No. _____

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of Louisiana has a statute providing that all children born in the State, if adopted, are entitled to receive amended birth certificates showing their adoptive parents. The State Registrar refused to issue such an amended certificate to a child who had been adopted in New York by an unmarried couple. The Registrar explained that this decision was based on the State's disapproval of adoptions by unmarried couples. The following questions are presented:

1. Whether the Fifth Circuit erred in holding that a state does not violate the Full Faith and Credit Clause when an executive official selectively disregards some out-of-state judgments of adoption based on policy assessments of the wisdom of those judgments.

2. Whether the Fifth Circuit erred in holding that 42 U.S.C. § 1983 does not provide a remedy for a violation of the Full Faith and Credit Clause.

3. Whether the Fifth Circuit erred in holding that a state does not violate the Equal Protection Clause of the Fourteenth Amendment when, based on its disapproval of the unmarried status of a child's adoptive parents, the state refuses to issue the child with an accurate, amended birth certificate.

PARTIES TO THE PROCEEDING

The Plaintiffs-Appellees below, who are Petitioners before this Court, are the following: Oren Adar, individually and as parent and next friend of J. C. A.-S. a minor; Mickey Ray Smith, individually and as parent and next friend of J. C. A.-S. a minor.

The Defendant-Appellant below, who is the Respondent before this Court, is Darlene W. Smith, in her capacity as State Registrar and Director, Office of Vital Records and Statistics, State of Louisiana Department of Health and Hospitals ("the Registrar").

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The en banc opinion of the United States Court of Appeals for the Fifth Circuit reversing the district court's grant of summary judgment for Petitioners is reported at 639 F.3d 146. Pet. App. 1a. The Fifth Circuit's order granting rehearing en banc is reported at 622 F.3d 426. Pet. App. 87a. The Fifth Circuit panel opinion affirming the district court's grant of summary judgment for Petitioners is reported at 597 F.3d 697. Pet. App. 89a. The opinion of the District Court (E.D. La.) is reported at 591 F. Supp. 2d 857. Pet. App. 134a.

JURISDICTION

The en banc Fifth Circuit issued its decision on April 12, 2011. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions and federal and state statutes, which are set forth in full in the Appendix to the Petition (Pet. App. 147a): U.S. Const. art. IV § 1; U.S. Const. amend XIV § 1; 28 U.S.C. § 1738; 42 U.S.C. § 1983; La. Rev. Stat. Ann. §§ 40:76, 40:77.

STATEMENT OF THE CASE

This case presents important and recurring questions about the scope and enforceability of the Full Faith and Credit Clause, as well as the meaning of the Equal Protection Clause. Those issues arise in the context of the State of Louisiana's selective

refusal to provide an accurate, amended birth certificate, listing adoptive parents, to some children born in that state and later adopted out of state. Despite a state statute creating a right to an accurate amended birth certificate, Louisiana has refused to issue such certificates when the state, based on its own public policy, disapproves of a given out-of-state judgment of adoption. A sharply divided en banc Fifth Circuit upheld this disparate treatment, reasoning that the Full Faith and Credit Clause does not control the actions of non-judicial state officials and is not enforceable under 42 U.S.C. § 1983. The court also held that Louisiana did not violate equal protection in refusing to issue accurate amended birth certificates to the children of adoptive, unmarried parents, based on the state's disapproval of those parents' marital status.

A. Louisiana's Refusal To Issue Accurate Amended Birth Certificates To Children Adopted By Unmarried Parents In Sister States

Under Louisiana law, when a child born in the state is adopted in another state, the child's adoptive parents are entitled to obtain a new Louisiana birth certificate for their child listing them as the child's parents. La. Rev. Stat. Ann. §§ 40:76(A), (C), 40:77; Pet. App. 149a-150a. Indeed, every state has a process for issuing a new birth certificate to adopted children reflecting the names of their adoptive parents. *See, e.g.*, Cal. Health & Safety Code § 102635; Fla. Stat. Ann. § 382.015(1); Idaho Code Ann. § 39-258(a); Iowa Code Ann. § 144.21; Me. Rev. Stat. Ann. tit. 22, § 2765; N.Y. Pub. Health Law §

4138(1)(c). In Louisiana, however, the Registrar has a policy and practice of refusing to issue accurate amended birth certificates to those Louisiana-born children who have been legally adopted in a court proceeding in a sister state but whose adoptive parents are not legally married. ROA 198-99.[1] Petitioners Oren Adar and Mickey Ray Smith, and their Louisiana-born son J.C. whom they adopted in New York, are one such family to whom the Registrar denied an accurate amended birth certificate under this policy. ROA 170-72.

The Registrar's justification for this disparate treatment of foreign judgments of adoption by unmarried parents is that such adoptions would not have been allowed in Louisiana, which prohibits joint adoptions by unmarried adults. When asked what possible interests Louisiana could have in discriminating against children who are legally adopted in other states by unmarried parents, the Registrar could not identify any. ROA 163-65.

A birth certificate is the only common identity document that establishes identity, parentage, and citizenship in one document, and that is uniformly recognized, readily accepted, and often required in an array of legal contexts. ROA 159-60, 176. Obtaining an amended birth certificate that accurately identifies both parents of an adopted child is vitally important for multiple purposes, including determining the parents' and child's right to make medical decisions for other family members at the

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[1] Citations to "ROA" are to the record on appeal before the U.S. Court of Appeals for the Fifth Circuit.

necessary moments; determining custody, care, and support of the child in the event of a separation or divorce between the parents; obtaining a social security card for the child; obtaining social security survivor benefits for the child in the event of a parent's death; establishing a legal parent-child relationship for inheritance purposes in the event of a parent's death; claiming the adopted child as a dependent on the parents' respective insurance plans; registering the child for school; claiming the child as a dependent for purposes of federal income taxes; and obtaining a passport for the child and traveling internationally.[2] ROA 159-60. The inability to obtain an accurate birth certificate poses a substantial barrier to accessing many essential rights and benefits in our society.[3]

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[2] For example, the U.S. Department of State currently requires "the full names of the applicant's parent(s) to be listed on all certified birth certificates to be considered as primary evidence of U.S. citizenship for all passport applicants, regardless of age," and will not accept "[c]ertified birth certificates missing this information … as evidence of citizenship." http://travel.state.gov/passport/passport_5401.html.

[3] While the adoption decree itself creates the parent-child relationship, it is not an acceptable substitute for a birth certificate, a point the Registrar conceded below. ROA 190-91. Unlike birth certificates, which are public documents, adoption decrees often contain sensitive, private information (such as the name of the birth parents and the grounds for termination of their parental rights) that is subject to a protective order. *Id.* In this case, J.C.'s New York adoption file and final decree were sealed in accordance with New York law. 2 Supp. Tr. 12 (Volume 4 of the Record on Appeal, labeled Supplemental Transcript No. 2).

Petitioners Adar and Smith are the parents and next friends of J.C., who was born in Shreveport Louisiana in 2005 and was surrendered there for adoption. Pet. App. 42a. Adar and Smith jointly adopted J.C. in New York in accordance with New York law, as evidenced by the judgment of adoption issued by a New York court. *Id.*

In accordance with the Louisiana "Record of Foreign Adoptions" statute, which provides that the Registrar is the sole custodian of birth certificates of children born in Louisiana, Petitioners requested that the Registrar issue a corrected birth certificate for J.C. – one that accurately lists Petitioners Adar and Smith as J.C.'s parents. *Id.* Louisiana law directs the Registrar to issue such an amended birth certificate to out-of-state adoptive parents when presented with the proper documentation. *Id.* at 43a. In rejecting Petitioners' application, the Registrar cited Louisiana public policy, noting that unmarried couples are not permitted to adopt children jointly in Louisiana. *Id.*

The inability to obtain a birth certificate, in and of itself a tangible harm, has surfaced repeatedly as an obstacle to Petitioners Adar and Smith exercising their rights and responsibilities as parents. For example, they had great difficulty enrolling J.C. as a dependant on the health insurance coverage Smith has through his employer – a problem that recurs from time to time when the company conducts internal audits. ROA 377-78. They were stopped at an airport when attempting to board a flight abroad and asked for the child's birth certificate when airport personnel wanted to confirm their

relationship to their child. ROA 434-37. Moreover, Adar, himself an adopted child, understands the stigma and dignitary harm that adopted children can experience when they are treated differently and worse than other children. ROA 434-37, 443-45.

B. Proceedings Below

Petitioners sued the Registrar in the U.S. District Court for the Eastern District of Louisiana, asserting claims pursuant to 42 U.S.C. § 1983 for violation of the Full Faith and Credit Clause and the Equal Protection Clause. Pet. App. 135a-136a. Petitioners sought declaratory relief and an injunction requiring the Registrar to issue an accurate, amended birth certificate to J.C. identifying both of his adoptive parents. *Id.*

1. *The District Court's Grant Of Summary Judgment*

The district court granted Petitioners' motion for summary judgment, holding that the Registrar's refusal to issue a birth certificate naming both Adar and Smith as J.C.'s parents was a denial of full faith and credit. Pet. App. 142a. The district court did not reach Petitioners' equal protection claim. *Id.* at 142a n.8.

In granting summary judgment to Petitioners, the district court held that, under this Court's precedents, Louisiana owes full faith and credit to the New York court's judgment of adoption, there is no public policy exception to this exacting obligation, and Louisiana must enforce the New York court judgment on an evenhanded basis with all other court judgments. Pet. App. 142a-143a. Turning to

the Louisiana "Record of Foreign Adoptions" statute, the district court held that the plain language mandates that, upon receipt of proper documentation, the Registrar was required to issue an amended birth certificate to J.C. listing both Adar and Smith as his "adoptive parents," a status determined exclusively and conclusively by the New York judgment of adoption. Pet. App. 144a-145a. Accordingly, the district court entered an injunction ordering the Registrar to "issue an amended birth certificate . . . identifying Oren Adar and Mickey Ray Smith as the child's parents." Pet. App. 146a.

2. *Affirmance By A Fifth Circuit Panel*

A panel of the Fifth Circuit unanimously affirmed the grant of summary judgment to Petitioners on their full faith and credit claim. Pet. App. 132a-133a. The court emphasized that "there [are] no 'roving public policy exception[s]'" to the full faith and credit owed to sister-state judgments. Pet. App. 117a (quoting *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222 (1998)). Thus, "the forum state may not refuse to recognize an out-of-state judgment on the grounds that the judgment would not obtain in the forum state." Pet. App. 105a (footnotes omitted). Although the forum state is free to apply its own laws regarding the enforcement of judgments, it must do so in an even-handed manner. *Id.* at 106a & n.33.

The court rejected the Registrar's attempts to distinguish adoption decrees from other types of final judgments. Pet. App. 110a-117a. Ultimately, the

court concluded that "Louisiana owes full faith and credit to the New York adoption decree that declares [J.C.] to be the adopted child of Adar and Smith," and that under the "plain meaning of the [Louisiana] statutes, Adar and Smith are the 'adoptive parents' of [J.C.]." Pet. App. 132a. The court therefore ordered the Registrar to comply with the district court's injunction. Pet. App. 133a. Like the district court, the three-judge panel did not reach the equal protection claim. *Id.* at 133a n.76.

3. *Reversal By The En Banc Fifth Circuit*

A sharply divided en banc court reversed the district court's grant of summary judgment on the full faith and credit claim, reached the equal protection claim for the first time and rejected it, and remanded for dismissal of the action. Pet. App. 31a. With respect to the full faith and credit claim, the en banc majority (11-5) held that the obligations created by the Full Faith and Credit Clause apply only to state courts. It added that even if executive or legislative actions could violate the Clause, such violations would not be redressable in federal court under 42 U.S.C. § 1983 – an issue the majority addressed *sua sponte*.

The majority interpreted the Full Faith and Credit Clause only to "govern the preclusive effect of final, binding adjudications from one state court … when litigation is pursued in another state or federal court." Pet. App. 6a. Because it viewed the Clause as "guid[ing] rulings in [state] courts," the majority held that "the 'right' it confers on a litigant is to have

a sister state judgment recognized in *courts of the subsequent forum state*." *Id.* (emphasis added). The majority went on to reason that "since the duty of affording full faith and credit to a judgment falls on courts, it is incoherent to speak of vindicating full faith and credit rights against non-judicial state actors" via Section 1983. Pet. App. 13a. Even if a broader individual right exists under the Full Faith and Credit Clause, the majority interpreted this Court's decision in *Thompson v. Thompson*, 484 U.S. 174, 185-87 (1988), as "expressly indicat[ing] that the only remedy available for violations of full faith and credit" is to litigate such claims in the state courts and ultimately seek review in this Court. Pet. App. 15a.

A narrower en banc majority (9-7) held that, even if Section 1983 provided a remedy against state officials for a violation of the Full Faith and Credit Clause, there was no violation in this case because Louisiana is entitled to "issue birth certificates in the manner it deems fit." Pet. App. 28a. Conceding that states must enforce foreign judgments in an evenhanded manner, the narrower en banc majority reasoned that Louisiana's denial of an amended birth certificate to J.C. met this requirement because "Louisiana does not permit any unmarried couples . . . to obtain revised birth certificates with both parents' names on them." *Id.*

The narrower en banc majority (9-7) next turned to Petitioners' equal protection claim, which neither the district court nor the Fifth Circuit panel had addressed. The narrower majority reasoned that heightened scrutiny was unwarranted, because in

contrast to the illegitimacy at issue in *Levy v. Louisiana*, 391 U.S. 68 (1968), and its progeny, J.C.'s "birth status is irrelevant to the Registrar's decision." Pet. App. 29a. The majority also noted that "adoption is not a fundamental right." Pet. App. 30a. Citing a report claiming that marriage provides a better environment for rearing children than does cohabitation, the narrower majority held that "Louisiana may rationally conclude that having parenthood focused on a married couple or single individual – not on the freely severable relationship of unmarried partners – furthers the interests of adopted children." *Id.*

Judge Wiener dissented, joined by four other judges. The dissent rejected the majority's limitation of the Full Faith and Credit Clause to state courts, noting that the plain text of the Clause expressly binds "each State," not just "each State's courts." Pet. App. 38a. The dissent went on to conclude that by imposing a duty on "each State," the Clause creates correlative rights for which Section 1983 provides a remedy to private parties against state actors. Pet. App 39a. Such an interpretation, Judge Wiener's opinion further explained, is consistent with Section 1983's broad remedial purpose, which this Court has repeatedly reaffirmed, including in a decision holding that violations of the Commerce Clause are redressable under Section 1983. Pet. App. 55a-63a (discussing *Dennis v. Higgins*, 498 U.S. 439 (1991)).

The dissenting judges also rejected the majority's alternative holding that, even if Section 1983 grants a remedy, full faith and credit was not denied here

because the Registrar purportedly was enforcing the out-of-state judgment evenhandedly. As Judge Wiener explained, given that Louisiana's birth certificate law declares that "*every* 'adoptive parent' is entitled to have his or her name reflected on a corrected birth certificate," the Registrar's refusal to issue a certificate reflecting both of J.C.'s adoptive parents amounted to the "un-evenhanded[]" enforcement of an out-of-state judgment, in violation of full faith and credit. Pet. App. 40a, 63a-75a.

Turning to equal protection, the dissent criticized the majority for reaching the equal protection claim "before the district court or even a panel of this court has done so." Pet. App. 79a. Applying rational basis review to Louisiana's differential treatment of the children of married and unmarried adoptive parents, the dissent rejected Louisiana's purported interest in "preferring that married couples adopt children." Pet. App. 80a-82a. In the dissent's view, this interest fails rational basis scrutiny because "*the instant case does not involve a Louisiana adoption at all and poses no threat whatsoever to Louisiana's adoption laws or adoption policy*." Pet. App. 81a (emphasis in original). Furthermore, because the Registrar's action occurred long after J.C. had already been adopted by Adar and Smith, the dissent explained, "there is no way that the potential stability of [J.C.'s] home could have been improved by the Registrar's post hoc action" of denying an amended birth certificate. Pet. App. 82a.[4]

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[4] The dissent also correctly concluded that Louisiana has no legitimate interest in denying two-parent birth certificates to

REASONS FOR GRANTING THE PETITION

This case raises important questions about whether non-judicial state officials may, in carrying out their official duties, disregard some out-of-state court judgments selectively based on policy assessments about the merits of those judgments. Creating direct conflicts with rulings from several other circuits, the en banc Fifth Circuit, with five judges dissenting, has insulated all such actions from scrutiny under the Full Faith and Credit Clause of the Constitution, holding that the Clause governs only decisions by state courts and that, in any event, Section 1983 does not provide a right of action to enforce the Clause. These rulings, by cutting back sharply on the scope of full faith and credit obligations, have undercut key guarantees that underlie our federal system of government, authorizing state executive officials and legislators in the Fifth Circuit to disregard *any* out-of-state judgment selectively, based on whatever criterion they choose to apply.

The factual setting in which this ruling arose illustrates how worrisome it is. Like every other state, Louisiana has recognized by statute that it is highly desirable to provide adopted children born in the state with birth certificates setting forth the names of their adoptive parents. Such a document provides by far the best means of verifying – to law enforcement, schools, medical providers, insurers and others – the nature of the familial relationships

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children of unmarried *adoptive* parents, while granting them to children of unmarried *biological* parents. Pet. App. 84a-85a.

that have been established by court judgments of adoption. Here, Louisiana does not deny that a valid judgment of adoption was issued by the court of a sister state. Louisiana simply wants the discretion to deny an amended birth certificate listing both adoptive parents to some but not all Louisiana-born children adopted out of state, based on Louisiana's policy judgments about the wisdom of its sister states' adoption laws.

Heretofore, it had been understood that such discrimination by states among out-of-state judgments is at the core of what the Full Faith and Credit Clause prohibits. The question whether the Fifth Circuit was correct to depart from that consensus clearly raises questions that urgently need to be addressed by this Court.

The facts of this case also serve to demonstrate the problematic nature of the Fifth Circuit majority's final holding – that there is nothing constitutionally suspect, for purposes of the Equal Protection Clause, about state action that discriminates among children based on the marital status of their adoptive parents. Such disparate treatment strikes at the core principle established in this Court's cases forbidding discrimination based on illegitimacy or on the immigration status of a child's parents. This Court has made clear that government discrimination against children based on disapproval of their parents requires careful scrutiny, and strong justification, under the Equal Protection Clause. The Fifth Circuit's disregard of these constitutional concerns creates a further issue warranting this Court's consideration.

I. The Fifth Circuit's Ruling That The Full Faith And Credit Clause Applies Only To State Courts Requires Review By This Court.

A. The Fifth Circuit's Limitation On The Reach Of The Full Faith And Credit Clause Conflicts With The Decisions Of Other Circuits.

The Fifth Circuit's holding that the Full Faith and Credit Clause applies only to state courts creates a direct conflict among the circuits. It conflicts with the Tenth Circuit's decision in *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007), which held that Oklahoma state executive officials violated full faith and credit by refusing to recognize a California judgment of adoption. And it also conflicts with decisions of the Seventh and Ninth Circuits, which have adjudicated full faith and credit claims on the merits against non-judicial state actors. *Rosin v. Monken*, 599 F.3d 574, 575 (7th Cir. 2010) (full faith and credit claim against state law enforcement officials); *United Farm Workers v. Ariz. Agric. Emp't Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982) (full faith and credit claim against state administrative board).

In *Finstuen*, a same-sex couple residing in California had adopted a child born in Oklahoma. The adoptive parents had requested an amended birth certificate listing them as parents from the Oklahoma State Department of Health (OSDH). OSDH refused their request based on an Oklahoma statute prohibiting state officials from recognizing an adoption judgment designating a same-sex couple as parents. 496 F.3d at 1142.

The family brought suit against three executive officials – the Governor, the Attorney General, and the Commissioner of the OSDH – alleging that their conduct in enforcing the statute and refusing to issue an amended birth certificate violated their obligation to give full faith and credit to the California adoption judgment. The Tenth Circuit agreed. Recognizing that "final adoption orders by a state court of competent jurisdiction are judgments that must be given full faith and credit under the Constitution by every other state in the nation," the court held that Oklahoma officials had violated the Full Faith and Credit Clause by "categorically reject[ing] a class of out-of-state adoption decrees." *Id.* at 1141. The Tenth Circuit was guided by this Court's long line of cases explaining that the purpose of the Full Faith and Credit Clause was to transform independent sovereign states into a single nation by requiring each state to recognize the judgments entered by the courts of every other state. *Id.* at 1152 (citing *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276-77 (1935), *Pac. Emp's Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939); *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948); *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 272 (1980); and *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998)). The court stressed that under this line of cases, "with respect to final judgments entered in a sister state, it is clear there is no 'public policy' exception to the Full Faith and Credit Clause." *Id.* at 1153.

The Tenth Circuit rejected Oklahoma's argument that forcing it to recognize the out-of-state judgment

of adoption "would constitute an impermissible, extra-territorial application of California law in Oklahoma." *Id.* at 1153. Oklahoma had confused its "obligation to give full faith and credit to a sister state's judgment" and "its authority to apply its own state laws in deciding what state-specific rights and responsibilities flow from that judgment." *Id.* The court explained that "[i]f Oklahoma had no statute providing for the issuance of supplementary birth certificates for adopted children," the full faith and credit claim would fail. *Id.* at 1154. However, because Oklahoma had such a statute, the Full Faith and Credit Clause required Oklahoma to apply the statute "in an 'even-handed' manner" to all judgments of adoption, including those obtained out-of-state by couples who could not adopt within the state. *Id.* (quoting *Baker*, 522 U.S. at 234-35).

The Fifth Circuit's decision here conflicts directly with the Tenth Circuit's holding in *Finstuen*. The plaintiffs in both cases sued state executive officials under the Full Faith and Credit Clause for refusing to recognize out-of-state judgments of adoption. While the Tenth Circuit held that state officials had violated the Constitution, the Fifth Circuit reached the opposite result because it interpreted the Full Faith and Credit Clause as applying only to state courts. Although the Fifth Circuit en banc majority attempted to diminish the clash with *Finstuen* by describing that case as concerned with a "state non-recognition statute, a problem different than the one here," the dissenters forcefully demonstrated that the majority's holding in this case is "in undeniable conflict with the Tenth Circuit's opinion," Pet. App.

77a-78a (Weiner, J., dissenting; internal quotation marks omitted). As the dissenters explained, the Louisiana Registrar's "uncodified policy of categorically rejecting … one subset of out-of-state adoptions violates the FF&C Clause in precisely the same way as did the now-stricken Oklahoma non-recognition statute." Pet. App. 78a.

The Fifth Circuit's limitation on the reach of the Full Faith and Credit Clause also conflicts with decisions of the Seventh and Ninth Circuits, which have adjudicated the merits of full faith and credit claims against non-judicial state actors. In *United Farm Workers v. Arizona Agricultural Employment Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982), the Ninth Circuit applied the Full Faith and Credit Clause in a case against a state administrative board. The case concerned union representation for the employees of BCI, an agricultural employer with operations in California and Arizona. *Id.* at 1251-52. The United Farm Workers (UFW), which had been certified by the California Agricultural Labor Relations Board ("California Board") as the exclusive California representative for BCI employees, brought a Section 1983 action against the Arizona Agricultural Employment Relations Board ("Arizona Board"), seeking to enjoin a union election in Arizona. *Id.* The UFW claimed that the Arizona Board had to accord full faith and credit to the California Board's certification of UFW. *Id.* The Ninth Circuit concluded that the Arizona Board's actions in holding a union election in Arizona did not violate full faith and credit, because the California Board's certification decision was expressly limited

to the geographical boundaries of California. *Id.* at 1255.

More recently, in *Rosin v. Monken*, 599 F.3d 574 (7th Cir. 2010), the Seventh Circuit adjudicated a Full Faith and Credit Clause claim brought against state law enforcement officials. The plaintiff had been convicted of "sexual abuse in the third degree," thereby qualifying for "sex offender" status under New York law. *Id.* at 575. Under his plea agreement, however, he was not required to register as a sex offender in New York. The plea agreement, and New York court judgment of conviction, were silent on the issue of registration. *Id.* at 576. When he later moved to Illinois, that state required him to register as a sex offender under Illinois law, based on the New York conviction. *Id.* at 575.

He sued the Illinois law enforcement officials under Section 1983 for violation of the Full Faith and Credit Clause. *Id.* The Seventh Circuit rejected the claim on the merits, holding that Illinois officials had not failed to give full faith and credit to the New York judgment of conviction. The court viewed as "dispositive" the "conspicuous absence" of any language in the New York judgment relieving the plaintiff from the obligation to register as a sex offender. *Id.* at 576. Without such language, there was no judgment regarding registration that Illinois failed to honor. *Id.*

B. Even Leaving Aside The Circuit Conflicts, The Fifth Circuit's Limitation On The Reach Of The Full Faith And Credit Clause Is Sufficiently Serious To Merit Review.

Even standing alone, the Fifth Circuit's decision raises important questions that merit this Court's consideration. By holding that the Full Faith and Credit Clause applies only to state courts, the Fifth Circuit has fundamentally altered the legal landscape. This Court has long made it clear that states are not free to disregard foreign judgments based on their state's public policy preferences, even if the activity underlying the judgment would be illegal under state law. *Baker*, 522 U.S. at 232-33; *Estin v. Estin*, 334 U.S. 541, 546 (1948) (Full Faith and Credit Clause "ordered submission ... even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it"); *see also Baker*, 522 U.S. at 243 (Kennedy, J. concurring) ("We have often recognized the second State's obligation to give effect to another State's judgments even when the law underlying those judgments contravenes the public policy of the second State.").

For example, in *Fauntleroy v. Lum*, 210 U.S. 230 (1908), with Justice Holmes writing for the majority, the Court required Mississippi to enforce a Missouri judgment that the defendant was liable to the plaintiff for money owed under a futures contract, even though Mississippi had criminalized "dealing in futures" and prohibited its courts from enforcing

such contracts. *Id.* at 234. The Supreme Court held that "right or wrong," the Missouri judgment had to be honored. *Id.* at 237. It is difficult to overstate the breadth of the *Fauntleroy* holding. Even though Mississippi's policy choice was clearly set forth in its criminal law and its restriction on courts' enforcement powers, the *Fauntleroy* Court insisted that the final judgment of the Missouri court be respected because it was a final judgment, and for no other reason.

Since then, the Court has repeatedly reaffirmed that it is "aware of [no] considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to such a judgment outside the state of its rendition." *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438 (1943).

In accordance with this Court's full faith and credit jurisprudence, judicial and non-judicial state actors routinely recognize foreign judgments and enforce them on an even-handed basis. The Fifth Circuit's holding would upset this equilibrium by allowing state officials to disregard foreign judgments or enforce them in a discriminatory manner for any reason. The decision thus creates great uncertainty as to whether judgments, including but not limited to judgments of adoption, will be respected from state to state. By inviting such unpredictable and discriminatory treatment of foreign judgments, the Fifth Circuit's decision threatens to undermine the Full Faith and Credit Clause's "purpose of transforming an aggregation of

independent, sovereign States into a nation." *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948). As this Court has recognized, "[t]o vest the power of determining the extraterritorial effect of a State's own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent." *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 272 (1980).

It is no answer to label the State's action in this case a denial of "enforcement" as opposed to a denial of "recognition" of the judgment. The en banc majority attempted to draw that distinction, pointing out that the Registrar did not question whether a valid adoption had occurred; she was just following a policy of refusing to provide amended birth certificates listing two adoptive parents if they were not married. Pet. App. 23a-28a.

The dissent correctly pointed out the flaw in the majority's analysis. To comply with its full faith and credit obligation, Louisiana must accept the New York court's adjudication of Adar's and Smith's adoptive parent status, as set forth in the New York adoption decree, and must evenhandedly enforce that decree under Louisiana's own birth certificate law. Pet. App. 63a-65a. Whether one calls it recognition or enforcement, the fact remains that the Full Faith and Credit Clause bans discrimination among out-of-state judgments based on parochial policy assessments of the wisdom of those judgments. That is precisely what occurred here.

C. The Fifth Circuit Erred In Holding That Full Faith And Credit Applies Only To State Courts.

The Fifth Circuit's ruling that only state courts are obliged to obey the Full Faith and Credit Clause is wrong for several reasons. First, the ruling contradicts the plain language of the Constitution. As the majority concedes in a footnote, the command of the Full Faith and Credit Clause is directed to "each State," not just "each State's courts." U.S. Const. art. IV § 1; Pet. App. 13a n.6. The drafters clearly knew how to limit the commands of the Constitution to state courts, as evidenced by the Supremacy Clause, which is directed to the "Judges in every State." U.S. Const. art. VI, cl. 2. They chose not to limit the Full Faith and Credit Clause in this way. As Judge Wiener explained for the dissenters, "[i]t is a foundational principle of constitutional interpretation that clauses of the Constitution that are worded differently are presumed to carry different meanings." Pet. App. 47a (citing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 334 (1816) (Story, J.), and *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 414-15 (1819) (Marshall C.J.)). Thus, given the differing language employed by the drafters in these constitutional provisions, the Full Faith and Credit Clause should be interpreted to bind all state actors, not just state courts.

Second, the majority's holding relies on inapposite cases, such as *Thompson v. Thompson*, 484 U.S. 174 (1988), which concern claims against private individuals rather than Section 1983 claims against state actors. *Id.* at 177-78 (suit in federal court by an

ex-husband against an ex-wife asking the court to choose between conflicting state custody determinations); *Minnesota v. N. Sec. Co.*, 194 U.S. 48, 71-72 (1904) (suit by a state against a foreign corporation); *Anglo-Am. Provision Co. v. Davis Provision Co.*, 191 U.S. 373, 373-74 (1903) (suit by one corporation against another); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 286-87 (1888) (suit by a state against a foreign corporation), *overruled on other grounds*, *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935). Properly understood, these cases do not limit the reach of the Full Faith and Credit Clause to state courts. In *Thompson*, the Court held that in enacting the Parental Kidnapping Prevention Act, Congress did not intend to create a private remedy to enforce the rights created by the Full Faith and Credit Clause. 484 U.S. at 185-87. Although there is no private remedy against private parties for violations of the Full Faith and Credit Clause, that is immaterial here because Petitioner has sued a state actor.

