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

Heather Finstuen, *et al.*,	)	
	)	
Plaintiffs,	)	
versus	)	**Case No.: CIV-04-1152C**
	)	
Drew Edmondson, in his official capacity as Attorney General of Oklahoma, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to FED.R.CIV.P. 56 and LCvR 56.1(c), plaintiffs submit the following brief in opposition to defendants' Motion for Summary Judgment.

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BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Index of Authorities

Decisional Authority

Statutory Authority

Secondary Authority

I. RESPONSE TO DEFENDANTS' STATEMENT OF FACTS

1) Plaintiffs agree that the factual statements contained in paragraphs 1 through 10 are undisputed.

2) The substance of paragraph 11 is admitted, although the record citation is erroneous. The now-admitted contention appears at paragraph 23 of the Second Amended Complaint.

3) Plaintiffs agree that the factual statements contained in paragraphs 12 and 13 are undisputed.

4) The factual statements appearing at paragraph 14 are incomplete and, to the extent they imply the plaintiffs have suffered no injury due to the State's action, are misleading. Hampel and Swaya, have been stripped of the legal right to enter and travel to and through Oklahoma without impairment of their parenting rights and V. has been stripped of her right to travel to Oklahoma with her parents. The complete interrogatory answers, consistent with the affidavits filed by the plaintiffs Hampel and Swaya in support of *Plaintiffs' Motion for Summary Judgment* [Dkt. No. 62, Exhibits 1 & 2] establish the following undisputed facts:

a) Hampel's and Swaya's presence in Oklahoma would impair the right to visit their child in the hospital if she falls ill; the right to make health care decisions for their child; or standing before a court in guardianship proceedings related to their child, to name a few.

b) Messrs. Hampel and Swaya have experienced the practical and emotional consequences of Oklahoma's Adoption Invalidation Law. Because the Adoption Invalidation Law threatens non-recognition of each of their parent-child relationships with V. by and in the State of Oklahoma, it interferes with Messrs. Hampel's and Swaya's decision to bring their daughter to the state in which she was born and the commitments they made during the adoption process.

(Dkt.No.63. Ex.2, Interrogatory Answer No. 5 & Ex.3, Interrogatory Answer No. 5; Dkt.No.62, Ex.1, ¶12 & Ex.2, ¶12.)

c) Messrs. Hampel and Swaya fear that, if they bring their daughter to see the town in which she was born, their parenthood of V. will not be respected by police, health officials, child welfare officials and other representatives of the State. They promised their daughter's birth mother in Oklahoma that she would be able to visit with V. on an annual basis, but they have been unable to bring V. to Oklahoma to fulfill that promise as a result of the Adoption Invalidation Law. Messrs. Hampel and Swaya view open adoption as a relationship of trust between adoptive parents and a birth parent. V.'s birth mother terminated her parental rights with the understanding that the men actively would support a relationship between her and V., yet the Adoption Invalidation Law has blocked them from being able to support that relationship.

(Dkt.No.63. Ex.2, Interrogatory Answer Nos. 8, 10 & Ex.3, Interrogatory Answer Nos. 8, 10; Dkt.No.62, Ex.1, ¶13 & Ex.2, ¶13.)

d) Further, because V.'s maternal grandfather by birth does not travel outside the State of Oklahoma, the law makes it impossible for V. to visit him at all. Messrs. Hampel and Swaya also have been unable to bring V. to meet many other persons in Oklahoma whom they would like her to meet, such as her birth mother's family and close friends, including those who were present in the hospital on the day that she was born.

(Dkt.No.63. Ex.2, Interrogatory Answer Nos. 9, 10, 11 & Ex.3, Interrogatory Answer Nos. 9, 10, 11; Dkt.No.62, Ex.1, ¶14 & Ex.2, ¶14.)

e) The State's refusal to recognize Messrs. Hampel and Swaya as her parents or to recognize her as their daughter has injured V. The Adoption Invalidation Law imposes a barrier to V. and her parents obtaining in or from Oklahoma all of the benefits and protections that should follow from their parent-child relationships anywhere in the country. In the meantime, V. continues to grow older without the benefit of interacting with her birth mother and extended family in Oklahoma during some of her most formative years – time that cannot be recovered.

