No. 11-46

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**

**BRIEF OF DEAN ERWIN CHEMERINSKY,
ET AL., IN SUPPORT OF THE
PETITION FOR A WRIT OF CERTIORARI**

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INTEREST OF *AMICI CURIAE*

Amici are 29 law professors, most of whom focus on constitutional law and all of whom are concerned about the proper application of the Full Faith and Credit Clause and the statutory means Congress has provided for enforcing that provision.[1] *Amici* believe that the decision in this case rests on fundamental misunderstandings about the scope and nature of the Clause. This brief therefore focuses on the doctrinal and analytical flaws that underlie the Fifth Circuit's conclusion that § 1983 is not available to remedy violations of the Full Faith and Credit Clause by state executive branch officials.

SUMMARY OF ARGUMENT

Under this Court's governing analytical framework, the Full Faith and Credit Clause plainly confers judicially enforceable "rights" on judgment holders. The Clause imposes binding obligations on states; that obligation is sufficiently concrete for judicial enforcement (and in fact has long been enforced by courts under well-settled standards); and judgment holders are clearly intended beneficiaries of the Clause. Indeed, this Court has repeatedly recognized the rights-creating nature of the Clause.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici* and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amici*'s intent to file this brief. Petitioners and respondents have consented to the filing of this brief, as reflected in letters filed with the Clerk of Court. A list of all *amici* is set forth in the appendix to this brief.

The conclusion that the Clause creates judicially enforceable rights is confirmed by this Court's recognition that the Commerce Clause creates such rights. *Dennis* v. *Higgins*, 498 U.S. 439 (1991). Both the Full Faith and Credit Clause and the Commerce Clause impose substantive restrictions on state authority in order to fuse formerly independent sovereigns into one nation. Given this shared purpose, both restrictions are properly understood as conferring correlative "rights" on individuals to be free from the type of state actions that each Clause prohibits. In fact, the Full Faith and Credit Clause is more naturally understood as a source of enforceable rights, because it is framed as an express limitation on state authority, rather than as a grant of power to Congress.

The majority's conclusion that the Full Faith and Credit Clause imposes duties on state courts alone is untenable. The text and structure of the Clause make clear that it imposes duties on states as a whole. Indeed, the Clause uses the same passive voice found in other constitutional provisions that are designed to prevent particular evils, rather than impose constraints on particular branches of government. And, as this case illustrates, actions by state executive officers can cause the evils the Full Faith and Credit Clause was designed to prevent, by fostering uncertainty, confusion, and delay with respect to issues that should have been resolved by an earlier out-of-state judgment.

Nor is it anomalous that violations of full faith and credit rights by state executive officers are redressable under § 1983, while violations by state courts are not. Congress can foreclose resort to § 1983 by providing an alternative remedy, and did so with respect to state court denials of full faith and

credit rights by providing for review of such denials in this Court. It provided no such alternative remedy, however, for violations of those rights by state executive officers. Leaving violations by such state actors wholly unredressed, moreover, would be truly anomalous.

This Court's decision in *Thompson* v. *Thompson*, 484 U.S. 174 (1988), does not bar recognition of the § 1983 claim asserted in this case. The statute at issue there commanded state *courts* to give full faith and credit to the child custody decrees of other states. That command carried with it the pre-existing statutory remedy of review by this Court of final state *court* determinations, which foreclosed implication of a private right of action. But, in contrast to recognition of an implied cause of action under the statute at issue in *Thompson*, a § 1983 claim against state executive officers who violate the Full Faith and Credit Clause is not inconsistent with any other statutory remedy, as Congress has provided none.

Finally, respondent did not afford full faith and credit to petitioners' adoption decree. Although Louisiana law required respondent to issue a new birth certificate reflecting both adoptive parents' names, respondent chose to treat New York's decree differently. Disparate treatment of some but not other out-of-state judgments violates the Clause.

