

Second Class Families: Interstate  
Recognition of Queer Adoption

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## INTRODUCTION

The question of whether states must recognize same-sex marriages performed in Massachusetts has been the subject of enormous debate.<sup>1</sup> In contrast, the question of whether states must recognize adoption by gay, lesbian, bisexual, or transgender parents [hereinafter queer adoption] has received little attention.<sup>2</sup> This is, however, an issue of great importance that remains unsettled. Imagine, for example, that Mary and Sarah, a lesbian couple, live in California where they are registered domestic partners.<sup>3</sup> Mary is artificially inseminated and gives birth to their son, Michael.<sup>4</sup> Sarah then adopts Michael using the California step-parent adoption procedure for domestic partners.<sup>5</sup>

When Michael is around five years old, Sarah's boss offers her a significant promotion if she will relocate to Florida.<sup>6</sup> Sarah and Mary are concerned, however, about whether Florida would recognize Sarah as Michael's legally adoptive parent.<sup>7</sup> Florida's adoption statute states that "no person eligible to adopt under this statute may adopt if that person is a homosexual."<sup>8</sup> Sarah and Mary consult with their attorney, who tells them that he cannot predict whether a Florida court would recognize the California adoption.<sup>9</sup> They begin to imagine terrible scenarios

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<sup>1</sup> Robert G. Spector, *The Unconstitutionality of Oklahoma's Statute Denying Recognition to Adoptions by Same-Sex Couples From Other States*, 40 TULSA L. REV. 467, 467 (2005).

<sup>2</sup> *Id.*

<sup>3</sup> The following hypothetical is loosely based on *Finstuen v. Edmondson*, 2006 WL 1445354 (W.D. Okla. 2006) (describing situation where lesbian couple adopted child in New Jersey and then moved to Oklahoma where their parental rights were in question).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* See also Fla. Stat. § 63.042(3); *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804, 806-07 (2004).

<sup>9</sup> The following hypothetical is loosely based on *Finstuen v. Edmondson*, 2006 WL 1445354 (W.D. Okla. 2006).

such as Mary and Sarah breaking up where Sarah is left with no legal parental rights.<sup>10</sup> They also wonder what would happen if Mary died and the state would not recognize Sarah as Michael's parent.<sup>11</sup> They ultimately decide to forgo the promotion and never travel to Florida.<sup>12</sup> This uncertainty and fear is very likely in the minds of many queer adoptive parents in the United States today.<sup>13</sup>

As discussed below, jurisdictions across the country are currently split as to whether states must recognize sister state adoptions.<sup>14</sup> Given the mobility of Americans today, it is inevitable that queer adoptive parents will move from states which permit them to adopt to states where such adoptions are prohibited. The issue of whether a state will recognize an out-of-state adoption is most likely to arise in the context of a custody dispute.<sup>15</sup> If the adoption were recognized, both parents would have legal rights in a custody dispute.<sup>16</sup> If the adoption were not recognized, a non-biological parent may have no rights whatsoever.<sup>17</sup>

This paper will argue that every state must recognize queer adoptions from other states.<sup>18</sup> To refuse to do so violates the Full Faith and Credit Clause of the Constitution, the Parental Kidnapping Prevention Act ("PKPA"), the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fourteenth Amendment, and the fundamental right

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* (noting that Ms. Finstuen avoided signing any documents related to her adopted son's surgery out of fear that her signature would be invalid in Oklahoma).

<sup>14</sup> Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbian Adoptions*, 3 Ave Maria L. Rev. 561, 614 (2005).

<sup>15</sup> Spector, *supra*, note 1 at 469-70.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *See infra* Part II.

to travel.<sup>19</sup> Thus, the United States Supreme Court should resolve the controversy and hold that no state may refuse to recognize out-of-state queer adoptions.

## I. BACKGROUND: THE STATE OF THE LAW

### A. *The Current State of the Law on Queer Adoption*

Adoption by queer parents is becoming more and more common in the United States today.<sup>20</sup> Until recently, states did not permit queer individuals or same-sex couples to adopt.<sup>21</sup> Change began in the courts.<sup>22</sup> Although no statutes originally authorized or barred such adoptions, appellate courts in nine states and the District of Columbia have interpreted the general adoption laws to allow same sex couples or queer individuals to adopt.<sup>23</sup> In contrast, appellate courts in at least five states have rejected, in whole or in part, queer adoption.<sup>24</sup>

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<sup>19</sup> See *infra* Part II.

<sup>20</sup> Wardle, *supra*, note 14 at 561.

<sup>21</sup> Wardle, *supra*, note 14 at 564.

<sup>22</sup> Wardle, *supra*, note 14 at 565.

<sup>23</sup> See generally Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003) (allowing adoption by former same-sex partner); In re M.M.D., 662 A.2d 837 (D.C. 1995) (permitting second-parent adoption in stages by same-sex couple); In re C.M.A., 715 N.E.2d 674 (Ill. App. Ct. 1999) (finding that prior judge could not prevent later judge from issuing order permitting lesbian partners to adopt); In re K.M., 653 N.E.2d 888 (Ill. App. Ct. 1995) (permitting lesbian partner adoption); Adoption of Galen, 680 N.E.2d 70, 71 (Mass. 1997); Adoption of Tammy, 619 N.E.2d 315, 319 (Mass. 1993); In re Adoption of Two Children by H.N.R., 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); In re Adoption of a Child by J.M.G., 632 A.2d 550 (N.J. Super. Ct. Ch. Div. 1993); In re Jacob, 660 N.E.2d 397 (N.Y. 1995); In re Adoption of Evan, 583 N.Y.S.2d 997 (Sup. Ct. 1992); In re Adoption of R.B.F., 803 A.2d 1195 (Pa. 2002) (describing exception provision that gives court discretion to grant partner's adoption that otherwise is not allowed by statute); In re B.L.V.B., 628 A.2d 1271 (Vt. 1993); see also In re Adoption of Charles B., 552 N.E.2d 884 (Ohio 1990) (holding adoption of severely impaired eight-year-old child by his counselor not prohibited because prospective adoptive parent was gay man living with his male partner); In re Adoption of M.J.S., 44 S.W.3d 41 (Tenn. Ct. App. 2001) (permitting adoption by former same-sex partner); Marc Wolinsky, *Stereotypes, Tolerance and Acceptance: Gay Rights in Courts of Law and Public Opinion*, 19 DEL. LAW 13, 18 (2001).