(Dkt.No.63. Ex.2, Interrogatory Answer No. 10 & Ex.3, Interrogatory Answer No. 10; Dkt. No.62, Ex.1, ¶15 & Ex.2, ¶15.)

f) Mr. Hampel, Mr. Swaya and V. have not traveled to Oklahoma since Oklahoma's Adoption Invalidation Law went into effect because of the risks it imposes on the parent-child relationships between V. and her legal parents, Messrs. Hampel and Swaya.

(Dkt.No.63. Ex.2, Interrogatory Answer Nos. 9, 13 & Ex.3, Interrogatory Answer Nos. 9, 13; Dkt.No.62, Ex.1, ¶16 & Ex.2, ¶16.)

5) The factual statements appearing at paragraph 15 are incomplete and, to the extent they imply the plaintiffs have suffered no injury due to the State's action, are misleading. The complete interrogatory answers, consistent with the affidavits filed by the plaintiffs Magro and Finstuen in support of *Plaintiffs' Motion for Summary Judgment* [Dkt. No. 62, Exhibits 14 & 15] establish the following undisputed facts:

a) Oklahoma's Adoption Invalidation Law impairs Ms. Finstuen's and Ms. Magro's right to visit their children in the hospital when ill; the right to make routine health care decisions for their children; the right to register their children for school; the right to enroll their children in child care; standing before a court in guardianship proceedings related to their children; the right to inherit property under intestacy rules; the right to obtain emergency medical leave when their children fall ill; and the right to obtain desperately needed benefits such as health insurance for their children, to name a few.

b) Because of Oklahoma's Adoption Invalidation Law, Ms. Finstuen's and Ms. Magro's decision-making is impaired on a daily basis by having to take into account the possibility of non-recognition of Ms. Finstuen's relationship with their children by innumerable persons in innumerable transactions, including in hospitals, schools or courts. For example, although Ms. Finstuen is their legal parent, she has avoided being the parent to sign forms of legal significance for the children in Oklahoma, such as permission and/or release forms associated with school and extra-curricular activities (for example, T-Ball, soccer, gymnastics); Girl Scout/Summer Camp authorization forms; and, medical and dental release forms for the children's care. When their daughter K. had surgery, Ms. Finstuen avoided signing any legal documents associated with her hospital stay and worried that, if K. were in intensive care for any reason (where visits are limited to "immediate family members"), Ms. Finstuen could be excluded. Ms. Finstuen has not signed any of the enrollment documents pertaining to the children's schooling. She does not feel she should take the risk that any document she signs pertaining to the children's care or control will be deemed legally invalid. Yet Ms. Magro may be unavailable to sign documents in an emergency, causing the family great concern.

(Dkt.No.63. Ex.4, Interrogatory Answer No. 5 & Ex.5, Interrogatory Answer No. 5; Dkt.No.62, Ex.14, ¶8 & Ex.15, ¶8.)

c) Oklahoma's Adoption Invalidation Law has practical and emotional consequences for Ms. Finstuen and Ms. Magro. It compelled them to have extensive conversations with their extended family to try to head off concerns about the children if something happens to Ms. Magro. Both have increasing emotional anxiety about whether Ms. Finstuen's parenthood will be respected in that event and about the potential for her to be denied rights of care and control over the children's upbringing.

(Dkt.No.63. Ex.4, Interrogatory Answer No. 11 & Ex.5, Interrogatory Answer No. 11; Dkt. No.62, Ex.14, ¶9 & Ex.15, ¶9.)

d) The Adoption Invalidation Law forces Ms. Finstuen and Ms. Magro to consider extraordinary and expensive measures to protect their children that should not be necessary, such as guardianships, and powers of attorney. They have discussed the painful possibility that they may be forced to leave the State and their jobs for the protection of their children. This would be a difficult decision for them. Ms. Magro has a very successful academic career and is up for tenure in the spring of 2006. Ms. Finstuen is nearing graduation from law school and has good prospects in Oklahoma as well. Being forced to move their family would be economically and professionally harmful and emotionally wrenching.

