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 a 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 *AMICI CURIAE* PROFESSORS OF LAW JOAN HEIFETZ HOLLINGER, COURTNEY G. JOSLIN, RHONDA WASSERMAN, *ET AL.* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

INTERESTS OF THE AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. DENYING CHILDREN ADOPTED BY UNMARRIED PARENTS A BENEFIT ENJOYED BY CHILDREN ADOPTED BY MARRIED PARENTS VIOLATES EQUAL PROTECTION. 4

A. This Court's Precedents Do Not Permit the State to Penalize Children on the Basis of Their Parents' Marital Status 5

B. Intermediate Scrutiny Applies, but Under Any Standard of Review, the Registrar's Policy Denies Equal Protection to Children Adopted by Unmarried Parents. 8

II. THE REGISTRAR'S POLICY HARMS CHILDREN ADOPTED BY UNMARRIED PARENTS BY DENYING THEM ACCURATE BIRTH CERTIFICATES AND BY STIGMATIZING THEM AND THEIR FAMILIES. 11

III. THE FIFTH CIRCUIT'S OPINION BROADLY THREATENS THE RIGHTS OF ADOPTED CHILDREN BY PERMITTING STATES TO REFUSE TO RECOGNIZE SISTER-STATE ADOPTIONS UNDER THE GUISE OF ENFORCEMENT AUTHORITY. 15

A. The Fifth Circuit's Opinion Misconstrued the Distinction Between "Enforcement" And "Recognition" Of Sister-State Adoptions. 17

B. Unless Reversed, the Fifth Circuit's Opinion May be Relied Upon by States to Deny Adoptive Families a Broad Range of Rights and Protections.................... 21

CONCLUSION 25

APPENDIX 1a

TABLE OF AUTHORITIES

Page

Cases

Baker v. Gen. Motors Corp.,
522 U.S. 222 (1998) 17, 18, 20

Broderick v. Rosner,
294 U.S. 629 (1935) 19

City of Phila. v. Bauer,
478 A.2d 773 (N.J. 1984) 20

Clark v. Jeter,
486 U.S. 456 (1988) 3, 5, 8

Delaney v. First Nat'l Bank,
386 P.2d 711 (N.M. 1963) 17

Embry v. Ryan,
11 So.3d 408 (Fla. App. 2 Dist. 2009) 17, 22

Estin v. Estin,
334 U.S. 541 (1948) 19

Fall v. Eastin,
215 U. S. 1 (1909) 18

Fauntleroy v. Lum,
210 U.S. 230 (1908) 17

Finstuen v. Crutcher,
496 F.3d 1139 (10th Cir. 2007) 17, 19

Finstuen v. Edmonson, 497 F. Supp. 2d 1295
(W.D. Okla. 2006) *aff'd in part and rev'd in part on other grounds sub nom. Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007)........ 7, 18

Giancaspro v. Congleton, No. 283267, 2009 WL 416301 (Mich. Ct. App., Feb. 19, 2009).........23