I. SECTION 1983 PROVIDES A CAUSE OF ACTION TO ENFORCE THE FULL FAITH AND CREDIT CLAUSE AGAINST STATE EXECUTIVE OFFICERS.

This Court has "repeatedly held that the coverage of [§ 1983] must be broadly construed." *Golden State Transit Corp.* v. *City of L.A.*, 493 U.S. 103, 105 (1989). A broad construction is "compelled by the statutory

language, which speaks of deprivations of '*any* rights, privileges, or immunities secured by the Constitution and laws.'" *Dennis*, 498 U.S. at 443. Such a construction is also compelled by the statute's legislative history, which underscores its broad remedial objectives. *Id.*

Three factors govern when a provision of federal law confers "rights" enforceable under § 1983: (1) whether the provision creates obligations that are binding on states; (2) whether the plaintiff's interest is sufficiently concrete for judicial enforcement; and (3) whether the provision was intended to benefit the plaintiff. *Id.* at 448-49. All three factors demonstrate that the Full Faith and Credit Clause creates enforceable rights. Indeed, this conclusion follows *a fortiori* from this Court's ruling that such rights are conferred by the Commerce Clause, which is couched only as a grant of power to Congress.

A. The Full Faith And Credit Clause Confers Enforceable Rights.

The Full Faith and Credit Clause satisfies all three criteria for determining whether a federal law confers judicially enforceable rights. First, the Clause plainly imposes binding obligations on states. It does not *encourage* states to recognize the judgments of sister states; it *requires* them to do so. See U.S. Const. art. IV, § 1 ("Full Faith and Credit *shall* be given in each State to the public Acts, Records, and judicial Proceedings of every other State.") (emphasis added).

Accordingly, this Court has referred to the Clause's "*command* . . . to give full faith and credit to every judgment of a sister State." *Morris* v. *Jones*, 329 U.S. 545, 553 (1947) (emphasis added); see also *Baker ex rel. Thomas* v. *Gen. Motors Corp.*, 522 U.S. 222, 232

(1998) (the Clause "'substituted a *command* for the earlier principles of comity'") (emphasis added) (quoting *Estin* v. *Estin*, 334 U.S. 541, 546 (1948)). Indeed, in the case of judgments, the Court has described this command as an "exacting" "*obligation*." *Id.* at 233 (emphasis added). Consistent with these characterizations, this Court has held that a state must honor even those out-of-state judgments that rest on policies that contradict the enforcing state's laws or policies. *Magnolia Petroleum Co.* v. *Hunt,* 320 U.S. 430, 438 (1943) (requiring Louisiana to respect a Texas judgment despite contrary Louisiana policy); *Fauntleroy* v. *Lum*, 210 U.S. 230, 237 (1908) (requiring Mississippi courts to enforce a Missouri judgment on a futures contract, despite Mississippi law criminalizing such contracts, and the fact that the Missouri judgment was based on a misapprehension of Mississippi law).

Second, a judgment holder's interests in obtaining full faith and credit for that judgment are sufficiently concrete for judicial enforcement. This Court has long enforced the commands of the Clause and its implementing statute. *Mills* v. *Duryee*, 11 U.S. (7 Cranch) 481 (1813); *Chi. & Alton R.R.* v. *Wiggins Ferry Co.*, 119 U.S. 615 (1887). And the Clause itself provides concrete standards for its enforcement. As this Court has explained, "[a] final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." *Baker*, 522 U.S. at 233. These standards are obviously not beyond the capacity of the judiciary to enforce.[2]

[2] Indeed, far less concrete interests have been deemed sufficiently definite to create rights enforceable under § 1983. *See*, *e.g.*, *Wright* v. *City of Roanoke Redevelopment & Hous.*

Finally, judgment holders such as petitioners are intended beneficiaries of the Full Faith and Credit Clause. This Court has long recognized that one purpose of the Clause is "to preserve rights acquired or confirmed . . . [in] judicial proceedings in one state by requiring recognition of their validity in others." *Pink* v. *A. A. A. Highway Express, Inc.*, 314 U.S. 201, 209-10 (1941); *Estin*, 334 U.S. at 546 (a judgment establishes rights in the judgment holder). The Clause thus protects individuals from "the uncertainty, confusion, and delay that necessarily accompany relitigation of the same issue" when one state refuses to recognize the judgment of another state's courts. *Underwriters Nat'l Assurance Co.* v. *N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704 (1982). See also *Riley* v. *N.Y. Trust Co.*, 315 U.S. 343, 348-49 (1942) (without the Clause, "adversaries could wage again their legal battles whenever they met in other jurisdictions").

