment, their fear is speculative. The undisputed fact is that they have an Oklahoma birth certificate identifying both men as parents to V. There is no suggestion V.'s Oklahoma birth certificate has been revoked or rescinded. The plain language of the Amendment would not affect a birth certificate issued by Oklahoma, as the Amendment only targets documents issued by other states. Further, before there would be any need for any person to see a copy of V.'s birth certificate during a visit to Oklahoma, some significant and unforeseen event would first have to take place. Thus, the harm the Hampel family has alleged in this case hinges on possible events or potential outcomes that are purely speculative.

In short, the Doel family and the Magro/Finstuen family have identified concrete and particularized harm arising as a direct result of the Amendment. Thus, these Plaintiffs have standing to challenge the Amendment. On the other hand, the Hampel/Swaya family has failed to identify any actual, non-speculative harm arising from the Amendment. Accordingly, they lack standing to challenge the Amendment. Therefore, the Court lacks jurisdiction over the Hampel/Swaya family's claims and they will be dismissed.

B. Full Faith and Credit

Defendants make a number of arguments for why the Plaintiffs' Full Faith and Credit Clause claim must fail. Defendants argue that: (1) Plaintiffs do not state a claim under the Full Faith and Credit Clause (FF&C) of the United States Constitution; (2) an adoption decree is not the type of judgment to which the FF&C Clause applies; (3) even if an adoption decree from another states is a "judgment," Oklahoma is not required to give it effect because Oklahoma is free to enact laws regulating the time, manner, and mechanism for enforcing that out-of-state judgment; (4) recognition of the adoption would permit another state to dictate Oklahoma's policy for same-sex adoptions and the FF&C Clause does not require such a result; and (5) Oklahoma is free to decide its own public policy and has done so through the Amendment.

There is no dispute that the Doels have a judgment declaring each to be the parent of E. Likewise, there is a judgment declaring Ms. Finstuen to be a parent to S. and K. There is no challenge to the validity of those court proceedings or any suggestion those judgments are in any way invalid. Rather, Defendants argue an adoption decree, such as these, is not

the type of judgment to which the FF&C Clause applies. The legal authority provided by Defendants is not decisive. Defendants cite to Jones v. Loving, 1961 OK 188, 363 P.2d 512, and Ronck v. Ronck, 1950 OK 145, 218 P.2d 902, as supporting the proposition that adoptions are a matter of contract between the parties and not a judicial proceeding in the usual sense of the word. Defendants' argument overstates the holding of the cases. The phrase on which Defendants rely is: "This court has held that the adoption of a child is essentially a matter of contract between the parties whose consent is required and is not a judicial proceeding although the sanction of a judicial officer is required for its consummation." Jones v. Loving, 1961 OK 188, ¶7, 363 P.2d at 513-14. Critical to the issue at bar is the fact that adoptions require the sanction of a judicial officer. That "sanction" comes in the form of a judgment and that judgment is entitled to the same full faith and credit as any other judgment. This conclusion is established by Oklahoma statute and case law. Prior to the addition of the Amendment, 10 Okla. Stat. § 7502-1.4(A) required recognition of a foreign adoption decree without qualification. In Ex parte Moulin, 1950 OK 82, ¶ 9, 217 P.2d 1029, 1031, the Oklahoma Supreme Court stated: "The validity of the Arkansas decree is not called in question, therefore the same is entitled to full faith and credit under the Federal Constitution, Art. 4, § 1." In fact, Defendant Edmondson relied on this statute and case in issuing the Attorney General's opinion that led to issuance of the birth certificate for the Hampel/Swaya family. Thus, the Court finds no merit in Defendants' argument that the adoption decrees are not the type of judgment entitled to application of the FF&C Clause and the Court finds that the adoption decrees issued to the Doels and the Magro/Finstuen families

are entitled to full faith and credit.[5] That finding, however, does not end the inquiry, as the Court must determine the extent to which the out-of-state adoptions decrees must be given credit.

The Supreme Court has set out the purpose for the FF&C Clause:

> The very purpose of the full-faith and credit clause was 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.