Gomez v. Perez, 409 U.S. 535 (1973) 7

Hood v. McGehee, 237 U.S. 611 (1915) 18

Hughes v. Fetter, 341 U.S. 609 (1951) 18

Levy v. Louisiana, 391 U.S. 68 (1968) 5, 9, 12

Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935) 17

Nixon v. Nixon, 763 N.W.2d 404 (Neb. 2009)..........17

Olmsted v. Olmsted, 216 U. S. 386 (1910) 18

Plyler v. Doe, 457 U.S. 202 (1982) 6, 7, 8

Russell v. Bridgens, 647 N.W.2d 56 (Neb. 2002) 23

Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816 (1977) 21

State ex rel A.R., 765 So.2d 395 (La. App. 2000) 21

Trimble v. Gordon, 430 U.S. 762 (1977) 5, 7

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) 6, 7

Wheeler v. Winters,
134 S.W.3d 774 (Mo. Ct. App. 2004) 17

Williams v. North Carolina,
317 U.S. 287 (1942) 17, 18

Statutes

42 U.S.C. § 671(a)(15)(C) 11

LA. CHILD CODE art. 1171-1177 9

LA. CHILD CODE art. 1207.. 9

LA. CIV. CODE art. 199... 21

LA. REV. STAT. § 17:167 13

LA. REV. STAT. § 17:222(B) 13

LA. REV. STAT. § 40:76(a)... 4

LA. REV. STAT. § 40:76(c) 4, 10, 14

LA. REV.STAT. § 9:392 (A) (4)-(6) 8

Uniform Adoption Act, 9 U.L.A. Part I (1994) 11

Other Authorities

Birth Certificate Fraud, Office of the
Inspector Gen., March 1988................................ 12

Brief of Att'y Gen., *Levy*, 391 U.S. 68, 1968
WL 112828 (Feb. 5, 1968)...................................... 9

CWLA Standards of Excellence for Adoption
§ 4.7 (rev. ed. 2000).. 9

Joan Heifetz Hollinger, *Adoption Law and
Practice*, § 1.01 (Matthew Bender 1989).............. 11

Naomi Cahn, *Perfect Substitutes or the Real
Thing?*, 52 DUKE L.J. 1077 (2003) 19

Restatement (Second) of the Conflict of Laws §§ 238(1), 262(1) & 290 (1971) 19

Rhonda Wasserman, *Are You Still My Mother? Interstate Recognition of Adoption by Gays and Lesbians*, 58 AM. U. L. REV. 1, 82 (2008).. 17, 19

Robert G. Spector, *The Unconstitutionality of Oklahoma's Statute Denying Recognition to Adoptions by Same-Sex Couples From Other States*, 40 TULSA L. REV. 467 (2005).......... 17

INTERESTS OF THE AMICI CURIAE

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Petitioners' petition for a writ of *certiorari*.[1] *Amici* are professors of family law, constitutional law and conflict of laws, and drafters of several Uniform Acts addressing family law matters. They have an interest in protecting children from discrimination on the basis of their parents' marital status and in ensuring that all States recognize judgments affecting family status. They are familiar with the issues in this case and knowledgeable about the constitutionally protected rights of adopted and biological children.

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of *amici's* intention to file this brief. The parties have consented to the filing of this brief, and such consents have been lodged with the Court. *See* Letter of Kyle Duncan, dated July 18, 2011 (Docketed). A complete list of *amici* along with selected biographical information appears in the Appendix to this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

A Louisiana law requires state officials to issue accurate, amended birth certificates to all adopted Louisiana-born children. Notwithstanding this statutory mandate, the Louisiana Registrar and Director, Office of Vital Records and Statistics (the "Registrar") has a policy and practice of selectively refusing to apply this statute to children adopted in other States by unmarried couples. The Registrar asserts that she refuses to apply the statute to children adopted by unmarried couples in other States in order to further Louisiana's interest in preventing unmarried couples from adopting.

In this brief, *amici* explain why this treatment runs afoul of the Equal Protection Clause and the Full Faith and Credit Clause and should not stand. *Amici* respectfully urge this Court to grant Petitioners' petition for a writ of *certiorari* in order to remedy the immediate and continuing harm the Registrar's policy causes adopted children and to clarify the proper application of the Equal Protection Clause and Full Faith and Credit Clause to children born in one State and adopted in a sister State. *Amici* do so for a number of compelling reasons.

First, the Registrar's policy denies equal protection to adopted children of unmarried parents. This Court has long held that treating children differently based on the marital status or conduct of their parents violates this principle. Because the treatment of children of unmarried parents historically was harsh and unfair, state laws or

policies that distinguish between children based on their parents' marital status must be viewed with suspicion and subjected to heightened constitutional scrutiny. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988).