(Dkt.No.63. Ex.4, Interrogatory Answer No. 11 & Ex.5, Interrogatory Answer No. 11; Dkt. No.62, Ex.14, ¶10 & Ex.15, ¶10.)

e) S. and K. have been injured by the State's refusal to recognize Ms. Finstuen and Ms. Magro as their parents and them as Ms. Finstuen's and Ms. Magro's children, and by the resulting barrier to their or their parents obtaining all of the benefits and protections that follow from those parent-child relationships. Ms. Finstuen and Ms. Magro are deeply concerned that further harm to S. and K. in the form of economic, emotional, dignitary, physical, or other damages will result. S. and K. do not understand why Oklahoma would not want Ms. Finstuen to be their mother. Whenever Ms. Finstuen leaves, K. has become increasingly concerned about when and whether she will come home. Likewise, S. has become clingy, wanting to stay close to Ms. Finstuen. The family lives in fear of what could happen if a crisis were to arise in the family instead of knowing they can depend on the legal rights that most parents and children take for granted.

(Dkt.No.63. Ex.4, Interrogatory Answer Nos. 10, 12 & Ex.5, Interrogatory Answer Nos. 10, 12; Dkt.No.62, Ex.14, ¶11 & Ex.15, ¶11.)

6) Plaintiffs agree that the factual statements contained in paragraph 16 are undisputed.

7) Plaintiffs incorporate by reference the additional undisputed facts, as set forth in paragraphs 1 through 38 of *Plaintiffs' Motion for Summary Judgment* (Dkt. No. 62).

II. ARGUMENT AND AUTHORITY

A. PLAINTIFFS HAVE STANDING TO CHALLENGE OKLAHOMA'S ADOPTION INVALIDATION LAW.

Defendants contend, erroneously, that plaintiffs lack standing to bring this challenge to Oklahoma's Adoption Invalidation Law. Plaintiffs have shown that they personally have suffered "actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury is "likely to be redressed by a favorable decision," *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976). *See also Nova Health Sys. v. Gandy*, 388 F.3d 744, 749 (10th Cir. 2004).

Defendants do not dispute that they are the proper State officials charged with enforcement of the Adoption Invalidation Law, nor do they suggest that the requested equitable relief will not redress the harm that plaintiffs suffer.[1] Rather, they contend that plaintiffs are asserting a "generalized grievance" against illegal government activity without having suffered

[1] The Court previously found that the governor and attorney general are charged with executing and enforcing the laws of Oklahoma, including specifically the Adoption Invalidation Law. *Order Den. Motion to Dismiss*, Dkt. No. 20 at 6-8 (Dec. 7, 2004). Additionally, Defendant Crutcher, joined after the Court issued its order, is the state official who "serve[s] as the executive officer and supervise[s] the activities of the State Department of Health, and act[s] for the Department in all matters except as may be otherwise provided in this Code; … and enforce[s] rules and standards adopted by the State Board of Health." OKLA. STAT. tit. 63, § 1-106(B)(2) (Supp. 2004). The Department of Health is responsible for issuing birth certificates, OKLA. STAT. tit. 63, § 1-316 (2001), like the one denied to Jennifer and Lucy Doel for their daughter E.

any actual or threatened invasion of a legally protected interest that is (1) concrete and particularized, and (2) actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (discussing the "injury in fact" prong of standing). Defendants' argument distorts the nature of plaintiffs' injuries traceable to the Adoption Invalidation Law.

In the first place, there is nothing "generalized" about plaintiffs' grievance. The plaintiffs are same-sex couples with existing, legal parent-child relationships established through final adoption decrees, and their children. They assert an invasion of their own rights (the recognition of their existing parent-child relationships), not a general interest in the State's interference with the rights of others. Nor is their connection to Oklahoma tenuous. Plaintiffs either reside in Oklahoma or have a specific reason to visit and ***would*** visit Oklahoma but for the Adoption Invalidation Law.

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

necessary for a revolver to have discharged all its rounds before plaintiffs can show injury in fact.