In short, the Full Faith and Credit Clause plainly confers enforceable rights. Indeed, this Court has repeatedly recognized the rights-creating nature of the Clause. See, *e.g.*, *Barber* v. *Barber*, 323 U.S. 77, 81 (1944) (state court's refusal "to give credit to [a] judgment because of its nature is a ruling upon a federal *right*") (emphasis added); *Magnolia Petroleum Co.*, 320 U.S. at 443 (when state court "refuses credit to the judgment of a sister state . . . , an asserted federal *right* is denied") (emphasis added); *Titus* v. *Wallick*, 306 U.S. 282, 291 (1939) (same); *Manhattan Life Ins. Co. of N.Y.* v. *Cohen*, 234 U.S. 123, 134 (1914) (Court has jurisdiction to review decision in which "*rights* under the full faith and credit clause

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Auth., 479 U.S. 418, 429-30 (1987) (statute providing for "reasonable" allowance for utilities sufficiently specific and definite).

were" passed upon); *Tilt* v. *Kelsey*, 207 U.S. 43, 50 (1907) ("a *right* under the [Clause] was specially set up and claimed by the executors," who sought but were denied full faith and credit for probate judgment) (emphasis added); *German Sav. & Loan Soc'y* v. *Dormitzer*, 192 U.S. 125, 126-27 (1904) (case involving full faith and credit due a divorce decree dealt "with the constitutional *rights* of the [private party]") (emphasis added); *Hancock Nat'l Bank* v. *Farnum*, 176 U.S. 640, 641 (1900) (state court decision denied plaintiff "a *right* given by" the U.S. Const. art. IV, § 1) (emphasis added).[3]

B. This Court's Decision In *Dennis* Confirms That The Full Faith And Credit Clause Confers Enforceable Rights.

The conclusion that the Full Faith and Credit Clause confers enforceable rights is confirmed by this Court's holding that the Commerce Clause confers such rights. By its terms, the Commerce Clause "speaks only of Congress' power over commerce." *Dennis*, 498 U.S. at 446. Accordingly, the state argued in *Dennis* that the Clause was not a source of individual rights at all, but rather a provision that "merely allocates power between the Federal and State Governments." *Id.* at 447 (citing state's brief). In rejecting that argument, this Court explained that

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[3] Even where federal law creates enforceable rights, a § 1983 remedy may be foreclosed if Congress provides an alternative enforcement mechanism. *Golden State Transit*, 493 U.S. at 106. The majority below, however, identified no such alternative remedy for Full Faith and Credit Clause violations by state executive officers. By contrast, Congress provided such an alternative for state *court* violations of the Clause, which is why, contrary to the view of the majority below, Pet. App. 13a n.6, there is nothing anomalous about recognition of a § 1983 remedy for violations by state executive officers alone. *See infra*, § II.B.

the Commerce Clause is not only "a power-allocating provision," but has also "'long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on [interstate] commerce.'" *Id.* By so limiting state power, the Clause necessarily conferred a correlative "'right' [on individuals] to engage in interstate trade free from restrictive state regulation," *id.* at 448.

The conclusion that the Full Faith and Credit Clause confers enforceable rights follows *a fortiori* from *Dennis*. The Full Faith and Credit and Commerce Clauses serve the same fundamental purpose of promoting national cohesion.

> The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

Milwaukee Cnty. v. *M.E. White Co.,* 296 U.S. 268, 276-77 (1935); see also *Sherrer* v. *Sherrer,* 334 U.S. 343, 355 (1948) (Clause "transform[ed] an aggregation of independent, sovereign States into a nation") (footnote omitted). The Commerce Clause serves this same purpose. See *Magnolia Petroleum*, 320 U.S. at 439 ("[t]he full faith and credit clause like the commerce clause . . . became a nationally unifying force").

Thus, one Clause promotes national cohesion by ensuring individuals can engage in commerce across state lines free from restrictive state regulation; the other, by ensuring that rights under final judgments

(and the certainty such judgments promote) are secure across state lines. Given this common purpose, it makes sense that both confer enforceable rights: judicial enforcement of the limits on state authority embodied in both Clauses is essential to ensure that these provisions achieve their common structural purpose.

Indeed, the Full Faith and Credit Clause more clearly confers individual rights than the Commerce Clause. Unlike the latter, the former is not couched as a grant of authority to Congress. Instead, as noted, the Full Faith and Credit Clause is an express command to states that explicitly restricts state authority.[4]

II. THE FIFTH CIRCUIT ERRED IN RULING THAT SECTION 1983 CANNOT BE USED TO REMEDY FULL FAITH AND CREDIT VIOLATIONS BY NON-JUDICIAL ACTORS.