<sup>24</sup> See In re Adoption of T.K.J., 931 P.2d 488, 489 (Colo. Ct. App. 1996) (holding that statutes prohibiting lesbian partner adoption do not violate equal protection); Lofton v. Kearney, 157 F. Supp. 2d 1372, 1385 (S.D. Fla. 2001) (granting summary judgment to defendants on the grounds that "there is a plausible reason for the State's action" in forbidding queer adoption), *aff'd* sub nom. Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 805 (11th Cir. 2004), *reh'g en banc* denied, 377 F.3d 1275 (11th Cir. 2004) (the court was evenly split on the decision to deny rehearing); cert. denied Lofton v. Sec'y Dep't Children & Family Servs., 125 S. Ct. 869 (Jan. 10, 2005); Dep't of Health & Rehabilitative Servs. v. Cox, 627 So. 2d 1210, 1217

Similarly, many states have passed conflicting legislation.<sup>25</sup> California, Connecticut, New Hampshire, and Vermont have passed statutes which expressly allow queer adoption,<sup>26</sup> while Alabama, Florida, Mississippi, Utah, and Connecticut have enacted laws that bar or allow rejection of all or some adoptions by homosexuals or same-sex couples.<sup>27</sup>

Although several states have passed statutes which bar same-sex couple adoption, Florida is now the only state that explicitly prohibits individual “homosexuals” from adopting.<sup>28</sup> Florida defines a “homosexual” as a person who has recently engaged in homosexual conduct.<sup>29</sup> Several Florida courts have upheld the ban as constitutional, including most recently, the Eleventh Circuit Court of Appeals, in the case of *Lofton v. Secretary of Department of Children and Family Services*.<sup>30</sup> The Eleventh Circuit applied a rational basis test and held that Florida could have a rational reason for prohibiting gays and lesbians from adopting.<sup>31</sup> Specifically, the court found that it is at least arguable that a child is better off when raised by one parent of each

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(Fla. Dist. Ct. App. 1993), aff'd in part sub nom. *Cox v. Fla. Dep't of Health & Rehabilitative Servs.*, 656 So. 2d 902, 903 (Fla. 1995); *In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002); *In re Adoption of Doe*, 719 N.E.2d 1071, 1072 (Ohio Ct. App. 1998) (holding that lesbian partner cannot adopt without the termination of the biological parent's rights); *In re Bonfield*, 773 N.E.2d 507, 509 (Ohio 2002) (ruling that lesbian partner is not parent but can file for shared custody); *In re Angel Lace M.*, 516 N.W.2d 678, 679 (Wis. 1994) (holding that second-parent adoption is not allowed under stepparent-adoption statutes); *see also S.B. v. L.W.*, 793 So. 2d 656, 662 (Miss. Ct. App. 2001) (Payne, J., concurring) (noting that Mississippi prohibits same-sex partner from adopting); *In re Adoption of Baby Z.*, 724 A.2d 1035, 1037 (Conn. 1999); Conn. Gen. Stat. §§ 45a-724(a)(2)-(3) (2004).

<sup>25</sup> Wardle, *supra*, note 14 at 565.

<sup>26</sup> *See* Cal. Fam. Code § 9000(b) (West 2005) (“A domestic partner, as defined in Section 297, desiring to adopt a child of his or her domestic partner may for that purpose file a petition in the county in which the petitioner resides.”); Conn. Gen. Stat. Ann. § 45a-724(a)(3) (West 2004) (“Subject to the approval of the Court of Probate as provided in section 45a-727, any parent of a minor child may agree in writing with one other person who shares parental responsibility for the child with such parent that the other person shall adopt or join in the adoption of the child, if the parental rights, if any, of any other person other than the parties to such agreement have been terminated.”); N.H. Rev. Stat. Ann. § 170-B:4 (2004) (repealing New Hampshire's twelve-year prohibition on queer adoption and foster parenting); Vt. Stat. Ann. tit. 15A, § 1-102(b) (2002) (“If a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection.”).

<sup>27</sup> *See* Ala. Code § 26-10A-5, 6 (2004); Fla. Stat. Ann. § 63.042(3) (West 2000); Miss. Code Ann. § 93-17-3 (2004); Okla. Stat. Ann. tit. 10, § 7502-1-4 (A) (West Supp. 2005); Utah Code Ann. § 78-30-1 (2002); *see also* Conn. Gen. Stat. Ann. § 45a-726a (West 2002) (requiring strict standards before allowing queer adoptions).

<sup>28</sup> *See* Fla. Stat. Ann. § 63.042(3) (West 2000); *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804, 806-07 (2004).

<sup>29</sup> *See* Fla. Stat. Ann. § 63.042(3) (West 2000); *Lofton*, 358 F.3d at 806-07.

<sup>30</sup> *Lofton*, 358 F.3d at 804.

<sup>31</sup> *Id.*

gender.<sup>32</sup> Although Florida allows single heterosexuals adopt, the court noted that such parents have the potential to marry an opposite sex person in the future.<sup>33</sup> The court also found that it is possible that being raised by a homosexual parent could be harmful to children and that such studies are inconclusive.<sup>34</sup> Therefore, the court held, Florida's ban is at least rational.<sup>35</sup> Thus, there is a split across the country as to whether same sex couples or queer individuals may adopt.<sup>36</sup>

*B. The Current State of the Law on Interstate Recognition of Queer Adoption*

Courts across the country are currently split on the issue of interstate recognition of adoption.<sup>37</sup> Although most jurisdictions have not considered the issue of interstate recognition of queer adoption in particular, courts have been inconsistent as to whether interstate recognition of adoption in general is required.<sup>38</sup> In her recent law review article, Lynn Wardle described this area of the law as tentative.<sup>39</sup> She argued that laws designed to achieve uniformity and consistency in adoption (such as the Uniform Adoption Act and the Parental Kidnapping Prevention Act) would not be necessary if there were absolute interstate adoption decree recognition.<sup>40</sup> Recent case law also illustrates the tentative nature of this area of the law. Although some courts have held that states must recognize sister-state adoptions, many courts have declined to require such recognition.