Third, as discussed above, if allowed to stand the en banc majority's holding would upset the constitutional balance that states have come to rely upon for nearly a century. Under the express language of the Full Faith and Credit Clause and under this Court's precedents, each state must give foreign judgments the effect they have in the state of rendition and apply its own enforcement laws even-handedly, and each state can expect the same treatment of its own judgments from every other state. The Constitution's carefully calibrated federal

system of government depends on each state honoring these commands.

For the foregoing reasons, the Fifth Circuit's full faith and credit holding has important implications for a wide variety of judgments rendered in state courts throughout the land and deserves this Court's review.[5]

II. Section 1983 Should Be Available As A Means Of Enforcing The Full Faith And Credit Clause Against State Legislative And Executive Actions.

As discussed above, the question whether the Full Faith and Credit Clause can be enforced affirmatively in federal court against non-judicial state actors under Section 1983 is one on which the circuits are divided. The Fifth Circuit reached the availability of Section 1983 *sua sponte*, even though it had not been preserved for review. The majority mischaracterized both a prior Fifth Circuit decision and the position of the Eleventh Circuit and it departed from the positions of the Seventh, Ninth, and Tenth Circuits. Because this part of the

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[5] This case, which concerns the full faith and credit accorded to *judgments*, does not implicate marriage licenses issued to same sex couples under state law. This Court has repeatedly made clear that when it comes to full faith and credit, final judgments stand on a different footing than statutes and public records. *E.g., Baker*, 522 U.S. at 232-33. A marriage license, unlike an adoption decree, is not a final judgment. Thus, the full faith and credit accorded to judgments is not relevant to marriage licenses. The Tenth Circuit's holding in *Finstuen*, if applied nationwide, would not require any state to recognize marriage licenses issued to same-sex couples in other states.

majority's holding, left untouched, could insulate its erroneous full faith and credit analysis, this Court should, at a minimum, vacate that portion of the Fifth Circuit opinion or, alternatively, reach and reject the majority's conclusion on this important question.

A. The Fifth Circuit Needlessly Addressed The Applicability Of Section 1983 Even Though That Issue Had Been Waived.

Respondent never moved to dismiss Petitioners' Section 1983 claim addressing the full faith and credit issue, sought summary judgment as to it, or otherwise raised the question of Section 1983's availability to redress violations of the Full Faith and Credit Clause until the Fifth Circuit invited briefing on this specific question when it granted rehearing en banc. The Registrar then, for the first time, argued that a violation of full faith and credit by a state executive official is not redressable under Section 1983, contending this defect is jurisdictional. Yet Section 1983 is not a jurisdictional statute, *see Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 615-20 (1979), but merely supplies the cause of action, a distinction long recognized by this Court. *E.g.*, *Bell v. Hood*, 327 U.S. 678, 681 (1946). Subject matter jurisdiction here is premised on 28 U.S.C. § 1331.

By failing to raise the applicability of Section 1983 before the district court, the Registrar plainly waived that issue on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not

consider an issue not passed upon below."). Indeed, under its own rules governing waiver, the Fifth Circuit should not have reached the issue. *See, e.g., Miller v. Texas Tech Univ. Health Scis. Ctr.*, 421 F.3d 342, 349 (5th Cir. 2005) (en banc). Furthermore, this is not a case "in which a federal appellate court is justified in resolving an issue not passed on below," such as "where the proper resolution is beyond any doubt . . . or where injustice might otherwise result." *Singleton*, 428 U.S. at 121 (internal citations and quotation marks omitted). Consequently, the Fifth Circuit should not have reached the issue.

B. The Fifth Circuit's Limitation On The Scope Of Section 1983 Creates A Circuit Split.

The Fifth Circuit has departed from the positions of its sister circuits, which have unremarkably assumed that Section 1983 is available as a federal cause of action to enforce violations of the Full Faith and Credit Clause. *See Finstuen*, 496 F.3d 1139 (affirming a judgment against a non-judicial state official brought under section 1983 to enforce the Full Faith and Credit Clause); *Rosin*, 599 F.3d at 575 (considering a Full Faith and Credit claim brought under Section 1983 without questioning federal jurisdiction); *United Farm Workers*, 669 F.2d at 1257 (same); *see also Lamb Enters., Inc. v. Kiroff*, 549 F.2d 1052, 1059 (6th Cir. 1977) (propriety of Section 1983 claim in federal court to enforce full faith credit obligation against a state court judge not questioned, but abstention deemed warranted).

The en banc majority cited the Eleventh Circuit's unpublished decision in *Stewart v. Lastaiti*, 409 F. App'x 235 (11th Cir. 2010), for the proposition that there is no federal cause of action under Section 1983 for violations of the Full Faith and Credit Clause. *Stewart*, however, is entirely off the mark, because the plaintiff did not bring a claim under Section 1983 and was not seeking full faith and credit for an out-of-state judgment. In that case, the plaintiff sued a Massachusetts judge, seeking to enjoin already pending state litigation regarding custody and child support under the theory that an "Acknowledgement of Paternity" form he had signed in Florida granted Florida courts continuing exclusive jurisdiction. *Stewart v. Lastaiti*, No. 10-60565-CIV, 2010 WL 1993884, at *1 (S.D. Fla. May 17, 2010), *aff'd*, 409 F. App'x 235 (11th Cir. 2010). The plaintiff did not mention Section 1983 in his complaint, Complaint at 12, *Stewart v. Lastaiti*, No. 10-60565, 2010 WL 1993884 (S.D. Fla. May 17, 2010), ECF No. 1, and the district court did not address it. Although the Eleventh Circuit made a fleeting reference to Section 1983, that appears to have been a clerical error. The district court and Eleventh Circuit analyzed only whether there was subject-matter jurisdiction under § 1331 for a cause of action under the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, or the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B.

Additionally, the Fifth Circuit mischaracterized its own decision in *White v. Thomas*, 660 F.2d 680 (5th Cir. 1981), where plaintiff brought multiple claims under Section 1983 against a Texas sheriff,

including one urging a vague theory that the sheriff had denied full faith and credit. The *White* court never held that full faith and credit could not be asserted as a claim under Section 1983 – only that the facts did not establish that the sheriff had been guilty of such a violation. Like *Lastaiti*, the *White* case did not involve application of full faith and credit to a court judgment.

Left unreviewed, the Fifth Circuit's decision grants states the extraordinary ability to disregard sister state judgments for whatever parochial policy reason a state official may choose. This circuit split must be addressed.

C. The Fifth Circuit Relies On Supreme Court Precedent Wholly Irrelevant To Section 1983.

In addition to creating a circuit split on the availability of a Section 1983 cause of action, the court below based its decision on Supreme Court precedent that did not involve an action brought pursuant to Section 1983.

As discussed above, the en banc court relies exclusively on this Court's decision in *Thompson v. Thompson*, 484 U.S. 174 (1988), to support the proposition that there is no remedy for full faith and credit violations under Section 1983. But *Thompson* involved neither state actors nor Section 1983. Whatever *Thompson* held as to the ability of private citizens to enforce the Full Faith and Credit Clause against other private citizens, it is completely silent as to the applicability of Section 1983 in a case against state actors.

D. The Fifth Circuit Ignores This Court's Precedent Applying Section 1983, Creating An Important Issue Regarding Constitutional Rights That Must Be Considered By The Court.

This Court has repeatedly held that Section 1983 is a remedial statute that must be applied expansively to ensure the protection of constitutional rights. *See Monell v. Dep't of Soc. Servs. Of City of New York*, 436 U.S. 658, 700-01 (1978) (finding that Section 1983 is "to be broadly construed, against all forms of official violation[s] of federally protected rights."); *see also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989) ("We have repeatedly held that the coverage of [Section 1983] must be broadly construed" (citations omitted)). The Fifth Circuit ignored this command. Its ruling would leave a party subjected to a violation of the Full Faith and Credit Clause in a non-judicial context with no federal remedy. That makes no sense.

Indeed, this Court has found Section 1983 to provide a cause of action for constitutional provisions that stray much further from the realm of individual rights than does the Full Faith and Credit Clause. In *Dennis v. Higgins*, 498 U.S. 439 (1991), this Court held that Section 1983 supports a cause of action for violations of the *dormant* Commerce Clause. Moreover, the rights-creating nature of the Full Faith and Credit Clause has already been recognized by this Court. *See Thomas v. Wash. Gas Light Co.*, 448 U.S. at 278, n.23 ("[T]he purpose of [the FF&C Clause] was to preserve *rights* acquired or confirmed under the public acts and judicial proceedings of one

state by requiring recognition of their validity in other states." (emphasis added) (quoting *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306 U.S. 493, 501 (1939))); *Magnolia Petroleum Co.*, 320 U.S. at 439 (referring to the Clause as creating judicially established "rights"). Moreover, the language of the Full Faith and Credit Clause readily meets this Court's test for whether a constitutional or statutory provision creates a federal right. *See Golden State Transit Corp.*, 493 U.S. at 106. The Full Faith and Credit Clause clearly creates obligations binding on a governmental unit, the Clause is specific and concrete, and the Clause exists to protect the right of individuals to gain respect for their judgments. *People* obtain judgments, *courts* do not. The Clause is *well* within the scope of Section 1983.

Finally, unlike the dormant Commerce Clause, the Full Faith and Credit Clause would even satisfy the analysis used by the dissenting justices in *Dennis*, who identified the "distinction between power-allocating and rights-securing provisions of the Constitution" as crucial in determining whether an individual right exists that is enforceable under Section 1983. 498 U.S. at 454 (Kennedy, J., dissenting). The Full Faith and Credit Clause is one of "those constitutional provisions which secure the rights of persons vis-à-vis the States," rather than one of the provisions that "allocate power between the Federal and State Governments." *Dennis*, 498 U.S. at 452-53. As such, the Full Faith and Credit Clause is enforceable under Section 1983. *Id.* The dissent below specifically noted this point. Pet. App. 62a.

Significantly, without the availability of Section 1983, Petitioners may have *no* available remedy to compel judicial recognition of their valid adoption decree. The Registrar argued below that Louisiana law did not allow for standing to sue to correct birth records. She said that, because some provisions of the state's Vital Statistics Laws expressly provided for judicial relief and the provisions at issue in this case do not, there was no standing to sue. Appellant's Supplemental Brief at 17-19, *Adar*, 639 F.3d 146 (5th Cir. 2011) (No. 09-30036), 2010 WL 5306486. The Fifth Circuit did not adopt this view, and suggested that Louisiana law would permit a mandamus action in state court. Pet. App. 21a n.8.

But regardless of the Fifth Circuit's view of Louisiana law, it is easy to conceive a Louisiana *state* court agreeing with the Registrar's arguments. Under the Fifth Circuit's decision, the following sequence of events would result: plaintiffs bring a mandamus action in state court, with the state trial court, intermediate appellate court, and state Supreme Court all deciding that state law does not confer standing to compel the Registrar to modify the birth certificate. Plaintiffs then seek *certiorari* to the Supreme Court, hoping this Court grants their petition, and then wait for a Supreme Court decision remanding the case back to the Louisiana Supreme Court to judicially create a remedy. The case is remanded to the trial court, which never created a record in the first instance having thrown the suit out on standing grounds. Plaintiffs then face three more adverse state decisions on the merits before

hopefully appearing again before the Supreme Court to gain respect for their valid judgment.

Such a process makes no sense as a means of enforcing the federal rights established in the Full Faith and Credit Clause, given that Section 1983 is readily available to serve the function.

III. The Fifth Circuit Mischaracterized This Court's Equal Protection Jurisprudence In Conflict With Other Circuits And Incorrectly Applied Even Rational Basis Review.

In refusing any form of heightened review under the Equal Protection Clause, the Fifth Circuit misstated the legal principle central to the *Levy v. Louisiana* line of cases and ignored this Court's decision in *Plyler v. Doe*, 457 U.S. 202 (1982). Further, even under rational basis review, the Fifth Circuit was incorrect in its analysis. That children are caught in this conflict only underscores the need for review by this Court.

A. The Fifth Circuit Misstated And Ignored This Court's Precedent In A Manner Contrary To Other Circuits.

This Court has long held that the law cannot constitutionally punish children for the status or actions of their parents. *See, e.g.*, *Levy*, 391 U.S. 68 (1968). In *Levy*, the Court invalidated a state provision denying children of unmarried parents the right to bring claims for wrongful death. After *Levy*, the Court repeatedly struck down similar state statutes discriminating against illegitimate children – a classification brought upon them by their parents' actions. *See, e.g., Weber v. Aetna Cas. &*

Sur. Co., 406 U.S. 164, 175 (1972) ("imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."); *Gomez v. Perez*, 409 U.S. 535, 538 (1973) ("a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally."); *Matthews v. Lucas*, 427 U.S. 495, 505 (1976) ("visiting condemnation upon the child in order to express society's disapproval of the parents' liaisons 'is illogical and unjust'" (quoting *Weber*, 406 U.S. at 175)); *see also Pickett v. Brown*, 462 U.S. 1, 8 (1983); *Trimble v. Gordon*, 430 U.S. 762, 766-67 (1977). Indeed, this Court has required that the statute "bear[] 'an evident and substantial relation to the particular .... interests [the] statute is designed to serve.'" *Pickett*, 462 U.S. at 8 (quoting *United States v. Clark*, 445 U.S. 23, 27 (1980); first bracket added). And the statute must be "substantially related to a legitimate state interest." *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982).

The same year this Court described this heightened standard in *Mills*, the Court applied it to a different context – a statute that prohibited undocumented immigrant children from attending public schools. *Plyler*, 457 U.S. at 223. Citing this Court's illegitimacy decisions applying heightened scrutiny in *Weber* and *Trimble*, the *Plyler* court stated that the statute had no rational justification because it "imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control." *Id.* at 220. "[L]egislation

directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice." *Id.*

The Fifth Circuit altogether ignored *Plyler* and contended that the *Levy* line of cases deals *solely* with illegitimacy. Pet. App. 29a-30a. Because it believed that J.C.'s "birth status [was] irrelevant to the Registrar's decision," the majority reasoned that the heightened scrutiny applied in the *Levy* line of cases was not relevant. *Id.* But the cases cited above do not rest on an analysis of "birth status" but rather make clear that it is *discrimination against children based on the actions of their parents* that is at issue. *Plyler* rejected the idea that treating children unfavorably based on the actions of their parents could further any state legitimate interest, because children "can affect *neither their parents' conduct* nor their own status." 457 U.S. at 220 (emphasis added) (citing *Trimble*, 430 U.S. at 770). Effectively, the Fifth Circuit finds a constitutional difference between laws targeting children based on disapproval of their *biological* parents and those based on disapproval of their *adoptive* parents, because adoptive parents necessarily did not give birth to their child. As Justice Scalia stated in *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010), that the Fifth Circuit has resorted to a play on words is a "sure sign" its "distinction is made-to-order."

The Fifth Circuit parts ways with the Second, Sixth, and Ninth Circuits, which have characterized the *Levy* line of cases more broadly. In *Walton v. Hammons*, 192 F.3d 590, 599 (6th Cir. 1999), the

Sixth Circuit held that a state could not withhold federal food stamp support from children based on their parents' non-cooperation in establishing the paternity of their children. Citing *Trimble*, *Weber*, and *Plyler*, the Sixth Circuit highlighted "the *general principle*, expressed by the Supreme Court *in different contexts*," that punishing children based on the actions of their parents is unjust. *Id.* (emphasis added). Other Circuits agree. *See United States v. Toner*, 728 F.2d 115, 130 (2d Cir. 1984) (characterizing *Plyler* as "stress[ing] [that] children were 'not accountable for their disabling status'"); *United States v. Thoresen*, 428 F.2d 654, 658 (9th Cir. 1970) (characterizing *Levy* as granting heightened scrutiny for laws based on "familial relationships").

The Fifth Circuit's strained limitation of this fundamental protection to the "birth status" of "illegitimacy" cannot be squared with this Court's jurisprudence nor with the characterization adopted by the Second, Sixth, and Ninth Circuits. Children in the Fifth Circuit do not deserve lessened solicitude.

B. Even Under Rational Basis Review, The Fifth Circuit's Analysis Is Deeply Flawed And Warrants Review.

In applying rational basis review in this case, the Fifth Circuit plainly analyzed the wrong statute. Discussing the purpose of Louisiana's *adoption* statute made scant sense, because it was Louisiana's *vital records* statute that was at issue. After summarily accepting Louisiana's reason for not

allowing unmarried couples to adopt in the state (which was not challenged in this case), the en banc majority then found the means by which the state furthers that irrelevant purpose to be rational. "Louisiana may rationally conclude that having parenthood focused on a married couple or single individual . . . furthers the interests of adopted children." Pet. App. 30a.

As Judge Weiner and his colleagues noted in dissent, the majority opinion analyzed a statute – regulating Louisiana *adoptions* – in a case that involved only a statute regulating the reissuance of Louisiana birth certificates. Pet. App 81a-82a. The two are not the same. Louisiana's goals of promoting its view of stable parental relationships in deciding who can adopt in the state is irrelevant because Petitioners are *already* the adoptive parents and Louisiana cannot change that. As the dissent noted, the Registrar's policy can only accomplish the opposite goal – to harm the children of unmarried adoptive parents and destabilize their families. The Registrar's action therefore fails even rational basis review.[6]

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[6] What is more, as Judge Weiner convincingly argued, the Louisiana vital records statute permits *both* unmarried *biological* parents to be listed on a child's birth certificate. Pet. App. 83a-85a. The state, and the Fifth Circuit majority, provide no explanation for how the state may constitutionally distinguish between adoptive and biological parents in this manner and survive even rational basis review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 11, 2011

APPENDIX

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Appendix A

United States Court of Appeals,
Fifth Circuit.
Oren ADAR, Individually and as Parent and Next Friend of J.C.A–S a minor; Mickey Ray Smith, Individually and as Parent and Next Friend of J.C.A–S a minor, Plaintiffs–Appellees,
v.
Darlene W. SMITH, In Her Capacity as State Registrar and Director, Office of Vital Records and Statistics, State of Louisiana Department of Health and Hospitals, Defendant–Appellant.

No. 09-30036.
April 12, 2011.

Before JONES, Chief Judge, and REAVLEY, JOLLY, DAVIS, SMITH, WIENER, GARZA, BENAVIDES, STEWART, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK and HAYNES, Circuit Judges.[*]

EDITH H. JONES, Chief Judge:

Mickey Smith and Oren Adar, two unmarried individuals, legally adopted Louisiana-born Infant J in New York in 2006. They sought to have Infant J's birth certificate reissued in Louisiana supplanting the names of his biological parents with their own. According to La. Rev. Stat. Ann. § 40:76(A), the Registrar "may create a new record of birth" when

[*] Judge King and Judge Graves did not participate in this decision.

presented with a properly certified out-of-state adoption decree. Subsection C states that the Registrar "shall make a new record . . . showing," inter alia, "the names of the adoptive parents." La. Rev. Stat. Ann. § 40:76(C). Darlene Smith, the Registrar of Vital Records and Statistics, refused their request.[1] The Registrar took the position that "adoptive parents" in section 40:76(C) means married parents, because in Louisiana, only married couples may jointly adopt a child. La. Child. Code Ann. art. 1221. She offered, however, to place one of Appellees' names on the birth certificate because Louisiana also allows a single-parent adoption. Smith and Adar sued the Registrar under 42 U.S.C. § 1983 for declaratory and injunctive relief, asserting that her action denies full faith and credit to the New York adoption decree and equal protection to them and Infant J.

The district court ruled in favor of Smith and Adar on their full faith and credit claim. Following the Registrar's appeal, a panel of this court pretermitted the full faith and credit claim, concluding instead that Louisiana law, properly understood, required the Registrar to reissue the birth certificate. This panel opinion was vacated by our court's decision to rehear the case en banc. *Adar v. Smith*, 622 F.3d 426 (5th Cir. 2010).

This court must decide whether Appellees' claim for a reissued Louisiana birth certificate rests on the

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[1] The Registrar's duty to maintain vital statistics and records is created within Louisiana's Public Health and Safety Law. La. Rev. Stat. Ann. tit. 40, ch. 2.

Constitution's full faith and credit clause or equal protection clause. Confusion has surrounded the characterization of Appellees' claims and their jurisdictional basis. Rather than parse the litigation history in detail, this discussion will demonstrate the following propositions:

1. Appellees have standing to sue for themselves and/or Infant J;
2. The federal courts have jurisdiction to decide whether Appellees stated a claim remediable under § 1983 for violation of the full faith and credit clause;
3. Appellees' complaint does not state such a claim; and
4. Appellees have failed to state a claim that the Registrar's action denied them equal protection of the laws.

We REVERSE and REMAND for entry of a judgment of dismissal by the district court.

I. FULL FAITH AND CREDIT

A. Justiciability

The Registrar initially contends that Appellees lack standing to sue and that the federal courts lack jurisdiction over the full faith and credit claim. The threshold justiciability questions are novel, but settled principles guide their resolution.

In order to establish standing, plaintiffs must show that (1) they have suffered an injury in fact, (2) a causal connection exists between the injury and challenged conduct, and (3) a favorable decision is

likely to redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992); *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 295 (5th Cir. 2001). We find Appellees have standing because they have been denied a revised birth certificate containing the names of both Smith and Adar as parents—the practical significance of which is undisputed—and through this action seek to redress the denial directly. Because standing does not depend upon ultimate success on the merits, Appellees are properly before this court. *See Warth v. Seldin*, 422 U.S. 490, 500, 95 S. Ct. 2197, 2206, 45 L. Ed. 2d 343 (1975); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1385 (5th Cir. 1986) ("It is inappropriate for the court to focus on the merits of the case when considering the issue of standing.").

Further, the court must assume jurisdiction to decide whether Appellees' complaint states a cause of action on which relief can be granted. *Bell v. Hood*, 327 U.S. 678, 681-82, 66 S. Ct. 773, 776, 90 L. Ed. 939 (1946). Since the absence of a valid cause of action does not necessarily implicate subject-matter jurisdiction unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 118 S. Ct. 1003, 1010, 140 L. Ed. 2d 210 (1998) (quoting *Bell*, 327 U.S. at 682-83, 66 S. Ct. at 776), we may determine whether plaintiffs have alleged an actionable claim under the full faith and credit clause. *See Thompson v. Thompson*, 484 U.S. 174, 178-79, 108 S. Ct. 513, 516,

98 L. Ed. 2d 512 (1988) (affirming dismissal of full faith and credit suit for failure to state a claim).

B. Full Faith and Credit

The questions at issue are the scope of the full faith and credit clause and whether its violation is redressable in federal court in a § 1983 action.

Appellees contend that their claim arises under the full faith and credit clause, effectuated in federal law by 28 U.S.C. § 1738. The Constitution's Article IV, § 1 provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

In pertinent part, the statute states:

> § 1738. State and Territorial statutes and judicial proceedings; full faith and credit.
>
> . . .
>
> Such Acts, records and judicial proceedings or copies thereof [of any State, Territory, or Possession of the United States], so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

Infant J was adopted in a court proceeding in New York state, as evidenced by a judicial decree. Appellees contend that Art. IV, § 1 and § 1738 oblige the Registrar to "recognize" their adoption of Infant J by issuing a revised birth certificate. The Registrar declined, however, to enforce the New York decree by altering Infant J's official birth records in a way that is inconsistent with Louisiana law governing reissuance. See La. Rev. Stat. Ann. 40:76; La. Child. Code Ann. arts. 1198, 1221. Appellees argue that either the Registrar's refusal to issue an amended birth certificate with both names on it, or the state law on which she relied, effectively denies them and their child "recognition" of the New York decree. Thus, the Registrar, acting under color of law, abridged rights created by the Constitution and laws of the United States. 42 U.S.C. § 1983.

This train of reasoning is superficially appealing, but it cannot be squared with the Supreme Court's consistent jurisprudential treatment of the full faith and credit clause or with the lower federal courts' equally consistent approach. Simply put, the clause and its enabling statute created a rule of decision to govern the preclusive effect of final, binding adjudications from one state court or tribunal when litigation is pursued in another state or federal court. No more, no less. Because the clause guides rulings in courts, the "right" it confers on a litigant is to have a sister state judgment recognized in courts of the subsequent forum state. The forum's failure properly to accord full faith and credit is subject to ultimate

review by the Supreme Court of the United States. Section 1983 has no place in the clause's orchestration of inter-court comity—state courts may err, but their rulings are not subject to declaratory or injunctive relief in federal courts.

Alternatively, even if the Supreme Court were inclined for the first time to find a claim of this sort cognizable under § 1983, the Registrar did not violate the clause by determining how to apply Louisiana's laws to maintain its vital statistics records. As the Supreme Court has clarified, "Enforcement measures do not travel with the . . . judgment." *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 235, 118 S. Ct. 657, 665, 139 L. Ed. 2d 580 (1998). The Registrar concedes it is bound by the New York adoption decree, such that the parental relationship of Adar and Smith with Infant J cannot be relitigated in Louisiana. That point is not at issue here. There is no legal basis on which to conclude that failure to issue a revised birth certificate denies "recognition" to the New York adoption decree.

1. The full faith and credit clause imposes an obligation on courts to afford sister-state judgments res judicata effect.

To explain these conclusions, we begin with the history and purpose of the full faith and credit clause. Under the common law, the concept of "full faith and credit" related solely to judicial proceedings. In particular, "the terms 'faith' and 'credit' were generally drawn from the English law of evidence and employed to describe the admissibility and effect of items of proof." Ralph U. Whitten, *The Original*

Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act, 32 Creighton L. Rev. 255, 265 (1998). These terms were incorporated into the Constitution in the full faith and credit clause.

Early on, the phrase "full faith and credit," when used in conjunction with a judgment, indicated either that a judgment would be given a conclusive, or res judicata, effect on the merits, or that the judgment, when properly authenticated, would "simply be admitted in to [sic] evidence as proof of its own existence and contents, leaving its substantive effect to be determined by other rules." *Id.* at 267. The Supreme Court soon rejected the argument that full faith and credit obligations entailed a mere evidentiary requirement, and instead held that state courts would be obliged to afford a sister-state judgment the same res judicata effect which the issuing court would give it. *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 485, 3 L. Ed. 411 (1813) (Story, J.); *Hampton v. McConnel*, 16 U.S. (3 Wheat.) 234, 235, 4 L. Ed. 378 (1818) (Marshall, C.J.). Since then, adhering to the original purpose of the clause, the Court has interrelated the requirement of "full faith and credit" owed to judgments with the principles of res judicata.

According to the Court, the purpose of the clause was to replace the international law rule of comity with a constitutional duty of states to honor the laws and judgments of sister states. *Estin v. Estin*, 334 U.S. 541, 546, 68 S. Ct. 1213, 1217, 92 L. Ed. 1561 (1948) (the full faith and credit clause "substituted a command for the earlier principles of comity and thus

basically altered the status of the States as independent sovereigns"). With respect to judgments, this meant that other states' courts were obliged "to honor" the "res judicata rules of the court that rendered an initial judgment." 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice And Procedure* § 4403, at 44 (2d ed. 2002) [hereinafter "Wright & Miller"]; *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439, 64 S. Ct. 208, 214, 88 L. Ed. 149 (1943) (noting that "the clear purpose of the full faith and credit clause" was to establish the principle that "a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every court as in that where the judgment was rendered"). The clause thus became the "vehicle for exporting local res judicata policy to other tribunals." 18B Wright & Miller § 4467, at 14; *see also Magnolia Petroleum Co.*, 320 U.S. at 438, 64 S. Ct. at 213 (stating that full faith and credit clause and implementing statute "have made that which has been adjudicated in one state res judicata to the same extent in every other").

Without the clause, unsuccessful litigants could have proceeded from state to state until they obtained a favorable judgment, capitalizing on state courts' freedom to ignore the judgments of sister states. But, as the Court put it, the full faith and credit clause brought to the Union a useful means of ending litigation by making "the local doctrines of res judicata . . . a part of national jurisprudence." *Durfee v. Duke*, 375 U.S. 106, 109, 84 S. Ct. 242, 244, 11 L. Ed. 2d 186 (1963) (quoting *Riley v. N.Y. Trust Co.*, 315

U.S. 343, 349, 62 S. Ct. 608, 612, 86 L. Ed. 885 (1942)).

The Court still maintains that the clause essentially imposes a duty on state courts to give a sister-state judgment the same effect that the issuing court would give it. *Thompson*, 484 U.S. at 180, 108 S. Ct. at 517 ("[T]he Full Faith and Credit Clause obliges States only to accord the same force to judgments as would be accorded by the courts of the State in which the judgment was entered."); *see also Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 525, 106 S. Ct. 768, 772, 88 L. Ed. 2d 877 (1986). Judgments thereby gain "nationwide force" for "claim and issue preclusion (res judicata) purposes." *Baker*, 522 U.S. at 233, 118 S. Ct. at 664. For this reason, a state satisfies its constitutional obligation of full faith and credit where it affords a sister-state judgment "the same credit, validity, and effect" in its own courts, "which it had in the state where it was pronounced." *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704, 102 S. Ct. 1357, 1365, 71 L. Ed. 2d 558 (1982) (quoting *Hampton*, 16 U.S. (3 Wheat.) at 235). The question, then, is whether this obligation gives rise to a right vindicable in a § 1983 action. We hold that it does not.