Furthermore, the Adoption Invalidation Law's mandate that the State shall not recognize legal parent-child relationships of same-sex couples who participated in adoption proceedings in other states creates a classification that denies these plaintiffs equal access to scores of statutory and common law benefits, rights, protections and defenses under Oklahoma law. *See, e.g., Plaintiffs' Motion for Summary Judgment*, Dkt. No. 62 at 13-14, nn. 6 & 7 (filed Dec. 1, 2005). In the context of equal protection challenges, the Supreme Court has held that the injury in fact analysis hinges on whether the government has erected a barrier making it more difficult for members of one group to obtain benefits or protections than it is for members of another group. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (The "injury in fact" in an equal protection case is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.). *See also Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14 (1978) (injury in fact is the inability to compete on equal footing); *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*); *Citizens for Equal Protection, Inc. v. Bruning*, 290 F.Supp.2d 1004, 1008 (D. Neb. 2003), *appeal docketed*, No. 05-2604 (8th Cir. June 10, 2005) (gay and lesbian citizens have standing to challenge law that serves as barrier to engaging in the political process). In short, the plaintiffs claim the type of constitutional injury that, according to the Supreme Court, has "long been recognized as judicially cognizable." *Heckler v. Mathews*, 465 U.S. 728, 738 (1984) (citations footnote omitted). *Cf. Romer v. Evans*, 517 U.S. 620, 627-31 (1996) (comprehensive change in

legal status that singles out certain class of citizens for broad denial of protection effects "literal violation" of equal protection).

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

Finally, as a result of the Adoption Invalidation Law, Plaintiffs Doel have been unable to obtain an accurate birth certificate reflecting the parent-child relationship between Jennifer and Lucy and their daughter, E. As a result, this family currently is suffering a concrete, particularized actual injury and standing unquestionably exists. Governmental entities often rely on birth certificates as proof of a child's identity and parentage. Even if an accurate certificate were issued, as the State finally was compelled to do for Plaintiffs Hampel's and Swaya's daughter, V., State officials easily may assume that these plaintiff families and others like them fall within the Adoption Invalidation Law, rendering the birth certificate ineffective in securing the child's rights.

B. DEFENDANTS HAVE OFFERED NO LEGALLY COGNIZABLE JUSTIFICATION FOR FAILING TO FOLLOW THE CONSTITUTION'S FULL FAITH AND CREDIT REQUIREMENTS.

Defendants attempt to circumvent the Full Faith and Credit requirement of the U.S. Constitution by suggesting that adoption decrees are not the type of judgment falling within the Clause's mandate. Ironically, defendants precede their argument with the observation that "[t]he Full Faith and Credit Clause is often misunderstood by litigants." *Defendants' Motion for Summary Judgment*, Dkt. No. 63 at 9 (filed Dec. 19, 2005). It has been again here.[2] There are several flaws in defendants' position.

A proper full faith and credit analysis distinguishes between public acts and court judgments. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) ("Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments."); *Magnolia Pet. Co. v. Hunt*, 320 U.S. 430, 437 (1943) ("The full faith and credit clause and the Act of Congress implementing it have, for most purposes, placed a judgment on a different footing from a statute of one state, judicial recognition of which is sought in another."). Defendants confuse this distinction. They wrongly rely on *Nevada v. Hall*, 440 U.S. 410 (1979), to argue that requiring the State to recognize the validity of a final judgment is tantamount to allowing one state to legislate the consequences of acts within the second state's borders.

In *Hall*, after the State of Nevada was sued in a California state court, the State of Nevada attempted to invoke a Nevada statute to limit its tort liability. Resolving a classic conflict of laws issue, the Supreme Court declined to require California to apply the Nevada ***statute*** in the pending case when doing so would contradict California public policy. Defendants' discussion of *Hall* fails to note the Supreme Court began its Full Faith and Credit analysis by distinguishing between acts and judgments, setting forth the general requirement that "[a] ***judgment*** entered in

[2] A proper application of Full Faith and Credit jurisprudence to the instant claims is set forth in *Plaintiffs' Motion for Summary Judgment*, Dkt. No. 62 at Section II.B. (Dec. 1, 2005), and is incorporated by reference.

one State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter." *Hall,* 440 U.S. at 422 (emphasis added).

Each of the adoption decrees that underpin plaintiffs' claims are final ***judgments*** entered by a court having jurisdiction over the parties and the subject matter. The Supreme Court already has held that a judicial decree affecting the legal status of persons properly within that state's jurisdiction must be recognized in another state even though they would not have been accorded that status under the laws of the second state. *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) (requiring North Carolina to recognize the change in marital status effected by a Nevada divorce decree even though it would not have been granted under the laws of North Carolina).