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Wardle, *supra*, note 14 at 615.

<sup>37</sup> Spector, *supra* note 1 at 469-70.

<sup>38</sup> *Id.*

<sup>39</sup> Wardle, *supra* note 14 at 592.

<sup>40</sup> Wardle, *supra* note 14 at 593.

Several recent courts and legislatures that have analyzed the issue have determined that adoption decrees that are valid and final in one state, must be recognized by all others. In *Finstuen v. Edmondson*, for example, the United States District Court for the Western District of Oklahoma struck down an Oklahoma statute that refused to recognize adoptions by same-sex couples from other states.<sup>41</sup> This was the first state to attempt to expressly refuse to recognize adoptions by same-sex couples from other states.<sup>42</sup> The statute read that Oklahoma “shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.”<sup>43</sup> The court found that the statute violated the Full Faith and Credit Clause, the Due Process Clause of the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment.<sup>44</sup> The court specifically stated that the Full Faith and Credit Clause requires that all states recognize sister-state adoptions.<sup>45</sup> This case is currently on appeal to the United States Court of Appeals for the Tenth Circuit.<sup>46</sup>

Similarly, in *Starr v. Erez*, S.E., the biological mother of her same-sex partner's adoptive child, filed suit in North Carolina arguing that the court should refuse to recognize the second-parent adoption decree that Washington State granted to her former partner, A.S.<sup>47</sup> S.E. lost at trial and appealed to the North Carolina Court of Appeals.<sup>48</sup> S.E. argued that North Carolina's anti-same-sex-marriage statute provided a basis for denying her former partner's parental

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<sup>41</sup> *Finstuen v. Edmondson*, 2006 WL 1445354, 1 (W.D. Okla. 2006).

<sup>42</sup> Spector, *supra* note 1.

<sup>43</sup> *Finstuen*, 2006 WL at 1 (noting that Oklahoma added amendment to 10 Okla. Stat. § 7502-1.4(A)).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Available at <http://www.lambdalegal.org/news/pr/lambda-legal-urges-federal.html>.

<sup>47</sup> *Starr v. Erez*, 97 CVD 624, 625 (Durham County, N.C. General Court of Justice 1997).

<sup>48</sup> *Id.*

rights.<sup>49</sup> The Court of Appeals held that North Carolina had to recognize the parental rights established in the Washington adoption decree.<sup>50</sup>

Also, in 2000, Mississippi prohibited “adoption by couples of the same gender.”<sup>51</sup> However, the legislature rejected part of the original proposal that would have denied recognition to such adoptions granted in other states.<sup>52</sup> This demonstrates that the Mississippi legislature recognized that the Constitution does not permit refusal of interstate recognition of final adoption decrees.

Likewise, in *Russell v. Bridgens*, the Supreme Court of Nebraska confronted the issue of whether Nebraska was required to give full faith and credit to a Pennsylvania adoption decree by two lesbians.<sup>53</sup> In December 1997, Bridgens and her partner, Serenna Russell, jointly adopted a child that Bridgens had already adopted a few years earlier.<sup>54</sup> Bridgens later claimed that Russell’s Pennsylvania adoption was invalid and should not be recognized in Nebraska.<sup>55</sup> The Nebraska Supreme Court held that a final judgment from a sister state must be recognized in Nebraska and that this adoption was such a final judgment.<sup>56</sup>

In contrast, there have been many cases in which courts have refused to recognize adoptions created in other states because those adoptions violated some strong public policy, essential procedure, or local state interest.<sup>57</sup> For example, courts have frequently refused to require states to recognize adult adoptions from other states (several states do not allow adult

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Miss. Code Ann. § 93-17-3(2).

<sup>52</sup> See Nancy D. Polikoff, *Recognizing Partners But Not Parents/Recognizing Parents But Not Partners: Lesbian and Gay Family Law in Europe and the United States*, XVII N.Y.L. SCH. J. HUM. RTS. 711, 735 (2000).

<sup>53</sup> *Russell v. Bridgens*, 647 N.W.2d 56 (Neb. 2002).

<sup>54</sup> *Id.* at 57.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 59.

<sup>57</sup> Wardle, *supra* note 14 at 599.

adoption).<sup>58</sup> For example, in *In re Estate of Griswold*, a New Jersey court refused to recognize a California “adult adoption” decree.<sup>59</sup> In this case, the plaintiff adopted the adult son of his second wife, who was fourteen years and eleven months younger than the adopter.<sup>60</sup> Although this type of adoption is valid in California, New Jersey law prohibited adoption of a person who is less than fifteen years younger than the adopter.<sup>61</sup>

Similarly, a Florida district court found that the Full Faith and Credit Clause requires that “[i]f the evidence shows that the adoption proceedings were in compliance with another state’s law and that law is similar to the law of Florida, then Florida will give it full faith and credit.”<sup>62</sup> In other words, the court held that Florida must only give full faith and credit to another state’s adoption decree if the proceedings were similar to Florida adoption proceedings. Also, in *Corbett v. Stergios*, the Iowa Supreme Court stated that “an adoption decree of a court of another state or nation is entitled to recognition here, if the court had jurisdiction to render it, at least to the extent it does not offend the laws or the public policy of this state.”<sup>63</sup> Here, the Iowa Supreme Court made the interstate adoption recognition contingent on whether the decree offends the laws or public policy of Iowa.<sup>64</sup> Thus, an Iowa court could potentially refuse to recognize queer adoptions from other states because such adoptions offend Iowa’s public policy.