Appellees assert that plaintiffs may employ § 1983 against any state actor who violates one's "right" to full faith and credit, since § 1983 provides remedies for the violation of constitutional and statutory rights. Only one federal case, to be discussed later, appears to support this proposition. *See Finstuen v.*

Crutcher, 496 F.3d 1139 (10th Cir. 2007). Other federal courts, led by the Supreme Court, have uniformly defined the "right" as a right to court judgments that properly recognize sister-state judgments; they have confined the remedy to review by the Supreme Court; and they have held that lower federal courts lack jurisdiction to preemptively enforce full faith and credit claim.[2] All of these principles are inconsistent with stating a claim remediable by § 1983.

The Supreme Court has described the full faith and credit clause as imposing a constitutional "rule of decision" on state courts.[3] While the Court has at times referred to the clause in terms of individual "rights," it consistently identifies the violators of that right as state courts. *See, e.g., Barber v. Barber*, 323 U.S. 77, 81, 65 S. Ct. 137, 139, 89 L. Ed. 82 (1944)

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[2] Supreme Court precedent differentiates the credit owed to laws and the credit owed to judgments. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232, 118 S. Ct. 657, 663, 139 L. Ed. 2d 580 (1998). While the credit owed to laws implicates conflict-of-law rules, the duty with respect to judgments is simpler, in that subsequent courts must simply apply the issuing state's res judicata laws.

[3] *Thompson v. Thompson*, 484 U.S. 174, 182-83, 108 S. Ct. 513, 518, 98 L. Ed. 2d 512 (1988) ("[T]he Clause 'only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State other than that in which the court is sitting.'") (quoting *Minnesota v. N. Sec. Co.*, 194 U.S. 48, 72, 24 S. Ct. 598, 605, 48 L. Ed. 870 (1904)); 16 AM. JUR. 2D Constitutional Law § 587, at 992 (1964) (same).

("The refusal of the Tennessee Supreme Court to give credit to that judgment because of its nature is a ruling upon a federal right."); *Magnolia Petroleum Co.*, 320 U.S. at 443, 64 S. Ct. at 216 ("When a state court refuses credit to the judgment of a sister state . . . , an asserted federal right is denied."); *Titus v. Wallick*, 306 U.S. 282, 291, 59 S. Ct. 557, 562, 83 L. Ed. 653 (1939) (same); *Tilt v. Kelsey*, 207 U.S. 43, 50, 28 S. Ct. 1, 3, 52 L. Ed. 95 (1907) (full faith and credit right was "denied by the highest court of the state"); *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 641-42, 645, 20 S. Ct. 506, 507-08, 44 L. Ed. 619 (1900) (finding that the *supreme court of Rhode Island* denied plaintiff "a right given by § 1, article 4, of the Constitution").

The cases thus couple the individual right with the *duty of courts* and tether the right to res judicata principles. This explains the usual posture of full faith and credit cases: the issue arises in the context of pending litigation—not as a claim brought against a party failing to afford full faith and credit to a state judgment, but as a basis to challenge the forum court's decision. Such cases begin in state court, and the Supreme Court intervenes only after the state court denies the validity of a sister state's law or judgment.[4] *See Allen v. Alleghany Co.*, 196 U.S. 458,

[4] In cases arising under federal diversity jurisdiction, full faith and credit issues may arise because federal district courts are governed by the full faith and credit statute. *See Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 56 S. Ct. 229, 80 L .Ed. 220 (1935); *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151 (5th Cir. 1974).

464-65, 25 S. Ct. 311, 313, 49 L. Ed. 551 (1905); *Johnson v. N.Y. Life Ins. Co.*, 187 U.S. 491, 495, 23 S. Ct. 194, 195, 47 L. Ed. 273 (1903) (noting that the litigant could not claim her full faith and credit "right" had been denied "until the trial took place"); *Chicago & A.R. Co. v. Wiggins Ferry Co.*, 108 U.S. 18, 23-24, 1 S. Ct. 614, 616, 27 L. Ed. 636 (1883) (no federal question arises until a state court fails to give full faith and credit to the law of a sister state).[5] Consequently, since the duty of affording full faith and credit to a judgment falls on courts, it is incoherent to speak of vindicating full faith and credit rights against non-judicial state actors.[6]

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[5] *See also* 16B AM. JUR. 2D *Constitutional Law* § 1030, at 998-99 (1964) ("In order to create a reviewable federal question under the constitutional provision as to full faith and credit," plaintiff must show that "the validity of the laws of another state is drawn into question *by the courts*.") (emphasis added).

[6] One might argue that this interpretation of the clause is curious given that the Constitution addresses itself to "each state," not to "each state's courts." Not only is this interpretation most consistent with the Supreme Court's long-standing precedent, however, but a contrary interpretation would create a serious anomaly of its own. The Supreme Court has explicitly held that if a *court* fails to afford full faith and credit to a judgment, the appropriate path for redress is Supreme Court review. *See Thompson*, 484 U.S. 174, 108 S. Ct. 513. If § 1983 provided a remedy for full faith and credit violations by state *executive officials*, litigants in such actions would have a considerable advantage over litigants who pursue recognition of out-of-state judgments through state courts. Whereas the former would have immediate federal court redress through § 1983, the latter would depend on Supreme Court review alone.

Fifth Circuit law confirms this point. *See White v. Thomas*, 660 F.2d 680, 685 (5th Cir. 1981). In *White*, this court dismissed a § 1983 claim brought against a Texas sheriff who fired the plaintiff for allegedly lying on his employment application form by failing to disclose his involvement in a juvenile crime. *Id.* at 682. The plaintiff argued that because a California court had entered an order expunging his juvenile record, Texas state officials were obliged to treat his record as expunged. The court held that the sheriff could not have violated the full faith and credit clause because its function was "to avoid relitigation of the same issue in courts of another state." *Id.* at 685. The clause did not "require a Texas *sheriff* to obey California law." *Id.* (emphasis added).

In a similar case, the Seventh Circuit denied relief under § 1983 when a plaintiff sued Illinois state police for failing to give full faith and credit to a New York judgment. *Rosin v. Monken*, 599 F.3d 574, 576 (7th Cir. 2010). The court reasoned that because the "primary operational effect of the Clause's application" was "for claim and issue preclusion (res judicata) purposes," the clause did not oblige executive officials to execute the judgment in the manner prescribed by the out-of-state judgment itself. *Id.* (quoting *Baker*, 522 U.S. at 233, 118 S. Ct. at 664).

That the obligation to afford judgments full faith and credit falls on courts is implicit from the fact that rules of res judicata provide the standard for determining whether a judgment is entitled to full faith and credit in the first place. According to the Court, a judgment is not entitled to full faith and

credit unless the second court finds that the questions at issue in the first case "have been fully and fairly litigated and finally decided in the court which rendered the original judgment." *Durfee*, 375 U.S. at 111, 84 S. Ct. at 245. Further, a judgment issued by a court without jurisdiction over the subject matter, or personal jurisdiction over the relevant parties, is not entitled to full faith and credit. *Underwriters Nat'l Assurance Co.*, 455 U.S. at 705, 102 S. Ct. at 1366 ("[B]efore a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree. If that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given."); *W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75, 82 S. Ct. 199, 201, 7 L. Ed. 2d 139 (1961) ("[A] state court judgment need not be given full faith and credit by other States as to parties or property not subject to the jurisdiction of the court that rendered it."). The predicates triggering full faith and credit are determinable only by courts. State executive officials are unsuited and lack a structured process for conducting the legal inquiry necessary to discern whether a judgment is entitled to full faith and credit. Thus, it makes little sense to impose full faith and credit obligations on non-judicial officers who are not equipped for such a task.

Even if a broader individual right exists under the full faith and credit clause, the Court has expressly indicated that the only remedy available for violations of full faith and credit is review by the Supreme Court. *See Thompson*, 484 U.S. 174, 108 S. Ct. 513. In *Thompson*, the Court held that the

Parental Kidnaping Prevention Act (PKPA)—which imposed a full faith and credit duty on states to enforce child custody determinations entered by sister-state courts—did not give rise to an implied private cause of action. The Court reasoned that because Congress had explicitly declined to rely on federal courts to enforce full faith and credit rights, the only remedy for full faith and credit violations must lie in Supreme Court review of state court decisions. *Id.* at 185-87, 108 S. Ct. at 519-20.

In making this point, the Court distinguished between enforcement of the PKPA by federal courts and a "full faith and credit approach," which simply imposed a federal duty on states vis-à-vis sister-state decrees. *Id.* The Court held that the PKPA embodied the latter approach because Congress had expressed no intention of involving federal courts in the enforcement of full faith and credit obligations. Not only did the Court find no implied private remedy in the PKPA, but it found no *statutory* remedy at all: it is "highly unlikely" that "Congress would follow the pattern of the Full Faith and Credit Clause and section 1738 by structuring [the PKPA] as a command to state courts to give full faith and credit to the child custody decrees of other states, and yet, without comment, depart from the enforcement practice followed under the Clause and section 1738." *Id.* at 183, 108 S. Ct. at 518 (quoting *Thompson v. Thompson*, 798 F.2d 1547, 1556 (9th Cir. 1986)).

The Court implicitly acknowledged that without some federal cause of action, state courts could simply refuse to comply with PKPA's requirements. *Id.* at

187, 108 S. Ct. at 520. Rather than suggesting other statutes—like § 1983—could provide the remedy, the Court responded only that state courts could not completely refuse to enforce the PKPA because final review of state court decisions was available in the Supreme Court. *Id.* The Court affirmed the historic "presumption" that state courts will "faithfully administer the Full Faith and Credit Clause," *id.*, and "that the courts of the states will do what the constitution and the laws of the United States require," *Chicago & A.R. Co.*, 108 U.S. at 24, 1 S. Ct. at 616. Importantly, resort to federal courts cannot be effected "because of fear that [state courts] will not." *Id.*

Appellees downplay the significance of *Thompson*. They suggest that because that case did not involve a state actor refusing to accord full faith and credit to another state's judgment, but was a suit against a *private* individual, *Thompson* should not foreclose resort to § 1983 to remedy full faith and credit violations by state actors. In fact, the actual relief sought by the plaintiff in his suit was for the federal district court to require the "*state courts* " to comply "with the standards established by [the PKPA]." *Thompson*, 798 F.2d at 1552 (emphasis added). This procedural posture may have provoked the Supreme Court to explain in great detail that Congress never intended lower federal courts to play any role in the enforcement of full faith and credit obligations. *Thompson*, 484 U.S. at 183-84, 108 S. Ct. at 518. It seems highly unlikely that the Court, having rejected a federal court full faith and credit remedy under the PKPA, would mint a § 1983 remedy in other full faith

and credit cases. In fact, the Eleventh Circuit recently dismissed a § 1983 action alleging violations of the full faith and credit clause, the PKPA, and the Full Faith and Credit for Child Support Orders Act, citing *Thompson* for its holding. *Stewart v. Lastaiti*, No. 10-12571, 2010 WL 4244064 (11th Cir. Oct. 28, 2010). Consequently, the only remedy for a state's refusal to discharge its obligations under the clause remains an appeal to the Supreme Court.

Only one federal court decision has permitted a full faith and credit claim to be brought in federal court pursuant to § 1983. *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007). In *Finstuen*, a couple sued to invalidate an Oklahoma statute that officially denied recognition to out-of-state adoptions by same-sex couples. The Tenth Circuit not only granted relief under § 1983, but also ordered a new birth certificate to be issued bearing the names of the same-sex parents. 496 F.3d at 1156. The bulk of the opinion is devoted to analysis of the allegedly unconstitutional state non-recognition statute, a problem different from the one here. Moreover, the court did not discuss, nor does it appear to have been argued, that (1) the clause has hitherto been enforced only as to court decisions denying recognition of out-of-state judgments, and (2) Supreme Court authority, cited below, denies federal question jurisdiction to full faith and credit claims.

Finstuen however, acknowledges the principle that "[e]nforcement measures do not travel with the sister state judgment" for full faith and credit purposes, and it characterizes the birth certificate

sought by the plaintiffs as an "enforcement mechanism". *See* 496 F.3d at 1154. In the end, *Finstuen* is distinguishable not only because the Registrar here concedes the validity of Infant J's adoption but because Louisiana law, unlike Oklahoma law, does not require issuing birth certificates to two unmarried individuals. The "enforcement measure"—issuance of a revised birth certificate—is thus critically different in the two states.

2. The Appellees' request for a birth certificate is appropriately brought in state court.

That the clause affords a rule of decision in state courts is reinforced by the cases that hold reliance on the clause alone insufficient to invoke federal question jurisdiction. 13D Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Richard D. Freer, *Federal Practice And Procedure* § 3563, at 214 (3d ed. 2008); *Minnesota v. N. Sec. Co.*, 194 U.S. 48, 72, 24 S. Ct. 598, 605, 48 L. Ed. 870 (1904) ("[T]o invoke the rule which [the Full Faith and Credit Clause] prescribes does not make a case arising under the Constitution or laws of the United States."); *Anglo–Am. Provision Co. v. Davis Provision Co.*, 191 U.S. 373, 374, 24 S. Ct. 92, 92-93, 48 L. Ed. 225 (1903) (the full faith and credit clause "establishes a rule of evidence rather than of jurisdiction"); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 291-92, 8 S. Ct. 1370, 1375, 32 L. Ed. 239 (1888). Although the full faith and credit clause is part of the Constitution within the meaning of 28 U.S.C. § 1331, "there is no jurisdiction because the relation of the constitutional

provision and the claim is not sufficiently direct that the case 'arises under' the clause." 13D Wright & Miller § 3563, at 214. Absent an independent source of jurisdiction over such claims, federal district courts may not hear such cases. *See, e.g.*, *Chicago & A.R. Co.*, 108 U.S. at 22, 1 S. Ct. at 615.[7] Thus, the Fifth Circuit has stated that "a fight over the enforcement of a state court judgment is not automatically entitled to a federal arena." *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151, 153 n.1 (5th Cir. 1974).

To enforce the clause, Appellees might have sought to compel the issuance of a new birth certificate in

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[7] *See* Erwin Chemerinsky, *Federal Jurisdiction* § 5.2.1, at 275 (5th ed. 2007) ("Jurisdiction for claims under the Constitution of the United States has been held to include all constitutional provisions except the full faith and credit clause of Article IV, § 1 . . . . The full faith and credit clause does not independently justify federal court jurisdiction every time a person seeks to compel a state to respect the judgment of another state's courts."); Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 Vand. L. Rev. 1667, 1706-07 (2008) (jurisdictional dismissal for failing to assert a colorable constitutional claim is appropriate for cases brought under the full faith and credit clause "because the Clause does not create substantive rights but rather provides a rule of decision (*i.e.*, a procedural rule) for state and federal courts"); Joan M. Krauskopf, *Remedies for Parental Kidnapping in Federal Court: A Comment Applying the Parental Kidnapping Prevention Act in Support of Judge Edwards*, 45 Ohio St. L.J. 429, 441 n.70 (1984) ("The full faith and credit clause (and presumably statutes enacted to implement it) prescribes a rule by which to determine what faith and credit to give judgments and public acts, and it does not create a basis for federal court jurisdiction.").

Louisiana courts,[8] for full faith and credit doctrine does not contemplate requiring an executive officer to "execute" a foreign judgment without the intermediary of a state court. *Riley v. N.Y. Trust Co.*, 315 U.S. 343, 349, 62 S. Ct. 608, 612, 86 L. Ed. 885 (1942); *McElmoyle ex rel. Bailey v. Cohen*, 38 U.S. (13 Pet.) 312, 325, 10 L. Ed. 177 (1839) ("[T]he judgment is . . . not examinable upon its merits; but it does not carry with it, into another state, the efficacy of a judgment upon property or persons, to be enforced by execution."). The Appellees concede in their brief that "most frequently judgments are enforced through further judicial proceedings, as reflected by the great body of full faith and credit jurisprudence." As the Supreme Court once indicated, to give one state's judgment "the force of a judgment in another state, *it must be made a judgment there*, and can only be executed in the latter as its laws may permit." *Lynde v. Lynde*, 181 U.S. 183, 187, 21 S. Ct. 555, 556, 45 L. Ed. 810 (1901) (emphasis added) (quoting *McElmoyle*, 38 U.S. (13 Pet.) at 325); *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457, 462-63, 21 L. Ed. 897 (1873) ("No execution can issue upon such judgments without a

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[8] For example, Louisiana law provides that "[a] writ of mandamus may be issued in all cases where the law provides no relief by ordinary means." La. Code Civ. Proc. Ann. art. 3862. In particular, "[a] writ of mandamus may be directed to a public officer to compel the performance of a ministerial duty required by law." *Id.* art. 3863; *see also State ex rel. Neighborhood Action Comm. v. Edwards*, 652 So. 2d 698, 699-700 (La. Ct. App. 1995). Were there no state remedy with respect to a full faith and credit violation, the Supreme Court may remand for a state court to supply one. *See Broderick v. Rosner*, 294 U.S. 629, 55 S. Ct. 589, 79 L. Ed. 1100 (1935).

new suit in the tribunals of other States.") (quoting J. Story, *Conflict Of Laws* § 609 (7th ed. 1872)); *Baker*, 522 U.S. at 241, 118 S. Ct. at 668 (Scalia, J., concurring) (same). After Appellees' case has been submitted to the state courts, the full faith and credit clause may provide the federal question to support Supreme Court review. *See Ford v. Ford*, 371 U.S. 187, 83 S. Ct. 273, 9 L. Ed. 2d 240 (1962) (reviewing South Carolina Supreme Court decision which rested upon its reading of the full faith and credit clause). This course of action coincides with that described by the Supreme Court in *Thompson*.

3. Alternatively, full faith and credit does not extend to enforcing the New York adoption decree.

Even if we assume, contrary to all the above-cited cases, that § 1983 provides a remedy against non-judicial actors for violations of the full faith and credit clause, the Appellees still cannot prevail because the Registrar has not denied recognition to the New York adoption decree.

Supreme Court precedent differentiates the credit owed to laws and the credit owed to judgments. *Baker*, 522 U.S. at 232, 118 S. Ct. at 663. With regard to judgments, the Court has described the full faith and credit obligation as "exacting." *Id.* at 233, 118 S. Ct. at 663. The states' duty to "recognize" sister state judgments, however, does not compel states to "adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments." *Id.* at 235, 118 S. Ct. at 665. Rather, enforcement of judgments is "subject to the evenhanded control of

forum law." *Id.* "Evenhanded" means only that the state executes a sister state judgment in the same way that it would execute judgments in the forum court.

In this case, the Registrar has not refused to recognize the *validity* of the New York adoption decree. The Registrar concedes that the parental relationship of Adar and Smith with Infant J cannot be revisited in its courts. That question is not at issue. The Registrar in fact offered to comply with Louisiana law and reissue a birth certificate showing one of the unmarried adults as the adoptive parent. The Registrar acknowledged that even though she would not issue the requested birth certificate with both names, the Registrar recognizes Appellees as the legal parents of their adopted child. And the Appellees apparently agree, admitting that birth certificates are merely "identity documents that *evidence* . . . the existing parent-child relationships, but do not create them." Appellees affirm that "the child at the center of this case" is already "legally adopted—and nothing that happens in this case will change that." In sum, no right created by the New York adoption order (*i.e.*, right to custody, parental control, etc.) has been frustrated, as nothing in the order entitles Appellees to a particular type of birth certificate.

Appellees nevertheless assert that the full faith and credit clause entitles them to a revised birth certificate with both of their names. The Supreme Court has not expressly ruled on this claim, but the Court has never "require [d] the enforcement of every

right which has ripened into a judgment of another state or has been conferred by its statutes." *Broderick v. Rosner*, 294 U.S. 629, 642, 55 S. Ct. 589, 592, 79 L. Ed. 1100 (1935). Importantly, in *Estin v. Estin*, the Supreme Court held that a divorce decree entered in Nevada effected a change in the couple's marital status in every other state, but the fact "that marital capacity was changed does not mean that every other legal incidence of the marriage was necessarily affected." 334 U.S. 541, 544-45, 68 S. Ct. 1213, 1216, 92 L. Ed. 1561 (1948). The Court then enforced a New York alimony decree notwithstanding the Nevada divorce. Forum state law thus determines what incidental property rights flow from a validly recognized judgment. And it has long been recognized that while one state may bind parties with a judicial decree concerning real property in another state, that decree will not suffice to transfer title in the other state. *Fall v. Eastin*, 215 U.S. 1, 30 S. Ct. 3, 54 L. Ed. 65 (1909).

These principles applied in *Hood v. McGehee*, where children adopted in Louisiana brought a quiet title action concerning land in Alabama against their adoptive father's natural children. 237 U.S. 611, 35 S. Ct. 718, 59 L. Ed. 1144 (1915). But Alabama's inheritance law excluded children adopted in sister states. *Id.* at 615, 35 S. Ct. at 719. The adopted children argued that the Alabama inheritance statute violated the full faith and credit clause. The Supreme Court disagreed, holding that there was "no failure to give full credit to the adoption of the plaintiffs, in a provision denying them the right to inherit land in another state." *Id.* Justice Holmes wrote that

Alabama "does not deny the effective operation of the Louisiana [adoption] proceedings" but only says that "whatever may be the status of the plaintiffs, whatever their relation to the deceased . . . the law does not devolve his estate upon them." *Id.*

Just as the Court in *Hood* did not find full faith and credit denied by Alabama's refusing certain rights to out-of-state adoptions, so here full faith and credit is not denied by Louisiana's circumscribing the kind of birth certificate available to unmarried adoptive parents. "The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.' "*Sun Oil Co. v. Wortman*, 486 U.S. 717, 722, 108 S. Ct. 2117, 2122, 100 L. Ed. 2d 743 (1988) (quoting *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501, 59 S. Ct. 629, 632, 83 L. Ed. 940 (1939)). Hood recognized that "Alabama is sole mistress of the devolution of Alabama land by descent." *Hood*, 237 U.S. at 615, 35 S. Ct. at 719. Louisiana can be described as the "sole mistress" of revised birth certificates that are part of its vital statistics records. Louisiana has every right to channel and direct the rights created by foreign judgments. *See, e.g.*, *Watkins v. Conway*, 385 U.S. 188, 87 S. Ct. 357, 17 L. Ed. 2d 286 (1966) (holding that Georgia's five-year statute of limitations for suits on out-of-state judgments does not deny full faith and credit). Obtaining a birth certificate falls in the heartland of enforcement, and therefore outside the full faith and credit obligation of recognition.

The Court continues to maintain a stark distinction between recognition and enforcement of judgments under the full faith and credit clause, as *Baker v. General Motors Corp.* confirms. 522 U.S. 222, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998). The Court held that a Michigan injunction barring a former General Motors employee from testifying against GM could not control proceedings against GM brought in other States. *Id.* at 238, 118 S. Ct. at 666. That the order was "claim preclusive between [the former employee] and GM" in Michigan did not prevent the employee from testifying if permitted by Missouri courts. *Id.* at 237-38, 118 S. Ct. at 666. According to the Supreme Court, "Michigan has no authority to shield a witness from another jurisdiction's subpoena power in a case involving persons and causes outside Michigan's governance." *Id.* at 240, 118 S. Ct. at 667. This is because "the mechanisms for enforcing a judgment do not travel with the judgment itself for purposes of full faith and credit." *Id.* at 239, 118 S. Ct. at 667.

Similarly, the New York adoption decree cannot compel within Louisiana "an official act within the exclusive province" of that state. *Id.* at 235, 118 S. Ct. at 665. The full faith and credit clause emphatically "did not make the judgments of other States domestic judgments to all intents and purposes." *Whitman*, 85 U.S. (18 Wall.) at 462-63 (quoting J. Story, *Conflict Of Laws* § 609 (7th ed. 1872)). Rather, the adoption decree "can only be executed in [Louisiana] as its laws may permit." *Fall*, 215 U.S. at 12, 30 S. Ct. at 8 (quoting *McElmoyle*, 38 U.S. (13 Pet.) at 325).

The Seventh Circuit case of *Rosin v. Monken* is both instructive and current. 599 F.3d 574 (7th Cir. 2010). In *Rosin*, a sex offender entered into a plea bargain in New York under which he would not have to register as a sex offender. *Id.* at 575. The plea bargain was reduced to judgment by a New York state court. When he moved to Illinois, however, he was forced to register as a sex offender. He sued officials in the Illinois state police department under § 1983, claiming they had failed to give full faith and credit to the New York order by requiring him to register as a sex offender. *Id.* The district court denied relief, and the Seventh Circuit affirmed. The court reasoned that even if the New York order had explicitly stated that plaintiff need not register in New York or any other state, Illinois's recognition of the New York order would not oblige the state to enforce that order in the prescribed manner. *Id.* at 576. According to the court, "Illinois need not dispense with its preferred mechanism for protecting its citizenry by virtue merely of a foreign judgment that envisioned less restrictive requirements being imposed on the relevant sex offender." *Id.* at 577. "The Full Faith and Credit Clause was enacted to preclude the same matters' being relitigated in different states as recalcitrant parties evade unfavorable judgments by moving elsewhere. It was never intended to allow one state to dictate the manner in which another state protects its populace." *Id.*

Similarly, the full faith and credit clause does not oblige Louisiana to confer particular benefits on unmarried adoptive parents contrary to its law. Forum state law governs the incidental benefits of a

foreign judgment. In this case, Louisiana does not permit any unmarried couples—whether adopting out-of-state or in-state-to obtain revised birth certificates with both parents' names on them. *See* La. Rev. Stat. Ann. § 40:76; La. Child. Code Ann. arts. 1198, 1221. Since no such right is conferred by either the full faith and credit clause or Louisiana law, the Registrar's refusal to place two names on the certificate can in no way constitute a denial of full faith and credit. As in *Rosin* where Illinois had the right to force the sex offender to register even if the New York judgment provided to the contrary, Louisiana has a right to issue birth certificates in the manner it deems fit. Louisiana is competent to legislate in the area of family relations, and the manner in which it *enforces* out-of-state adoptions does not deny them full faith and credit.[9]

II. EQUAL PROTECTION

Appellees' alternative § 1983 theory contends that denying a revised birth certificate to children of unmarried couples violates the equal protection

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[9] Appellees rely on the broad purposes of § 1983 to bolster their claim. In *Dennis v. Higgins*, 498 U.S. 439, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991), the Court held that violations of the commerce clause may be redressed by § 1983. *Dennis*, unlike the instant case, rested on a long line of authorities that conferred an individual "right" of persons engaged in interstate commerce to sue in federal court. Full faith and credit clause jurisprudence has followed an entirely different enforcement path. Further, even if § 1983 provided an arguable remedy, the Appellees' *right* to recognition of their out-of-state adoption decree has not been abridged, only the enforcement in terms of a revised birth certificate.

clause. Without doubt, Appellees have standing to pursue this claim under § 1983. Appellees do not appear to argue that unmarried couples are a suspect class, or that the Louisiana law discriminates based on sex. Their theory appears to be that Louisiana treats a subset of children—adoptive children of unmarried parents—differently from adoptive children with married parents, and this differential treatment does not serve any legitimate governmental interest. This theory is unavailing in the face of the state's rational preference for stable adoptive families, and the state's decision to have its birth certificate requirements flow from its domestic adoption law. To invalidate the latter would cast grave doubt on the former.

Appellees have not explained why adoptive children of unmarried parents is a suspect classification. While Appellees rely heavily upon the *Levy v. Louisiana*[10] line of cases to support the inference that heightened scrutiny is nonetheless required here, the classification described in those cases relates to illegitimacy. *See, e.g.*, *Pickett v. Brown*, 462 U.S. 1, 8, 103 S. Ct. 2199, 2204, 76 L. Ed. 2d 372 (1983); *Trimble v. Gordon*, 430 U.S. 762, 767, 97 S. Ct. 1459, 1463, 52 L. Ed. 2d 31 (1977). Since Infant J's birth status is irrelevant to the Registrar's decision, these cases cannot support the conclusion that Infant J belongs to a suspect class protected by

[10] 391 U.S. 68, 88 S. Ct. 1509, 20 L. Ed. 2d 436 (1968).

heightened scrutiny.[11] And, since adoption is not a fundamental right,[12] the Louisiana law will be upheld if it is rationally related to a legitimate state interest. *Romer v. Evans*, 517 U.S. 620, 631, 116 S. Ct. 1620, 1627, 134 L. Ed. 2d 855 (1996).

Louisiana has "a legitimate interest in encouraging a stable and nurturing environment for the education and socialization of its adopted children." *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004). Since such an end is legitimate, the only question is the means. In this case, Louisiana may rationally conclude that having parenthood focused on a married couple or single individual—not on the freely severable relationship of unmarried partners—furthers the interests of adopted children. In fact, research institution Child Trends released a report underscoring the importance of stable family structures for the well-being of children.[13] In

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[11] Importantly, even if the classification at issue were based on illegitimacy, illegitimacy is not a suspect classification and thus not subject to the Supreme Court's most "exacting scrutiny." *Pickett*, 462 U.S. at 8, 103 S. Ct. at 2204; *Trimble*, 430 U.S. at 767, 97 S. Ct. at 1463.

[12] *See, e.g.*, *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 811 (11th Cir. 2004); *Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989) (concluding "that there is no fundamental right to adopt"). Nor do Appellees attempt to argue that fundamental rights are implicated in this case.

[13] Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, *Child Trends Research Brief*, at 6

particular, the report noted that marriage, when compared to cohabitation, "is associated with better outcomes for children," since marriage is more likely to provide the stability necessary for the healthy development of children.[14] This fact alone provides a rational basis for Louisiana's adoption regime and corresponding vital statistics registry. Moreover, since the law here attempts neither to encourage marriage nor to discourage behavior deemed immoral (unlike laws invalidated by Levy), but rather to ensure stable environments for adopted children, the court has sufficient basis to hold that the Louisiana law does not run afoul of the equal protection clause. Consequently, Appellees' claim fails on the merits.