Milwaukee County v. M.E. White Co., 296 U.S. 268, 276-77 (1935). Recognizing this intent to alter the relationships of the states, the Supreme Court has established that statutes and judgments are treated differently under the Clause:

> The Full Faith and Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 501, 59 S.Ct. 629, 632, 83 L.Ed. 940 (1939); see Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818-819, 105 S.Ct. 2965, 2977-2978, 86 L.Ed.2d 628 (1985). Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in

---

[5] See also Homer H. Clark, Jr., 2 The Law of Domestic Relations in the United States § 21.12 (2d ed. 1987):

> There is no reason why adoption decrees entered by courts of the various states, if based upon jurisdiction, should not be entitled to full faith and credit. A few cases take the position, however, that adoption decrees are recognized only as a matter of comity and that if their recognition would offend some strong public policy of the forum, recognition may be denied. Such a view with respect to the decrees of other state courts is erroneous. These decrees should be recognized pursuant to the Full Faith and Credit Clause regardless of differences in the law of adoption and in fact some courts have done so even where the forum law would not have authorized the granting of an adoption under the circumstances.

> one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.

Baker by Thomas v. General Motors Corp., 522 U.S. 222, 232-33 (1998).

Defendants argue that requiring recognition of the adoption decrees would run counter to established precedent which allows each state to dictate its own public policy. Defendants' argument is without merit. The Supreme Court has clearly stated that while "[a] court may be guided by the forum State's 'public policy' in determining the *law* applicable to a controversy," there is "no roving 'public policy exception' to the full faith and credit due *judgments*." Id. at 233 (emphasis in original and citations omitted). Thus, regardless of whether the adoption decrees of the other states are contrary to the public policy of Oklahoma, because they are judgments, not laws, they are entitled to full faith and credit.

Defendants also argue that the mechanism for enforcing a judgment is dictated by the laws of the forum state. Thus, Defendants argue, because issuing an Oklahoma birth certificate is an act within the exclusive province of Oklahoma, requiring that act to be performed cannot be predicated on the judgment of a court of a different state. Defendants' argument misapplies the standard controlling the restrictions that apply when enforcing foreign judgments. The rule set forth by the Supreme Court is as follows:

> Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law.

Id. at 235. Thus, it is left to the forum state to regulate the mechanism for enforcing a judgment, e.g., what types of collection actions may be used, how a judgment must be registered or otherwise established in the forum state, and what court or other proceedings must be used to enforce the judgment. However, those enforcement mechanisms may not interfere with the right of the party to the benefits of that judgment. See Broderick v. Rosner, 294 U.S. 629, 643 (1935) ("[A state] may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause, when its courts have general jurisdiction of the subject-matter and the parties."). The Amendment is simply not an enforcement mechanism.[6]

Defendants next argue the adoption decrees do not have to be recognized by Oklahoma, based on the Supreme Court's statement in Baker that: "[o]rders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority." Baker, 522 U.S. at 235. Defendants argue this statement makes clear the FF&C Clause does not apply to the issuance of adoption decrees, as that is an official act within the exclusive province of the state.

Defendants' argument overlooks the plain language of the Baker opinion. The quotation set out above is limited to permitting non-recognition of orders commanding

[6] Further, the enforcement mechanisms must be applied in an "evenhanded" manner. Here, even if the Amendment were considered an enforcement mechanism, it cannot be said to be evenhanded.

action. Here, the adoption decrees do not attempt to direct any Oklahoma official to take action or direct any Oklahoma official to refrain from acting. Rather, the decrees merely establish the legal relationships between the adult and minor Plaintiffs. It is Oklahoma law, specifically 10 Okla. Stat. § 7502-1.4, that requires Oklahoma officials to act by issuing a birth certificate in harmony with out-of-state decrees. Because the Amendment would impair the proper recognition of the finally adjudicated facts of the out-of-state decrees, it must be set aside as violative of the Full Faith and Credit Clause.