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<sup>58</sup> See K.M. Potraker, Annotation, *Adoption of Adult*, 21 A.L.R. 3d 1012, § 20[b] (1968) (citing *First Nat’l Bank v. Mott*, 133 So. 78 (Fla. 1931); *Tsilidis v. Pedakis*, 132 So. 2d 9 (Fla. Dist. Ct. App. 1961)); Susan Frelich Appleton, *Surrogacy Arrangements and the Conflict of Laws*, 1990 WIS. L. REV. 399, 416-17.

<sup>59</sup> *In re Estate of Griswold*, 354 A.2d 717 (N.J. Super. Ct. 1976).

<sup>60</sup> *Id.* at 718.

<sup>61</sup> *Id.*

<sup>62</sup> *Kupec v. Cooper*, 593 So. 2d 1176, 1178 (Fla. Dist. Ct. App. 1992).

<sup>63</sup> *Corbett v. Stergios*, 137 N.W. 2d 266 (Iowa 1965).

<sup>64</sup> *Id.* at 267.

Even California, which has long allowed adult adoptions, has refused to recognize adult adoptions for purpose of trusts and estates law in some circumstances.<sup>65</sup> Also, the Restatement (Second) of Conflict of Laws, section 290, asserts that a state may refuse to recognize an out-of-state adult adoption for purpose of local inheritance if the adoption was done solely for inheritance or emigration purposes, and if that violates a strong local public policy.<sup>66</sup> Thus, it is far from clear that states must always recognize final adoption decrees created in other states. Specifically, it is not settled whether all states must recognize queer adoptions created in other states, although no court has yet rejected a sister state’s queer adoption.

## II. ARGUMENT: STATES MUST RECOGNIZE QUEER ADOPTIONS FROM OTHER STATES

### A. *The Full Faith and Credit Clause*

The Full Faith and Credit Clause of Article IV of the United States Constitution has been interpreted to require all states and every court to recognize and accord the same “full faith and credit” to the judgments of other states.<sup>67</sup> In *Matsushita Electric Industrial Co. v. Epstein*, the Supreme Court held that the Clause “directs all courts to treat a state-court judgment with the same respect that it would receive in the courts of the rendering State.”<sup>68</sup> The Court has established, however, that *statutes* are treated differently than

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<sup>65</sup> Wardle, *supra* note 14 at 607.

<sup>66</sup> Restatement (Second) of Conflict of Laws § 290 cmt. c (1971).

<sup>67</sup> U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”).

<sup>68</sup> *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 373 (1996).

*judgments*.<sup>69</sup> In 2004, the Court reiterated in *Franchise Tax Board v. Hyatt* that “the full faith and credit command ‘is exacting’ with respect to ‘[a] final judgment...’[but is] less demanding with respect to choice of laws.”<sup>70</sup> The Court has held that the 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.”<sup>71</sup> The Clause does, however, require that a final judgment in one state “qualif[y] for recognition throughout the land.”<sup>72</sup> Thus, all states must give full faith and credit to the judgments of other states but are not always required to give full faith and credit to sister state statutes.<sup>73</sup>

Most legal scholars and commentators that have considered the issue of interstate recognition of adoption decrees have found that state adoption decrees are judgments and must be recognized by other states.<sup>74</sup> They treat such decrees like any other judgment under the Full Faith and Credit Clause of the United States Constitution.<sup>75</sup> For example, Professor Barbara Cox contended that the Supreme Court has held that every state must give judgments from other states “the same credit, validity, and effect” that would be given to the judgment in the state that rendered it.<sup>76</sup> She asserted that a valid, final adoption degree rendered in one state is such a judgment and must be recognized in every other state.<sup>77</sup> Professor Ralph Whitten also argued

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<sup>69</sup> Barbara J. Cox, *Adoptions By Lesbian and Gay Parents Must Be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes That Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV. 751 (2003).

<sup>70</sup> *Franchise Tax Board v. Hyatt*, 538 U.S. 488 (2003).

<sup>71</sup> *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).

<sup>72</sup> *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232-33 (1998).

<sup>73</sup> Cox, *supra* note 69 at 761.

<sup>74</sup> Wardle, *supra* note 14 at 574.

<sup>75</sup> See Luther L. McDougal, III et al., *American Conflicts Law* § 224, at 786 (5th ed. 2001) (footnote omitted).

<sup>76</sup> Cox, *supra* note 69 at 761.

<sup>77</sup> Cox, *supra* note 69 at 761.

that the Full Faith and Credit Clause of the Constitution should be interpreted to generally require states to recognize sister-state queer adoption decrees.<sup>78</sup>

Opponents have argued, however, that the Full Faith and Credit Clause does not require interstate recognition of queer adoptions.<sup>79</sup> For example, Lynn Wardle argued that a state should not be required to recognize queer adoptions if it would violate that state's public policy.<sup>80</sup> She conceded that there is no public policy exception with regard to judgments.<sup>81</sup> The Supreme Court has clearly held that a state's public policy is only relevant regarding statutes, but is not applicable with regard to judgments.<sup>82</sup> Instead, Wardle argued that there are exceptions to the requirement of interstate judgment recognition.<sup>83</sup> She listed all sixteen exceptions from the Restatement (Second) of Judgments such as exceptions with regard to duress, fraud, lack of representation, lack of subject matter jurisdiction, etc.<sup>84</sup> These exceptions would make a judgment invalid in the issuing state. Wardle was simply reiterating, therefore, the fact that a state need not recognize an invalid judgment.<sup>85</sup> This argument sheds no light on whether states must recognize *valid*, final adoption decrees from other states.