Defendants' contention, unsupported by authority, that adoption decrees are not the type of judgment entitled to full faith and credit is likewise without merit. Adoption is accomplished through judicial proceedings that result in final decrees that are not susceptible to modification. 1-4 ADOPTION LAW & PRACTICE, § 4.02 (Matthew Bender, 2003). The existence of a final decree of adoption precludes the choice of law problems that might arise in other types of ongoing domestic relations disputes. Ralph U. Whitten, *Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases*, 31 CAP. U.L. REV. 803, 804 (2003). Scholars uniformly have observed that ***every state must recognize a valid adoption decree rendered in another state*** and that an adopted child may change residence or domicile without affecting the validity of his or her adoption. EUGENE F. SCOLES *ET AL*., CONFLICT OF LAWS 678 (3d ed. 2000) ("An adoption decree entered by a court of competent jurisdiction will ordinarily be recognized everywhere."); JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 716 & nn.2-3 (1935) (reporting that an adopted child "will be treated in every other state … just as adopted children

are treated in such other state," and citing cases); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 31(1)(a) ("A judgment in an action whose purpose is to determine or change a person's status is conclusive upon the parties to the action with respect to the existence of the status, and rights and obligations incident to the status which under the procedures governing the action are ordinarily determined therein….").[3] Not only have defendants failed to provide authority to the contrary, but Defendant Edmondson, in his official capacity as Oklahoma Attorney General, has formally opined that Oklahoma ***must*** afford full faith and credit to adoption decrees from other states. 2004 OK AG 8.

Next, defendants mistakenly argue that the regulation of adoption is an area within Oklahoma's exclusive province and, therefore, the Adoption Invalidation Law is excepted from the Full Faith and Credit mandate. Adoptions occur in every state and this area of law is no more "exclusive" or less subject to full faith and credit than any others. Oklahoma's Adoption Invalidation Law does not concern itself with adoptions effected in or by Oklahoma and plaintiffs do not seek to adopt under Oklahoma law. The adoptive parent plaintiffs already are the legal parents of plaintiff children through judgments entered in valid adoption proceedings under the laws of other states that must be respected.

Finally, confusing full faith and credit and *res judicata* principles, defendants argue that Oklahoma need not recognize plaintiffs' adoption decrees because the defendants were not parties to the adoption proceedings. Such a rule would render the Full Faith and Credit Clause

[3] Even Oklahoma's own Supreme Court has applied this constitutional mandate with full force in the context of final decrees of adoption rendered in other states. *Conville v. Bakke*, 400 P.2d 179, 185 (Okla. 1965) (noting the constitutional hurdle imposed by full faith and credit requirements in an action attempting to avoid the effect of a final adoption decree entered in a Missouri proceeding); *Ex parte Moulin*, 203 Okla. 99, 101, 217 P.2d 1029, 1031 (1950) (where validity not in question, Arkansas adoption decree entitled to full faith and credit under the Federal Constitution).

meaningless. In addition, defendants' position ignores the Supreme Court's holding that a court decree affecting the ***legal status*** of persons properly within the state's jurisdiction must be recognized in another state even though the same status would not have been accorded under the laws of the second state. *Williams v. North Carolina*, 317 U.S. 287, 298 (1942).

The chaos resulting from a contrary result would be alarming. If what defendants urge really were the law, any state could second guess the adoptions completed in other states, refusing to respect them and forcing re-litigation of whether that state thought the particular parents who had adopted elsewhere should have been allowed to adopt or not. Finality would turn to fiction and no adoption would be safe. The Full Faith and Credit Clause was intended to avert such chaos by serving as a national unifying force. "It altered the status of the several states as independent foreign sovereignties, each free to ignore the rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application." Jean A. Mortland, *Interstate Federalism: Effect of Full Faith and Credit to Judgments*, 16 U. DAYTON L. REV. 47, 76-77 (1990).

Oklahoma's Adoption Invalidation Law cannot override the mandate of the Full Faith and Credit Clause of the U.S. Constitution, which requires defendants to recognize plaintiffs' adoption decrees as valid. The Adoption Invalidation Law should be stricken down as unconstitutional and its enforcement enjoined.