CONCLUSION

For the foregoing reasons, the judgment of the district court is reversed and remanded for entry of judgment of dismissal.

(2002), *available at http*:// www. childtrends. org/ files/ Marriage RB 602. pdf.

[14] *Id.* at 2. The report explains that "cohabiting unions are generally more fragile than marriage." As a result, such children are more likely to "experience instability in their living arrangements," which "can undermine children's development." *Id.*

REAVLEY, Circuit Judge, concurring:

I concur in the court's opinion by Chief Judge Jones but respond briefly to the disappointing dissent. My dissenting colleagues go beyond our due to fault the Louisiana official for her construction of the Louisiana statute. And then they claim the court here conflicts with the Tenth Circuit's decision[1] where Oklahoma had prohibited its courts and agencies from any recognition of foreign adoptions by same-sex couples. Whatever the correctness of that opinion may be, it is not the case on appeal where the forum state has not refused to recognize the foreign adoption. As the dissent acknowledges, the only contest here is whether plaintiffs may require the Registrar to put both of their names on an amended birth certificate.

But the disturbing theme of the dissent is that the "Full Faith and Credit Clause creates a federal right that is actionable against state actors via 42 U.S.C. § 1983." That ignores all of the authority to the contrary as the majority opinion shows. Remember that the Supreme Court said in *Thompson v. Thompson*, that the "Full Faith and Credit clause, in either its constitutional or statutory incarnations, does not give rise to an implied federal cause of action."[2] The Court supports that statement by citing

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[1] *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2009).

[2] *Thompson v. Thompson*, 484 U.S. 174, 182, 108 S. Ct. 513, 518, 98 L. Ed. 2d 512 (1988).

Minnesota v. Northern Securities[3] and Wright and Miller who wrote that it had long been understood that a judgment in another state does not present federal question jurisdiction simply because the plaintiff alleges that full faith and credit must constitutionally be given to the judgment.[4] As Justice Scalia said, concurring in *Baker v. General Motors*, the full faith and credit clause only gives general validity, faith and credit to foreign judgments as evidence.[5]

The dissent would isolate us from controlling precedent of many years.

LESLIE H. SOUTHWICK, Circuit Judge, specially concurring:

Because of my respect for my colleagues with different views, I open with the observation that we are in untraveled territory. There are divergent understandings being stated by these opinions. The sole purpose of each is to reach the correct destination as charted by the Constitution and the Supreme Court. The charts, though, are not well-marked. It is to be expected that different judges making diligent examinations will discern different courses.

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[3] *Minnesota v. Northern Securities*, 194 U.S. 48, 72, 24 S. Ct. 598, 605, 48 L. Ed. 870 (1904).

[4] 13D Wright, Miller & Cooper, *Federal Practice and Procedure* § 3563.

[5] *Baker v. General Motors*, 522 U.S. 222, 241, 118 S. Ct. 657, 668, 139 L. Ed. 2d 580 (1998).

In summary, I conclude that the dissent of Judge Wiener has validly analyzed some of the language in what is perhaps the most relevant decision, *Thompson v. Thompson*, 484 U.S. 174, 178-79, 108 S. Ct. 513, 98 L. Ed. 2d 512 (1988). Yet still I reach the same conclusion as does the majority as to the overall effect of that decision. I would not decide the other issues resolved in the majority opinion, namely, that the Defendant has in fact recognized the foreign adoption or that there is no violation of Equal Protection.

As to the Full Faith and Credit Clause, the majority has quite properly observed that considering Section 1983 to be a remedy for purported violations of this Clause is a new, if not quite brand-new, argument. The validity of the Tenth Circuit's opinion in a related case has been discussed in the other opinions. *See Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007). The Eleventh Circuit has also spoken. *See Stewart v. Lastaiti*, No. 10-12571, 2010 WL 4244064 (11th Cir. 2010) (unpublished). It held Section 1983 was not a vehicle for a claim under the Full Faith and Credit Clause, though its holding was stated softly in an unpublished opinion. *Id.* at *1-2.

The majority relies heavily on *Thompson*. That opinion certainly held "that the Full Faith and Credit Clause, in either its constitutional or statutory incarnations, does not give rise to an implied federal cause of action." *Thompson*, 484 U.S. at 182, 108 S. Ct. 513 (citations omitted). That strong statement does not clearly resolve our issue. By referring to a "cause of action," the Court might have been

concluding that strictly based on the specific statute there involved and on the Constitution itself, there was not both a personal right and a remedy for a violation. *See Larry W. Yackle*, Federal Courts 243-44 (3d ed.2009). The Court did not consider Section 1983. It is not clearly reasonable to conclude that Section 1983 was the unaddressed but ready escape from all the barriers thrown in front of the *Thompson* plaintiff. Still, I am trying to understand what the Supreme Court must be held to have concluded. The most we know from this language in *Thompson* is that neither the specific statute involved nor the Full Faith and Credit Clause itself provided both the right and the remedy.

The dissent may also have the better of it by noting that the Supreme Court has referred to the Full Faith and Credit Clause in terms of "rights." *See* Dissent *infra* at note 19 (Weiner, J., dissenting). That starts us down the road to considering that all that is needed is a vehicle such as Section 1983 by which to enforce the right.

I cannot continue down that road, and therefore part company with the dissent, because of the language in *Thompson* that immediately follows the statement about no implied cause of action. The Court gave a clear and quite limited explanation of the reach of the Full Faith and Credit Clause, namely, that it "'only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State other than

that in which the court is sitting.'" *Thompson*, 484 U.S. at 182-83, 108 S. Ct. 513 (quoting *Minn. v. N. Sec. Co.*, 194 U.S. 48, 72, 24 S. Ct. 598, 48 L. Ed. 870 (1904); *see* 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure § 3563*, at 50 (1984)).

Had this 1904 language not been pulled into *Thompson*, I might more readily consider that *Northern Securities* was an anachronism from a day before the rediscovery of Section 1983. Though what is now denominated as Section 1983 was adopted in 1871, it had almost from its inception lay dormant until given life in *Monroe v. Pape*, 365 U.S. 167, 183, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), *overruled in part by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 663, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); *See* Michael J. Gerhardt, The *Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. Cal. L. Rev. 539, 549 (1989).

Another reason to treat the old construction of Full Faith and Credit as outdated would have been the points Judge Wiener makes in his analysis of why the dormant Commerce Clause was found to create individual rights assertable in a Section 1983 action. *See Dennis v. Higgins*, 498 U.S. 439, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991). The majority analytically relegates *Dennis* to a footnote, concluding that the jurisprudential treatment of the dormant Commerce Clause and the Full Faith and Credit Clause are distinguishable, the former but not the latter often being written in terms of "rights." *See* Majority Opinion *supra* note 9.

The dissent's good arguments nonetheless fail in light of the adoption of the *Northern Securities* definition of this Clause in *Thompson*. Explaining the 1904 language away as a relic of a different era will not do. This is too recent and clear an explanation of the effect of the Full Faith and Credit Clause to be ignored. Nothing suggests the language was limited to the kind of case the Court was considering, namely, a suit between two private parties. The Supreme Court was explaining the work that the Full Faith and Credit Clause could be made to do—in *Thompson* and in all other cases.

Having decided that the Full Faith and Credit Clause does not create an individual right on which a Section 1983 suit may be based, I would not address whether the actions of the Louisiana State Registrar constituted a failure to recognize the New York adoption decree. The issue is not necessary to reach, and I would leave it for a case in which it is relevant.

Finally, as to the Equal Protection argument, the usual practice is not to consider an issue until it has first been addressed by the district court. *See F.D.I.C. v. Laguarta*, 939 F.2d 1231, 1240 (5th Cir. 1991). I would follow that practice here.

HAYNES, Circuit Judge, concurring and dissenting:

I concur in the court's judgment reversing and remanding the district court's judgment as to the claim based upon the full faith and credit clause; I further join in the reasoning of Sections I.A and I.B.1

and 2 of the majority opinion. However, I would not reach the alternative ground discussed in Section I.B.3 of that opinion. Without addressing the merits (or lack thereof) of the equal protection argument, I respectfully dissent from the decision to reach that question for the reasons stated in the first paragraph of Section II.B of the dissent.

WIENER, Circuit Judge, with whom BENAVIDES, CARL E. STEWART, DENNIS and PRADO, Circuit Judges, join, dissenting:

Convinced that we should affirm the district court by holding that the Full Faith and Credit Clause ("FF&C Clause") creates a *federal* right that is *actionable* against *state actors* via 42 U.S.C. § 1983, I respectfully dissent.

At the very core of the issue that I take with the en banc majority is my rejection out of hand of the linchpin of their assertion, *i.e.*, that the FF&C Clause imposes obligations solely on state *courts* and not on any other state *actors*. I reject that credo for three main reasons. First, this overly narrow interpretation of the FF&C Clause runs contrary to its plain text, which expressly binds "each State," not just "each State's courts." Second, to support its courts-only position, the en banc majority reads a holding into Supreme Court precedent that simply is not there: To date, the Court has *not addressed* one single FF&C Clause claim brought by a *private* party against a *state* actor under § 1983. Faced with that lacuna, the majority instead relies on cases that predate the states' modern practice of affording

out-of-state judgment holders non-judicial procedures to *register* their judgments. Third, the notion that a provision of the Constitution would direct the allocation of the states' internal functions defies basic principles of Federalism.

The FF&C Clause literally imposes a duty on "each State" and thereby creates correlative rights for which § 1983 provides a remedy to private parties against state actors. This conclusion accords with § 1983's broad remedial purpose, which the Supreme Court has repeatedly endorsed and applied expansively. It also comports with the Court's applicable precedent, which squarely holds that a constitutional provision creates a right that is actionable under § 1983 when (1) the provision imposes a mandatory obligation on the several states, (2) the right is concrete, specific, and judicially cognizable, and (3) the provision was intended to benefit the party bringing the action.[1] As I shall do my best to show, all three of these prerequisites are present in the instance of the FF&C Clause.

We should also hold that the Defendant–Appellant Darlene Smith, Louisiana's State Registrar and Director of the Office of Vital Records and Statistics (the "Registrar"), violated the rights guaranteed to Plaintiffs–Appellees Oren Adar and Mickey Smith ("Appellees") by the FF&C Clause when she refused to *recognize* their valid out-of-state adoption decree, which declares them to be "adoptive parents." Only

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[1] *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106, 110 S. Ct. 444, 107 L. Ed. 2d 420 (1989).

by judicial legerdemain, is the en banc majority able to conclude otherwise: it mislabels *recognition* of an out-of-state judgment, which the FF&C Clause unquestionably requires, as *enforcement* of such a judgment, the methodologies of which no one disputes should be determined by Louisiana law. Stated differently, it is certainly Louisiana's prerogative to determine the benefits to which out-of-state "adoptive parents" are entitled in Louisiana, but the FF&C Clause nevertheless mandates that (1) Louisiana "recognize" all valid out-of-state *status* judgments *and* (2) Louisiana evenhandedly confer to all such judgment-holders those benefits that Louisiana law does establish. Here, Louisiana law declares that *every* "adoptive parent" is entitled to have his or her name reflected on a corrected birth certificate. Yet, the Registrar un-evenhandedly refuses to issue such a certificate to Appellees for the sole reason that she will not "accept," viz., give full faith and credit to, their unquestionably valid out-of-state judgment. What else could this mean but that she refuses to *recognize* the out-of-state judgment that defines Appellees as "adoptive parents"?

I lament that, in its determination to sweep this high-profile and admittedly controversial case out the federal door (and, presumably, into state court), the en banc majority:

- Strips federal district and appellate courts of subject matter jurisdiction over violations of the FF&C Clause.
- Unduly cabins, if not emasculates, *Ex parte Young* and § 1983 by holding that the federal

courts may not enjoin a state's refusal to act in accordance with the mandate of the FF&C Clause.

- Creates a circuit split on the full faith and credit that must be afforded to valid, out-of-state adoption decrees by the adopted child's birth state, as well as the availability of a federal forum for deciding such claims.[2]
- Dismisses *sua sponte* the Appellees' very likely winning claims under the Equal Protection Clause without affording the district court, as the court of "first impression," the initial opportunity to hear the evidence, analyze the case, and adjudicate those claims, as historically required by the prudence and practice of this and other appellate courts.

I. FACTS & PROCEEDINGS

Inasmuch as the majority opinion does not reiterate the facts of this case or point elsewhere to any recitation of the facts, reference may be made to its factual and procedural posture as detailed in the panel opinion.[3] I here summarize only the key facts that merit emphasis.

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[2] *See Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007). *See also Rosin v. Monken*, 599 F.3d 574, 575 (7th Cir. 2010) (permitting a plaintiff to bring a § 1983 action asserting a claim under the FF&C Clause).

[3] *See Adar v. Smith*, 597 F.3d 697, 701-02 (5th Cir. 2010).

Appellees Adar and Smith are the parents and next friends of the third Plaintiff–Appellee, Infant J C A–S ("Infant J"), a five-year-old boy who was born in Shreveport, Louisiana and surrendered there for adoption. Appellees became Infant J's parents by adopting him in a proper New York court in accordance with the laws of that state. That court made the adoption final by issuing a valid order of adoption; neither the Appellant nor the en banc majority questions either the validity or finality of that decree. In those proceedings, Appellees also had Infant J's full name changed from the one that appeared on his original Louisiana birth certificate.

In conformity with the Louisiana "Record of Foreign Adoptions" statute, Appellees conveyed a duly authenticated copy of the New York order of adoption to the Registrar. Because Infant J was born in Louisiana, the Registrar is the sole custodian of his birth certificate.[4] Still following Louisiana's statute, Appellees requested that the Registrar issue Infant J

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[4] The Registrar remains so even though the family now lives in California and even though the adoption took place in New York. It is beyond me why a state would create the fuss that Louisiana has over this birth certificate when that state has so little, if any, interest in the child or the parents. I note that (1) neither Adar nor Smith was a citizen or resident of Louisiana when they began planning to adopt or when Infant J was born, (2) a final adoption was completed in New York, and (3) neither Adar nor Smith, or Infant J, lives or plans to live in Louisiana. It is not as though this were a so-called "evasion" case: Louisiana's law expressly permits out-of-state adoptions by providing for agency adoption and does not prohibit children from being taken out of state to be adopted by persons whom Louisiana would not allow to adopt in state.

a corrected birth certificate—one that accurately lists them as Infant J's parents and records his true name. Adoptive parents, both in state and out, commonly request an updated birth certificate following adoptions,[5] and Louisiana law directs the Registrar to perform this service for out-of-state adoptive parents when presented with a valid out-of-state adoption decree.[6]

In officially rejecting Appellees' request to correct Infant J's birth certificate, the Registrar stated, "We are not able to accept the New York adoption judgment to create a new birth record for J." She did so on the rationale that Louisiana law allows only single individuals and married couples (1) *to adopt* (2) *in Louisiana*, and that this rule should control who may be listed as the parents of an adopted child on his Louisiana birth certificate, irrespective of his state of adoption. This, even though, by its *express* terms, Louisiana *adoption* law governs only who may adopt in a *Louisiana* adoption proceeding; it does not address birth certificates at all. (Ironically, the Registrar eventually offered to settle this case by putting the name of either Adar *or* Smith, but not both, on a revised birth certificate for Infant J, despite the fact that the New York adoption decree lists both Adar *and* Smith as Infant J's lawful parents. I have

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[5] Adar and Smith are, after all, the only legal parents Infant J has—not even the Registrar now contests that point. Neither does she contest that a birth certificate is a thing of value. It is often required to do things as varied as enroll in school, request a passport, or obtain a marriage license or a driver's license.

[6] *Adar*, 597 F.3d at 713-19.

searched the Constitution in vain for a "Half Faith and Credit Clause.")

Appellees sued the Registrar in district court. Their complaint makes two claims, both under § 1983. The first claim is grounded in the FF&C Clause and asserts that the Registrar's categorical rejection of out-of-state adoption decrees held by unmarried couples violates that Clause. The second claim is grounded in the Equal Protection Clause and has two facets: (1) the Registrar's refusal violates that Clause by impermissibly classifying Appellees based on their sexual orientation and marital status; and (2) the Registrar's refusal violates that Clause by burdening Infant J with an impermissible legitimacy classification and the state's disapprobation of his parents.

Adar and Smith moved for summary judgment on both claims. The Registrar filed an opposition but did not file any cross-motions for summary judgment. The district court granted Adar and Smith's summary judgment motion based solely on their FF&C Clause claim. Significantly, that court never reached their claims brought under the Equal Protection Clause.

The Registrar appealed, and a panel of this court unanimously affirmed. The Registrar then petitioned for rehearing en banc, which brings us to today.

II. ANALYSIS

A. The Full Faith and Credit Clause Claim

To begin with, the en banc majority would trivialize Appellees' claim by mischaracterizing it as a quid pro quo: Appellees are *entitled* to a Louisiana

birth certificate *because* they obtained a New York adoption decree.[7] But this just is not Appellees' claim. Rather, Appellees assert that the Registrar has acted unconstitutionally by refusing to "accept" their New York adoption decree as an out-of-state "final decree of adoption" as that term is employed in Louisiana's *birth certificate* law (*not* for purposes of its *adoption* laws), which nowhere distinguishes on the basis of the marital status of the adoptive parents. The "recognition" that Appellees request is not the act of "issuing a revised birth certificate," as the en banc majority misleadingly asserts.[8] Instead, Appellees request that the Registrar afford full faith and credit to their valid New York adoption decree by accepting it for purposes of Louisiana's nondiscriminatory birth certificate law—as she does to other *out-of-state* final decrees of adoption.

The en banc majority ultimately misreads (or mislabels) both the text of the FF&C Clause and Supreme Court precedent in its determination to hold that (1) the FF&C Clause is *only* "a rule of decision" for state courts,[9] and, (2) alternatively, the Registrar "has not denied *recognition*" to Appellees' New York

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[7] *See* En Banc Majority Opinion at 151 ("Infant J was adopted in a court proceeding in New York state, as evidenced by a judicial decree. Appellees contend that [the FF&C Clause] oblige[s] the Registrar to 'recognize' their adoption of Infant J by issuing a revised birth certificate.").

[8] *Id.*

[9] *Id.* at 151, 157.

adoption decree.[10] When read in proper context, however, both assertions are wholly unsupported by the *substance* of the passages that the majority quotes. I remain convinced that (1) the FF&C Clause *does* create a *federal* right; (2) § 1983 does provide the appropriate federal remedy by which such a right may be vindicated against *state* actors—not just state judicial officers but executive and legislative officers as well; and (3) Appellees have brought a meritorious § 1983 action against the Registrar for violating their rights under the FF&C Clause.

1. The Full Faith and Credit Clause imposes an obligation on "each State" to afford res judicata effect to judgments of other states.

The en banc majority's first misstep is to read words into the FF&C Clause that simply are not there. The FF&C Clause states:

Full Faith and Credit shall be given *in each State* to the public Acts, Records, and *judicial Proceedings of every other State*.[11]

Again, the FF&C Clause says "in each State," not "by the Courts of each State." Nowhere in the text of the FF&C Clause does the Constitution say that this Clause *only* "guides rulings in courts" in its "orchestration of inter-*court* comity," as—out of thin air—the en banc majority claims.[12] By its terms, the

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[10] *See id.* at 158 (emphasis in original).

[11] U.S. Const. art. IV, § 1 (emphases added).

[12] En Banc Majority Opinion at 151-52 (emphasis added).

FF&C Clause addresses itself to the states *qua* states. When the drafters of the Constitution intended for a particular provision to bind only the courts of the states, they knew how to say so, as the text of the Supremacy Clause makes clear.[13] It is a foundational principle of constitutional interpretation that clauses of the Constitution that are worded differently are presumed to carry different meanings.[14] The en banc majority ignores this principle when it assigns the "each State" language of the FF&C Clause the same meaning as the "Judges in every State" language of the Supremacy Clause.[15]

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[13] *See* U.S. Const. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." (emphasis added)).

[14] *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 334, 4 L. Ed. 97 (1816) (Story, J.) ("From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason . . . ."). *See also McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 414-15, 4 L. Ed. 579 (1819) (Marshall, C.J.) (concluding that "[i]t is impossible, we think, to compare" the Necessary and Proper Clause's use of the word "necessary" with the Import–Export Clause's use of the phrase "absolutely necessary . . . without feeling a conviction, that the convention understood itself to change materially the meaning of the word 'necessary,' by prefixing the word 'absolutely' " (emphasis in original)).

[15] Additionally, in the political-question context, it has long been settled that a clause of the Constitution addresses itself to a single branch of government, to the exclusion of all others, only when the clause evinces a "textually demonstrable commitment" to that branch. *Nixon v. United States*, 506 U.S. 224, 228-29, 113

Finding absolutely no support for its position in the text of the FF&C Clause, the en banc majority next turns to case law in search of affirmation that the FF&C Clause binds only state *courts* (and not other state actors). The en banc majority's second misstep, then, is its twisting of Supreme Court precedent—*Thompson v. Thompson*[16] and its progeny—which holds only that there is no *implied* cause of action directly under the FF&C Clause. In no way, however, does this precedent persuade that the FF&C Clause does not create a private federal right that can be asserted via § 1983 against all state actors as distinct from private actors. The en banc majority errs, therefore, in cherry-picking passages of *Thompson* out of context and applying them here, failing all the while to acknowledge *Thompson's* naturally limited holding as *a suit between two private parties*, and not, as here, a *private* party against a *state* actor.

On a superficial level, *Thompson* is ambiguous as to whether it holds, on the one hand, that the FF&C Clause, as implemented by the Parental Kidnaping Prevention Act, does not create a federal *right*;[17] or, on

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S. Ct. 732, 122 L. Ed. 2d 1 (1993) (citing *Powell v. McCormack*, 395 U.S. 486, 519, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969); *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)).

[16] 484 U.S. 174, 187, 108 S. Ct. 513, 98 L. Ed. 2d 512 (1988).

[17] *See id.* at 183, 108 S. Ct. 513 ("Unlike statutes that explicitly confer a right on a specified class of persons, the PKPA is a mandate directed to state courts to respect the custody decrees of sister States." (citations omitted)).

the other hand, that Congress did not intend to create a private *remedy* to enforce the rights created by the FF&C Clause.[18] But, if we were to read *Thompson* and its progeny as holding that the FF&C Clause does not create a federal right, then *Thompson* cannot be reconciled with the cases in which the Supreme Court has heard appeals from state courts of last resort on FF&C Clause issues.[19] By contrast, if we read

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[18] *See id.* at 179, 108 S. Ct. 513 (" '[T]he legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question.' " (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979))); *id.* ("In this case, the essential predicate for implication of a private remedy plainly does not exist."); *id.* at 180, 108 S. Ct. 513 ("[T]he context, language, and legislative history of the PKPA all point sharply away from the remedy petitioner urges us to infer."); *id.* at 187, 108 S. Ct. 513 (stating in conclusion that "we 'will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.' " (quoting *California v. Sierra Club*, 451 U.S. 287, 297, 101 S. Ct. 1775, 68 L. Ed. 2d 101 (1981))).

[19] *See, e.g.*, *Manhattan Life Ins. Co. of N.Y. v. Cohen*, 234 U.S. 123, 134, 34 S. Ct. 874, 58 L. Ed. 1245 (1914) (conceding that the Supreme Court would have jurisdiction to review a case in which "the record [left] no doubt that rights under the full faith and credit clause were essentially involved and were necessarily passed upon"); *Rogers v. Alabama*, 192 U.S. 226, 230-31, 24 S. Ct. 257, 48 L. Ed. 417 (1904) ("[T]he exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights . . . . [T]here can be no doubt that if full faith and credit were denied to a judgment rendered in another state upon a suggestion of want of jurisdiction, without evidence to warrant the finding, this court would enforce the constitutional requirement." (citation omitted)); *German Sav. & Loan Soc'y v. Dormitzer*, 192 U.S. 125, 126-27, 24 S. Ct. 221, 48 L. Ed. 373

Thompson as holding only that the FF&C Clause does not create a private remedy, then it can coexist without tension alongside the Supreme Court's practice of adjudicating FF&C Clause appeals. For that reason, *Thompson* is properly read as holding only that there is no private remedy against *private parties* for violations of the FF&C Clause. That reading is licit because in *Thompson* (as well as in every other case cited by the en banc majority for the proposition that the FF&C Clause only affords a rule of decision in state courts[20]), *the defendant was a private citizen*, not a state official![21] This is the

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(1904) (explaining that in a case addressing whether "full faith and credit [had] been given to a decree of divorce," the state supreme court's opinion "deal[t] expressly with the constitutional rights of the [private party], and the [private party] seems to have insisted on those rights as soon as the divorce was attacked"); *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 641-45, 20 S. Ct. 506, 44 L. Ed. 619 (1900) (reversing a decision of the Rhode Island Supreme Court on the ground that it denied the plaintiff "a right given by § 1, article 4, of the Constitution of the United States"); *Estin v. Estin*, 334 U.S. 541, 550, 68 S. Ct. 1213, 92 L. Ed. 1561 (1948) (Frankfurter, J., dissenting) (noting the existence of "a federal right, given by the Full Faith and Credit Clause").

[20] *See* En Banc Majority Opinion at 157.

[21] *See, e.g.*, *Thompson*, 484 U.S. at 178, 108 S. Ct. 513 (suit by an ex-husband against an ex-wife); *Minnesota v. N. Securities Co.*, 194 U.S. 48, 71-72, 24 S. Ct. 598, 48 L. Ed. 870 (1904) (suit by a state against a foreign corporation); *Anglo–Am. Provision Co. v. Davis Provision Co.*, 191 U.S. 373, 374, 24 S. Ct. 92, 48 L. Ed. 225 (1903) (suit by one corporation against another corporation); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 286, 8 S. Ct. 1370, 32 L. Ed. 239 (1888) (suit by a state against a foreign corporation).

reason—the only reason—why the default federal remedies that are available in actions against state officials, i.e., the doctrine of *Ex Parte Young* and 42 U.S.C. § 1983, were not available against the *private* actors in *Thompson* and its progeny.

Properly understood then, *Thompson* does not control the instant case. The reason there was no remedy to enforce the FF&C Clause in *Thompson* is that there is no implied cause of action for violations of the FF&C Clause by private parties. Here, however, when Appellees are suing a *state actor*, they have no need for an *implied* cause of action: Section 1983 *expressly* provides them with the only remedy they seek and the only one they need. At bottom, the *Thompson* holding has no bearing on either of the questions that are dispositive of this appeal, to wit: (1) May a state delegate to a non-judicial actor the obligation of giving full faith and credit to out-of-state judgments? and (2) if it may and does so, what remedies are available to a judgment holder if that non-judicial state actor fails or refuses to carry out that constitutional obligation?

It is true that FF&C Clause claims have traditionally arisen in state-court litigation, but only because bringing suit on an out-of-state judgment was historically the only method of enforcing an out-of-state judgment[22] (and therefore only state

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[22] *See Guinness PLC v. Ward*, 955 F.2d 875, 890 (4th Cir. 1992) ("[U]nder the common law, the procedure to enforce the judgment of one jurisdiction in another required the filing of a new suit in the second jurisdiction to enforce the judgment of the first. The suit on the judgment was an independent action."

judges were in a position to deny recognition to a judgment, i.e., violate the FF&C Clause). An accident of history is not a constitutional necessity, however. In fact, to date, all but two or three of the fifty states have enacted some version of the Revised Uniform Enforcement of Foreign Judgments Act, which authorizes non-judicial officers to register out-of-state judgments, thereby entrusting to them their states' obligations under the FF&C Clause.[23] For example, the Louisiana Constitution mandates that "[i]n each parish a clerk of the district court . . . *shall be ex officio notary public and parish recorder of conveyances, mortgages, and other acts* . . . ."[24] Thus, a parish clerk of court—a non-judicial administrative official—routinely records out-of-state money judgments in Louisiana's public records just as he records deeds, mortgages, etc.—parallel to the Registrar's nondiscretionary duties with regard to out-of-state status decrees—and he does so, or fails to

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(citation omitted)). *See also Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 271, 56 S. Ct. 229, 80 L. Ed. 220 (1935) (explaining that "suits upon a judgment, foreign or domestic, for a civil liability, . . . were maintainable at common law upon writ of debt, or of indebitatus assumpsit.").

[23] The Act, promulgated in 1964 by the National Conference of Commissioners on Uniform State Laws, allows an out-of-state judgment holder to file an authenticated copy of an out-of-state judgment with the clerk of an in-state court and provides that "[a] judgment so filed has the same effect . . . as a judgment of a [court] of [the forum] state and may be enforced or satisfied in a like manner." Revised Uniform Enforcement Of Foreign Judgments Act § 2 (1964).

[24] La. Const. art. V, § 28 (emphasis added).

do so, wearing his public-records hat and not his court-functionary hat, without any intervention by a state court of law and without a state judge's application of the FF&C Clause's alleged "rule of decision." In this way, the en banc majority's insistence that the states must use only their courts to satisfy their duties under the FF&C Clause is not only unsupported by Supreme Court precedent; it also draws into question the constitutionality of the judgment-registration statutes of those states and even the Louisiana Constitution.

Lastly, the en banc majority fails to address the fact that its construction of the FF&C Clause—that it applies only to state courts and thus only state courts must recognize out-of-state judgments—is inconsistent with the Constitution's system of dual sovereignty. The framers of the Constitution expressly refrained from dictating to the states how to organize themselves internally. It is "[t]hrough the structure of its government" that "a State defines itself as a sovereign."[25] This is why there is no provision anywhere in the Constitution that removes from the states the discretion to discharge the obligations that the Constitution imposes on them however they see fit.[26] This constitutionally mandated

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[25] *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991).

