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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