C. THE ADOPTION INVALIDATION LAW UNCONSTITUTIONALLY INFRINGES ON PLAINTIFFS' RIGHT TO TRAVEL.

Defendants contend that the Adoption Invalidation Law neither penalizes plaintiffs' right to travel nor impinges on a fundamental right. Rather, they insist that any effect on the

plaintiffs'[4] right to travel is merely incidental. The argument lacks merit.[5]

The Adoption Invalidation Law undoubtedly penalizes plaintiffs for traveling in and through Oklahoma. It is hard to imagine a more draconian penalty than refusing to recognize that a child has parents and is not legally an orphan. The State denies plaintiffs the protections and benefits that flow from their legal parent-child relationships. The interference here is strong. The litany of protections provided to recognized parents and their children under Oklahoma's statutory scheme is comprehensive. Additionally, because the Adoption Invalidation Law facially denies plaintiffs both access to these statutory protections and recognition of their legal parent-child relationships, the State has forced the adult plaintiffs to alter their upbringing of their children to avoid or minimize the risks of traveling or remaining in Oklahoma, and of interacting with Oklahoma officials. The effects on plaintiffs include deprivation of extended family contact, the need to create extra legal documents and the need to avoid signing documents in the capacity of a parent.

Moreover, contrary to the defendants' contention, the Adoption Invalidation Law does impinge upon a fundamental right. Plaintiffs are not asserting in this litigation a fundamental right to adopt. They already have adopted their children. Rather, they sue here as fit and active

[4] Defendants suggest that the right to travel claim is pressed only by the plaintiffs who reside in Washington, who cannot safely travel to Oklahoma so E. can visit her birth mother and extended family. However, the other plaintiffs, who moved to Oklahoma from other states, also have right to travel claims. *Saenz v. Roe*, 526 U.S. 489, 500 (1999) (constitutional right to travel includes, for those travelers who elect to become permanent residents, the right to be treated like citizens of that state). All Oklahoma citizens who become legal parents in the State, either by adoption or birth, and their children have full access to panoply of rights, obligations, protections and defenses by virtue of their parent-child relationships. Yet legal parents, by adoption, and their children who relocate to Oklahoma are denied the same recognition and access if the parents happen to be same-sex couples, even though their parent-child relationships are just as valid.

[5] A proper analysis of plaintiffs' Right to Travel claims is set forth in *Plaintiffs' Motion for Summary Judgment*, Dkt. No. 62 at Section E. (Dec. 1, 2005), and is incorporated by reference.

parents who have a protected liberty interest in their parental autonomy, including the fundamental right to make decisions concerning the care, custody, and control of their children. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (reviewing the long history of Supreme Court precedent on the subject); s*ee also Davis v. Davis*, 708 P.2d 1102, 1109 & nn. 33 & 34 (Okla. 1985) (interference with parental autonomy and privacy must be justified by compelling state concern). The private realm of the family is sheltered from undue government interference – and certainly fracture – and all plaintiffs share the fundamental right of family privacy. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("Choices about marriage, family life, and the upbringing of children are … rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect."); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-51 (1992) (recognizing Constitutional limits on State's right to interfere with family autonomy and parenthood); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) ("the Constitution protects the sanctity of the family").

The two court of appeals decisions relied upon by defendants are inapposite and unhelpful to resolving this case. *City of Akron v. Beil*, 660 F.2d 166 (6th Cir. 1981), involved residency requirements for candidates for city council. The court held that candidacy for public office did not trigger the same heightened scrutiny of residency requirements that is used in cases involving the fundamental right to vote. There is no comparable residency requirement involved here, where fundamental rights ***are*** impaired.

In *Michael C. ex rel. Stephen C. v. Radnor Twp. Sch. Dist.*, 202 F.3d 642 (3rd Cir. 2000), plaintiff, who had moved to Pennsylvania from Washington D.C., complained that Pennsylvania's procedures for placement of students with disabilities interfered with the plaintiff's right to travel, even though plaintiff would have been subject to the same procedural

requirements for educational placement had he transferred within the state. The *Radner* court rejected the argument, finding that any burden on travel presented by the placement procedures was merely incidental. Of course, Stephen C. was not told that if he moved to Pennsylvania he automatically would cease being Michael's father in the State's eyes. Importantly, the Pennsylvania procedures did not, as here, single out a particular class of persons to create a complete barrier to accessing state benefits or to deny legal status recognition. Although Stephen C. could obtain a proper education for Michael by following neutral placement procedures, Oklahoma has provided no options that permit same-sex couples to protect their valid and existing parent-child relationships when visiting or relocating to Oklahoma.

D. THE DEFENDANTS' FLAWED ANALYSIS FAILS TO JUSTIFY THE ADOPTION INVALIDATION LAW'S DENIAL OF PLAINTIFFS' RIGHTS TO EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS.