[26] The closest the Constitution comes is in the Republican Form of Government Clause, *see* U.S. Const. art. IV, § 4, and it has long been the law that the question of what that clause requires is a political one for Congress, not a judicial one for the courts.

solicitude toward the states' prerogative to arrange their own affairs is the reason that we have the clear-statement rule of statutory construction.[27] By declaring that the FF&C Clause requires the states to use only their courts, and not also their non-judicial officials, to fulfill their full-faith-and-credit obligations, the en banc majority erodes the dual federal/state sovereignty that has long been the hallmark of American Federalism.

2. The Appellees' request for a corrected birth certificate was appropriately made to the Registrar, and their complaint against the Registrar for her unconstitutional refusal to recognize their parental status was appropriately brought in federal court via § 1983.

The en banc majority fails to appreciate or acknowledge the role—indeed, the raison d'etre—of § 1983 in providing a private remedy against state actors. This failure is exemplified in the majority's persistent reliance on the Supreme Court's pronouncements regarding the FF&C Clause *outside of* the § 1983 context. The majority asserts that "the Court has expressly indicated that the only remedy available for violations of full faith and credit is

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See generally Luther v. Borden, 48 U.S. (7 How.) 1, 12 L. Ed. 581 (1849).

[27] *See Gregory*, 501 U.S. at 460, 111 S. Ct. 2395 ("If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." (citations, internal quotation marks, and alterations omitted)).

review by the Supreme Court."[28] Yet again, in a precedential non sequitur, the majority relies exclusively on *Thompson v. Thompson* for this proposition.

Exacerbating its misapplication of this Supreme Court precedent is the majority's failure to heed the Court's direction to apply § 1983 expansively. The Supreme Court has repeatedly pronounced that § 1983 is a remedial statute which is intended "to be broadly construed, against all forms of official violation of federally protected rights."[29] With this maxim firmly entrenched, the Court has willfully extended the aegis of § 1983 enforcement to non-Fourteenth Amendment rights, such as, for example, those guaranteed by the dormant Commerce Clause.

It is well settled indeed that, even though "[a] vast number of § 1983 actions involve violation of constitutional rights in individual circumstances,"[30] actions brought via § 1983 may assert violations of

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[28] En Banc Majority Opinion at 155-56 (citing *Thompson*, 484 U.S. 174, 108 S. Ct. 513, 98 L. Ed. 2d 512).

[29] *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 700-01, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). *See also Golden State*, 493 U.S. at 105-06, 110 S. Ct. 444 ("We have repeatedly held that the coverage of [§ 1983] must be broadly construed." (citations omitted)).

[30] 13A Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Richard D. Freer, Joan E. Steinman, Catherine T. Struve, Vikram David Amar , *Federal Practice And Procedure § 3531.6* (3d ed. 2010).

non-individual constitutional rights. *Dennis v. Higgins*[31] is a prime example. There, a motor carrier filed a § 1983 cause of action against Nebraska state officials for violating the Commerce Clause by imposing "retaliatory" taxes and fees on motor carriers that operated in Nebraska but used vehicles registered in other states.[32] The Nebraska Supreme Court had ruled that "claims under the Commerce Clause are not cognizable under § 1983 because, among other things, the Commerce Clause does not establish individual rights against government, but instead allocates power between the state and federal governments."[33] The Supreme Court nevertheless directed that "[a] broad construction of § 1983 is compelled by the statutory language . . . . The legislative history of the section also stresses that as a remedial statute, it should be liberally and beneficently construed."[34] "Even more relevant to [that] case," the Court noted, it had consistently "rejected attempts to limit the types of constitutional

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[31] 498 U.S. 439, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991).

[32] *See id.* at 441, 111 S. Ct. 865 ("In his complaint, petitioner complained, *inter alia*, that the taxes and fees constituted an unlawful burden on interstate commerce and that respondents were liable under 42 U.S.C. § 1983.").

[33] *Id.* at 442, 111 S. Ct. 865 (internal quotation marks omitted).

[34] *Id.* at 443, 111 S. Ct. 865 (internal footnote and quotation marks omitted).

rights that are encompassed within the phrase 'rights, privileges, or immunities.'"[35]

In *Dennis*, the Court reviewed the two-step inquiry that it had laid out in *Golden State Transit Corporation v. Los Angeles* for determining whether § 1983 provides a remedy for violations of a particular provision of federal law: first, requiring the plaintiff to "assert the violation of a federal right" and second, requiring the defendant to "show Congress specifically foreclosed a remedy under § 1983."[36] The Court had identified three factors that initially help determine whether a statutory or constitutional provision creates a federal right: whether the provision (1) "creates obligations binding on the governmental unit," (2) that are sufficiently specific and concrete to be judicially enforced, and (3) were "intended to benefit the putative plaintiff."[37] The *Dennis* Court concluded that the Commerce Clause did indeed create a federal right:

> Although the language of [the Commerce Clause] speaks only of Congress' power over commerce, the Court long has recognized

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[35] *Id.* at 445, 111 S. Ct. 865.

[36] 493 U.S. at 106, 110 S. Ct. 444 (quotation marks and citations omitted). Because the Registrar has *not* shown, or even argued, that there is a comprehensive enforcement scheme for preventing state interference with the right created by the FF&C Clause that would foreclose the § 1983 remedy, the only issue is whether the FF&C Clause creates a federal right. *See id.* at 108-09, 110 S. Ct. 444.

[37] *Id.* (quotation marks, alterations, and citations omitted).

> that it also *limits the power of the States* to erect barriers against interstate trade. Respondents argue, as the court below held, that the Commerce Clause merely allocates power between the Federal and State Governments and does not confer "rights." There is no doubt that the Commerce Clause is a power-allocating provision, giving Congress pre-emptive authority over the regulation of interstate commerce. It is also clear, however, that the Commerce Clause does more than confer power on the Federal Government; it is also a *substantive restriction on permissible state regulation* of interstate commerce. The Commerce Clause has long been recognized as *a self-executing limitation on the power of the States* to enact laws imposing substantial burdens on such commerce.[38]

The Dennis defendants had conceded that the first two *Golden State* factors favored the plaintiffs but argued that "the Commerce Clause does not confer rights within the meaning of § 1983 because it was not designed to benefit individuals, but rather was designed to promote national economic and political union."[39] The Court disagreed, explaining that the individual plaintiffs were "within the 'zone of

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[38] 498 U.S. at 446-47, 111 S. Ct. 865 (internal quotation marks and citations omitted and emphases added).

[39] *Id.* at 449, 111 S. Ct. 865.

interests' protected by the Commerce Clause."[40] Additionally, the regulation of the states in this instance was *for the plaintiffs' benefit*.[41]

In like manner, the FF&C Clause expressly limits the power of states to deny full faith and credit to the judgments of other states. All three of the *Golden State* factors favor the conclusion that the FF&C Clause creates a right that is actionable under § 1983: the FF&C Clause unambiguously imposes a mandatory, binding obligation on the several states and thus on their actors;[42] the right to have an out-of-state judgment recognized is concrete, specific, and judicially cognizable;[43] and the FF&C Clause was intended to benefit individual holders of out-of-state judgments.[44]

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[40] *Id.*

[41] *See id.*

[42] *See, e.g.*, *Estin*, 334 U.S. at 545-46, 68 S. Ct. 1213 ("The Full Faith and Credit Clause . . . substituted a command for the earlier principles of comity . . . and ordered submission by one State even to hostile policies reflected in the judgment of another State . . . .").

[43] *See, e.g.*, *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 693-94, 102 S. Ct. 1357, 71 L. Ed. 2d 558 (1982).

[44] *See Thomas v. Wa. Gas Light Co.*, 448 U.S. 261, 278 n. 23, 100 S. Ct. 2647, 65 L. Ed. 2d 757 (1980) ("[T]he purpose of [the FF&C Clause] was to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states . . . ." (quoting *Pac. Emp'rs Ins. Co. v. v. Indus. Accident Comm'n of Cal.*, 306 U.S.

Justice Kennedy, in his *Dennis* dissent, disagreed with the majority because he saw a "distin[ction] between those constitutional provisions which secure the rights of persons vis-à-vis the States, and those provisions which allocate power between the Federal and State Governments."[45] He concluded that "[t]he former secure rights within the meaning of § 1983, but the latter do not."[46] Thus, Justice Kennedy distinguished all "supposed right[s]" secured by Article I of the Constitution as falling outside the scope of § 1983, which was consistent with the Court's previous holding in Carter v. Greenhow,[47] prohibiting

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493, 501, 59 S. Ct. 629, 83 L. Ed. 940 (1939))); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439, 64 S. Ct. 208, 88 L. Ed. 149 (1943) (explaining that the "clear purpose of the full faith and credit clause" was to ensure that "rights judicially established in any part [of the nation] are given nation-wide application"). It is axiomatic that a judgment establishes rights that benefit the judgment holder. *See, e.g.*, *Hanson v. Denckla*, 357 U.S. 235, 246 n. 12, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

[45] *Dennis*, 498 U.S. at 452-53, 111 S. Ct. 865 (Kennedy, J., dissenting). *See also Golden Transit*, 493 U.S. at 116, 110 S. Ct. 444 (Kennedy, J., dissenting) ("[Section 1983] thus distinguishes secured, rights, privileges, and immunities from those interests merely resulting from the allocation of power between the State and Federal Governments.").

[46] *Dennis*, 498 U.S. at 453, 111 S. Ct. 865 (Kennedy, J., dissenting).

[47] 114 U.S. 317, 5 S. Ct. 928, 29 L. Ed. 202 (1885).

a § 1983 action for a Contracts Clause claim.[48] In Carter, the Court had explained:

> [The Contracts Clause] forbids the passage by the states of laws such as are described. If any such are nevertheless passed by the legislature of a state, they are unconstitutional, null, and void. In any judicial proceeding necessary to vindicate his rights under a contract affected by such legislation, the individual has a right to have a judicial determination declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the constitution.[49]

Justice Kennedy insisted that this construction of the Contracts Clause applied equally, if not more so, to the Commerce Clause:

> At least such language [of the Contracts Clause] would provide some support for an argument that the Contracts Clause prohibits States from doing what is inconsistent with civil liberty. If the Contracts Clause, an express limitation upon States' ability to impair the contractual rights of citizens, does not secure rights within the meaning of § 1983, it assuredly demands a great leap for the

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[48] *See Dennis*, 498 U.S. at 457-58, 111 S. Ct. 865 (Kennedy, J., dissenting).

[49] 114 U.S. at 322, 5 S. Ct. 928.

majority to conclude that the Commerce Clause secures the rights of persons.[50]

When applied, not to the Commerce Clause, but to the FF&C Clause, both Justice Kennedy's concerns and the Court's earlier holding in *Carter* are easily reconcilable with the *Dennis* majority's holding. For openers, the FF&C Clause—an *Article IV* provision outlining the states' obligations, not an Article I power-allocating provision—plainly does secure the rights of persons, *i.e.*, individual judgment-holders, against the several states. Just as plainly, the FF&C Clause does not deal with the allocation of power between the state and federal governments. Thus, Justice Kennedy's exception of provisions that allocate power does not encompass the FF&C Clause, which affirms the finality of judgments obtained by individuals in one state vis-à-vis *every other state*. Moreover, whereas the Contracts Clause is a restriction on a state's authority to pass laws that *collaterally* impede citizens' ability to contract, the FF&C Clause is a restriction on state action that *directly* undermines any individual's state judgment.

Unlike the Commerce Clause then, the FF&C Clause does embody the right of an individual against a state, not the right of the states against the federal government. And, unlike the Contracts Clause, the FF&C Clause has a direct effect on individual citizens, i.e., as a result of its general restriction on state legislation, does more than collaterally affect

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[50] *Dennis*, 498 U.S. at 458, 111 S. Ct. 865 (Kennedy, J., dissenting).

individuals. Finally, as alluded to by Justice Kennedy, the FF&C Clause—even more so than the Commerce Clause or the Contracts Clause—prohibits states from doing that which is "inconsistent with civil liberty"[51]—here, the Registrar's refusal to recognize the New York decree's establishment of Appellees' rightful status as the legal parents of Infant J.

For all the same reasons advanced by the *Dennis* Court in recognizing the private federal right created by the Commerce Clause—including the issues raised by Justice Kennedy in his dissent—the FF&C Clause indisputably does confer a constitutional "right" for which § 1983 provides an appropriate remedy. Respectfully, the en banc majority errs absolutely in concluding otherwise.

3. The Full Faith and Credit Clause does not extend to enforcing the New York adoption decree under New York's enforcement regime but does extend to accepting the out-of-state decree as a valid decree under Louisiana's enforcement regime

The Supreme Court has defined the right secured by the FF&C Clause as one of "recognition"—not "enforcement"—making three distinct pronouncements: (1) "[a] final judgment in one State . . . qualifies for *recognition* throughout the land" and thereby "gains nationwide force";[52] (2) although

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[51] *Id.*

[52] *Baker*, 522 U.S. at 233, 118 S. Ct. 657 (citations omitted and emphasis added).

"[e]nforcement measures do not travel with the sister state judgment as preclusive effects do[,] such measures remain subject to the *even-handed* control of forum law";[53] and (3) although "[a] court may be guided by the forum State's 'public policy' in determining the law applicable to a controversy," there is "*no roving 'public policy exception'* to the full faith and credit due judgments."[54]

For the instant case, this means: (1) Louisiana must *recognize* the New York adoption decree, i.e., Louisiana must accept Appellees' legal "adoptive parent" status that was lawfully established by the New York decree; (2) Louisiana is not required to apply New York's birth certificate law or afford Appellees any rights granted to "adoptive parents" by *New York* law, but Louisiana *must* maintain "evenhanded control" of its *own* birth certificate law; and (3) Louisiana may look to its public policy to determine whether its Vital Statistics Laws apply to this controversy, but it may not refuse to give the New York adoption decree *full* faith and credit because of

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[53] *Id.* at 235, 118 S. Ct. 657 (citation omitted and emphasis added).

[54] *Id.* (citations omitted and emphasis added). Interestingly enough, the Registrar formally rejected Appellees' application for a revised birth certificate based on an advisory opinion from the Louisiana Attorney General that *incorrectly* concluded: "*Louisiana is not required to accept such an out-of-state judgment under the Full Faith and Credit Clause of the United States Constitution if it violates public policy.*" Finding no supporting legal authority for that statement, I can only conclude that the Attorney General pulled it out of political thin air.

policy concerns (especially not those articulated by its *adoption* laws, which are wholly irrelevant to this New York adoption *and* to Louisiana's birth certificate law).

The en banc majority skims over these nuances of the Supreme Court's application of the FF&C Clause. Even worse, it mistakenly converts the notion of "recognition" into one of "enforcement," so as to conclude that "[o]btaining a birth certificate falls in the heartland of enforcement, and therefore outside the full faith and credit obligation of recognition."[55] But, the Supreme Court has only excluded from FF&C Clause protection the enforcement of the *rendering* state's laws—which are not at issue here. What it has maintained, however, is that the forum state does have an obligation to apply its own enforcement measures evenhandedly to all out-of-state judgments. If a forum state refuses to apply its enforcement measures to only *some* out-of-state judgments, *i.e.*, does not maintain evenhanded control of forum law, it is essentially refusing to *recognize* the force of those disfavored out-of-state judgments in the forum state. And that is precisely what the Registrar has done here. She has refused to recognize Appellees' nationwide, lawful status as "adoptive parents" by denying them the "adoptive parent" rights created in *Louisiana's* birth certificate (not adoption) statute.

Thus, much like the arguments made by Oklahoma in *Finstuen v. Crutcher*, the en banc

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[55] En Banc Majority Opinion at 159-60.

majority's conclusion "improperly conflates [Louisiana]'s obligation to give full faith and credit to a sister state's judgment with its authority to apply *its own state laws* in deciding what state-specific rights and responsibilities flow from that judgment."[56] Louisiana's birth certificate statute is surely one that decides which Louisiana-specific rights flow from an out-of-state adoption decree: *No one* challenges either that statute or Louisiana's prerogative to determine whether "adoptive parents" are entitled to a revised birth certificate. Yet the Registrar has *still* failed to meet her obligation to afford full faith and credit to Appellees' out-of-state adoption decree by refusing to recognize it and to issue revised birth certificates to "adoptive parents" evenhandedly.

The en banc majority's reliance on the Supreme Court century-old case of *Hood v. McGehee*[57] aptly illustrates its error in confusing "recognition" with "enforcement." In *Hood*, a man who had adopted children in Louisiana subsequently bought land in Alabama. When he died, his adopted children brought a quiet-title action, asserting their rights to the Alabama land. Under Louisiana law, the adopted children would have had inheritance rights to the land because the Louisiana adoption decree vested the adopted children with the same inheritance rights as those of biological children. But, under Alabama inheritance law at that time, no children adopted in other states could inherit land in Alabama from their

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[56] 496 F.3d at 1153 (emphasis added).

[57] 237 U.S. 611, 35 S. Ct. 718, 59 L. Ed. 1144 (1915).

adoptive parents. The Supreme Court ultimately held that the Alabama inheritance law did not violate the FF&C Clause.[58]

That said, the only proper *Hood* analogy to the instant case would be if New York law *would* allow all adoptive parents to obtain revised birth certificates but Louisiana law would *not*. In this hypothetical example, Appellees would not be entitled to a revised Louisiana birth certificate simply because of the New York law; neither would they be entitled to claim that the Louisiana law violated the FF&C Clause.

But, that is far removed from the case that is before us today. Here, the Registrar is not refusing to apply New York's birth certificate law; she is refusing to "accept" the New York adoption decree and recognize the corresponding status determination for purposes of *Louisiana's* birth certificate law. The problem here is *not* that Louisiana, like Alabama in *Hood*, is "refusing certain rights to out-of-state adoptions," as the en banc majority asserts.[59] The real problem is that Louisiana is refusing rights *created by its own law*, but only to a subset of valid out-of-state adoptions. In favoring some out-of-state adoptions over others, the Registrar is refusing to give full faith and credit to all of them, *i.e.*, she is not enforcing Louisiana law in an *evenhanded manner*, which she is constitutionally required to do. The Registrar's actions are thus patently distinguishable

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[58] *See id.* at 615, 35 S. Ct. 718.

[59] En Banc Majority Opinion at 159-60.

from those of Alabama in *Hood*, and—for the same reasons that Alabama's law did *not* violate the FF&C Clause—the Registrar's actions ineluctably do.

The en banc majority also improvidently relies on *Rosin v. Monken*, a Seventh Circuit case that the majority mislabels "instructive."[60] *Rosin* does not support the majority's position, however. To the contrary, it exemplifies exactly how the FF&C Clause functions to give nationwide recognition to one state's status determination. In *Rosin*, the plaintiff was convicted as a sex offender in New York, thereby lawfully obtaining "sex offender" status; but he was not required to register in New York's sex offender registry because his plea agreement specified that the New York registration requirement be deleted from his plea form. When the defendant moved to Illinois, however, that state did require him, as a person with "sex offender" status, to record his status in Illinois's sex offender registry.[61] The Seventh Circuit held that the absence of a registration requirement in the New York plea deal need not be given full faith and credit in Illinois because "[the defendant] could not bargain for a promise from New York as to what other states would do based on his guilty plea to sexual abuse in the third degree."[62] Nevertheless, the defendant's New York "guilty plea to sexual abuse" did universally define him as a "sex offender," which

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[60] *Id.* at 160.

[61] *See Rosin*, 599 F.3d at 575.

[62] *Id.* at 577.

was a legal status that *did* transfer into Illinois pursuant to the FF&C Clause for purposes of Illinois's "enforcement" laws that dictate the obligations of "sex offenders" living in Illinois.[63]

Likewise here, when Adar and Smith legally adopted Louisiana-born Infant J in New York, each gained the status of "adoptive parent" for purposes of the laws of every other state, including Louisiana. Consequently, when Appellees, as the lawful "adoptive parents" of Infant J, duly requested a birth certificate pursuant to the cognizant Louisiana statute, the Registrar violated the FF&C Clause by refusing to accept their request. This despite the fact that—under that specific Louisiana statute—*all* "adoptive parents" are entitled to have their names registered on their Louisiana-born child's birth certificate. By refusing to treat *both* Adar and Smith as lawful "adoptive parents" under Louisiana's birth certificate law, the Registrar failed to *recognize* Appellees' status as defined by the New York judgment.

The only difference between *Rosin* and the instant case lies in the fact that the Illinois officials *wanted* to accept the New York "sex offender" status of the defendant and record it in accordance with Illinois law; but, for *public policy reasons*, the Louisiana Registrar does *not* want to accept the New York

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[63] Interestingly enough, in this "instructive" case, the plaintiff brought a FF&C Clause claim—*under § 1983*—against the Illinois officials whom he alleged had failed to recognize the New York plea deal by forcing him to register in Illinois. And, federal jurisdiction thus obtained was never questioned. *See id.* at 575.

"adoptive parent" status of both Appellees and to record it in compliance with Louisiana law. That small *difference* does not, however, *legally distinguish* these two cases, especially given that there is no roving public policy exception to the full faith and credit that is owed to out-of-state judgments. The legal issue is the same in each case: Both involve the forum state's recognition of *another state's status determination*, which the Supreme Court has long identified as a type of judgment that is entitled to full faith and credit.[64]

Neither the Appellees nor I have ever claimed that, alone and in a vacuum, the FF&C Clause gives them the right to have their names appear on Infant J's birth certificate. But, Louisiana has elected to enact a "Record of Foreign Adoptions" statute that specifically addresses recording the status of *out-of-state adoptive parents of Louisiana-born children*. Louisiana's statute states:

> When a person [1] born in Louisiana [2] is adopted in a court of proper jurisdiction [3] in any other state or territory of the United States, the [Louisiana] state registrar may create a new record of birth in the archives

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[64] *See, e.g.*, *Williams v. North Carolina*, 325 U.S. 226, 230, 65 S. Ct. 1092, 89 L. Ed. 1577 (1945) ("Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises."); *Williams v. North Carolina*, 317 U.S. 287, 301, 63 S. Ct. 207, 87 L. Ed. 279 (1942) (rejecting the contention that "decrees affecting the marital status of its domiciliaries are not entitled to full faith and credit in sister states").

> [4] upon presentation of a properly certified copy of the final decree of adoption . . . . *Upon receipt of the certified copy of the decree, the state registrar shall make a new record in its archives*, showing: . . . The names of the adoptive parents and any other data about them that is available and adds to the completeness of the certificate of the adopted child.[65]

This specialized statute unequivocally directs[66] the Registrar to record *all* validly certified out-of-state adoption decrees by, *inter alia*, inscribing the names of *all* "adoptive parents" on revised birth certificates. And the FF&C Clause unquestionably requires the Registrar to recognize *all* out-of-state adoptions. And this is precisely what she has refused to do. When carefully and objectively examined, the Registrar's actual policy is to issue new birth certificates containing the names of every adoptive parent for *some* out-of-state adoptions but *not* for

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[65] La. Rev. Stat. Ann. § 40:76 (emphases added).

[66] The Registrar has argued, and the en banc majority has agreed, that § 40:76(A)'s initial use of permissive language stating that she "may create a new record" means that she enjoys absolute discretion in issuing or denying birth certificates for out-of-state adoptions. The panel opinion rejected this argument as unpersuasive and unreasonable in light of Louisiana law and held that the correct interpretation of § 40:76(A) is that its use of "may" affords the Registrar the limited discretion of determining whether the certification furnished by the applicants is satisfactory. For a more extended discussion on why the Registrar and the en banc majority is mistaken, *see Adar*, 597 F.3d at 715-18.

others—specifically, not for adoptions by two unmarried parents like Appellees. As such, the Registrar's pick-and-choose recognition policy violates the FF&C Clause.

The en banc majority is simply off target in characterizing the Registrar's action as "declin[ing] [ ] to *enforce* the New York decree by altering Infant J's birth records in a way that is inconsistent with Louisiana law governing reissuance."[67] I repeat, Louisiana is declining to *recognize* the New York decree for purposes of its *own* law! Louisiana law commands that the names of every—repeat, *every*—out-of-state adoptive parent "shall" appear on the adopted child's reissued Louisiana birth certificate. The sole prerequisite is the presentation to the Registrar of a certified copy of the out-of-state adoption decree. In no way, then, would reissuing a revised birth certificate to Appellees be "*inconsistent*" with this law. On the contrary, it would be entirely consistent with it.[68]

I must also disagree with the en banc majority's contention that the Registrar's offer to reissue the birth certificate, but only with the name of either

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[67] En Banc Majority Opinion at 151 (emphasis added).

[68] Reissuing a revised birth certificate to Appellees would also be consistent with the wholly separate Louisiana statute for *in-state* adoptions of Louisiana-born children. Although Louisiana law places restrictions on who may *adopt* in Louisiana in the first place, once a child is legally adopted there, Louisiana commands that the name of every legal adoptive parent "*shall* be recorded" on the child's birth certificate. *See* La. Rev. Stat. Ann. § 40:79(A)(2) (emphasis added).

Adar or Smith, both "compl[ies] with Louisiana law" and "recognizes Appellees as the legal parents of their adopted child."[69] These assertions are puzzling to say the least: They patently ignore the constitutional truism that the Appellees' adoption decree is entitled to full faith and credit, not to half faith and credit—not to mention the fact that the "Louisiana law" *at issue*, as explained above, is *nondiscriminatory* and *nondiscretionary* on its face. If anything, the en banc majority's ascribing "recognition" to the Registrar's Solomonesque offer to Infant J's adoptive parents to decide between themselves which one she should list on the certificate judicially blesses a quintessential Catch–22 choice. It further underscores the Registrar's un-evenhandedness in refusing to give official recognition to both parents' legal status and in refusing to accept both of them as the legal adoptive parents of Infant J for purposes of Louisiana's own birth certificate (not adoption) law.[70] This flies in the face of that unambiguous statute which explicitly governs out-of-state adoptions of Louisiana-born children and just as explicitly mandates the listing of

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[69] En Banc Majority Opinion at 158-59.

[70] Furthermore, although not raised by Appellees, if the Registrar were to issue a birth certificate with the name of only one parent on it, she would violate the other parent's Due Process rights by unlawfully terminating his interest in parental rights. *See In re Adoption of B.G.S.*, 556 So. 2d 545, 548-50 (La. 1990) (explaining that the ability of a mother of an illegitimate child to refuse to place the father's name of the birth certificate amounts to "the power to deprive the unwed father of his natural parental right to custody").

every adoptive parents on presentation of the proper documentation. And it does so without any restriction, reservation, or discretionary exception whatsoever.

Importantly, Appellees are *not* asking Louisiana to change its law; neither are they requesting an order commanding the Registrar to apply Louisiana law to them.[71] Appellees challenge only the constitutionality of the Registrar's policy of refusing to "accept" those out-of-state adoption decrees that declare an unmarried couple to be a Louisiana-born child's "adoptive parents." Given the unambiguous language of Louisiana's nondiscriminatory "Record of Foreign Adoptions" law, the only way the Registrar could constitutionally refuse to issue Appellees a revised birth certificate is if she did not believe the New York

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[71] Appellees presumably could have brought a mandamus action in state court for an order commanding the Registrar to issue a revised birth certificate under Louisiana law (an action that, under *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984), no federal court could entertain). But Appellees never took that course of action. Instead, they brought their action against the Registrar in *federal* court, via § 1983, to redress her violation of the FF&C Clause, *i.e.*, her refusal to recognize another state's judgment. Because we are constrained in every instance to address the case actually brought, not one that theoretically could have been brought, we have no choice but to analyze Appellees' federally asserted claim under federal law if legally possible. Accordingly, unlike the question presented in *Pennhurst*, the question we must answer under the FF&C Clause is whether the Registrar has afforded Appellees' valid New York adoption decree the *recognition* to which a judgment of another state is constitutionally entitled.

decree was valid. But the New York decree's validity is undisputed by the Registrar, as evidenced by her hindsight settlement offer to name either one of the Appellees—but not both—as an "adoptive parent" on Infant J's corrected birth certificate. The Registrar has, therefore, failed to give *full* faith and credit to the New York adoption decree in refusing to recognize the "adoptive parent" status that it conferred to Appellees.

4. The en banc majority opinion creates a circuit split.

The en banc majority superficially dismisses *Finstuen v. Crutcher* as "an outlier to the jurisprudence of full faith and credit,"[72] implicitly disrespecting the Tenth Circuit, as well as the State of Oklahoma and the district court where that case was filed, by failing to determine the jurisdiction to hear such a FF&C Clause case. In fact, though, *Finstuen* is both instructive and consistent with Supreme Court FF&C Clause jurisprudence. Oklahoma's existing law governing the effect of adoption decrees—quite similar to Louisiana's own birth certificate law—specified rights to holders of final adoption decrees. Generally, Oklahoma law stated:

> 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

[72] En Banc Majority Opinion at 157.

> and the kindred of the adoptive parents. From the date of the final decree of adoption, the child shall be entitled to inherit real and personal property from and through the adoptive parents in accordance with the statutes of descent and distribution. The adoptive parents shall be entitled to inherit real and personal property from and through the child in accordance with said statutes.[73]

Oklahoma only differed from Louisiana, however, in that Oklahoma's legislature forthrightly enacted an additional statute that excluded specific subsets of out-of-state adoptive parents from entitlement to the benefits conferred by the general adoption law. Oklahoma's "non-recognition" statute provided:

> The courts of this state shall recognize a decree, judgment, or final order creating the relationship of parent and child by adoption, issued by a court or other governmental authority with appropriate jurisdiction in a foreign country or in another state or territory of the United States. The rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though the decree, judgment, or final order were issued by a court of this state. **Except that, this state, any of its agencies, or any court of this state *shall not recognize* an adoption**

[73] Okla. Stat. tit. 10, § 7505–6.5(A).