Notwithstanding the foregoing evidence, the majority reasoned that, "[w]hile 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*." Pet. App. 11a (emphasis added). "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 actors." *Id.* at 13a (emphasis added). This reasoning does not withstand scrutiny.

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[4] Thus, the Clause confers rights under the analysis of the dissent in *Dennis*, which deemed the "distinction between power-allocating and rights-securing provisions of the Constitution" crucial in determining the existence of enforceable rights. *Dennis*, 498 U.S. at 454 (Kennedy, J., dissenting).

A. The Text, Structure And Purpose Of The Full Faith And Credit Clause Confirm That It Applies To Non-Judicial Actors.

The majority's conclusion that the Clause imposes obligations only on state courts is refuted by the text of the Clause itself. By providing that "Full Faith and Credit shall be given *in each State* to the public Acts, Records and judicial Proceedings of every other State," U.S. Const. art. IV, § 1 (emphasis added), the first sentence of the Clause imposes a duty on states as a whole, not merely on their judicial branches. This is confirmed by the second half of the sentence, which identifies actions by distinct branches of state government. See *id.* (separately identifying "public Acts," *i.e.*, legislative actions, and "judicial Proceedings"). Having distinguished—in the very same sentence—"judicial proceedings" from the actions of other state governmental actors, it is wholly implausible to conclude that the Framers used the phrase "in each State" to impose an obligation on state *courts alone*. Pet. App. 11a. See *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 334 (1816) ("[I]t is hardly to be presumed that the variation in the language [in Article III] could have been accidental. It must have been the result of some determinate reason . . . ."); cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("'it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'" of particular language in different parts of the same law).

The majority sought to escape that implausibility by resorting to history. It claimed that this Court has "adher[ed] to the original purpose of the clause" and thus "interrelated the requirement of 'full faith and credit' owed to judgments with the principles of res

judicata." Pet. App. 8a. But the law review article the majority cites to support this thesis argues that this Court's decisions have "gone far beyond the original understanding of the provision." Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 Creighton L. Rev. 255, 257 (1998); see also *id.* at 343-44 (the Court went "wrong" in an 1887 decision, which allegedly "read[] history backwards"). Thus, whether or not it accords with the Clause's original, merely evidentiary purpose (as some scholars have claimed), the view that this Court has long adhered to is that the first sentence of the Clause "'substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns.'" *Baker*, 522 U.S. at 232 (quoting *Estin*, 334 U.S. at 546).

The duty to enforce this command has typically fallen on state courts, see Pet. App. 12a (describing the "usual posture" in which full faith and credit issues arise), which is why this Court's cases have frequently identified state courts as violators of that command. But this historical fact in no way compels the conclusion that the command is directed *only* to state courts. To the contrary, the Clause uses the same passive voice found in other constitutional provisions, such as the Privileges and Immunities Clause and the Fourth and Fifth Amendments.[5] This

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[5] *See* U.S. Const. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); *id.* amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."); *id.* amend. V (no person "shall . . . be deprived of life, liberty or property, without due process of law; nor shall

formulation demonstrates that the Framers were concerned with preventing particular types of evils, not with imposing constraints on particular branches of government.

For example, both the Full Faith and Credit Clause and the Privileges and Immunities Clause use the passive voice to afford certain protections to persons "*in*" states. U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given *in* each State . . . .") (emphasis added); *id.* art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens *in* the several States.") (emphasis added). The latter Clause has long been recognized to protect against infringements by any state entity, including state legislatures, *Toomer* v. *Witsell*, 334 U.S. 385 (1948), municipalities, *United Bldg. & Constr. Trades Council* v. *Mayor of Camden*, 465 U.S. 208 (1984), and state courts, *Supreme Court of N.H.* v. *Piper*, 470 U.S. 274 (1985). Given its similar wording, the Full Faith and Credit Clause likewise affords protection against all forms of state actions that undermine its command, regardless of the branch of state government involved. This is particularly so given that these clauses appear side-by-side in the same Article and share the same "primary purpose" of "help[ing] [to] fuse into one Nation a collection of independent, sovereign States." *Toomer*, 334 U.S. at 395.