C. Equal Protection

Plaintiffs argue the Amendment must be set aside as it violates the Equal Protection Clause by discriminating against children based on their parents' sexual orientation or unmarried intimate relationship and/or by discriminating against same-sex couples who adopt children. Plaintiffs argue that the Amendment improperly impairs their legal relationships based on the parents' sexual orientation or due to the fact that both parents are of the same sex. Plaintiffs argue the Amendment should be reviewed under strict or intermediate scrutiny but that it fails to pass muster under even the most relaxed standard of review. Defendants argue that because there is not a fundamental right to adopt and/or that because homosexuals are not a suspect class, the Amendment is entitled to a presumption of validity. According to Defendants, the Amendment should be reviewed under a rational basis analysis. Thus, Defendants argue, because the Amendment is rationally related to a legitimate government interest, Plaintiffs' Equal Protection Clause claims must fail.

At the outset the Court notes that, for the most part, both parties ignore the language of the Amendment and thereby miss the issues relevant to the Equal Protection Clause analysis. Contrary to Plaintiffs' argument, with the limited exception noted below, the Amendment does not target children because of their parents' sexual orientation, nor does it facially attack same-sex couples because of their relationships. Also, the Amendment does not on its face discriminate against gay or lesbian individuals or their children. Likewise, Defendants' argument that there is no constitutional right to adopt misses the point as the Plaintiff children have already been adopted.[7] Rather, the effect of the Amendment is to refuse legal recognition of certain parent-child relationships that have been legally formed in a different state. Specifically, the Amendment requires Oklahoma agencies and courts to refuse recognition to one of a child's parents if that child was adopted in some other state by two persons of the same sex.[8] The Amendment, on its face, has the same impact whether the adoptive same-sex parents were homosexual or heterosexual; thus, sexual orientation is not the focus of the statute.

However, because the Amendment attempts to strip away the parental status of at least one of the adult Plaintiffs from each family unit, it violates the Equal Protection Clause and must be struck down.

---

[7] In this regard, this action involves an entirely different situation than that in Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004), which dealt with restrictions on the right to adopt.

[8] "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*." 10 Okla. Stat. § 7502-1.4 (A) (emphasis added).

1. Plaintiff Children

The starting point in the analysis is to identify the scope of rights afforded to the Plaintiff children. Even though the Plaintiff children are adopted, they occupy the same status as if they were the biological children of each of the parents. See 10 Okla. Stat. § 7505-6.5(A):

> 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. From the date of the final decree of adoption, the child shall be entitled to inherit real and personal property from and through the adoptive parents in accordance with the statutes of descent and distribution. The adoptive parents shall be entitled to inherit real and personal property from and through the child in accordance with said statutes.

The same result obtains in the states where the adoptions took place. See Cal. Fam. Code Ann. § 8616: "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." and N.J. Stat. Ann. § 9:3-50(b):

> 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. For good cause, the court may direct the entry of judgment nunc pro tunc as of the date the action was instituted. In applying the intestate laws of this State, an adopted child shall have the same rights of inheritance as if born to the adopting parent in lawful wedlock.

See also Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 845, n.51 (1977) (Stewart, J., concurring in judgment) (where, during a discussion of the relationships of foster families and the rights inherent therein, the Court, citing New York law stated:

"Adoption, for example, is recognized as the legal equivalent of biological parenthood."). Thus, the Amendment's attempt to deny recognition to one parent operates to strip away certain legal rights to which the Plaintiff children became entitled upon their adoption. For example, the Plaintiff children would not be permitted to recover for the wrongful death of the nonrecognized parent (see 12 Okla. Stat. § 1054 and OUJI-Civ2d 8.1 (setting out who may sue in a wrongful death claim and the damages that may be recovered)); maintain an action under the workers' compensation statute for the death of the nonrecognized parent (see 85 Okla. Stat. § 3.1); recover child support payments should the nonrecognized parent leave the home (see 10 Okla. Stat. § 4); or inherit from the nonrecognized parent in the same manner as if the parent were legally recognized (see 84 Okla. Stat. § 213).

In this regard, the Amendment has the same effect as statutes which affected an illegitimate child's rights. Consequently, the Amendment may stand only if it satisfies intermediate scrutiny. Clark v. Jeter, 486 U.S. 456, 461 (1988) ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy."). Under that standard of review, the Amendment must fail unless it is "substantially related to an important governmental objective." Id.