> **by more than one individual of the same sex from any other state or foreign jurisdiction.**[74]

As a result, out-of-state adoptive parents, like Appellees, who should normally have been able to have their rights as adoptive parents recognized under the general Oklahoma law, were prevented from doing so by this Oklahoma statute's mandate of non-recognition of only particular—but not all—out-of-state adoption decrees.

In essence, the practical effect of the Registrar's policy of non-recognition is the same as that of Oklahoma's statute, which the Tenth Circuit invalidated in *Finstuen*. Like Oklahoma's general adoption statute, Louisiana's general enforcement provision is nondiscriminatory; and like Oklahoma's non-recognition statute, the Registrar's specific and exceptional "policy" is indisputably discriminatory. It is that discrimination that ultimately prevented Appellees from obtaining the revised birth certificate that otherwise they would have been able to obtain but for the Registrar's refusal to "accept"—give full faith and credit to—their valid out-of-state adoption decree for purposes of Louisiana's otherwise nondiscriminatory law.

Consequently, the en banc majority makes a flawed distinction when it asserts that "[t]he bulk of the [*Finstuen*] opinion is devoted to analysis of the allegedly unconstitutional state non-recognition

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[74] Okla. Stat. tit. 10, § 7502–1.4(A) (emphasis added).

statute, a problem different than the one here."[75] This blesses Louisiana's cynical ploy of having its Registrar and Attorney General do, by *executive* fiat, that which the Tenth Circuit ruled Oklahoma's *legislature* could not do statutorily. In fact, by invalidating a statute as violative of the FF&C Clause, the Tenth Circuit clearly read the FF&C Clause as binding on every branch of a state's government, and not just on state judges, which is in direct tension with the en banc majority's reading of the FF&C Clause.

The en banc majority's holding, therefore, is in undeniable conflict with the Tenth Circuit's opinion, which ultimately held: "Because the Oklahoma statute at issue categorically rejects a class of out-of-state adoption decrees, it violates the Full Faith and Credit Clause."[76] Here, the Registrar's uncodified policy of categorically rejecting, *i.e.*, not "accepting," one subset of out-of-state adoptions violates the FF&C Clause in precisely the same way as did the now-stricken Oklahoma non-recognition statute. The en banc majority's holding to the contrary has thus created a circuit split—and comes down on the wrong side of it in the process.[77]

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[75] En Banc Majority Opinion at 156-57.

[76] *Finstuen*, 496 F.3d at 1141.

[77] In addition, the en banc majority is simply wrong to claim that "[o]nly one federal court decision has permitted a full faith and credit claim to be brought in federal court pursuant to § 1983," citing *Finstuen*. En Banc Majority Opinion at 156-57. The Seventh Circuit too has allowed a plaintiff to bring a claim under

B. The Equal Protection Claim

The en banc majority refuses to acknowledge that there are important prudential reasons for this appellate court—sitting en banc at that—to refrain from adjudicating Appellees' Equal Protection claim before the district court or even a panel of this court has done so. Although we do have jurisdiction over that claim, and although the parties have fully briefed it to the en banc court, we should have refrained from being the first court to rule on it. This is because, *inter alia*, (1) the Registrar never moved for summary judgment on the Equal Protection claim in district court, and (2) the district court never addressed it.

The only time we should ever reach an issue that was not first decided in the district court is when such issue presents a pure question of law the "proper resolution [of which] . . . is beyond any doubt."[78] As I respectfully but strongly disagree with the en banc majority's conclusion that the proper resolution of Appellees' Equal Protection Clause claim is purely legal and its resolution is beyond doubt, *i.e.*, wholly without merit, I shall address it briefly if for no other reason than to demonstrate that the resolution of this claim is definitely not "beyond any doubt."

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§ 1983 against state actors for violating the FF&C Clause. *See Rosin*, 599 F.3d at 575.

[78] *Vogt v. Bd. of Comm'rs of Orleans Levee Dist.*, 294 F.3d 684, 697 (5th Cir. 2002).

1. The Registrar's denial of an accurate birth certificate to Appellees is not rationally related to Louisiana's interest in furthering in-state adoption by married parents.

Rational basis review directs that a challenged state action be sustained "if the classification drawn by the [action] is rationally related to a legitimate state interest."[79] Here, Appellees challenge the Registrar's policy of denying an accurate birth certificate—for a Louisiana-born child adopted outside of Louisiana—reflecting both out-of-state unmarried, adoptive parents. Appellees constitutionally challenge that policy as applied to them. To frame this issue properly, we must remain mindful that Appellees are challenging neither (1) Louisiana's birth certificate statute, which is facially neutral as to the marital status of adoptive parents, nor (2) Louisiana's adoption laws, which are entirely inapplicable and unaffected here. Appellees only challenge the executive-branch policy declared by the Registrar.

The Registrar has identified Louisiana's interest as "preferring that married couples adopt children" because "a marriage provides a more stable basis for raising children together than relationships founded on something other than marriage." Without any further analysis, however, the Registrar then conclusionally states that her action was rationally related to that interest because "[i]f it is rational to

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[79] *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

conclude that it is in the best interest of adoptive children to be placed in a home anchored by both a father and a mother, then it is also rational to allow birth certificates to reflect only married couples as 'adoptive parents.'" *But wait: something just does not add up!*

Undoubtedly, the Registrar (and the en banc majority) has tendered a worthy defense of Louisiana's in-state *adoption* laws, which prohibit *Louisiana* adoptions by unmarried couples. But, *the instant case does not involve a Louisiana adoption at all and poses no threat whatsoever to Louisiana's adoption laws or adoption policy*. The one and only thing that Appellees have ever challenged is the Registrar's refusal to accept—recognize—their valid out-of-state adoption decree so they may obtain a Louisiana birth certificate that accurately reflects their legal status as adoptive parents—pursuant to and wholly consistent with Louisiana's *Vital Statistics Laws*.[80] Appellees' claim has absolutely nothing to do with adoption laws—particularly not Louisiana's adoption laws as found in the *Louisiana Children's Code*[81]—and has everything to do with ensuring that the applicable Louisiana public records contain accurate and complete information, pursuant to Louisiana's Vital Statistics Laws, as found in its *Revised Statutes*. Because the Registrar's policy does

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[80] "Vital Statistics Laws" are Chapter 2 of Title 40, "Public Health and Safety," of Louisiana's Revised statutes. *See generally* La. Rev. Stat. Ann. §§ 40:32–356.

[81] *See* La. Child. Code Ann. arts. 1198, 1221.

not affect Louisiana adoptions, the governmental interest served by her refusal to issue a birth certificate reflecting both unmarried out-of-state adoptive parents *must* extend beyond a defense of Louisiana's *adoption* laws.

Another crucial and controlling fact here is that the Registrar did not take the challenged action here until well *after* Appellees had adopted Infant J and taken him into their home outside Louisiana. So, there is no way that the potential stability of Infant J's home could have been improved by the Registrar's post hoc action.[82] Consequently, because the Registrar has failed to offer a *single* reason—specific to issuing a birth certificate—how her action is at all related to a legitimate governmental interest, Appellees' Equal Protection claim has at least arguable legal merit. As such, our longstanding prudential practice demands that this challenge be considered first by the district court, where it has never been addressed. Prudence and precedent confirm that this en banc court should refrain from deciding Appellees' Equal Protection Clause claim and instead remand it for the district court to take the first crack at it.

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[82] If anything, there is an argument that denying Appellees an accurate birth certificate will actually make Infant J's home less stable because of the hardships and tensions that it inevitably could impose on Infant J's parents. These include, without limitation, those specific injuries advanced in the district court and before the panel, *e.g.*, medical insurance inclusion, issue-free travel, etc.

2. The correct Equal Protection Clause comparator to Appellees is "unmarried biological parents," not "married adoptive parents."

Confirming the impropriety of the en banc majority's failure to remand the Equal Protection Clause claim to the district court is the presence of a serious controversy regarding the rational basis test. Here, there is no way for the Registrar to pass that test when the correct comparator—"unmarried biological parents"—is used. Up to now, the entire Equal Protection analysis has been made on the assumption that the relevant comparator class to Appellees is couples who are "married non-biological parents," a subset of out-of-state adoptive parents to whom Louisiana readily issues birth certificates without restriction. But that is a baldly flawed assumption: The appropriate comparator class is the one comprising couples who are "unmarried biological parents."[83]

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[83] This is not to say that I don't believe that Appellees have a viable claim under the Equal Protection Clause using "married non-biological parents" as a comparator, inasmuch as all out-of-state adoptive parents have *already* lawfully adopted the Louisiana-born children by the time that Louisiana's birth certificate law comes into play, making marital status irrelevant as a condition of the birth certificate. I am simply convinced that "unmarried biological parents" are the *better* comparator for purposes of this analysis, given that the issue cannot be "stability in the home" and *must* involve Louisiana's vital statistic laws, which already do reflect the parental status of unmarried couples, *i.e.*, unmarried *biological* parents.

By statute, Louisiana recognizes and issues birth certificates to unmarried biological parents, irrespective of its proffered policy preference that children only have parents who are married to one another. And nothing in this provision conditions issuance of such birth certificates on the biological parents' maintaining a common home. Just as the unmarried Appellees are unquestionably the legal parents of Infant J by virtue of the New York adoption decree, Louisiana cannot control or change the fact that, both in and outside Louisiana, unmarried couples do give birth to children, and that they do so with increasing frequency—undoubtedly with much greater frequency than unmarried couples adopt. Properly framed, then, the predicate Equal Protection question is, how does Louisiana treat unmarried couples who wish to be named as parents on their biological children's birth certificates?

Louisiana law states:

> If a child is born outside of marriage, the full name of the father shall be included on the record of birth of the child only if the father and mother have signed a voluntary acknowledgment of paternity or a court of competent jurisdiction has issued an adjudication of paternity.[84]

So, in Louisiana, an *unmarried* couple definitely is statutorily entitled to a birth certificate for their biological child, listing both of them as legal parents of that child, regardless of whether those parents

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[84] La. Rev. Stat. Ann. § 40:34(B)(1)(h)(ii).

share living quarters. The only prerequisite is that those parents or a court verify the accuracy of the information provided—precisely parallel to Louisiana's prerequisite of a valid certified copy of an out-of-state adoption decree to obtain a corrected Louisiana birth certificate.

Because Louisiana will issue a birth certificate listing both members of an *unmarried* couple as parents when they are the biological parents of the child, the Registrar must identify a legitimate government interest that is served by distinguishing between, and treating differently for purposes of issuing birth certificates, (1) a couple comprising unmarried non-biological *adoptive* parents and (2) a couple comprising unmarried *biological* parents, all of whom have equal parental rights under the law. The Registrar has defended her policy as a refusal "to recognize permanently in [Louisiana] public records a parent-child relationship that cannot exist under Louisiana law." But her statement is patently false: Some unmarried couples, viz., unmarried biological parents, *can* and *do* maintain parent-child relationships that are recognized under Louisiana law and are *recorded on* Louisiana birth certificates. This is expressly documented in Louisiana's statutes as well as in its public records. As such, it is at least strongly arguable that there is no legitimate governmental interest served by refusing to issue Appellees an accurate birth certificate, particularly given that, neither Louisiana law nor the Registrar prevents *all* unmarried couples from being named as parents on birth certificates in Louisiana's permanent public records.

What's the legal difference? Where's the Equal Protection? Can there be any question that the en banc majority erred in addressing and dismissing Appellees' Equal Protection Clause claim on the merits before that claim was heard and fully vetted by the district court?

. . . .

For any and all of the foregoing reasons, I must respectfully dissent from the en banc majority's actions in (1) reversing the district court's holding on Appellees' Full Faith and Credit Clause claim and (2) deciding their Equal Protection Clause claims instead of remanding them to the district court for it to perform its essential function of being the first court to address all ripe and well-pleaded claims over which there is federal jurisdiction.

Appendix B

United States Court of Appeals,

Fifth Circuit.

Oren ADAR, Individually and as Parent and Next Friend of J C A-S a minor; Mickey Ray Smith, Individually and as Parent and Next Friend of J C A-S a minor, Plaintiffs-Appellees,

v.

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

No. 09-30036.

Oct. 1, 2010.

Revised Oct. 26, 2010.

Before JONES, Chief Judge, and JOLLY, DAVIS, SMITH, WIENER, GARZA, BENAVIDES, STEWART, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK and HAYNES, Circuit Judges.[1]

BY THE COURT:

A member of the court having requested a poll on the petition for rehearing en banc, and a majority of

[1] Judge King did not participate.

the circuit judges in regular active service and not disqualified having voted in favor,

It is ordered that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will issue a supplemental briefing schedule in the near future.

Appendix C

United States Court of Appeals,

Fifth Circuit.

Oren **ADAR**, Individually and as Parent and Next Friend of J.C. A.-S., a minor; Mickey Ray **Smith**, Individually and as Parent and Next Friend of J.C. A.-S., a minor, Plaintiffs-Appellees,

v.

Darlene W. **SMITH**, In Her Capacity as State Registrar and Director, Office of Vital Records and Statistics, State of Louisiana Department of Health and Hospitals, Defendant-Appellant.

No. 09-30036.

Feb. 18, 2010.

Before REAVLEY, JOLLY, and WIENER, Circuit Judges.

WIENER, Circuit Judge:

Plaintiffs-Appellees Oren Adar and Mickey Ray Smith (the "Adoptive Parents"), individually and next friends of their adopted minor son, Plaintiff-Appellee J C A-S ("Infant J"), all three referred to collectively as "Plaintiffs-Appellees," brought this injunction action against Defendant-Appellant Darlene W. Smith, the Louisiana State Registrar (the "Registrar"), to force her to issue a new original birth

certificate ("Certificate") for Infant J, who was born in Louisiana. The Adoptive Parents are unmarried adult males who obtained a joint adoption decree for Infant J in a New York state court. After obtaining that decree, the Adoptive Parents applied to the Registrar for a Certificate listing both men as parents of Infant J. The Registrar refused to issue the Certificate, citing Louisiana statutes that prohibit the in-state adoption of children by unmarried couples. On a motion for summary judgment, the district court issued a mandatory injunction, commanding the Registrar to issue the Certificate on grounds that (1) Louisiana owes full faith and credit to the New York adoption decree, and (2) La. Rev. Stat. Ann. § 40:76 authorizes the issuance of a Certificate listing both men as adoptive parents of Infant J. The Registrar timely appealed. We affirm.

I. FACTS AND PROCEEDINGS

A. Facts

Infant J is a male who was born in Shreveport, Louisiana, in 2005. In April 2005 the Adoptive Parents, who then resided in Connecticut, obtained an agency adoption of Infant J in the Family Court of Ulster County, New York, pursuant to New York state law that authorizes joint adoptions by unmarried, same-sex couples.

After obtaining this New York adoption decree, the Adoptive Parents arranged for a Report of Adoption to be forwarded from the New York Department of Health to the Louisiana Department of Health and Hospitals, Office of Public Health, Vital Records and Statistics. The Adoptive Parents sought to have a

Certificate issued and recorded for Infant J, reflecting his new name and his relationship to the Adoptive Parents. Before deciding whether to comply with that request, the Department of Health and Hospitals requested an opinion from the State's Attorney General whether Louisiana was required to issue the requested Certificate. The Attorney General issued an opinion that Louisiana does not owe full faith and credit to the instant New York adoption judgment because it is repugnant to Louisiana's public policy of not allowing joint adoptions by unmarried persons.

Approximately one week after receiving this opinion, the Registrar wrote to the Adoptive Parents informing them of her decision to decline to issue the Certificate. The Registrar's letter stated that because (1) Louisiana only authorizes in-state adoptions by single adults or married couples; (2) La. Rev. Stat. Ann. § 40:76 vests the Registrar with full discretion in issuing amended birth certificates for out-of-state adoptions of Louisiana-born children; and (3) La. Rev. Stat. Ann. § 40:34(D) only authorizes the Registrar to issue amended Certificates in accordance with Louisiana law, the State's Office of Vital Records and Statistics was "not able to accept the New York adoption judgment to create a new birth certificate." As additional support for not issuing the Certificate, the Registrar cited the State Attorney General's opinion that Louisiana does not owe full faith and credit to the instant New York judgment.

B. Proceedings

In October 2007, the Plaintiffs-Appellees filed suit in the Eastern District of Louisiana against the

Registrar in her official capacity, seeking (1) a declaration that the Registrar's refusal to issue the Certificate violates both the Full Faith and Credit Clause (the "Clause") and the Equal Protection Clause of the United States Constitution and (2) a mandatory injunction requiring the Registrar to issue a Certificate that identifies both Adoptive Parents as Infant J's parents.

The Registrar filed a motion to dismiss for lack of jurisdiction which the district court denied. After the Registrar filed an answer to the amended complaint, the Adoptive Parents filed a motion for summary judgment. In it they asserted that (1) by its plain language, La. Rev. Stat. Ann. § 40:76 expressly requires the issuance of a Certificate for Infant J reflecting that both Adoptive Parents are his parents, (2) Louisiana owes full faith and credit to the New York state adoption decree, and (3) failure to issue a Certificate for Infant J denies the Plaintiffs-Appellees equal protection under the United States Constitution.

In granting summary judgment to the Plaintiffs-Appellees, the district court held that Louisiana owes full faith and credit to the New York adoption decree and that there is no public policy exception to the Clause. The court also went on to state that a forum state's enforcement of such a decree from an adjudicating state is subject to the "evenhanded" enforcement of the laws of the forum state. The district court then examined the Louisiana statute that governs the recording of out-of-state adoptions of Louisiana-born children and held that

the plain language of the statute mandates that, on receipt of a duly certified copy of the New York adoption decree, the Registrar had to issue a Certificate for Infant J that contains the names of the Adoptive Parents as his parents. As the trial court granted summary judgment on grounds of Full Faith and Credit and Louisiana law, it did not reach the Plaintiffs-Appellees' equal protection claim.

Before filing her timely notice of appeal, the Registrar filed a motion in the district court seeking either a new trial or dismissal. In that motion, the Registrar asserted for the first time that the Adoptive Parents lacked standing and, in the alternative, that the district court should abstain from interpreting La. Rev. Stat. Ann. § 40:76 and instead certify the question to the Louisiana Supreme Court. After briefing and a hearing, the district court denied the Registrar's motion for a new trial or dismissal, as well as her motion for a temporary stay. Subsequently, the Registrar filed a motion in this court seeking a stay pending this appeal, which we granted.

II. STANDARD OF REVIEW

We review questions of jurisdiction, including standing, *de novo.*[1] If the district court expressly or implicitly resolves any factual disputes in making its jurisdictional ruling, we review such findings for clear error.[2] We review a grant of summary judgment *de*

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[1] *Bonds v. Tandy*, 457 F.3d 409, 411 (5th Cir. 2006).

[2] *See Pederson v. Louisiana State University*, 213 F.3d 858, 869 (5th Cir. 2000) (citation omitted).

novo under the same standards applied by the district court.[3] Summary judgment is appropriate when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law.[4] We review determinations of fact in the light most favorable to the nonmoving party, and we review questions of law *de novo.*[5] We also review the district court's determinations of state law *de novo,* giving no deference to such rulings.[6]

III. ANALYSIS

This case poses an issue of first impression in this circuit; only one other circuit has addressed a similar one.[7] The instant dispute implicates the questions (1)

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[3] *Floyd v. Amite County Sch. Dist.*, 581 F.3d 244, 247 (5th Cir. 2009).

[4] *Id.*

[5] *Id.*

[6] *Tradewinds Environmental Restoration, Inc. v. St. Tammany Park, LLC,* 578 F.3d 255, 258 (5th Cir. 2009) (citing *Salve Regina Coll. v. Russell,* 499 U.S. 225, 239-40, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991)).

[7] The Tenth Circuit dealt with similar facts and claims in *Finstuen v. Crutcher,* 496 F.3d 1139 (2007). We summarize it briefly. In *Finstuen,* three same-sex couples challenged an amendment to Oklahoma's foreign adoption statute that prohibited the State from recognizing adoptions by same-sex couples. 496 F.3d at 1142. The district court held that the amended statute was unconstitutional because it violated the Full Faith and Credit Clause, and the court ordered Oklahoma to issue a revised birth certificate to one of the couples. The Tenth Circuit affirmed on full faith and credit grounds. *Id.* at 1156.

whether Louisiana owes full faith and credit to the subject New York adoption decree and (2) whether full faith and credit requires Louisiana, under the plain language of its own statute and under the constitutional requirement of "evenhanded" enforcement of that judgment, to issue a Certificate for Infant J that lists both Adoptive Parents as his parents.

The Registrar is now challenging the standing of the Plaintiffs-Appellees[8] to bring this action. As

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The appeals court reasoned that each State owes full faith and credit to every other state's judgments. *Id.* at 1153. That court also noted that the forum state's mechanisms for the enforcement of such a judgment are determined by the *lex loci*-therefore the rights of the judgment flowed from the law of Oklahoma, not California, the state of adoption. *Id.* at 1154. The court ruled that, because the amended adoption statute's categorical refusal to recognize out-of-state judgments was unconstitutional, and because Oklahoma had a duty to recognize the California adoption decree, the Doe plaintiffs were entitled to whatever rights would be afforded them from the judgment under Oklahoma law. *Id.* at 1154-56. Concluding that Oklahoma's foreign adoption statute, *sans* the amendment, provided for the issuance of a birth certificate to the Does, the Tenth Circuit held that denial of the birth certificate would be a violation of the "evenhanded" requirement in applying local enforcement mechanisms to foreign judgments and affirmed the district court's grant of summary judgment. *Id.*

[8] The Registrar argues throughout her briefing that the "Appellees" lack standing to pursue this action, and she does not differentiate between the Adoptive Parents and Infant J for purposes of her argument. As the Adoptive Parents bring suit

standing is jurisdictional, we address that issue before addressing full faith and credit and state law.

A. Standing

The Registrar contends that the Plaintiffs-Appellees have not satisfied Article III's standing requirements; specifically, that the harms they allege are not sufficient injuries-in-fact. The harms alleged are (1) difficulties encountered in enrolling Infant J in Smith's health insurance plan; (2) problems encountered with airline personnel who suspected that the Adoptive Parents were kidnappers of Infant J; and (3) denial of the "emotional satisfaction" of "seeing both of their names on the birth certificate." In supplemental briefing, the Registrar also contends that La. Rev. Stat. Ann. § 40:76 does not grant a right to judicial relief.

The Adoptive Parents counter that the issue of standing is more properly framed as two broader questions: (1) whether the Registrar's refusal to issue a fully compliant Certificate reflecting the entire parent-child relationship created by the New York adoption decree results in a legally cognizable injury in and of itself; and (2) whether the "barriers" imposed by the Registrar's refusal to list both Adoptive Parents in a Certificate, as evidenced by "past difficulties," constitutes a legally cognizable injury for purposes of standing. In supplemental

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both individually and as next friend to Infant J, however, the standing of both the parents and Infant J must be determined independently. We construe the Registrar's arguments on this matter as applying with equal measure to each Plaintiff-Appellee.

briefing, the Adoptive Parents also invoke La. Rev. Stat. Ann. § 40:77 which they assert constitutes a non-discretionary mandate that the Registrar issue certified copies of Certificates to out-of-state adoptive parents of Louisiana-born children.

Standing is a question of justiciability that poses two questions: (1) whether the parties' claims present a constitutional case or controversy and (2) whether federal court is the proper forum to decide this question.[9] As the jurisdiction of the federal courts is limited, parties may not seek redress there unless they can show an actual case or controversy under Article III of the United States Constitution, *i.e.*, an "injury-in-fact."[10]

There are three aspects to the constitutional requirement for standing under Article III, *viz.,* a showing by the plaintiffs of (1) an injury-in-fact that constitutes the invasion of a legally protected interest which is (a) concrete and particularized and (b) actual

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[9] *Comer v. Murphy Oil USA,* 585 F.3d 855, 868 (5th Cir. 2009). *See also Apache Bend Apartments, Ltd. v. United States,* 987 F.2d 1174, 1176-77 (5th Cir. 1993) ("The Supreme Court has noted that [t]he term 'standing' subsumes a blend of constitutional requirements and prudential considerations.'") (quoting *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 471, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)).

[10] *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal citations and punctuation omitted). The Registrar does not challenge the Plaintiffs-Appellees' prudential standing, and we limit our discussion to Article III's requirements only.

or imminent; (2) a causal connection between such injury and the conduct complained of; and (3) the likelihood that a favorable decision will redress the injury.[11] The party invoking federal jurisdiction has the burden of establishing these elements.[12] Article III standing may also obtain by virtue of a state or federal statutory right, the invasion of which confers standing.[13]

The Registrar asserts that the injuries allegedly suffered by the Plaintiffs-Appellees do not rise to the level of injuries-in-fact. The Plaintiffs-Appellees disagree, pointing to the barrier of health care coverage, the impediments to travel, and the dignitary harm of an obsolete, incorrect birth certificate, as providing the requisite injury-in-fact. We need not resolve this disagreement, however, because Plaintiffs-Appellees have sufficiently alleged, for the purposes of standing, that (1) La. Rev. Stat. Ann. §§ 40:76 and 40:77 mandate that the Registrar issue a Certificate and (2) they have suffered cognizable harm by Registrar's refusal to do so.

The state of Louisiana recognizes a private right of action to correct public records. In *State ex rel.*

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[11] *Lujan,* 504 U.S. at 560-61, 112 S. Ct. 2130.

[12] *Id.* at 561, 112 S. Ct. 2130.

[13] *Warth v. Seldin,* 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) ("The actual or threatened injury required by Art. III may exist solely by virtue of 'statute creating legal rights, the invasion of which creates standing . . . '") (quoting *Linda R.S. v. Richard D.,* 410 U.S. 614, 617 n.3, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973)).

Treadaway v. Louisiana State Bd. of Health, the Supreme Court of Louisiana approved of civil actions as the proper vehicle for requiring the State to correct birth certificates.[14] *Treadaway* dealt with the attempt of the relator to have his deceased mother's birth certificate altered to designate her race as "white" rather than "colored."[15] The relator sought alteration under the then-current statutory provision for correcting birth certificates, La. Rev. Stat. Ann. § 40:266. That statute read: "No certificate or record on file in the local registrar's office shall be altered except upon submission of sufficient documentary or sworn evidence acceptable as the basis of the alteration." The contemporary analog of that statute is La. Rev. Stat. Ann. § 40:59, which subjects any alteration procedure to regulations of the Department of Health and Hospitals and requires a showing by sworn and documentary proof. The current statute

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[14] 54 So. 2d 343, 344 (La. App. 1951) ("We think that the public interest which is involved is paramount, and that in such a case what is most desirable is that the record be correct, and that whenever the attention of the Board of Health is directed by any person at interest to the possible incorrectness of a record and conclusive evidence is produced, the public interest demands that the correction be made . . . ."). *See also Messina v. Ciaccio,* 290 So. 2d 339, 342 (La. App. 4th Cir. 1974) (affirming the trial court's ordering of the Louisiana Bureau of Vital Statistics to alter child's birth certificate).

[15] *Treadaway,* 54 So. 2d at 343. The fact that the relator's underlying motive for changing the certificate arose from Louisiana's then-prevailing practice of institutionalized racial discrimination (which, by virtue of his mother's racial designation, saddled the relator with legal disabilities) does not affect that case's pertinence to the instant action.

that governs birth certificate corrections for out-of-state adoptions is La. Rev. Stat. Ann. § 40:76, which-like the predecessor La. Rev. Stat. Ann. § 40:266, and La. Rev. Stat. Ann. § 40:59-requires that specified documentary evidence be submitted before a new Certificate will be issued, and (as discussed in more detail *infra*) is couched in mandatory language. Accordingly, we find apposite *Treadaway's* holding that:

> [S]ince the matter was brought to the attention of the Board of Health by a person who was affected by the record, the Board of Health is authorized and, in fact, required by the statute to receive such evidence as might be available and, in accordance with its own rules, to make the change if the evidence submitted is found by the court to be satisfactory.[16]

Given the plain language of the governing statute and the Louisiana Supreme Court's recognition of private rights of action to correct the State's public documents, we hold that Infant J has made sufficient allegations of a statutory right to an accurate birth certificate and thus has Article III standing to compel the Registrar to issue a new Certificate.

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[16] *Id.* at 344. *Cf. Warth*, 422 U.S. at 500, 95 S. Ct. 2197 ("Essentially, the standing question . . . is whether the constitutional or *statutory provision* on which the claim rests properly can be understood as granting persons in the plaintiff' position a right to judicial relief.") (emphasis added).

This reasoning applies, by virtue of La. Rev. Stat. Ann. § 40:77,[17] with equal force to the allegations of the Adoptive Parents. Therefore, we hold that, like Infant J, the Adoptive Parents have made sufficient allegations of a statutory right to provide standing to pursue their claims against the Registrar.

This is not dispositive of the question of constitutional standing by itself, however, because the law is well-settled that a statute cannot grant standing to parties whose claims do not rise to the constitutional threshold.[18] When a person alleges a concrete, particularized, and individual injury by virtue of the operation of a statute, however, Article III standing to challenge that statute's execution usually obtains.[19] We therefore hold that

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[17] "Upon completion of the new record as provided for in R.S. 40:76 with respect to an adopted person who was born in Louisiana and adopted in another state, *the state registrar shall issue to the adoptive parents* a certified copy of the new record and shall place the original birth certificate and the copy of the decree and related documents in a sealed package and shall file the package in its archives." (emphasis added).