Indeed, even where constitutional provisions *are* directed at particular branches of government, this Court has not applied them literally when doing so would permit the type of harm the provision was intended to forestall. Thus, the First Amendment

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private property be taken for public use, without just compensation").

provides that "*Congress* shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const., amend. I (emphasis added). Yet, this Court did not hesitate to apply it to an injunction grounded on "the inherent powers of the Executive and the courts." *N.Y. Times Co.* v. *United States*, 403 U.S. 713, 732 (1971) (per curiam) (White, J., concurring); *see also id.* 720-22 (Douglas, J., concurring) (explaining that criminal law did not apply "[s]o any power that the Government possesses [to enjoin publication] must come from its 'inherent power'").[6] And this Court long ago concluded that the Commerce Clause, although framed only as a grant of power to Congress, "'also limits the power of the States to erect barriers against interstate trade.'" *Dennis*, 498 U.S. at 446.

As this case illustrates, the fundamental purposes of the Full Faith and Credit Clause can be frustrated by executive as well as judicial actions. As noted, one such purpose was to eliminate "the uncertainty, confusion, and delay that necessarily accompany relitigation of the same issue" when one state refuses to recognize the judgment of another state's courts. *Underwriters Nat'l Assurance Co.*, 455 U.S. at 704. In domestic relations matters, such uncertainty can "affect fundamental rights and relations such as the lawfulness of [a couple's] cohabitation, [or] their children's legitimacy." *Estin*, 334 U.S. at 553 (Jackson, J., dissenting). To eliminate these risks, the Full Faith and Credit Clause made each state "an integral part of a single nation, in which rights

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[6] The Court has likewise applied the First Amendment to state common law, without even pausing over whether an amendment directed at Congress should, as a matter of incorporation doctrine, apply only to state legislatures. *See N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 276-77 (1964).

judicially established in any part are given nation-wide application." *Magnolia Petroleum*, 320 U.S. at 439. Here, by refusing to recognize New York's adoption judgment, respondent has frustrated the Constitution's command of "nation-wide application" of state judgments. And, as the *amici* Center for Adoption Policy, et al., explain in greater detail, that refusal engenders precisely the types of uncertainty with respect to parent-child relations that the Clause was designed to prevent.[7]

B. No "Remedial Anomalies" Justify A Refusal To Permit Section 1983 Claims Against State Executive Actors.

The majority sought to bolster its admittedly "curious," counter-textual conclusion by reasoning that "a contrary interpretation would create a serious anomaly of its own"—namely, that violations of the Full Faith and Credit Clause by state executive officials would be remediable under § 1983, whereas violations by state courts can be remedied only through this Court's review. Pet. App. 13a n.6. But a conclusion that violations of a constitutional provision can be remedied when violated by one type of state actor, but cannot be remedied at all when violated by another state actor, is far more anomalous than a conclusion that violations of the same constitutional provision can be subject to different remedial schemes, depending on the source of the violation. In fact, the latter conclusion is not anomalous at all.

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[7] The majority erred in ruling that respondent afforded the New York judgment full faith and credit. *See infra*, § III. In all events, the majority's holding that § 1983 can *never* be used to enforce the Full Faith and Credit Clause necessarily applies to executive actions that, even on the majority's view, would frustrate the command of the Clause.

The majority itself was plainly uncomfortable with its conclusion that state executive officials can violate the Full Faith and Credit Clause with impunity, and thus felt compelled to suggest that petitioners have a remedy. See Pet. App. 20a-21a. But its suggested remedy is flatly inconsistent with its constitutional analysis. If, as the majority held, a state executive officer is not subject to the Full Faith and Credit Clause, then recognition of an out-of-state judgment is (under the majority's view) a discretionary act, not a ministerial duty subject to mandamus.[8] And if a state court refuses to grant mandamus because (as the majority believes) the officer is under no constitutional duty to recognize the judgment, it is difficult to understand on what ground this Court could order a state court to supply a remedy. *Id.*

In contrast to the incongruities and analytical inconsistencies inherent in the majority's conclusion, there is nothing anomalous about different remedies for Full Faith and Credit Clause violations by state executive and judicial officers. A state's judiciary cannot properly be said to have denied rights under that Clause until all state appeals have been taken. Like its federal counterpart, a state judiciary is "not a batch of unconnected courts, but a judicial *department* composed of 'inferior Courts' and 'one supreme Court.' Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 227

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[8] Insofar as the majority was suggesting that respondent could be compelled to comply with the Louisiana law govern-ing issuance of revised birth certificates, that remedy is equally illusory under the majority's analysis since (according to the majority) respondent's offer to include only one adoptive parent's name would have complied with that law. *See infra*, § III.