Wardle then pointed out that section 103 of the Restatement (Second) Conflict of Laws notes that in exceptional cases "when the national interest behind full faith and credit does not require it, and when enforcement would infringe upon important governmental interests of the

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<sup>78</sup> Ralph U. Whitten, *Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases*, 31 CAP. U. L. REV. 803, 849-50 (2003); *see also* Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 256 (1998); Ralph U. Whitten, *Exporting and Importing Domestic Partnerships: Some Conflict-of-Laws Questions and Concerns*, 2001 BYU L. REV. 1235, 1238 (2001).

<sup>79</sup> *See generally* Wardle, *supra* note 14.

<sup>80</sup> Wardle, *supra* note 14 at 580.

<sup>81</sup> Wardle, *supra* note 14 at 580.

<sup>82</sup> Wardle, *supra* note 14 at 580.

<sup>83</sup> Wardle, *supra* note 14 at 580.

<sup>84</sup> Wardle, *supra* note 14 at 580.

<sup>85</sup> *Franchise Tax Board v. Hyatt*, 538 U.S. 488, 489 (2003).

state where enforcement is sought, mandatory recognition or enforcement of the sister-state judgment is not required.”<sup>86</sup> She suggested that the national interest in interstate comity, harmony, and national unity would not be significantly furthered by requiring interstate recognition of queer adoptions.<sup>87</sup> It is difficult to imagine, however, a more profound need for national unity than the need to uniformly recognize parental rights throughout the country. Without such uniform recognition, children will be part of unstable and uncertain family structures, with the possibility of losing their parents the moment they cross a state border.

Moreover, the United States Supreme Court described the national interest in the Full Faith and Credit Clause in the case of *Milwaukee County v. M.E. White Co.*:

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.<sup>88</sup>

Thus, the purpose of the Clause is to prevent states from disregarding the judgments of other states, regardless of whether a state’s policies would have allowed the same judgment.

Furthermore, Wardle gave no support for the implication that recognition of interstate queer adoptions would infringe on an important state interest.<sup>89</sup> The term “important” indicates a significantly higher standard than mere rational basis.<sup>90</sup> The implication is that states could

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<sup>86</sup> Wardle, *supra* note 14 at 582; Restatement (Second) of Conflict of Laws § 103 (1971).

<sup>87</sup> Wardle, *supra* note 14 at 582.

<sup>88</sup> *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276-77 (1935).

<sup>89</sup> See Wardle, *supra* note 14 at 582.

<sup>90</sup> See generally *Craig v. Boren*, 429 U.S. 1124 (1977) (finding that intermediate scrutiny requires important state interest which is more significant interest than required for rational basis review).

potentially have important reasons for discriminating against queer families. As discussed below, there is simply no credible evidence to legitimize this form of discrimination.<sup>91</sup> In fact, the Reporter's Comments of the Restatement note that “[a]lmost invariably” the national unity purpose behind the Full Faith and Credit Clause “will outweigh any interest that a State may have in not recognizing or enforcing a sister State judgment.”<sup>92</sup> As there are no important state interests in discriminating against queer adoptive families, such discrimination cannot overcome the need for national unity. Thus, interstate recognition of queer adoptions is therefore not subject to the Restatement’s exception to the rule requiring interstate recognition of final judgments.

*B. The Parental Kidnapping Prevention Act*

Moreover, in addition to the Full Faith and Credit Clause, the Parental Kidnapping Prevention Act (“PKPA”) mandates interstate recognition of queer adoption.<sup>93</sup> In 1980, the federal government enacted the PKPA, which requires that states provide full faith and credit to child custody determinations made in conformity with the PKPA's jurisdictional requirements.<sup>94</sup> The PKPA was enacted to address the interstate custody recognition problems that continued to exist after the adoption of the Uniform Child Custody Jurisdiction Act (“UCCJA”).<sup>95</sup>

The UCCJA required that all states recognize and enforce child custody determinations made in other jurisdictions.<sup>96</sup> The UCCJA was designed to prevent a disappointed litigant in a

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<sup>91</sup> See *infra* Part II.C. (indicating that no state has important governmental interest in discrimination against queer adoptive parents).

<sup>92</sup> Restatement (Second) of Conflict of Laws § 290 cmt. c (1971).

<sup>93</sup> See 28 U.S.C. § 1738A (2000); Wardle, *supra* note 14 at 570.

<sup>94</sup> Spector, *supra* note 1 at 470.

<sup>95</sup> See 9(IA) U.L.A. 270 (1999); Spector, *supra* note 1 at 470.

<sup>96</sup> Spector, *supra* note 1 at 471.

custody case from removing the child from the original decree-granting state to another state and start litigation over again.<sup>97</sup> All 50 states, the District of Columbia, and the Virgin Islands adopted the UCCJA as law.<sup>98</sup> However, several states did not follow the original text of the statute.<sup>99</sup> There was a great deal of litigation over the UCCJA and states interpreted the statute inconsistently.<sup>100</sup> Therefore, the federal government enacted the PKPA to resolve these problems and to clarify that states give full faith and credit to other states' custody determinations.<sup>101</sup>

It is clear that under the UCCJA and the PKPA, an adoption decree is a “child custody determination.”<sup>102</sup> For example, in *In re E.H.H.*, the Utah Court of Appeals found that termination of parental rights via adoption is “the ultimate custody and visitation determination as to the party whose rights are terminated.”<sup>103</sup> Also, in *In re Adoption of Asente*, the Ohio Supreme Court recognized that “adoption proceedings are truly custody proceedings requiring application of the PKPA and the UCCJA because the end result of an adoption is the complete

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<sup>97</sup> Spector, *supra* note 1 at 470.

<sup>98</sup> Spector, *supra* note 1 at 471.

<sup>99</sup> Spector, *supra* note 1 at 471. For example, Alaska omitted the “significant connection” jurisdiction basis of UCCJA §3(a)(2). Alaska Stat. § 25.30.020 (repealed 1998). Texas prioritized home state jurisdiction over the other jurisdictional bases. Tex. Fam. Code Ann. §152.003 (repealed 1999). Arizona equated “domicile” with “home state.” Ariz. Rev. Stat. § 25-433 (repealed 2000).