Second, under this Court's precedents, the Registrar's policy cannot withstand even rational basis review, much less the heightened scrutiny applied to laws that penalize children based on the marital status of their parents. The Registrar has argued that she may selectively refuse to provide accurate birth certificates to children adopted out-of-state by unmarried parents in order to express a preference for adoption by married couples. Louisiana cannot rationally conclude that a categorical rule denying accurate birth certificates to children who have already been validly adopted in another State by unmarried parents furthers any legitimate, much less any important, interest of Louisiana.

Third, as a result of the Registrar's policy, adopted children of unmarried couples suffer both tangible and intangible harms. A birth certificate is universally recognized as a necessary document to prove a child's identity and parentage. Children without accurate birth certificates face numerous hurdles in establishing their identity and parentage. Given that the Registrar acknowledges that J.C.A.-S. has two legal adoptive parents, her policy serves only to punish J.C.A.-S. and other children like him for their parents' status and stigmatize them as less worthy than children in other families.

Fourth, the Fifth Circuit majority misconstrued the Full Faith and Credit Clause when it held that Louisiana, through the Registrar, had not refused to "recognize" an out-of-state judgment, but rather had merely declined to "enforce" it. If not corrected, this erroneous reading of the Full Faith and Credit Clause could be relied upon by States to deny adoptees a panoply of rights and protections, compounding the Equal Protection concerns.

ARGUMENT

I. DENYING CHILDREN ADOPTED BY UNMARRIED PARENTS A BENEFIT ENJOYED BY CHILDREN ADOPTED BY MARRIED PARENTS VIOLATES EQUAL PROTECTION.

Like all States, Louisiana provides amended or revised birth certificates to adopted children, including children born in Louisiana and adopted in another State, who present a properly certified copy of the other State's final decree of adoption. LA. REV. STAT. § 40:76(a). In addition to the date and place of the child's birth, the Louisiana Vital Statistics statute requires that "the state registrar shall make a new record in its archives, showing: . . . (3) [*t*]*he names of the adoptive parents* and any other data about them that is available *and adds to the completeness of the certificate* of the adopted child." LA. REV. STAT. § 40:76(c) (emphasis added).

However, the Registrar has a policy and practice of selectively denying this right to one class of individuals: children adopted by unmarried

parents. This stands in stark contrast to at least four other classes to which the Registrar issues a complete birth certificate: (i) biological children of married parents, (ii) adopted children of married parents; (iii) biological children of unmarried parents (when both biological parents acknowledge the child); and (iv) adopted children of single parents.

A. This Court's Precedents Do Not Permit the State to Penalize Children on the Basis of Their Parents' Marital Status.

Beginning in 1968, a series of United States Supreme Court decisions established the principle that the Equal Protection and Due Process Clauses of the Fourteenth Amendment prohibit States from penalizing children because their parents are unmarried. *See, e.g., Levy v. Louisiana*, 391 U.S. 68 (1968); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Clark v. Jeter*, 486 U.S. 456 (1988). These cases emphasize several important common themes: (i) children are not responsible for the circumstances of their birth or for the legal status or conduct of their parents; (ii) having unmarried parents bears no relationship to children's worth as individuals; (iii) children of unmarried parents deserve as much legal and economic protection as other children; and (iv) States may not seek to influence the behavior of adults by penalizing their children. In *Levy* and subsequent cases, this Court rejected the historic common law and statutory rules that treated nonmarital children disparately by, for example, denying them the right to recover for a parent's

wrongful death, inherit from or through a parent, or share a parent's workers' compensation benefits. As this Court noted, it is "illogical and unjust" to penalize nonmarital children for the circumstances of their birth by denying them important rights and protections. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972).

In the present case, the Fifth Circuit majority peremptorily dispensed with the *Levy* line of cases by characterizing them as applicable solely to the disparate treatment of nonmarital biological children and of no relevance to adopted children. App. to Pet. Cert. at 29a-30a. This interpretation erroneously limits the scope of this Court's decisions. Although arising from cases that concern biological children, this Court's precedents protect *all* children from being disadvantaged based on the marital status of their parents and thus, have equal relevance to adopted children. Just as "no child is responsible for his birth," *Weber*, 406 U.S. at 175, so no child is responsible for his adoption.