[18] *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 100, 99 S. Ct. 1601, 60 L. Ed. 2d 66 (1979).

[19] *See Lujan,* 504 U.S. at 561-62, 112 S. Ct. 2130 ("When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon *whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury,* and that a judgment preventing or requiring the action will redress it.") (emphasis added).

Plaintiffs-Appellees' allegations of injury flowing from the Registrar's failure to comply with the statute satisfy the prerequisites of injury-in-fact for Article III standing purposes.[20]

B. Full Faith and Credit

Turning to the substantive claims at issue, we first consider whether, under the United States Constitution, Louisiana owes full faith and credit to the New York adoption decree. The Registrar asserts several rationalizations why Louisiana does not owe full faith and credit to the decree as a constitutional matter, and she categorizes the argument based on them as an alternative to her argument that Louisiana's out-of-state adoption statute does not, by its plain meaning, require her to issue a new Certificate. As we need consider La. Rev. Stat. Ann. § 40:76 only if Louisiana owes full faith and credit to the New York decree,[21] we first address full faith and credit.

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[20] Although not raised by any party, we also note in passing that we and the district court have subject-matter jurisdiction over these claims. The Plaintiffs-Appellees' claim is that, by refusing to give full faith and credit to the out-of-state adoption decree, the Registrar denies them the rights afforded by Louisiana's out-of-state adoption certificating statute. This case therefore "arises under" the United States Constitution.

[21] That is, if Louisiana does not owe full faith and credit, then presumably La. Rev. Stat. Ann. § 40:76 would not apply because the New York adoption decree likely would not be a proper "final decree of adoption" that Louisiana would have to recognize.

1. The Full Faith and Credit Clause

The Full Faith and Credit Clause of the United States Constitution reads:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.[22]

Congress enacted implementing legislation for the Clause in 1790[23] and has amended that legislation only once, in 1948.[24] The Supreme Court first

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[22] U.S. Const. art IV, § 1.

[23] 1 Cong. Ch. 11, May 26, 1790, ch. 11, 1 Stat. 122. ("That the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.").

[24] 28 U.S.C. § 1738. In the 1948 revision of the Judicial Code, the wording of the first implementing statute was amended to include state statutes within the command of the implementing statute:

interpreted the Clause in *Mills v. Duryee* to require that an out-of-state *judgment* be given the same effect in the several states as it would be given in the adjudicating state.[25] Such expansive full faith and credit was later held not to be owed to a *statute* enacted in another state, however, when the forum state is competent to legislate on the matter.[26]

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> . . . .
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> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

[25] 11 U.S. (7 Cranch) 481, 485, 3 L. Ed. 411 (1813).

[26] *Franchise Tax Bd. of California v. Hyatt,* 538 U.S. 488, 494, 123 S. Ct. 1683, 155 L. Ed. 2d 702 (2003) ("As we have explained, '[o]ur precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments.' *Baker v. General Motors Corp.,* 522 U.S. 222, 232, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998). Whereas the full faith and credit command 'is exacting' with respect to '[a] final judgment . . . rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment,' *id.,* at 233, 522 U.S. 222, 118 S. Ct. 657, 139 L. Ed. 2d 580, it is less demanding with respect to choice of laws. We have held that the Full Faith and Credit Clause does not compel '"a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."'") (citing *Sun Oil Co. v. Wortman,* 486 U.S. 717, 722, 108 S. Ct. 2117, 100 L. Ed. 2d

The Supreme Court's most recent full faith and credit decision dealing with judgments, *Baker ex rel. Thomas v. General Motors Corp.,*[27] both reiterates that full faith and credit is owed to out-of-state judgments[28] and explains the "exacting"[29] nature of this duty. Important to the instant appeal, the Court in *Baker* emphasized that there are no "roving public policy exceptions" to the Clause;[30] that is, the forum state may not refuse to recognize[31] an out-of-state judgment on the grounds that the judgment would not obtain in the forum state.[32] Although the duty of recognition that is owed is "exacting," however, it is not absolute. For example, even though the forum

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743 (1988)) (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm'n,* 306 U.S. 493, 501, 59 S. Ct. 629, 83 L. Ed. 940 (1939)).

[27] 522 U.S. 222, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998).

[28] *Id.* at 233-35, 118 S. Ct. 657.

[29] *Id.* at 233, 118 S. Ct. 657.

[30] *Id.*

[31] Although it may be possible to collaterally attack a judgment as invalid in the forum state, *e.g.*, when the sister state lacked jurisdiction to effect the order, the validity of the instant New York order is not at issue. The Registrar conceded that the adoption order is a valid and true judgment under New York law.

[32] *Milwaukee County v. M.E. White Co.,* 296 U.S. 268, 277, 56 S. Ct. 229, 80 L. Ed. 220 (1935) ("In numerous cases this court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded . . . .").

state may not refuse to enforce the judgment of the adjudicating state, the forum state is not required to substitute the adjudicating state's provisions for the *enforcement* of judgments for their own.[33] The substantive issues adjudicated in that state are afforded full faith and credit; within particular bounds, the provisions for enforcing that judgment are determined by the law of the forum state.

2. Application

As a threshold matter, there is virtually universal acknowledgment that Louisiana owes full faith and credit to the New York adoption decree and *must* recognize that the Adoptive Parents are Infant J's legal parents. Numerous authorities hold that a state must afford out-of-state adoption decrees full faith and credit.[34] The parental rights and status of the

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[33] *Baker,* 522 U.S. at 234, 118 S. Ct. 657 ("Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the even-handed control of the forum law.") (citing *McElmoyle ex rel. Bailey v. Cohen,* 13 Peters 312, 325, 10 L. Ed. 177 (1839)).

[34] *See, e.g., Hood v. McGehee,* 237 U.S. 611, 615, 35 S. Ct. 718, 59 L. Ed. 1144 (1915) ("There is no failure to give full credit to the adoption of plaintiffs, in a provision denying them the right to inherit land in another State. Alabama is sole mistress of the devolution of Alabama land by descent.") *See also Finstuen,* 496 F.3d at 1156 (collecting authorities from Oklahoma, Montana, North Carolina, Pennsylvania, Florida, Illinois, Massachusetts, New Mexico, and California that all hold adoption judgments are owed full faith and credit). See also the position of the Restatement (First) Conflict of Laws, § 143. Most pertinently,

Adoptive Parents, as adjudicated by the New York court, are not confined within that state's borders and do not cease to exist at Louisiana's borders; the Registrar points to no precedent or persuasive authority to the contrary. In the face of this well-established legal principle, however, the Registrar tenaciously insists that there are exceptions to the application of the Clause that allow Louisiana to refuse to give full faith and credit to the instant adoption decree. The Registrar contends first that the "preclusive effects of an out-of-state judgment do not compel another State to alter its public records." She asserts further that adoption decrees are "fundamentally different judgments" from those that must be given "categorical effect" under the Clause, because, unlike typical "money judgements," adoption decrees "create new status, forge on-going family relationships, are typically the product of non-adversarial proceeding[s], and may subvert a State's core domestic policies." Finally, the Registrar echoes her first contention by advancing that the Clause does not support extending the effects of an adoption decree to control the public records of another state. We consider each of these contentions in turn.

a. An Out-of-state Adoption Decree has only Preclusive Effect on Future Litigation

The Registrar's first contention is in reality an argument that the Clause's reach is coextensive with

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Louisiana itself acknowledges that out-of-state adoptions are to be afforded full faith and credit. *Alexander v. Gray,* 181 So. 639, 645 (La. App. 2d Cir. 1938).

that of the traditional principle of *res judicata* and therefore does not constrain a forum state's actions beyond such strictures. By way of example, the Registrar offers that an adjudicating state's divorce decree would preclude the forulm state from re-litigating the matters decided in that divorce, but would not mandate that the forum state alter its public records to reflect that judgment. From this premise, the Registrar propounds the argument that full faith and credit, being no greater than *res judicata,* does not require the Registrar to "alter Louisiana's vital records [in a manner] contrary to Louisiana's substantive family law." The Registrar takes this argument further by noting (correctly) that full faith and credit does not require a state to substitute its own statutes for those of another state. Therefore, she continues, because "categorical" recognition of the New York judgment (as opposed to giving it mere *res judicata* effect) would be tantamount to exporting New York's public policy determination about who may adopt in Louisiana, requiring Louisiana to accept the New York judgment would be no different than requiring Louisiana to substitute a New York statute for one of its own. Consistent with her argument that full faith and credit is nothing greater than *res judicata,* the Registrar also contends that, because Louisiana was not party to the New York proceedings ("adjudicating her duty to register the New York adoption decree"), Louisiana is not required "to obey New York law"; that Louisiana's processing of vital statistics is "collateral" to "the decree's *res judicata* effects."

These arguments fail for a number of reasons. First and foremost, full faith and credit is not merely a redundant reiteration of *res judicata.* At its core, the common law doctrine of *res judicata* is concerned with respecting the finality of litigation.[35] In contrast, even though the Clause does promote this laudatory end,[36] its primary purpose is to serve the *modus vivendi* of federalism by harmonizing the competing sovereign interests of the several states.[37] A crucial difference between *res judicata* and the Clause is that *res judicata* is the *voluntary* restraint by a forum state from exercising its power so as to respect the judgment of another state. Indeed, as to judgments, a forum state may and sometimes does choose to

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[35] 47 Am. Jur. 2d Judgments § 465 ("[T]he doctrine of res judicata is a manifestation of the recognition that endless litigation leads to confusion or chaos. It reflects the refusal of the law to tolerate a multiplicity of, or needless, litigation to the harassment and vexation of a party opponent.") Additionally, *res judicata* is a doctrine based on the equitable tradition of estoppel. *See* 47 Am. Jur. 2d Judgments § 466.

[36] *See Baker,* 522 U.S. at 235, 118 S. Ct. 657 (noting that full faith and credit has a "preclusive" effect on litigation in forum states).

[37] *Milwaukee County,* 296 U.S. at 276-77, 56 S. Ct. 229 ("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."). *See also generally* Stewart E. Sterk, *The Muddy Boundaries Between* Res Judicata *and Full Faith and Credit,* 58 Wash. & Lee L. Rev. 47 (2001).

re-litigate issues as it sees fit.[38] In contrast, the Clause is a *mandatory,* constitutional curb on every state's sovereign power. With respect to judgments (although not to statutes), a state as a rule *has no discretion* to disregard a decision of another state on a matter over which that other state is competent to exercise jurisdiction.[39]

The Registrar's second argument, that the New York adoption decree is a judgment *cum* statute to which Louisiana does not owe full faith and credit, is a leap too far. Although she is correct that, under the Clause, a statute is not owed the same exacting obeisance as is a judgment, the Registrar cites no authority for the proposition that some kinds of judgments may be treated as statutes for purposes of full faith and credit analyses. She appears to be arguing that, because the New York court's adoption decree embodies both the public policy of New York

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[38] *See, e.g., Amerson v. La. Dep't of Transp. & Dev.,* 570 So. 2d 51, 54 (La. App. 5th Cir. 1990) (discussing some judicially created exceptions to the bar of *res judicata*).

[39] *See Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430, 438, 64 S. Ct. 208, 88 L. Ed. 149 (1943) ("We are aware of no . . . considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to . . . a judgment outside the state of its rendition.").

There are limited exceptions to the mandate of the Full Faith and Credit Clause that look behind the judgment to original court proceedings-such as attacking the validity of the judgment under the forum state's law-which are inapplicable here and are not advanced by the Registrar.

and New York's adoption statutes (as interpreted by New York courts), the decree may be ignored by Louisiana as an attempt to substitute New York's statute for Louisiana's. But, if credited, this shallow, circular attempt to conflate "judgment" and "statute" would swallow the Clause's curb on the states.[40] If the Registrar's argument were correct, its natural conclusion would be that only those judgments that are rendered on purely common law grounds-unadulterated by any statutory nexus, effect, or derogation-would have to be afforded protection under the Clause. Under this reasoning, to the extent that a judgment incorporates the statutory-and repugnant-public policy of the adjudicating state, a forum state would be free to ignore the adjudicating state's *judgment* as an improper substitution for the forum state's *statute.* Such a reading, for the purpose of interstitially importing such an illicit "public policy exception" to the reach of the Clause, is utterly contradicted by precedential full faith and credit jurisprudence.

We acknowledge, as the Registrar observes, that an out-of-state judgment may not force the forum state to "accomplish an official act within its exclusive province."[41] But, this exception refers to judgments that *themselves* purport to compel action *by* (not *in*)

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[40] *See also Finstuen,* 496 F.3d at 1153 (discrediting a similar argument).

[41] *Baker,* 522 U.S. at 235, 118 S. Ct. 657.

another state.[42] Even though the Clause may not serve as a puppeteer to empower an adjudicating state to govern a forum state by judicial decree, that is not occurring here. The New York court has not ordered Louisiana, or any other state, to do or refrain from doing anything. It has merely adjudicated a parent-child relationship between the Adoptive Parents and Infant J. Thus, the question here is not what has a New York decree purported to compel Louisiana *to do or not to do*; rather, the question here is what respect does Louisiana *owe* to New York's adoption decree. The obvious answer is that Louisiana owes "exacting" full faith and credit to the New York adoption decree.[43]

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[42] *Id.* (noting that the Court has struck down decrees by one state that purported to transfer title between parties in another state, even though the judgment was preclusive on the parties themselves) (citing *Fall v. Eastin,* 215 U.S. 1, 30 S. Ct. 3, 54 L. Ed. 65 (1909)). *See also Finstuen,* 496 F.3d at 1154.

[43] The Registrar's argument that Louisiana is not bound because it was not party to the adoption decree is even more specious. The Supreme Court has made abundantly clear that non-parties may be bound by judgments under the Clause. *See, e.g., Johnson v. Muelberger,* 340 U.S. 581, 588-89, 71 S. Ct. 474, 95 L. Ed. 552 (1951) (holding that, under the Clause, a daughter may not challenge the validity of her deceased father's Florida divorce on jurisdictional grounds in New York court when Florida law would not allows such an attack). It is true that the Supreme Court held, in *Estin v. Estin,* 334 U.S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561 (1948), that a judgment rendered in another state would only be enforced if the other state had personal jurisdiction over the parties to the judgment. As the Tenth Circuit noted when dismissing an argument similar to the Registrar's, however, *Estin* only applies when one attempts to

b. Adoptions Decrees are Fundamentally Different from Those Judgments that Must Be Given Categorical Effect under the Full Faith and Credit Clause.

Arguments like those of the Registrar-that adoption decrees are fundamentally different kinds of judgments and are not owed full faith and credit-have either been rejected by those courts that have considered them or simply reflect a fundamental misapprehension of the law and the Constitution. First, as already noted, multiple authorities-including Louisiana-have demonstrated virtually universal agreement that adoption decrees are judgments for purposes of full faith and credit.[44] Furthermore, although the Supreme Court itself has not addressed this precise issue, it has held that other types of domestic-law judgements are to be afforded full faith and credit. For example, the very case on which the Registrar would rely for her argument, *New York ex rel. Halvey v. Halvey,*[45] recognized that the results of custody proceedings are owed full faith and credit. In *Halvey*, the Court considered a

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enforce a judgment *against* a non-party. *See Finstuen,* 496 F.3d at 1155. Here, as in *Finstuen,* the Plaintiffs-Appellees are only seeking to be afforded the rights under Louisiana law to which the judgment entitles them. The New York judgment is not, for example, a damage award or injunction against Louisiana or the Registrar.

[44] *See supra* note 34.

[45] 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947). The Registrar's specific citation of authority is to Justice Frankfurter's concurrence.

mother's attempt to have a New York court enforce her Florida-adjudicated child-custody determination. The New York state court had given effect to the determination, but had modified its terms. After the mother challenged this modification under the Clause, the Supreme Court held that (1) New York may alter the custody decree because under Florida law, such decrees are modifiable by a Florida court, but (2) New York could do so only to the same extent as could a Florida court.[46] In reaching this result, the Court reiterated the general principle that out-of-state judgments are due full faith and credit, stating "[t]he general rule is that this command [the Full Faith and Credit Clause] requires the judgment of a sister State to be given full, not partial, credit in the State of the forum."[47]

The Registrar's claim that adoptions fall within a "category" of judgments that are not owed full faith and credit is likewise unavailing. The dichotomy she purports to identify would describe judgments as either prospective or retrospective, with retrospective judgments being owed full faith and credit but prospective judgments *not* being owed such respect by forum states. According to this contention by the Registrar, the Clause would apply to such retrospective judgments as money judgments, but not to prospective judgments (to which subset she would

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[46] *Id.* at 614-15, 67 S. Ct. 903.

[47] *Id.* (citing *Davis v. Davis,* 305 U.S. 32, 59 S. Ct. 3, 83 L. Ed. 26 (1938); *Williams v. State of North Carolina,* 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942)).

assign adoption decrees). This assertion echoes the argument dismissed by the Supreme Court in *Baker* that there is some *per se* difference under the Clause between money judgments and equitable judgments. The *Baker* Court held unequivocally that both kinds of judgments are afforded full faith and credit under the Constitution.[48]

The Registrar cites no authority for her proposed prospective-retrospective dichotomy of judgments. Instead, she confuses the broad full faith and credit obligation owed by a forum state to out-of-state *judgments* with the tightly restricted obligation of the forum state to respect an out-of-state court's ability to determine *post-judgment activity* in the forum state.[49] This distinction was articulated most recently in *Baker,* when the Court noted that, although respect for judgments is exacting, the Clause does not require one state "to adopt the practices of other States regarding the time, place, manner, and mechanisms for enforcing judgments."[50]

The Registrar would support her distinction by a negative analogy, seeking to show that, unlike money judgments or divorces, which are "final," an adoption judgment "concern[s] the new and ongoing parent-child status created in the originating State." This description of the nature of an adoption is

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[48] 522 U.S. at 234, 118 S. Ct. 657.

[49] *See generally* Sterk, *supra* note 37, for a discussion of this dichotomy.

[50] *Baker*, 522 U.S. at 235, 118 S. Ct. 657.

misleading, however: Like divorce decrees between spouses, adoption decrees seek to make legally final the relationship between the adoptive parents and the adopted child.[51] The parent-child status is no more "ongoing" or less final than any other legally determined domestic relationship. That is, the adoption decree creates a legal relationship that remains in effect until and unless it is subsequently changed by legal processes. No one questions that adoptive parents may lose or surrender their parental rights through judicial action just as spouses may divorce and later remarry each other; but this truism does not in any way mitigate the obligation of one state to give full faith and credit to the status judgments of other states.[52]

The Registrar concludes her argument on this point with the statement that "categorically enforcing sister-state adoption decrees will inevitably undermine core social policies of the second State in a way that simple money judgments or even divorce

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[51] *See, e.g., Matter of Male Infant D.,* 137 Misc. 2d 1016, 1019 523 N.Y.S.2d 369 (New York Family Ct. 1987). ("Since certainty and finality in an adoption proceeding are highly desirable, both from the point of view of the child, who has a substantial interest in a secure home, and from the point of view of the adoptive parents, whose bonding with the child should be unimpeded by fears of possible loss of the child, it is of great importance that an adoption be final when completed and not subject to future attack or controversy.")

[52] Likewise, the Registrar's argument that adoptions are not "judgments" because they are not the product of adversarial proceedings is wholly without merit. *See supra* note 34 and accompanying text.

decrees do not." To the extent that this assertion is meant to cast doubt on whether Louisiana must give full faith and credit to the subject New York adoption decree, the Supreme Court has made pellucid that there is no "roving public policy exception" to the Full Faith and Credit Clause.[53] Again, the specific question here is not whether Louisiana may refuse to recognize the New York adoption (which it clearly may not), but whether that recognition requires it to issue a Certificate under the terms of its own statute. Whether the New York adoption contravenes Louisiana's "public policy" is simply irrelevant and immaterial. Put another way, the new Certificate merely records the action done by the New York court and expresses nothing about what Louisiana would or would not do in matters of its solely domestic concern.

c. The Clause Does Not Support Extending the Effects of an Adoption Decree to Control the Public Records of Another State.

The Registrar's argument here is that the Clause does not "command[ ] complete recognition of a sister-state adoption in another State's public records." This is nothing more than a rehash of her earlier argument that adoptions are not a specie of judgment that is owed universal recognition under the Clause. It is equally unavailing.

C. LA. REV. STAT. ANN. § 40:76.

Having determined that Louisiana owes full faith and credit to the instant New York adoption decree,

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[53] *Baker,* 522 U.S. at 233, 118 S. Ct. 657.

we turn to the Registrar's arguments concerning Louisiana's duty *vel non* to give effect to that decree. She contends that Louisiana's out-of-state adoption birth certificate statute is an "enforcement mechanism," and therefore, even if Louisiana owes full faith and credit to the New York adoption decree, is not required to enforce the decree by issuing a Certificate to Infant J. Alternatively, the Registrar urges us to certify the question of § 40:76's application to the Supreme Court of Louisiana. We address certification before addressing the Registrar's proffered interpretation of the State's statute.

1. Certification of the Question of Interpretation of § 40:76 to the Louisiana Supreme Court.

Rule 12 of the Louisiana Supreme Court authorizes us to certify questions of state law to that court. The Registrar urges us to certify the "proper construction" of § 40:76 to the Louisiana Supreme Court. She offers as support for this request that (1) the state law is unsettled on this question; (2) a definitive interpretation would "impact the constitutional question"; and (3) the "the state law implicates sensitive family-law and interstate comity issues." Because we hold that the statute's meaning is clear and unambiguous, we decline the Registrar's request for certification under Rule 12.

2. Section 40:76 is an Enforcement Mechanism for Purposes Full Faith and Credit.

The Registrar does not point to any direct authority for her bald assertion that a statute such as § 40:76 is a "time [and] manner . . . mechanism[ ] for

enforcing judgments."[54] The Plaintiffs-Appellees counter not only that the statute is not an enforcement mechanism, but that it would be immaterial if that were not clear because, even if the statute were an "enforcement mechanism," under *Baker,* the Registrar has failed to enforce the statute in an "evenhanded" manner.

We are at least doubtful that the adoption statute is an "enforcement mechanism." But even if we assume *arguendo* that it is such a mechanism, the Registrar cannot prevail. If the plain language of Louisiana's own statute requires that a new, corrected birth certificate be issued to Louisiana-born adopted minors and their adoptive parents[55] (as it clearly does), that requirement must be applied in an "evenhanded" manner.[56] The pertinent question thus turns on the language of Louisiana's statute.

3. Interpreting LA. REV. STAT. ANN. § 40:76.

Neither the parties's citations nor our research reveals that any other court, state or federal, has interpreted § 40:76. Proceeding on a blank slate, therefore, we must look to analogous decisions of

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[54] *Baker,* 522 U.S. at 235, 118 S. Ct. 657.

[55] *See Finstuen,* 496 F.3d at 1154 (noting that, even though a California judgment is owed full faith and credit by Oklahoma, "[w]hatever rights may be afforded [by virtue of the judgment] flow from an application of Oklahoma law, not California"). *See also McElmoyle ex rel. Bailey v. Cohen,* 13 Peters 312, 325, 10 L. Ed. 177 (1839) (holding judgment may only be enforced as laws of enforcing forum permit).

[56] *Baker,* 522 U.S. at 224, 118 S. Ct. 657.

Louisiana's courts for guidance in construing its statutes: When we interpret state law, we are "bound to apply the law as the state's highest court would."[57] With regard to judicial interpretation of state statutes, the Louisiana Supreme Court has held:

As a general rule, "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters' [in which case] the intention of the drafters, rather than the strict language controls."[58]

Furthermore:

> While it is true that the Civil Code directs that laws on the same subject matter should be construed with reference to one another, it is also true that it is only when one statute is unclear that another on the same subject should be called in aid to explain it. Otherwise, where there is no ambiguity, the words of a statute are to be read in their

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[57] *FDIC v. Abraham,* 137 F.3d 264, 267-68 (5th Cir. 1998) (citations omitted).

[58] *State v. Ste. Marie,* 723 So. 2d 407, 409 (La. 1998) (quoting *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 243, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989) (internal citation omitted)).

> most usual significance, that is, according to their general and popular use.[59]

With these general principles in mind, we examine the text of the subject statute itself. La. Rev. Stat. Ann. § 40:76 reads:

> A. When a person born in Louisiana is adopted in a court of proper jurisdiction in any other state or territory of the United States, the state registrar may create a new record of birth in the archives upon presentation of a properly certified copy of the final decree of adoption or, if the case has been closed and the adoption decree has been sealed, upon the receipt of a certified statement from the record custodian attesting to the adoption decree.
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> B. The decree is considered properly certified when attested by the clerk of court in which it was rendered with the seal of the court annexed, if there is a court seal, together with a certificate of the presiding judge, chancellor, or magistrate to the effect that the attestation is in due form. The certified statement is considered proper when sworn to and having the seal of the foreign state or territory's record custodian.

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[59] *Crescionne v. Louisiana State Police Retirement Bd.,* 455 So. 2d 1362, 1363 (La. 1984) (citing La. Civil Code art. 17 which was amended in 1987 to be reassigned as La. Civil Code Ann. art. 13).

> C. Upon receipt of the certified copy of the decree, the state registrar shall make a new record in its archives, showing:
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> (1) The date and place of birth of the person adopted.
>
> (2) The new name of the person adopted, if the name has been changed by the decree of adoption; and
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> (3) The names of the adoptive parents and any other data about them that is available and adds to the completeness of the certificate of the adopted child.

The district court interpreted the plain language of § 40:76(C) to mandate that the Registrar issue a Certificate for Infant J that identifies both Adoptive Parents. The Registrar takes issue with the district court's interpretation for two reasons. First, she asserts that § 40:76(A) vests her with the discretion to decide whether to issue a new birth certificate ("the state registrar *may* create a new record of birth in the archives . . . ."), and that § 40:76(C)'s mandatory language ("Upon receipt of the certified copy of the decree, the state registrar *shall* make a new record . . .") applies only to the *contents* of the new certificate. This reading, she argues, renders her decision whether to issue a new Certificate wholly discretionary and not subject to challenge. The Registrar further contends that the phrase "adoptive parents" should be construed *in pari materia* with those provisions of the Louisiana Civil Code that

prohibit adoptions within the state by unmarried couples. The Registrar does not offer, and our research does not reveal, any place where the phrase "adoptive parents" is expressly defined in the Louisiana Civil Code, the State's statutes, or the case law.

The crux of the Registrar's first argument is that each word in the statute must be given effect;[60] accordingly, giving effect to this permissive language in § 40:76(A) renders the entire statute discretionary as to whether a Certificate is issued. Thus, according to the Registrar, (1) § 40:76(A) affords her broad discretion in deciding whether to issue a Certificate on the basis of an out-of-state adoption; (2) § 40:76(B) establishes the authentication requirements for an out-of-state decree; and (3) § 40:76(C) mandates *only* the contents of the Certificate, when and if the Registrar should choose to issue one.

Dealing as we are with a statutory grant of ministerial authority, we look to Louisiana precedent on this matter as a guide for our interpretation. Under the State's constitution, a statutory grant of ministerial authority must comport with that document's separation-of-powers clause, which prohibits "[unconstitutional] delegation" of authority by the legislative branch of state government to

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[60] *See Burmaster v. Plaquemines Parish Gov't,* 982 So. 2d 795, 804 (La. 2008) ("[E]very word in a statute must be given meaning, if possible, and no word, clause, phrase or sentence of a statute shall be deemed meaningless or surplusage if a construction can be legitimately found that will give force to and preserve every word of the statute.").

another branch.[61] Delegation of authority by the legislature to the executive branch must not be so broad as to impinge the mandatory separation of powers.[62] In considering this issue, Louisiana courts have traditionally distinguished between two types governmental authority: (1) *ministerial or administrative* authority, which may be delegated; and (2) purely *legislative* authority, which may not be delegated.[63] As for the former, Louisiana's highest court has observed that:

> the complexity of our social and industrial activities . . . [have lead the court's] decisions to hold as non-legislative the authority conferred upon boards and commissions . . . . [T]he Legislature may make the operation or application of a statute contingent upon the existence of certain conditions, and may delegate . . . the power to determine the existence of such facts and carry out the terms of the statute. So long as the regulation or action . . . does not determine what the law shall be, or involve the exercise of primary and independent discretion, but only determines within prescribed limits some fact upon which the law by its own terms

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[61] *State v. All Pro Paint & Body Shop, Inc.,* 639 So. 2d 707, 711 (citing La. Stat. Ann. art. II § 2).

[62] *Id.*

[63] *Id.*

> operates, such regulation is administrative and not legislative in its nature.[64]

As for the delegation of legislative authority, that court has stated:

> When the delegated authority is unfettered . . . , its exercise becomes *legislative, not administrative,* in nature, and contravenes the mandate of Article 2, Section 2 of the Louisiana Constitution.[65]

The Supreme Court of Louisiana has fashioned a three-pronged test for determining whether a statute unconstitutionally delegates legislative authority:

> Delegation of authority to an administrative agency is constitutionally valid if the enabling statute (1) contains a clear expression of legislative policy, (2) prescribes sufficient standards to guide the agency in the execution of that policy, and (3) is accompanied by adequate procedural safeguards to protect against abuse of discretion by the agency.[66]

Whenever possible, a court should avoid interpreting a statute in a way that renders it

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[64] *Schwegmann Brothers Giant Super Markets v. McCrory,* 237 La. 768, 112 So. 2d 606, 613 (1959) (footnotes omitted).

[65] *State v. Taylor,* 479 So. 2d 339, 343 (La. 1985) (emphasis added).

[66] *All Pro Paint & Body,* 639 So. 2d at 711.

unconstitutional.[67] If the Registrar's interpretation of § 40:76 would render it unconstitutional under the *All Pro Paint & Body* test, then it should be rejected in favor of a more constrained construction, assuming one is available.