(1995). Allowing a state's judicial depart-ment to reach a final decision on a full faith and credit claim is thus required by the structure of that branch of government. It is also consistent with principles of federalism and the related presumption that state courts will "faithfully administer the Full Faith and Credit Clause." *Thompson*, 484 U.S. at 187.

And, where a state's judiciary reaches a final decision assertedly adverse to that federal right, Congress has provided a remedy, by way of review in this Court. See 28 U.S.C. § 1257(a). In light of this statutory framework, allowing a plaintiff to bring a § 1983 action against a state court that denied a full faith and credit claim "would be inconsistent with Congress' carefully tailored scheme" for judicial review of state court decisions. *Golden State Transit*, 493 U.S. at 107 (internal quotation marks omitted). Thus, Congress has foreclosed a § 1983 remedy for full faith and credit violations by state courts, by providing an alternative enforcement mechanism. *Id.* at 106.

By contrast, a § 1983 action against a state executive official who interferes with full faith and credit rights is not inconsistent with any alternative statutory enforcement mechanism or remedy, as Congress has provided none.[9] Thus, there is nothing

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[9] Injunctive relief under *Ex Parte Young*, 209 U.S. 123 (1908), is presumptively available against state executive officers who violate the Full Faith and Credit Clause, as it is when such officers violate other constitutional provisions. *See* 13 Charles A. Wright et al., *Federal Practice and Procedure* § 3524.3, at 376-77 (3d ed. 2008) ("Ex Parte Young can be employed in a nearly endless variety of situations.") This remedy, however, is not conferred by Congress; it exists as a matter of constitutional structure and necessity. *See Alden* v. *Maine*, 527 U.S. 706, 747 (1999) (suits under *Ex Parte Young* "for declaratory or injunctive

anomalous about the availability of different remedies for violations of the Full Faith and Credit Clause by different state actors. Accordingly, the majority's concerns in this regard do not justify its truly anomalous conclusion that this Clause can be violated with impunity by state executive actors.

Nor is there any merit to the majority's contention that "[t]he predicates triggering full faith and credit are determinable only by courts," and that, as a result, "[s]tate 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." Pet. App. 15a. State executive officers are subject to many constitutional provisions—including the First Amendment, and the Privileges and Immunities, Due Process, Equal Protection, and Takings Clauses—whose precise scope and meaning are determined by courts. This reality of our constitutional scheme does not excuse state executive officers from compliance with these provisions. Instead, they must consult lawyers about the propriety of their actions, and are shielded from liability for damages if their actions are reasonable. See *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). There is nothing about the command of the Full Faith and Credit Clause that makes it uniquely too difficult for state executive officers to understand or follow.

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relief against state officers must . . . be permitted if the Constitution is to remain the supreme law of the land."). Indeed, the presumptive availability of such injunctive relief is another factor weighing in favor of recognition of a § 1983 remedy here. *See Dennis*, 498 U.S. at 447 (availability of injunctive and declaratory relief for Dormant Commerce Clause violations confirmed that Commerce Clause conferred a right enforceable under § 1983).

C. *Thompson* v. *Thompson* Does Not Foreclose A Section 1983 Action Against Executive Actors Who Violate The Full Faith And Credit Clause.

Finally, this Court's decision in *Thompson*, 484 U.S. 174, does not justify the decision below. *Thompson* held that the Parental Kidnapping Prevention Act (PKPA), which addressed the enforcement of state child custody orders, did not give rise to an implied cause of action. In reaching this conclusion, the Court found that Congress had not intended to involve federal courts in the enforcement of custody orders, and instead adopted a "full faith and credit approach." *Id.* at 185. "[I]t seems highly unlikely," the Court explained, that "Congress would follow the pattern of the Full Faith and Credit Clause . . . 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." *Id.* at 183 (internal quotation marks omitted).