Defendants assert the state's interest is found in the Oklahoma Adoption Code, 10 Okla. Stat. § 7501-1.2(A) which states:

> The Legislature of this state believes that every child should be raised in a secure, loving home and finds that adoption is the best way to provide a permanent family for a child whose biological parents are not able or willing

> to provide for the child's care or whose parents believe the child's best interest will be best served through adoption.

In addition, Defendants argue the Amendment was intended to halt the erosion of the mainstream definition of the family unit, another valid state interest. See Dkt. No. 62 Exh. 8. Defendants argue these statements demonstrate a legitimate state purpose for the Amendment.[9]

Initially the Court notes that where intermediate scrutiny is applied, the state has the burden of proving "whether the proffered justification is 'exceedingly persuasive.' The burden of justification is demanding and it rests entirely on the State." United States v. Virginia, 518 U.S. 515, 533 (1996) (citation omitted). Defendants have failed to meet this burden. As far as the state's interest is defined by 10 Okla. Stat. § 7501-1.2, there is no evidence that the adoptions by the adult Plaintiffs herein fail to satisfy the goal of placing the Plaintiff children in secure, loving, and permanent homes. The very fact that the adoptions have occurred is evidence that a court of law has found the adoptions to be in the best interests of the children. (See Dkt. No. 62, Exh. 11 and Exh. 16, each noting that the adoption was found to be in the children's best interest). To now attempt to strip a child of one of his or her parents seems far removed from the statute's purpose and therefore from Defendants' asserted important government objective.

[9] Defendants assert the Amendment should be reviewed under a rational basis analysis and therefore posit the purposes of the Amendment in the terms appropriate to that standard.

As for the statement of purpose, the Amendment does little if anything to promote the traditional family unit.[10] Indeed, the Amendment has no effect on single-parent adoptions, even when the single parent is homosexual, nor does it require the adoptive parents be married or even in a stable relationship.[11] Rather, the Amendment's sole effect is to refuse recognition of the previously determined parental rights of one of the Plaintiff parents. Defendants have not demonstrated, and the Court cannot find, any set of facts where that alteration of the family is substantially related to an important governmental objective.

Rather, much like the statutes imposing different standards on illegitimate children, the Amendment attempts to penalize the Plaintiff children for the acts of their parents. As the Supreme Court stated in Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972):

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, 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. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual-as well as an unjust-way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth . . . .

---

[10] Even to the extent the Amendment can be found to promote the traditional family, that support is insufficient to survive intermediate scrutiny.

[11] Unquestionably, other aspects of the adoption process may address these issues. However, here the Court is only concerned with the Amendment's ability to promote a "traditional" family.

(footnotes omitted). Accordingly, the Court finds that to the extent the Amendment operates to strip from the Plaintiff children a parent obtained as a result of lawful adoption, it fails to survive an Equal Protection Clause analysis as it is not substantially related to an important governmental objective.

2. Adult Plaintiffs

Although, as noted above, the Amendment does not, on its face, base its effect on the sexual orientation of the parents, the impact of the Amendment likely has a disparate impact on homosexual individuals as they are more likely to be same-sex parents seeking recognition of their adoption. To establish a disparate impact, Plaintiffs must show both a discriminatory impact and a discriminatory purpose. The Supreme Court's analysis of disparate impact based on gender is illustrative of the proper analysis.

> When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, . . . is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. See Arlington Heights v. Metropolitan Housing Dev. Corp., *supra* [429 U.S. 252 (1977)]. In this second inquiry, impact provides an "important starting point," 429 U.S., at 266, 97 S.Ct., at 564, but purposeful discrimination is "the condition that offends the Constitution." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554.

See Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 274 (1979).

Here, it is clear the Amendment is facially neutral. It does not on its face discriminate against any particular protected group or class. Rather, it bars recognition of an out-of-state adoption where the adoptive parents are of the same sex. Further, as noted above, the

Amendment does not overtly target homosexual individuals. However, the impact of the statute will undoubtedly have a greater discriminatory impact on that group than any other. Thus, the inquiry turns to the second prong, discriminatory purpose. When determining whether a challenged law has a discriminatory purpose, the Feeney court set out the analysis as follows:

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. See United Jewish Organizations v. Carey, 430 U.S. 144, 179, 97 S.Ct. 996, 1016, 51 L.Ed.2d 229 (concurring opinion). It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Feeney, 442 U.S. at 279 (footnotes omitted).