<sup>100</sup> Spector, *supra* note 1 at 471. For example, regarding the issue of whether an order entered pursuant to emergency jurisdiction must be a temporary order or whether it can be a permanent order, compare *Curtis v. Curtis*, 574 So. 2d 24, 25 (Miss. 1990) (temporary), with *Cullen v. Prescott*, 394 S.E.2d 722, 724 (S.C. Ct. App. 1990) (can be permanent if no other custody case is pending). Spector also noted that the goals of the UCCJA were not accomplished because the goals were incompatible. Spector, *supra* note 1 at 471. The UCCJA had two main goals: to prevent parental kidnapping of children by attempting to provide clear and specific rules of jurisdiction and enforcement through the UCCJA, and to provide that the forum that could make the most informed decision would be the forum which decided the custody determination would be. Spector, *supra* note 1 at 471. Due to the incompatibility of these goals, courts rendered decisions that were inconsistent. Ann B. Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnaping Prevention Act*, 25 U. CAL. DAVIS L. REV. 845 (1992).

<sup>101</sup> Spector, *supra* note 1 at 471. “The PKPA authorizes continuing exclusive jurisdiction in the original decree state so long as one parent or the child remains there and that state has continuing jurisdiction under its own law. Unlike the PKPA, the UCCJA did not directly address this issue.” Spector, *supra* note 1 at 471.

<sup>102</sup> Spector, *supra* note 1 at 471.

<sup>103</sup> *In re E.H.H.*, 16 P.3d 1257, 1259 (Utah App. 2000).

termination of the rights of the birth parents.”<sup>104</sup> There are no cases that hold that an adoption decree is not a custody determination under the PKPA.<sup>105</sup> Therefore, because the PKPA requires interstate recognition of custody determinations, the PKPA requires interstate recognition of adoption decrees.<sup>106</sup>

### C. Equal Protection

Furthermore, the Equal Protection Clause of the Fourteenth Amendment of the United States does not permit states to recognize interstate adoptions by heterosexual parents while refusing to recognize queer adoptions from other states.<sup>107</sup> Such action would unconstitutionally discriminate against both the adopted children based on their parents’ sexual orientation and gender and against the adoptive parents themselves.<sup>108</sup> Although courts should review such laws under intermediate scrutiny, the laws would not even pass rational basis review, the most relaxed standard of review.<sup>109</sup>

First of all, state laws refusing to recognize queer adoptions from other states while recognizing heterosexual adoption discriminate based on gender and should therefore be subject to intermediate scrutiny.<sup>110</sup> For example, as discussed above, Oklahoma recently attempted to refuse to recognize adoptions by same-sex couples from other states.<sup>111</sup> This was clearly gender

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<sup>104</sup> *In re Adoption of Asente*, 734 N.E.2d 1224, 1225 (Ohio 2000).

<sup>105</sup> Spector, *supra* note 1 at 472.

<sup>106</sup> Spector, *supra* note 1 at 472.

<sup>107</sup> *Finstuen v. Edmondson*, 2006 WL 1445354, 7-12 (W.D. Okla.).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *See generally* *Craig v. Boren*, 429 U.S. 1124 (1977) (holding that classifications based on gender are subject to intermediate scrutiny).

<sup>111</sup> *See generally* *Finstuen*, 2006 WL at 1445354.

discrimination. Under this statute, Oklahoma could recognize adoption by more than one individual of different sexes, but not of the same sex.<sup>112</sup> Another look at the hypothetical above involving Sarah and Mary illustrates this point.<sup>113</sup> If Sarah and Mary moved to Oklahoma, then under this statute Sarah's adoption of Michael would not be recognized. She would lose her parental rights. If she were a man, however, then the adoption would be recognized because she would not be part of a same sex couple. Therefore, the issue turns on Sarah's gender.

If a state were to pass a law refusing to recognize a sister-state adoption by a queer individual (as opposed to the example involving a same-sex couple above), this would also be gender discrimination. For example, imagine a scenario where David adopts a child in California. David moves to Florida to be near his extended family. David is currently in a romantic relationship with a man named John. If a Florida court were to refuse to recognize the adoption due to David's sexual orientation, it would be gender discrimination. If David were a woman, then his relationship with John would not affect his parental rights.

The United States Supreme Court has long held that gender discrimination is subject to intermediate scrutiny.<sup>114</sup> The Court first held that gender discrimination should be subject to intermediate scrutiny in *Craig v. Boren* in 1976.<sup>115</sup> In *Craig*, Oklahoma enacted a statute permitting 18 year old females to buy beer but required males to be 21.<sup>116</sup> The Court found that although drunk driving statistics showed that males substantially exceeded females in causing drunk driving accidents, the law failed intermediate scrutiny.<sup>117</sup> Also, in *United States v.*

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<sup>112</sup> *Id.* at 1.

<sup>113</sup> *See supra* Part I.

<sup>114</sup> *See generally Craig*, 429 U.S. at 1124.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

*Virginia Military School* (VMI), the Court held that VMI's policy of excluding women did not pass intermediate scrutiny.<sup>118</sup> The Court found that a state cannot pass a law that is based on broad gender stereotypes.<sup>119</sup> Discrimination against an adoptive parent simply because of his or her gender or the gender of his romantic partner should therefore be subject to intermediate scrutiny.

Opponents would argue that this is not gender discrimination because such a law would apply to men and women equally. Both men and women must be heterosexual in order to have their out-of-state adoptions recognized. The Supreme Court dismissed this type of argument, however, in *Loving v. Virginia*.<sup>120</sup> The state of Virginia argued that the state anti-miscegenation laws applied equally to both blacks and whites.<sup>121</sup> Neither race could marry the other.<sup>122</sup> The Court found this line of reasoning to be inconsistent with equal protection. The Court "reject[ed] the notion that mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations..."<sup>123</sup> Similarly, arguing that both men and women are equally subject to this type of gender discrimination does not comport with equal protection.