The Defendants' analysis of plaintiffs' Fourteenth Amendment claims is overly simplistic and relies primarily on three misguided premises. First, defendants wrongly suggest that the rights of biological parents *vis-à-vis* their children differ from the rights of adoptive parents. Second, defendants assert that the interest implicated by the plaintiffs' Complaint is the "right to adopt a child," which they contend is not a fundamental right. Third, defendants contend that homosexuality is not a suspect classification and, therefore, Oklahoma's Adoption Invalidation Law is entitled to a presumption of validity against any equal protection challenge. These analyses are each flawed.[6]

[6] Proper equal protection and substantive due process analyses are set forth in *Plaintiffs' Motion for Summary Judgment*, Dkt. No. 62 at Sections C. & D. (Dec. 1, 2005), and are incorporated by reference.

Supreme Court precedent makes short shrift of defendants' first premise. The Court has refused to distinguish between biological and adoptive parents. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843-44 & n.51 (1977) (noting that adoption is recognized as the legal equivalent of biological parenthood). All legal parents, *i.e.*, persons recognized as parents by state law at the time the status is created, have a fundamental liberty interest in the care, custody and rearing of their children that merits both procedural protection and substantive protection under the Due Process Clause of the Fourteenth Amendment. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). *See also* OKLA. STAT. tit. 10, § 7505-6.5 (2001) ("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.").

Second, the "right to adopt" is not before the Court. No plaintiff seeks a decree of adoption from any Oklahoma court. The adult plaintiffs and their children already enjoy legal parent-child relationships. Under the Full Faith and Credit Clause, these parent-child and family relationships continue in force as the parties move across state boundaries. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, ch. 11, topic 3, introductory note (1971). Oklahoma's failure to respect these family and parent-child relationships or to accord plaintiffs the rights and obligations that arise from legal parenthood grossly infringes on plaintiffs' fundamental rights.

Moreover, although the right to adopt or its character is not an issue in this case, even a non-fundamental right cannot be denied unequally to one group of people without adequate justification. *Romer v. Evans*, 517 U.S. 620, 633 (1996) (classifications may not be drawn merely for the purpose of disadvantaging the group burdened by the law). The defendants' position, which relies on the Eleventh Circuit's flawed analysis of *Lawrence v. Texas*, 539 U.S.

558 (2003) in *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), is erroneous. The Supreme Court in *Lawrence* overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), and declared that the Texas sodomy prohibition facially violates the Due Process Clause of the Fourteenth Amendment, which protects the liberty of adults to make decisions regarding intimate relationships. The Supreme Court's analysis invoked a long-established protected constitutional right of fundamental dimension, and held that it protects gay and lesbian adults just as it does heterosexuals.[7]

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[7] Throughout its opinion, the *Lawrence* Court used sweeping language – applying only to the most fundamental of liberty interests – to describe the constitutional right at stake. From its opening paragraph, the Court emphasized that the case "involves liberty of the person both in its spatial and more transcendent dimensions." *Lawrence*, 539 U.S. at 562. The Court recognized a "due process right to demand respect for conduct protected by the substantive guarantee of liberty," *id.* at 575. This is a "*full* right," to be engaged in "without intervention of the government," part of "a realm of personal liberty which the government may not enter," *id.* at 578 (emphasis added) (quotations omitted). The government "cannot demean" gay and lesbian people or "control their destiny by making their private sexual conduct a crime." *Id.* at 578. Indeed, this right is "an integral part of human freedom." *Id.* at 577.

The Supreme Court was applying a *well-established* fundamental right, not identifying a *new* one. The Court expressly invoked its earlier jurisprudence identifying a fundamental substantive due process right of privacy and autonomy in intimate matters and relationships and explicitly grounded its holding in *that* fundamental right. The Court directed that "the most pertinent beginning point" was its decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965), invalidating a law against contraception because it violated the "right to privacy" of married couples. *Lawrence*, 539 U.S. at 564. The *Lawrence* Court explained that decisions following *Griswold*, including *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Roe v. Wade*, 410 U.S. 113 (1973), and *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), made clear that this right to privacy applies beyond married couples, to encompass the "right . . . to make certain fundamental decisions affecting [an individual's] destiny," regardless of marital status or other factors. *Lawrence*, 539 U.S. at 565. *See also id.* (*Roe* "confirmed once more" that the "liberty" protected by the Due Process Clause "has a substantive dimension of *fundamental* significance in defining the rights of the person"); *id.* (describing the privacy right at issue in *Eisenstadt* as a "*fundamental*" human right) (emphasis added). The Court also quoted at length from its decision in *Planned Parenthood of Se. Penn. v. Casey*, which had emphasized that "matters [] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." 505 U.S. 833, 851 (1992). *See Lawrence*, 539 U.S. at 574. The language the