Here, the Amendment was clearly targeted at preventing recognition of homosexual parents. Defendants' briefs are replete with arguments demonstrating the Amendment targets homosexuals, and Defendants admit as undisputed Plaintiffs' fact no. 13 which states the Amendment was intended to "protect Oklahoma children from being targeted for adoption by gay couples across the nation and to ensure that children are raised in traditional family environments." (Dkt. No. 62, p. 3.) Further, the Amendment was passed in direct response to the Attorney General's opinion which led to the issuance of V.'s birth certificate listing Messrs. Hampel and Swaya as parents. Clearly, the Amendment was intended by the Oklahoma Legislature to have an adverse impact on an identifiable group. Plaintiffs have established a prima facie case for a disparate impact claim. The next step is to determine the level of scrutiny that should be applied.

The Supreme Court has applied different levels of review depending on the nature of the class bringing a disparate impact claim. Here, the class is based on an individual's sexual orientation. In Romer v. Evans, 517 U.S. 620 (1996), the Court was faced with a challenge to a Colorado statute repealing all state laws that prohibited discrimination based on sexual orientation. In measuring the law within the context of the Equal Protection Clause, the Supreme Court applied a rational basis test, that is whether the law bore "a rational relation to some legitimate end." Id. at 631. The Romer Court then determined the law could not survive the inquiry because it was not related to a legitimate governmental interest. Id. at 635. In reaching this conclusion, the Romer Court noted: "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." Id. at 633.

Here, the Amendment has the effect of closing access to the government to Plaintiffs. Because of the Amendment, Plaintiffs cannot obtain the assistance of the state in obtaining legal recognition of established parental rights. The door to assistance is closed solely because of the adult Plaintiffs' sexual orientation. Thus, as in Romer, the Amendment violates the Equal Protection Clause and must be set aside. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." Id. at 633.

The avowed purpose behind the Amendment also requires it be set aside. As noted above, the Amendment was passed to halt the erosion of the mainstream definition of the family unit and to protect Oklahoma children from being targeted for adoption by gay couples across the nation and to ensure that children are raised in traditional family environments. That is, the Amendment targets an unpopular group and singles them out for disparate treatment. As the Romer Court stated:

> A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare · · · desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."

Id. at 634-635 (quoting Dep't of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)). Thus, to the extent the Amendment has a disparate impact on homosexual individuals seeking recognition of out-of-state adoptions, it violates the Equal Protection Clause of the Constitution and must be set aside.

D. Due Process

Plaintiffs argue the Amendment violates their substantive Due Process rights because it infringes on their liberty interest in parental and family autonomy and in intimate relationships. As with the Equal Protection claim, Defendants argue that because there is no fundamental right to adopt, Plaintiffs cannot state a Due Process claim.

Plaintiffs have overstated the reach of the Due Process Clause and Defendants have again misstated the issue before the Court. Turning to Defendants' argument first, as

explained fully above, this case is not about the right to adopt; the Plaintiff children have already been adopted. Rather, the case is about whether the Amendment's attempt to erase one parent from the legally-established parent-child relationship can withstand a constitutional challenge. Likewise, aside from the disparate impact issue noted within the Equal Protection context, the sexual orientation of the parents is immaterial to application of the Amendment. Thus, Plaintiffs' intimate relationship arguments are inapposite.

The Supreme Court has found that certain rights are so basic and fundamental that the state cannot infringe them without establishing that the restriction is justified by a sufficient purpose and that the means of restriction is necessary to achieve the objective. The first step in a substantive Due Process analysis is to determine if the plaintiff has identified a fundamental right. Here, it is clear that a fundamental right is implicated. The Amendment denies recognition to a judgment that established the adult Plaintiffs as the parents of the Plaintiff children. In so doing, the Amendment in essence tells one of the adult Plaintiffs "you are no longer the parent of your child." In this regard, the Amendment clearly infringes on the fundamental right to the care, custody, and rearing of the child. The Supreme Court has, on numerous occasions, clearly established these parental rights are fundamental. Troxel v. Granville, 530 U.S. 57, 65-66 (2000):

> The liberty interest at issue in this case-the interest of parents in the care, custody, and control of their children-is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in Meyer v. Nebraska, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in Pierce v. Society

of Sisters, 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in Pierce that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Id., at 535, 45 S.Ct. 571. We returned to the subject in Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Id., at 166, 64 S.Ct. 438.