The majority's conclusion that this reasoning forecloses § 1983 actions to redress full faith and credit violations by state executive officials, Pet. App. 16a-17a, suffers from the same flaws as its "anomalous remedies" theory. "[T]he principal problem Congress was seeking to remedy [through the PKPA] was the inapplicability of full faith and credit requirements to custody determinations." *Thompson*, 484 U.S. at 181. The solution it adopted was a statutory "'command to state *courts* to give full faith and credit to the child custody decrees of other states.'" *Id.* at 183 (emphasis added). That solution necessarily carried with it the pre-existing statutory remedy of review by this Court of final state *court*

determinations. That remedy foreclosed implication of a private right of action, *id.*, and, as we have explained, is sufficient to foreclose resort to § 1983 with respect to the class of violations it covers—*i.e.*, state *court* denials of full faith and credit rights. But because this remedy does not apply to Full Faith and Credit Clause violations by state executive officers, it does not foreclose resort to § 1983 with respect to this different class of violations. Put differently, in contrast to recognition of an implied cause of action under the PKPA, a § 1983 claim against state executive officers who violate the Full Faith and Credit Clause is not inconsistent with any other statutory remedy, as Congress has provided no such remedy for violations by these state actors.

Nor does *Thompson* foreclose a finding that the Full Faith and Credit Clause creates enforceable rights, as Judge Southwick believed. Pet. App. 35a-37a (concurring). Judge Southwick relied on *Thompson*'s statement that the 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[s] to the public acts, records, and judicial proceedings of a State other than that in which the court is sitting."

484 U.S. at 182-83 (quoting *Minnesota* v. *N. Sec. Co.*, 194 U.S. 48, 72 (1904)). This statement cannot be given the sweeping scope Judge Southwick ascribes to it.

In no fewer than eight cases that followed *Northern Securities*, this Court referred to the "right" conferred by, or derived from, the Full Faith and Credit Clause. See *supra* at 6-7. In virtually all of these cases, that

description was essential to the Court's jurisdiction, and thus cannot be dismissed as dicta. It is inconceivable that, by quoting *Northern Securities*, this Court in *Thompson* meant to overturn the jurisdictional predicates to so many cases. Moreover, in *Baker*, which post-dates *Thompson*, this Court again described the Clause as the source of a "right," explaining that it made the previously independent states "'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.'" 522 U.S. at 232 (emphasis added) (quoting *Milwaukee Cnty.*, 296 U.S. at 277).

Given the context in which the *Thompson* Court quoted *Northern Securities*, its statement is properly understood as a *description* of the "right" conferred by the Clause when a litigant seeks to vindicate that right in state court. As just noted, the PKPA was a "'command to state *courts* to give full faith and credit to the child custody decrees of other states.'" *Thompson*, 484 U.S. at 183 (emphasis added). In the context of state court litigation involving the judgment of a court from another state, the right that the Full Faith and Credit Clause confers operates as a "rule of decision"—namely, the rule that "[a] final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." *Baker*, 522 U.S. at 233. By describing the right, in the context of state court litigation, as a "rule of decision," the Court cannot plausibly be understood to have determined that the Full Faith and Credit Clause creates no rights enforceable under § 1983, without any discussion of the overwhelming evidence to the contrary discussed above.

In short, none of the reasons cited by the en banc majority and concurring opinions below justifies the Fifth Circuit's decision to foreclose use of § 1983 to remedy full faith and credit violations by state executive officials.

III. RESPONDENT DID NOT GIVE FULL FAITH AND CREDIT TO PETITIONERS' JUDGMENT.

Finally, the majority erred in ruling that respondent did not violate the Full Faith and Credit Clause. Enforcement measures do not travel with an out-of-state judgment, Pet. App. 22a-23a. But petitioners invoked no New York enforcement right. They sought recognition and enforcement of their judgment in accordance with Louisiana law.

That law provides that, "[u]pon receipt of the certified copy of [an out-of-state adoption] decree, the state registrar *shall* make a new record in its archives, showing: . . . [t]he *name**s*** of the adoptive *parent**s*** and any other data about *them* that is available." La. Rev. Stat. Ann. § 40:76(c) (emphases added). By offering to issue a birth certificate showing only one adoptive parent's name, respondent plainly did not "offer[] to comply with" this law. Pet. App. 23a. Instead, she adopted a policy to issue revised birth certificates showing the names of both adoptive parents "for *some* out-of-state adoptions but *not* for others." *Id.* at 71a-72a. That policy does not reflect an "evenhanded" application of state law, but rather a "pick-and-choose recognition policy [that] violates" the Full Faith and Credit Clause. Respondent's refusal to provide amended birth certificates to some children adopted in other states is a denial of recognition of those out-of-state adoptions, and thus violates the Full Faith and Credit Clause.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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