The Registrar's interpretation fails at least prongs two and three of the *All Pro Paint & Body* test. First, even if the Registrar were correct that the permissive "may" in § 40:76(A) allows her unfettered discretion to issue or not to issue a birth certificate, there is still no accompanying legislative guide to implementing the legislative policy (assuming there is one) in furtherance of this grant of discretion. Under the Registrar's own argument it would be within her sole decision whether to issue a birth certificate: No standards for making that decision, outside of mere whimsy, are to be found in the statute.[68] By the same

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[67] *Crown Beverage Co. v. Dixie Brewing Co.,* 695 So. 2d 1090, 1093 (La. App. 4th Cir. 1997) ("If a statute can be interpreted in either of two ways, one of which raises a serious question of the statute's constitutionality and one of which does not, then the court should favor the interpretation which avoids the constitutional question.") (citing Norman Singer, *Sutherland's Statutory Construction* § 45.11 (5th ed. 1992 rev.)).

[68] The Registrar has in fact described how the application of such unguided discretion might look. In her deposition, the Registrar noted that it has been her policy, when previously faced with a request for a birth certificate for an out-of-state adoption by persons unable to legally adopt in Louisiana, to issue the certificate with only one parent's name. Yet, she cites no statutory authority for this practice other than Louisiana's *in-state* adoption provisions. Certainly nothing in § 40:76 authorizes this practice or indicates that it furthers the legislature's policy with regard to *out-of-state* adoptions.

token, this absence of any guiding policy is linked to the absence of any procedural safeguards. Because, under the Registrar's interpretation, she would have the unlimited discretion to issue (or to decline to issue) birth certificates for out-of-state adoptions, she in her discretion may simply choose not to issue a birth certificate for a Louisiana-born child to a married couple who *could* legally adopt in Louisiana. Her proffered reading of the statute would thus afford such a couple no safeguard in their access to a new, corrected birth certificate. The Legislature's intent in enacting § 40:76, at a minimum, is surely not to allow the Registrar-for any reason or for no reason at all-to deny birth certificates to out-of-state adopters who could have adopted the Louisiana-born child under Louisiana law. The statute's plain language suggests no such legislative intent.

In the framework of *All Pro Paint & Body,* we do not find the Registrar's excessively broad interpretation of § 40:76 to be persuasive or reasonable. Under the Registrar's interpretation, she would enjoy absolute discretion in issuing or denying birth certificates for out-of-state adoptions, without any legislative guidance or limitation whatsoever. Furthermore, there is some authority which holds that when a statute directs a public official to perform some act, the otherwise permissive auxiliary "may" is in fact read as mandatory, if to deem it discretionary would thwart the act's very purpose.[69]

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[69] *See Sanders v. Department of Health & Human Resources,* 388 So. 2d 768, 770 (La. 1980) ("If a requirement is so essential to the statutory plan that the legislative intent would be

We need not go so far as to hold that the language in § 40:76(A) is mandatory, however, because a facially reasonable reading of that statute would restrict the applicability of the "may" in that section *to that section only,* limiting the Registrar's discretion to issue a birth certificate for an out-of-state adoption to the determination whether the out-of-state decree is "properly certified," or, in the case of sealed records (as is the case here), on receipt of a certified statement. This more circumspect reading affords the Registrar the discretion of the permissive language in the exercise of her ministerial function, i.e., in determining the validity and sufficiency of the certification furnished, without granting her the plenary and arbitrary power to decide which Louisiana-born children will receive Certificates and which will not.

We hold that the correct interpretation of § 40:76(A) is that its use of "may" affords the Registrar the limited discretion of determining whether the certification furnished by the applicants is satisfactory. The discretion afforded her is that she

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frustrated by non-compliance, then it is mandatory."). *See also* Norman Singer, *Sutherland's Statutory Construction* § 57.14 (5th ed. 1992 rev.) ("Courts have also stated that where the intent of the legislature was to impose a duty on a public officer rather than a discretionary power, even the word 'may' has been held to be mandatory."). *But see Bannister v. Department of Streets,* 666 So. 2d 641, 646 (La. 1996) ("[P]rovisions designed to secure order, system, and dispatch in proceedings by guiding the discharge of a governmental official's duties are usually construed as directory even if worded in the imperative, especially when the alternative is harshness or absurdity.").

need issue a certificate only when she is satisfied that the certification is satisfactory, a decision that is guided in turn by § 40:76(B)'s list of the required contents of such certification. Finally, if the decree's certification is proper, then § 40:76(C) *mandates* that the Registrar issue a new, corrected birth certificate. This interpretation avoids the Registrar's manifestly strained and unconstitutional attempt to go beyond the plain language of the statute.

In her second statutory-interpretation argument, the Registrar notes that construing § 40:76(C) as requiring her to issue a birth certificate that lists both adoptive parents whenever, under § 40:76(A), she determines that the proffered certification satisfies § 40:76(B), is a reading improperly isolated from the rest of Louisiana's substantive law, specifically articles 1198, 1221, and 1243 of the Louisiana Children's Code, which authorize joint adoptions by married couples only, and article 3520(B) of the Louisiana Civil Code, which limits state recognition to married heterosexual persons only.[70] Thus, according to the Registrar's interpretation, because (1) the Adoptive Parents are an unmarried, same-sex couple, and (2) adoption provisions *other* than § 40:76 would deny them the right to adopt in Louisiana, §

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[70] La. Civ. Code Ann. art. 3520(B) ("A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage.").

40:76 should likewise require such a prohibition for out-of-state adoptions by referential implication.

The Registrar relies on Article 13 of the Louisiana Civil Code, which directs that statutes are to be construed with reference to one another. Assuming *arguendo* (and not without serious doubts as to its validity) that the statutory provisions which the Registrar cites are relevant or salient to the meaning of "adoptive parents," the Registrar's reasoning nevertheless fails to account for the strictures established by the Supreme Court of Louisiana when interpreting the Civil Code's Article 13. The court held in *Crescionne* that other statutes are to be consulted "*only* when one statute is unclear."[71] In essence, the Registrar's entire argument rests on construing the term "adoptive parents" *not* to include "same-sex couples" for purposes § 40:76 because an *in-state* adoption can be effected only by married, heterosexual couples. Nowhere does she argue, however, that the term "adoptive parents" is ambiguous or unclear.

The court's decision in *Crescionne* is instructive here. In that case, the parties disagreed about the meaning of the phrase "surviving spouse" in a particular state statute. The court reasoned that:

> The ordinary meaning of the word "spouse" is one's husband or wife, and marriage is

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[71] 455 So. 2d at 1363 (emphasis added). The court in *Crescionne* considered Article 17, which was later re-codified as present Article 13. The reassignment "did not change the law." *See* Revision Comments.

> dissolved only by death, divorce, judicial decree of nullity, or the contracting of another marriage on account of absence when authorized by law. Had the legislature intended that a use of the term other than the one usually and generally understood, it could have given the words "surviving spouse" a legal definition . . . .
>
> . . . .
>
> Since there is no special statutory definition of the term "surviving spouse," we hold that it must be given its ordinary, commonly understood meaning . . . .[72]

Like "surviving spouse," the term "adoptive parents" is nowhere defined in the statute, or elsewhere in the codes or the case law of Louisiana. When we parse the term for its plain meaning, we find that a common dictionary definition of "parent" is "father or mother,"[73] and that the meaning of "adoptive" is "of or involving adoption . . . acquired or related by adoption."[74] Thus, when effect is given to the ordinary meaning of the words of the statute, the plain meaning of "adoptive parents" is a "father or mother who adopts a child." It is obvious to us that this construction is the ordinary, commonly understood one. As the meaning of "adoptive parent"

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[72] *Crescionne,* 455 So. 2d at 1364.

[73] *Webster's Encyclopedia Unabridged Dictionary Of The English Language* (1989 ed.).

[74] *Id.*

is clear and unambiguous, our inquiry is over; we need not consult other statutes for interpretive guidance.[75] Neither shall we overstep our mandate by importing the strained and attenuated reading that the Registrar urges by reference to other statutory provisions of at best uncertain applicability. The New York adoption decree constitutes both Adar and Smith as a "father" "related by adoption" to Infant J. Accordingly, under the plain meaning of the term "adoptive parents," written as it is in § 40:76, and by virtue of the New York adoption decree, we hold that Adar and Smith are the "adoptive parents" of Infant J for purposes of §§ 40:76 and 40:77.

CONCLUSION

We hold that under the plain meaning of the statutes, Adar and Smith are the "adoptive parents" of the minor J.C. A.-S. for purposes of LA. REV. STAT. ANN. §§ 40:76 and 40:77, and that under the Full Faith and Credit Clause of the Constitution of the United States, Louisiana owes full faith and credit to the New York adoption decree that declares J.C. A.-S. to be the adopted child of Adar and Smith. We hold further that said § 40:76 does not vest the Registrar

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[75] Likewise, the Registrar's argument that La. Rev. Stat. Ann. § 40:34(D) prohibits altering vital birth records in violation of state law is without force; the out-of-state adoption provision, La. Rev. Stat. Ann. § 40:76, expressly requires the "adoptive parents" to be named on the new, corrected birth certificate, and it controls. *See, e.g., Morton v. Mancari,* 417 U.S. 535, 550-51, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

with discretion to refuse to make a new, correct birth certificate for a Louisiana-born child when, as here, his out-of-state adoption decree is evidenced by documentation that indisputably satisfies the requirements of § 40:76(A) and (B). We also hold that § 40:76 mandates that the Registrar make a new record for J.C. A.-S. and issue a new, correct birth certificate for him containing all statutorily directed information.

We therefore LIFT our stay of the district court's order; AFFIRM the district court's grant of a mandatory injunction; and ORDER that the Registrar comply with the district court's injunction forthwith.[76]

[76] Because we affirm the district court's grant of summary judgment on these grounds, we decline to address Plaintiffs-Appellees' equal protection arguments.

Appendix D

United States District Court,
E.D. Louisiana.
Oren ADAR, et al.
v.
Darlene W. SMITH, in her capacity as State Regstrar and Director, Office of Vital Records and Statistics, State of Louisiana Department of Health and Hospitals.
Civil Action No. 07-6541.
Dec. 22, 2008.

ORDER AND REASONS

JAY C. ZAINEY, District Judge.

Before the Court is a **Motion for Summary Judgment (Rec. Doc. 27)** filed by Plaintiffs, Oren Adar and Mickey Ray Smith, individually and as parents and next friends of J.C.A.-S., a minor ("Plaintiffs"). Defendant Darlene W. Smith, in her official capacity, opposes the motion. The motion, set for hearing on December 10, 2008, is before the Court on the briefs without oral argument. For the reasons that follow, the motion is **GRANTED.**

I. BACKGROUND

Mr. Adar and Mr. Smith, the Plaintiffs, currently live in San Diego, California. (Compl. ¶ 6). They are adoptive parents of J, born in Shreveport, Louisiana, in 2005. (*Id.*). They jointly adopted J in New York and obtained an Order of Adoption issued by the Ulster County Family Court, dated April 27, 2006. (*Id.*).

The Plaintiffs allege that they sought from the Louisiana Office of Public Health, Vital Records

Registry, an amended birth certificate from the State of Louisiana that properly identifies both of them as J's legal parents. (*Id.* at ¶ 8). According to Plaintiffs, Smith "rejected" the request to issue an amended birth certificate listing the Plaintiffs as J's parents through a letter dated April 27, 2007. (*Id.* at ¶ 9, *See* MSJ Exh. 2). In that letter, Smith concluded that Louisiana law and public policy do not permit her to issue a birth certificate with the names of unmarried adoptive parents. (Pl. Stmt. of Facts p. 3). Smith further relied on an advisory opinion from the Louisiana Attorney General's Office, which concluded that Louisiana is not required to give full faith and credit to an out-of-state adoption decree that violates Louisiana public policy. (Pl. Stmt. of Facts p. 3, *see* MSJ Exh. 3). Plaintiffs aver that to this day, they have been unable to obtain an accurate birth certificate for their child, which has caused harm to the Plaintiffs.[1] (Pl. Stmt. of Facts p. 6-7).

As a result, the Plaintiffs filed the instant action on October 9, 2007, requesting that the Court enter a judgment in the following respects: (1) declaring that Ms. Smith's refusal to respect Plaintiffs' out-of-state adoption decree and refusal to issue an amended birth certificate for J violates the Full Faith and Credit Clause of the Constitution and Plaintiffs' rights thereunder; (2) declaring that Ms. Smith's refusal to respect Plaintiffs' out-of-state adoption

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[1] Specifically, the Plaintiffs allege that their inability to obtain a birth certificate for Infant J has caused many problems relating to providing medical insurance for Infant J through the Plaintiffs' employer.

decree and refusal to issue an amended birth certificate for J violates Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; (3) entering an injunction requiring Ms. Smith, in her official capacity, to issue an amended birth certificate to J.C.A.-S., identifying Oren Adar and Mickey Ray Smith as the child's parents; and (4) awarding reasonable attorneys' fees and costs under 42 U.S.C. § 1988. (Compl. p. 5). The Defendant thereafter filed a Motion to Dismiss for Lack of Jurisdiction (Rec. Doc. 6), which was denied by the Court on April 1, 2008.

In the instant motion, the Plaintiffs move for summary judgment arguing that the Defendant's interpretation of Louisiana adoption law is not supported by the statutes. (MSJ p. 31-32). The Plaintiffs also argue that Smith's application of the adoption statutes violates the Plaintiffs' rights under the United States Constitution. (*Id.*). Specifically, the Plaintiffs argue that the Full Faith and Credit Clause mandates that the Defendant enforce the New York adoption decree without regard to Louisiana's public policy. (*Id.* at 18). Further, the Plaintiffs contend that Smith's disparate treatment of the Plaintiffs violates the Equal Protection Clause. (*Id.* at 27).

In opposition, the Defendant argues that the state rightfully denied the out-of-state "directive" because it was contrary to Louisiana law and public policy. (Mem. In. Opp. p. 3). Under Louisiana law, Smith contends that her discretion to issue a new birth certificate is limited by what types of adoption are allowed under Louisiana adoption law, and she chose

to disregard the portions of the directive that did not conform to the statutes. (*Id.* at 4). The Defendant further argues that the Plaintiff failed to make the New York adoption executory under Louisiana law, and her refusal to accept the judgment does not volate the Full Faith and Credit Clause.[2]

II. DISCUSSION

A. Summary Judgment Standard

Summary Judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any," when viewed in the light most favorable to the non-movant, "show that there is no genuine issue as to any material fact." *TIG Ins. Co. v. Sedgwick James,* 276 F.3d 754, 759 (5th Cir. 2002) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-50, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* (citing *Anderson,* 477 U.S. at 255, 106 S.Ct. 2505). Once the moving party has initially shown "that there is an absence of evidence to support the non-moving party's cause," *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), the non-movant must come forward with "specific facts" showing a genuine factual issue for trial. *Id.* (citing Fed .R. Civ. P. 56(e); *Matsshita Elec. Indus. Co. v. Zenith Radio,* 475 U.S.

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[2] Smith relied on an advisory opinion written by the Louisiana Attorney General regarding whether refusing the out-of-state directive would violate the Full Faith and Credit Clause. *See* La. A.G. No. 03-0325.

574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). Conclusional allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial. *Id.* (citing *SEC v. Recile,* 10 F.3d 1093, 1097 (1993)).

B. Full Faith and Credit Clause

The United States Constitution states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. Art. IV, § 1. Pursuant to that clause, Congress has enacted 28 U.S.C. § 1738.[3]

The purpose of the full faith and credit clause was to alter the status of the states as independent foreign sovereignties, with each free to ignore the obligations created under the laws or the judicial proceedings of the others, and to instead make them integral parts of a single nation through which a remedy upon a just obligation can be demanded as of right, irrespective of the state of its origin. *Milwaukee County v. M.E. White, Co.,* 296 U.S. 268, 276-77, 56 S. Ct. 229, 80 L. Ed. 220 (1935). The United States Supreme Court

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[3] 28 U.S.C. § 1738 provides in part: "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken."

has stated that its incorporation was for the purpose of transforming sovereign states into a nation, and that the "price" of our federal system means that local policy must sometimes give way. *Sherrer v. Sherrer,* 334 U.S. 343, 355, 68 S. Ct. 1087, 92 L. Ed. 1429 (1948).

In applying the full faith and credit clause, the Supreme Court has drawn a clear distinction between the credit owed to statutes and judgments. *Baker v. Gen. Motors Corp.,* 522 U.S. 222, 233, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998). With regard to statutes, the full faith and credit clause does not require a state to substitute the statutes of another state for its own when dealing with matters in which it is competent to legislate. *Pacific Employers Ins. Co. v. Industrial Accident Comm'n,* 306 U.S. 493, 501 59 S. Ct. 629, 632, 83 L. Ed. 940 (1939); *see also Nevada v. Hall,* 440 U.S. 410, 421-422, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979), *Franchise Tax Bd. v. Hyatt,* 538 U.S. 488, 494, 123 S. Ct. 1683, 155 L. Ed. 2d 702 (2003) (stating that full faith and credit is "less demanding" with respect to choice of laws). However, the Supreme Court has made it clear that the full faith and credit obligation of a state is "exacting" with regard to judgments rendered by a court with proper jurisdiction, qualifying such judgments for recognition throughout the nation. *Baker,* 522 U.S. at 233, 118 S. Ct. 657. *See also Franchise Tax Bd. v. Hyatt,* 538 U.S. 488, 494, 123 S. Ct. 1683, 155 L. Ed. 2d 702 (2003) (affirming the holding in *Baker*). While a court may be guided by public policy in determining the choice of law, the Court in *Baker* held that there is no "roving public policy exception" to the full faith and credit

obligation of states to recognize judgments. *Baker,* 522 U.S. at 233, 118 S. Ct. 657. Instead, the Supreme Court has held in a number of cases that full faith and credit must be given to the judgment of another state even if the forum would not be required to entertain the suit under its own laws or the judgment contravenes the public policy of the forum state. *See Baker,* 522 U.S. 222, 118 S. Ct. 657; *Milwaukee County v. M.E. White, Co.,* 296 U.S. 268, 56 S. Ct. 229, *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430, 438, 64 S. Ct. 208, 213, 88 L. Ed. 149 (1943), *Fauntleroy v. Lum,* 210 U.S. 230, 237, 28 S. Ct. 641, 643, 52 L. Ed. 1039 (1908).

The Plaintiffs argue that the full faith and credit clause requires that the Defendant recognize the out-of-state adoption decree, and cite extensive caselaw in support of their position. The Defendant argues that the full faith and credit clause does not require her to accept an out-of-state adoption decree because it contravenes Louisiana law by allowing two unmarried individuals to adopt jointly, a conclusion she reached relying on a Louisiana Attorney General's advisory opinion.[4] This Court finds the Defendant's arguments to be without merit. The Plaintiffs' out-of-state adoption decree must be given full faith and credit by Louisiana.

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[4] The Attorney General's Opinion, La. A.G. No. 03-0325, relies solely on *Bradford Electric Light Company, Inc. v. Clapper*, 286 U.S. 145, 159, 52 S. Ct. 571, 76 L. Ed. 1026 (1932). However, the Clapper decision dealt with a statute rather than a judgment. Because this case deals with a judgment, *Clapper* is distinguishable and does not support the Defendant's conclusion.

The Defendant in this matter fails to appreciate the long history of precedent regarding full faith and credit of judgments, which has been thoroughly analyzed by the U.S. Supreme Court in *Baker v. Gen. Motors Corp.*[5] While courts have granted some exceptions to full faith and credit regarding statutes, there is no such exception to the full faith and credit obligation regarding judgments. *Id.* at 233, 118 S. Ct. 657. The Defendant (and the Attorney General advisory opinion she relies upon) confuses the issues of Louisiana's obligation to give full faith and credit to a valid out-of-state adoption decree and Louisiana's right to apply its own laws in deciding what rights flow from that judgment. *See Finstuen v. Crutcher,* 496 F.3d 1139, 1153 (10th Cir. 2007) (ruling an Oklahoma statute unconstitutional under the full faith and credit clause because it refused to recognize out-of-state adoptions by states that permit adoption by same-sex couples).[6] While there may be applicable Louisiana laws regarding the enforcement of rights established by a judgment, there is no question that the rights granted by the adoption decree are final

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[5] 522 U.S. 222, 118 S. Ct. 657, 139 L. Ed. 2d 580.

[6] This Court acknowledges that some of the facts in Finstuen are distinguishable from the facts in this case. Finstuen dealt with an unconstitutional statute banning the recognition of an out-of-state adoption decree. In the present case, there is a dispute over whether the state registrar is authorized to amend a birth certificate based on an out-of-state adoption decree. However, the core issues that arise in both cases remain the same: the interaction between the full faith and credit clause and the forum state's adoption laws. This Court finds the reasoning in Finstuen to be instructive in this matter.

and enforceable under the full faith and credit clause. Finally, many courts-including Louisiana's Supreme Court-have held that valid adoption decrees from out-of-state are entitled to full faith and credit. *See Succession of Caldwell,* 114 La. 195, 38 So. 140 (1905), *Alexander v. Gray,* 181 So. 639 (La. App. 2 Cir. 1938), *Byrum v. Hebert,* 425 So. 2d 322 (La. App. 3 Cir. 1982).[7] *See also Russell v. Bridgens,* 264 Neb. 217, 647 N.W.2d 56 (Neb. 2002), *Wachovia Bank and Trust Company v. Chambless,* 44 N.C. App. 95, 260 S.E.2d 688.

This Court finds no merit in the Defendant's argument that there is a public policy exception to this obligation. Regardless of whether the out-of-state adoption decree contravenes Louisiana law or public policy, the obligation to recognize the judgment under the full faith and credit clause remains, in the words of the U.S. Supreme Court in *Baker,* "exacting." *Baker,* 522 U.S. at 233, 118 S. Ct. 657. Therefore, the Plaintiffs are entitled to summary judgment on this issue, and the out-of-state adoption decree is entitled to full faith and credit.[8]

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[7] The U.S. Fifth Circuit Court of Appeals has also recognized Louisiana's longstanding policy of accepting "foreign-created status." *See Kuchenig v. California Company*, 410 F.2d 222 (5th Cir. 1969).

[8] Because the Plaintiff is entitled to summary judgment on this basis, this Court need not reach the issue of whether the Defendant has violated the Equal Protection Clause.

C. Louisiana Out-of-State Adoption Statute

While Louisiana is required to give full faith and credit to the New York adoption decree, that does not mean that Louisiana must adopt New York's practice regarding the time, manner, and mechanisms for enforcing the judgment. *Baker,* 522 U.S. at 235, 118 S. Ct. 657. Enforcement measures remain subject to the evenhanded control of the forum's law. *Id.* (citing *McElmoyle ex rel. Bailey v. Cohen,* 13 Pet. 312, 10 L. Ed. 177 (1839)). Therefore, it is necessary for this Court to determine the correct interpretation of the Louisiana out-of-state adoption statute. The primary statute at issue is La. R.S. § 40:76, which governs the record of foreign adoptions. It provides:

> **§ 76. Record of foreign adoptions**
>
> A. When a person born in Louisiana is adopted in a court of proper jurisdiction in any other state or territory of the United States, the state registrar may create a new record of birth in the archives upon presentation of a properly certified copy of the final decree of adoption or, if the case has been closed and the adoption decree has been sealed, upon the receipt of a certified statement from the record custodian attesting to the adoption decree.
>
> B. The decree is considered properly certified when attested by the clerk of court in which it was rendered with the seal of the court annexed, if there is a court seal, together with a certificate of the presiding judge, chancellor, or magistrate to the effect

that the attestation is in due form. The certified statement is considered proper when sworn to and having the seal of the foreign state or territory's record custodian.

C. Upon receipt of the certified copy of the decree, the state registrar shall make a new record in its archives, showing:

(1) The date and place of birth of the person adopted.

(2) The new name of the person adopted, if the name has been changed by the decree of adoption.

(3) The names of the adoptive parents and any other data about them that is available and adds to the completeness of the certiicate of the adopted child.

La. R.S. § 40:76 (Emphasis Added).

The Plaintiffs argue that La. R.S. § 40:76 expressly authorizes the Defendant to issue birth certificate for this out-of-state adoption, and that the Defendant's policy is based on a flawed intepretation. The Defendant argues that Louisiana adoption law does not allow her to list two unmarried persons on a joint birth certificate, and that her discretion is limited by other adoption statutes. Further, the Defendant claims that the Plaintiffs have failed to make the judgment eecutory under La. R.S. § 13:4241.

This Court finds that the out-of-state adoption statute, La. R.S. § 40:76, does authorize the state

rgistrar to issue a birth certificate upon receipt of the adoption decree. Contrary to the arguments of the Defendant, the plain language of the statute in § 40:76(C) specifically directs the registrar to make a new record upon receipt of the adoption decree, and no limitations or restrictions are present within the language of the statute. The Defendant argues that other statutes, namely La. R.S. § 40:34 and § 40:79, limit her discretion regarding the issuance of a new birth certificate. However, the Court finds these arguments without merit, as neither statute specifically addresses out-of-state adoptions in contrast to La. R.S. § 40:76.[9] Rather, the Defendant's argument that these statutes bar issuance of a birth record is undermined by the plain language of the out-of-state adoption statute. Further, the Defendant's interpretation is flawed because it would render the plain language of La. R.S. § 40:76 meaningless by reading in restrictions and requirements that simply are not present in the text of the statute.

In addition, the Court rejects the Defendant's assertion that the judgment must be made executory before it can be enforced. There is no language in La. R.S. § 40:76 requiring that an out-of-state adoption decree be made executory, rather § 40:76(C) specifically provides that the state registrar "shall make a new record" upon "receipt of a certified copy of

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[9] La. R.S. § 40:34 contains general provisions regarding vital statistics records, and La. R.S. § 40:79 covers records of adoption decrees. However, the language in La. R.S. § 40:79 suggests that it applies to in-state adoptions, while La. § 40:76 applies specifically to out-of-state adoptions.

the decree." La. R.S. § 40:76(C). Further, certified out-of-state adoption decrees are distinguishable from a typical money judgment that must be made executory before enforcement. Finally, the Court notes that the 10th Circuit Court of Appeals in *Finstuen* rejected a similar dilatory argument by the Defendant. *See Finstuen v. Crutcher,* 496 F.3d 1139, 1153-1155 (10th Cir. 2007). Therefore, the Court finds that La. R.S. § 40:76 expressly authorizes the state registrar to issue a new birth record upon receipt of a valid out-of-state adoption decree entitled to full faith and credit. Accordingly, and for the foregoing reasons;

IT IS ORDERED that the **Motion for Summary Judgment (Rec. Doc. 27)** filed by Plaintiffs, Oren Adar and Mickey Ray Smith, individually and as parents and next friends of J.C.A.S., a minor, is **GRANTED.**

IT IS FURTHER ORDERED that the Defendant, Darlene W. Smith, in her official capacity as State Registrar and Director, Office of Vital Records and Statistics, State of Louisiana Department of Health and Hospitals, shall issue an amended birth certificate pursuant to La. R.S. § 40:76(C) to J.C.A.-S. identifying Oren Adar and Mickey Ray Smith as the child's parents.

Appendix E

Constitutional and Statutory Provisions Involved

U.S. Constitution: art. 4, clause I (Full Faith and Credit)

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Constitution: amend. 14 – Equal Protection

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1738

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

La. Rev. Stat. 40:76

§ 76. Record of foreign adoptions

A. When a person born in Louisiana is adopted in a court of proper jurisdiction in any other state or territory of the United States, the state registrar may create a new record of birth in the archives upon presentation of a properly certified copy of the final decree of adoption or, if the case has been closed and the adoption decree has been sealed, upon the receipt of a certified statement from the record custodian attesting to the adoption decree.

B. The decree is considered properly certified when attested by the clerk of court in which it was rendered with the seal of the court annexed, if there is a court seal, together with a certificate of the presiding judge, chancellor, or magistrate to the effect that the attes-

tation is in due form. The certified statement is considered proper when sworn to and having the seal of the foreign state or territory's record custodian.

C. Upon receipt of the certified copy of the decree, the state registrar shall make a new record in its archives, showing:

(1) The date and place of birth of the person adopted.

(2) The new name of the person adopted, if the name has been changed by the decree of adoption; and

(3) The names of the adoptive parents and any other data about them that is available and adds to the completeness of the certificate of the adopted child.

La. Rev. Stat. 40:77

§ 77. Certified copy for adoptive parents

A. Upon completion of the new record as provided for in R.S. 40:76 with respect to an adopted person who was born in Louisiana and adopted in another state, the state registrar shall issue to the adoptive parents a certified copy of the new record and shall place the original birth certificate and the copy of the decree and related documents in a sealed package and shall file the package in its archives.

B. Except as provided in R.S. 40:74, this sealed package shall be opened only upon the demand of the adopted person, or if deceased, by his or her descendants, or upon the demand of the adoptive parent, or the state registrar, or the recognized public or private social agency which was a party to the adoption, and then only by order of a Louisiana court of competent jurisdiction at the domicile of the vital records registry which court order shall issue only after a showing of compelling reasons, and opened only to the extent necessary to satisfy such compelling necessity.

C. In satisfying the requirement that information shall be revealed only to the extent necessary to satisfy the compelling necessity shown, the court is further authorized to use the services of the curator ad hoc appointed pursuant to Article 5091.2 of the Louisiana Code of Civil Procedure.

D. All motions for records under this Section shall be in accordance with and subject to, the provisions of R.S. 9:437 and, if an adoption agency is involved, the agency shall be served with a copy of the motion as provided in Article 1313 of the Louisiana Code of Civil Procedure.