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The *Lofton* decision's interpretation of *Lawrence* as other than an application of the settled fundamental right to liberty in sexual privacy is unfaithful to the text and clear import of the Supreme Court decision. *See also Lofton v. Sec'y of Dep't of Children & Family Servs.*, 377 F.3d 1275, 1303-14 (11th Cir. 2004) (Barkett, J., dissenting from denial of reh'g *en banc*) (cogently responding to the *Lofton* panel's misreading of *Lawrence*). Of course, the Eleventh Circuit's characterization of *Lawrence* is not binding. In *Lawrence*, the Court sought to prevent states from discriminating against gay and lesbian people in the civil realm because of their private sexual lives and relationships. *Lawrence*, 539 U.S. at 575. The Supreme Court's guidance calls into question the validity of any sweeping law that would deny gay and lesbian people the right to adopt or its privileges simply to penalize, or express distaste for or disapproval of, their protected intimate adult relationships or their parent-child relationships.

Finally, defendants contend that, because, according to them, sexual orientation does not constitute a suspect classification for the purpose of equal protection analysis, the Adoption Invalidation Law is entitled to a presumption of validity. This analysis is wrong and in any event misses the mark. Though the Adoption Invalidation Law cannot survive any level of constitutional scrutiny, strict or heightened scrutiny undoubtedly applies because the Adoption Invalidation Law impacts plaintiffs' fundamental rights. Accordingly, it is unnecessary for the Court to determine whether sexual orientation constitutes a suspect classification that also would trigger strict or heightened scrutiny because plaintiffs have not relied upon that alternative ground. The issue is not before the Court.

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Court used to describe these cases – on which it explicitly based its holding – demonstrates that it was applying a pre-existing and fundamental right. Indeed, this analysis would have been entirely superfluous had *Lawrence* been invoking a right of less than "fundamental significance."

Differential treatment of children based upon their parents' conduct or status long has triggered heightened scrutiny, under which the State must show at least that the classification is substantially related to an important and legitimate state interest. *Pickett v. Brown*, 462 U.S. 1, 8 (1983). The State has not and cannot meet this standard.

Moreover, plaintiff parents are fit and active parents who, as noted above, have a protected liberty interest in their parental autonomy, including the fundamental right to make decisions concerning the care, custody, and control of their children. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000). The private realm of the family is sheltered from undue government interference and all plaintiffs share a fundamental right of family privacy. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-51 (1992). The State can offer no justification for interfering in the lives of these parents and families, let alone a compelling justification to which the law is narrowly tailored, *Edwards v. Valdez*, 789 F.2d 1477, 1483 (10th Cir.1986) (to satisfy strict scrutiny, as for discriminatory infringements of fundamental rights, the State must be able to demonstrate an actual compelling governmental interest which the measure's classification is in fact narrowly tailored to serve).

In addition to interfering with the plaintiffs' parental and family autonomy, the law's classification invidiously discriminates against plaintiffs by targeting parents (and their children) for being in same-sex relationships and raising children. As in *Lawrence v. Texas*, 539 U.S. 558 (2003), the State is unconstitutionally penalizing plaintiffs for the parents' exercise of their constitutionally protected fundamental liberty interest in having an intimate adult same-sex relationship. The State imposes no such penalty on other adoptive parents, such as single parents who may freely adopt despite having unmarried intimate relationships. Such a classification triggers strict scrutiny. *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (when challenged law

invades a fundamental right, analysis of the law's discriminatory classification is subject to most stringent analysis).

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

III. CONCLUSION

For the reasons stated both herein and in plaintiffs' Motion for Summary Judgment, the defendants' Motion for Summary Judgment should be denied.

Respectfully Submitted,

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s/ Kenneth D. Upton, Jr.