Applying intermediate scrutiny, the Supreme Court should strike down any state adoption law that recognizes heterosexual, but not queer adoption. Intermediate scrutiny requires that a classification based on gender must serve an important government interest and must be

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<sup>118</sup> *United States v. Virginia*, 518 U.S. 515, 533 (1996).

<sup>119</sup> *Id.*

<sup>120</sup> *Loving v. Virginia*, 388 U.S. 1, 1 (1967).

<sup>121</sup> *Id.* "[T]he state contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based on race..." *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

substantially related to achieving this interest.<sup>124</sup> 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.”<sup>125</sup>

As discussed above, the *Finstuen* court held that Oklahoma’s statute singling out queer adoptions did not pass intermediate scrutiny.<sup>126</sup> The defendants in that case argued that the state had several important interests in refusing to recognize queer adoption.<sup>127</sup> First, the defendants argued that the state has an interest in placing children in secure, loving, and permanent homes and that placing a child with same sex couples would not be in the child’s best interests.<sup>128</sup> Second, the defendants argued that recognizing only heterosexual adoptions would help to maintain the mainstream definition of the family unit.<sup>129</sup> The court found that there was not enough evidence to support these arguments.<sup>130</sup> The court noted that there are currently thousands of foster children in need of stable, permanent homes and that nothing but animus can explain the argument that a child is better off in foster care than with queer parents.<sup>131</sup>

Such arguments against interstate recognition of queer adoptions are reminiscent of the state’s arguments in *Loving v. Virginia*.<sup>132</sup> There, the state of Virginia argued that interracial marriage would erode the concept of the family as the social structure of society.<sup>133</sup> The state also argued that the children of interracial marriages might be damaged due to increased

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<sup>124</sup> *Virginia*, 518 U.S. at 533.

<sup>125</sup> *Id.*

<sup>126</sup> *Finstuen v. Edmondson*, 2006 WL 1445354, 7-12 (W.D. Okla.).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *See* *Loving v. Virginia*, 388 U.S. 1, 1 (1967).

<sup>133</sup> *Id.*

problems and societal pressures.<sup>134</sup> The Supreme Court dismissed these arguments as mere pretext for racism.<sup>135</sup> Similarly, these arguments in the context of queer adoption are mere pretext for homophobia and therefore do not pass intermediate scrutiny.

Moreover, the case of *Romer v. Evans* demonstrates that laws refusing to recognize interstate queer adoptions would not pass intermediate scrutiny.<sup>136</sup> In *Romer*, the United States Supreme Court reviewed the constitutionality of a Colorado statute repealing all state laws that prohibited discrimination based on sexual orientation.<sup>137</sup> The Court applied a rational basis test and determined that the law did not bear “a rational relation to some legitimate end.”<sup>138</sup> 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.”<sup>139</sup> The Court stated that the statute was invalid because it barred all claims of discrimination based on sexual orientation and was thus too broad.<sup>140</sup> The statute closed off access to the government for a group of people.<sup>141</sup>

Similarly, a general state law that refused to recognize queer adoptions would be a broad rule that stripped all homosexuals from bringing an individual claim. Potential queer adoptive parents would not have any right to show that they were fit parents and could provide a home that would be in a child's best interests. The *Finstuen* court stated refusing to recognize interstate queer adoptions closes “the door to assistance...solely because of the adult Plaintiffs'

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *See generally* *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 635.

<sup>139</sup> *Id.* at 633.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

sexual orientation.”<sup>142</sup> The *Romer* Court also found that the Colorado statute was motivated by sheer animus towards homosexuals.<sup>143</sup> The Court held that distinctions on the basis on sexual orientation are allowable only if you can find a legitimate state interest that is not based on animus.<sup>144</sup> There is simply nothing to support the notion that all queer individuals are unfit parents other than animus.<sup>145</sup> Thus, as in *Romer*, a state statute singling out queer adoptive parents would violate the Equal Protection Clause and would not pass a rational basis test. As it would not pass rational basis, it certainly would not pass the higher standard of intermediate scrutiny. Therefore, no state should be permitted to recognize heterosexual adoptions from other states and not recognize out-of-state queer adoptions.

#### D. *Lawrence v. Texas and Due Process*

“[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education...These 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...Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexuals do.”<sup>146</sup>

The United States Supreme Court wrote the above words in 2003 in the case of *Lawrence v. Texas*.<sup>147</sup> In *Lawrence*, the plaintiff was arrested when police entered his home and found him

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<sup>142</sup> *Finstuen v. Edmondson*, 2006 WL 1445354, 7-12 (W.D. Okla.).

<sup>143</sup> *Romer*, 517 U.S. at 625.

<sup>144</sup> *Id.*

<sup>145</sup> *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 946 (Mass. 2003).

<sup>146</sup> *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 835 (1992)).

<sup>147</sup> *Id.*

having sexual relations with another man.<sup>148</sup> The Court struck down Texas's same-sex ban on homosexual relations on due process grounds.<sup>149</sup> The Court held that homosexuals have “the right to engage in consensual sexual activity in the home without government intervention” and that individual decisions concerning intimacy and physical relationships are a form of liberty protected by due process.<sup>150</sup> If a state were to refuse to recognize a sister-state queer adoption, that state would be infringing on the parent’s right to engage in consensual activity in the home without government intervention. Stripping a person of their parental rights because of the gender of their intimate partner certainly infringes on one’s liberty to make individual decisions concerning intimacy. Thus, refusing to recognize a sister-state queer adoption is a violation of the adoptive parents’ due process rights under *Lawrence*.<sup>151</sup>

Opponents have argued, however, that the *Lawrence* Court did not hold that the liberty interest in making decisions regarding personal intimacy in the home was a fundamental right.<sup>152</sup> Traditionally, due process requires that a state may infringe on a fundamental right only if the state has a compelling interest and the infringement is narrowly tailored to fit that interest.<sup>153</sup> The *Lawrence* Court, however, did not look to see whether Texas had a compelling interest in maintaining the anti-homosexual statute.<sup>154</sup> The Court simply found that the Texas statute furthered no legitimate state interest.<sup>155</sup> Therefore, opponents have said, the liberty interest in intimacy need only be subject to rational basis review and while states do not have a legitimate

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<sup>148</sup> *Id.* at 563.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Finstuen v. Edmondson*, 2006 WL 1445354, 12 (W.D. Okla.).