In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, *e.g.*, Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); Wisconsin v. Yoder, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); Quilloin v. Walcott, 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); Parham v. J. R., 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); Glucksberg, *supra*, at 720, 117 S.Ct. 2258 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ[t] ··· to direct the education and upbringing of one's children" (*citing* Meyer and Pierce)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right

> of parents to make decisions concerning the care, custody, and control of their children.

Because the effect of the Amendment is to interfere with the parent Plaintiffs' rights to make decisions related to the care, custody, and control of their child(ren), Plaintiffs have established the Amendment infringes on a fundamental right.

Defendants now have the obligation to produce a compelling interest to be served which justifies the infringement. That is, Defendants must establish the Amendment is necessary to achieve the objective. Because Defendants erroneously focus on the issue as the right to adopt, they offer no compelling interest to justify the infringement. However, based on Defendants' arguments within the Equal Protection claim, it appears the interest to be served by the Amendment was (1) to halt the erosion of the mainstream definition of the family unit and (2) to meet the goals set out in the Oklahoma Adoption Code, 10 Okla. Stat. § 7501-1.2, that every child should be placed in a setting that meets the child's best interests. The Court agrees that the statute expresses a compelling state interest. However, there is no basis on which to find that the Amendment in any way supports this interest. As noted above, a court of competent jurisdiction has determined the adoptions are in the Plaintiff children's best interest. The Amendment attempts to undo that determination with no consideration of changed circumstances or any other evidence that indicates the earlier decision was in any way incorrect. As for the intent to protect the mainstream definition of

the family unit, as noted earlier, the Amendment does nothing to promote that goal.[12] Finally, the Court finds the Supreme Court's statement in Quilloin v. Walcott, 434 U.S. 246, 255 (1978), decisive on the issue.

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."

(quoting Smith v. Org. of Foster Families, 431 U.S. at 862-63). Here, the out-of-state adoption decrees created families and the Amendment attempts to break up those families with no consideration either for the fitness of the adult Plaintiffs as parents or the best interest of the Plaintiff children. Rather, the Amendment attempts that break up only because the Plaintiff adults are of the same sex. Such an act cannot survive under Due Process jurisprudence.[13]

E. Right to Travel

Defendants argue that Plaintiffs' right-to-travel clause claim must fail as it is brought only by the Hampel/Swaya family and they lack standing. Although the Court agrees, for the reasons set forth above, that the Hampel/Swaya family does not have standing in this

[12] The Court notes because there is no evidence the Amendment is necessary to achieve the asserted state interest, it is unnecessary to resolve whether the Amendment provides the least restrictive means for satisfying that goal.

[13] The Court notes that the Amendment's effect of terminating a parent's rights without any process likely would run afoul of procedural due process protections as well. However, that issue has not been raised.

matter, the Court does not read the Plaintiffs' travel clause claim as narrowly as Defendants. Rather, as Plaintiffs assert in their brief, the Doels and the Magro/Finstuen family believe the Amendment impacts their right to travel in that it treats them differently from other Oklahoma residents.

Supreme Court jurisprudence clearly establishes a fundamental right to travel. United States v. Guest, 383 U.S. 745, 757 (1966) ("The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."). The question then becomes – does the Amendment infringe on this fundamental right?

The Supreme Court has identified separate components which the right to travel protects:

> [1] the right of a citizen of one State to enter and to leave another State, [2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, [3] for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

Saenz v. Roe, 526 U.S. 489, 500 (1999). Plaintiffs argue the Amendment impacts each component. However, because the remaining Plaintiffs are citizens of Oklahoma and there are no ingress or egress arguments made, only the third component is implicated here. Therefore, the decisive issue is whether, as a result of the Amendment, Plaintiffs are treated differently than other Oklahomans. Defendants argue they are not because, under Oklahoma law, same-sex couples are not permitted to adopt and, consequently, Plaintiffs are on the

same footing as all other Oklahoma citizens. Plaintiffs have offered no evidence countering this assertion. Thus, Plaintiffs have failed to demonstrate that they are treated differently that other citizens of the state. Consequently, Plaintiffs' right-to-travel cause claim must fail.