<sup>152</sup> *See Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *See generally Lawrence*, 539 U.S. at 574.

<sup>155</sup> *Id.* at 559.

interest in preventing sexual intimacy between two consenting adults, states do have a legitimate interest in prohibiting queer adoptions.<sup>156</sup>

Indeed, the *Lawrence* Court does not explicitly articulate whether the liberty and privacy interests in sexual intimacy are fundamental rights.<sup>157</sup> Also, the Court stated that the Texas law was so illegitimate that it would not even pass a rational basis review.<sup>158</sup> It was therefore unnecessary for the Court to consider whether the Texas law would pass a higher level of review. The Court's plain language and analysis, however, indicates that a fundamental right is at issue.<sup>159</sup> First, the Court stated that choices regarding intimacy are "choices central to personal dignity and autonomy... central to the liberty protected by the Fourteenth Amendment."<sup>160</sup> The use of the word "central" implies that this is a fundamental right on par with other fundamental rights protected by the Fourteenth Amendment Due Process Clause.

Second, even though the Court did not use the term fundamental right, the Court's reasoning relied on several cases involving an explicit fundamental right.<sup>161</sup> The Court discussed *Griswold v. Connecticut*, explaining that the *Griswold* Court held that a general right of personal privacy extending to choices regarding sexual conduct emanates from the penumbras of the bill of rights.<sup>162</sup> This right of privacy cannot not be invaded absent a showing that the legislation is necessary to a compelling state interest.<sup>163</sup> The *Lawrence* Court then asserted that the *Griswold* decision formed the foundation for the decision in *Roe v. Wade*, where the Court

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<sup>156</sup> *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804, 806-07 (2004).

<sup>157</sup> *See generally Lawrence*, 539 U.S. at 574.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*; Mark Strasser, *Rebellion in the Eleventh Circuit: On Lawrence, Lofton, and the Best Interests of Children*, 40 TULSA L. REV. 421, 422 (2005).

<sup>160</sup> *See generally Lawrence*, 539 U.S. at 574.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*; *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965).

<sup>163</sup> *Griswold*, 381 U.S. at 481.

held that the fundamental right to privacy extended to the right to an abortion.<sup>164</sup> The *Lawrence* Court based its decision explicitly on *Griswold* and *Roe*'s fundamental right to privacy.<sup>165</sup> This strongly suggests that the Court treated the liberty interest in sexual intimacy and a fundamental right.

Third, the Court wrote a considerable amount on the issue of whether a fundamental right can only be found where the right is deeply rooted in our history and traditions.<sup>166</sup> The Court held that history and tradition are factors to consider when deciding if there is a fundamental right but are not necessarily controlling factors.<sup>167</sup> The Court then pointed out that laws against homosexual behavior do not have ancient roots and that sodomy laws have not historically been enforced against consenting adults.<sup>168</sup> The clear implication of this discussion is that homosexual intimacy is not barred from being considered a fundamental right based on history and tradition. Thus, the *Lawrence* Court strongly suggested that the liberty interest in sexual intimacy is a fundamental right. Any state laws infringing on such a right, therefore, must be based upon a compelling state interest. As previously discussed, a state could not have a compelling state interest in barring interstate recognition of all queer adoptions. In short, the Due Process Clause of the Fourteenth Amendment does not permit states to refuse to recognize interstate queer adoptions.

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<sup>164</sup> See generally *Lawrence*, 539 U.S. at 574; *Griswold*, 381 U.S. at 481; *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>165</sup> See generally *Lawrence*, 539 U.S. at 574; *Griswold*, 381 U.S. at 481; *Roe*, 410 U.S. at 113.

<sup>166</sup> *Lawrence*, 539 U.S. at 567-68.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

### *E. The Right to Travel*

Furthermore, all states must recognize sister state queer adoptions because refusing to do so would infringe on the family's fundamental right to travel. Supreme Court jurisprudence clearly establishes a fundamental right to travel.<sup>169</sup> In *United States v. Guest*, the Court held that “[t]he constitutional right to travel from one State to another...occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.”<sup>170</sup> In *Saenz v. Roe*, the Court identified three basic rights with regard to travel:<sup>171</sup>

[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.

The first right is clearly implicated here. If a person cannot travel to another state without fear of losing their parental rights over their child, their right to enter another state has been infringed upon. It is difficult to imagine a greater infringement on the right to travel than the possibility of losing your children. The child's right to travel is also clearly infringed upon because the child may lose one or more of her parents simply by crossing a state line. A state may infringe on a fundamental right if the state has a compelling interest and the infringement is narrowly tailored to fit that interest.<sup>172</sup> As discussed above, no state could have a compelling interest to discriminate against queer parents as a whole. Thus, states must recognize out-of-state queer adoptions.

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<sup>169</sup> *United States v. Guest*, 383 U.S. 745, 757 (1966).

<sup>170</sup> *Id.*

<sup>171</sup> *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

<sup>172</sup> *Finstuen v. Edmondson*, 2006 WL 1445354, 12 (W.D. Okla.),

## CONCLUSION

Given the current uncertainty in the law, when a same-sex couple and their adoptive children relocate, their entire legal relationship is put in jeopardy by simply crossing state lines. The United States Supreme Court should resolve the controversy and hold that no state may refuse to recognize out-of-state queer adoptions. To refuse to do so would violate the Full Faith and Credit Clause of the Constitution, the PKPA, the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fourteenth Amendment, and the fundamental right to travel. No state should be permitted to treat queer parents and their adoptive children as second class families.