IV. CONCLUSION

As set forth more fully herein, Plaintiffs Gregory Hampel and Edmund Swaya and their child V. have failed to demonstrate the existence of an injury in fact caused by the Amendment to 10 Okla.Stat. § 7502-1.4 (A). Accordingly, they lack standing to proceed in this matter and their claims are dismissed.

Plaintiffs Lucy and Jennifer Doel and their child E., and Plaintiffs Anne Magro and Heather Finstuen and their children S. and K. have demonstrated harm from the Amendment. By its refusal to recognize and give effect to a valid judgment, from another court of competent jurisdiction, which established their status as parents of their respective children, the Amendment violates the Full Faith and Credit Clause of the United States Constitution, the Equal Protection Clause and substantive due process rights. However, the Court is not faced with and does not address whether Plaintiffs had the right to adopt in the first instance. Rather, this opinion only addresses the effect of the Amendment on the previously established parent-child relationship.

Finally, because Plaintiffs have failed to demonstrate that the Amendment treats newcomers to the state differently than longtime residents, Plaintiffs' right-to-travel claim fails.

For these reasons, the Court finds both Plaintiffs' and Defendants' Motions for Summary Judgment (Dkt. Nos. 62 and 63) should be GRANTED in part and DENIED in part as explained above. The claims of Plaintiffs Hampel, Swaya, and their child V are dismissed. The Court finds that the Amendment to 10 Okla.Stat. § 7502-1.4 (A), violates the United States Constitution, that it must be set aside, and any further enforcement of it is enjoined. Finally, the Court directs Defendant Crutcher and the Oklahoma Department of Health to issue a birth certificate for E., identifying Jennifer and Lucy Doel as her parents, and to issue birth certificates for S. and K., identifying Anne Magro and Heather Finstuen as their parents.

IT IS SO ORDERED this 19th day of May, 2005.

ROBIN J. CAUTHRON
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

HEATHER FINSTUEN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. CIV-04-1152-C
	)	
DREW EDMONDSON, in his official capacity as Attorney General of Oklahoma; BRAD HENRY, in his official capacity as Governor of Oklahoma; and DR. MIKE CRUTCHER, in his official capacity as Commissioner of Health of Oklahoma,	)	
	)	
Defendants.	)	

J U D G M E N T

Upon consideration of the pleadings herein, and in accordance with the Court's Memorandum Opinion issued in this case, the Court finds that Plaintiffs' and Defendants' Motions for Summary Judgment should be granted in part and denied in part. The claims of Plaintiffs Hampel, Swaya, and their child V. are dismissed..

The Amendment to 10 Okla.Stat. § 7502-1.4 (A), violates the United States Constitution's Full Faith and Credit clause, and Plaintiffs' rights to Equal Protection and substantive Due Process. The Amendment is hereby declared null and void and any further enforcement of the Amendment is enjoined.

Finally, Defendant Crutcher and the Oklahoma Department of Health shall issue a birth certificate for E., identifying Jennifer and Lucy Doel as her parents and to issue birth certificates for S. and K., identifying Anne Magro and Heather Finstuen as their parents.

Judgment is therefore entered.

DATED this 19th day of May, 2006.

ROBIN J. CAUTHRON
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

HEATHER FINSTUEN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. CIV-04-1152-C
	)	
DREW EDMONDSON, in his official capacity as Attorney General of Oklahoma; BRAD HENRY, in his official capacity as Governor of Oklahoma; and DR. MIKE CRUTCHER, in his official capacity as Commissioner of Health of Oklahoma,	)	
	)	
Defendants.	)	

ORDER

The Memorandum Opinion and Order entered in this case on May 19, contained a scrivener's error which erroneously indicated the Order was entered in 2005. That Order is hereby corrected to reflect the correct date of May 19, 2006.

IT IS SO ORDERED this 22th day of May, 2006.

ROBIN J. CAUTHRON
United States District Judge