Indeed, this Court has recognized that the principle of equal treatment for all children is not limited to laws that disadvantage children with unmarried parents, but also applies to any law that penalizes children solely because of the conduct or behavior of their parents. In *Plyler v. Doe*, 457 U.S. 202 (1982), striking down a state law that barred undocumented immigrant children from attending public schools, this Court held that "[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against

his children does not comport with fundamental conceptions of justice." *Id.* at 220. Similarly, in *Trimble v. Gordon*, 430 U.S. 762, 769 (1977), this Court rejected "the argument that a State may attempt to influence the actions of men and women by imposing sanctions on [their] children . . . ."

In contravention of these precedents, the Registrar's policy harms children adopted by unmarried parents by depriving them of "substantial benefits accorded children generally," *Gomez v. Perez*, 409 U.S. 535, 538 (1973), allegedly for the purpose of encouraging adoptions by married parents. Such treatment is "an ineffectual—as well as an unjust—way of deterring the parent." *Weber*, 406 U.S. at 175. *See also Finstuen v. Edmonson*, 497 F. Supp. 2d 1295, 1308-10 (W.D. Okla. 2006) (Oklahoma law that denied revised birth certificates to children adopted by same-sex couples "attempt[ed] to penalize the Plaintiff children for the acts of their parents" and therefore violated the children's rights to equal protection), *aff'd in part and rev'd in part on other grounds sub nom. Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

Indeed, widespread acceptance of the Fifth Circuit's restrictive application of *Levy* would give rise to the incongruous possibility that a child adopted in another State by an unmarried couple will receive *fewer* benefits than a child raised by unmarried biological parents.[2] Under the Fifth

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[2] In Louisiana, as in all States, out-of-wedlock biological children have all the legal and economic rights of children born

Circuit's view, the Equal Protection clause bars disparate treatment of a child *born* out of wedlock, but permits disparate treatment of a child *adopted* out of wedlock. *Amici* ask this Court to grant certiorari to reverse the holding of the court below and to clarify that such a harsh and inequitable result violates the Constitution.

B. Intermediate Scrutiny Applies, but Under Any Standard of Review, the Registrar's Policy Denies Equal Protection to Children Adopted by Unmarried Parents.

This Court has confirmed that laws denying benefits and protections to children based on the marital status or conduct of their parents are subject to intermediate constitutional scrutiny. *See Clark* 486 U.S. at 461; *Plyler*, 457 U.S. at 220. "To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." *Clark*, 486 U.S. at 461. In the case at issue, there is no important governmental interest that is substantially related to the refusal to provide an accurate record of birth and parentage to a Louisiana-born child who has been adopted in another State.

The Registrar claims that her policy of refusing to revise the birth certificates of children adopted by unmarried parents is justified by Louisiana's interest in preventing unmarried couples

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in wedlock with respect to their mothers and acknowledged fathers, LA. REV.STAT. § 9:392(A)(4)-(6).

from adopting. (Supp'l Br. of Appellant on *En Banc* Review at 51-53). The Registrar's asserted justification is virtually identical to the purported justification rejected by this Court in *Levy*. In *Levy*, the Louisiana Attorney General claimed that the challenged law was intended to express a preference that children be born to married parents: "Louisiana's purposes . . . are positive ones: the encouragement of marriage [and] . . . the preservation of the legitimate family as the preferred environment for socializing the child." Brief of Att'y Gen., *Levy*, 391 U.S. 68, 1968 WL 112828, at *4-5 (Feb. 5, 1968). This Court held, however, that States cannot deny important rights or benefits to children in order to encourage marriage or the creation of marital families. *Levy*, 391 U.S. at 72.

The Fifth Circuit majority erroneously limited the *Levy* line of cases to children with unmarried *biological* parents and applied rational basis scrutiny, holding that the Registrar's policy furthered Louisiana's asserted preference for married adoptive parents. But regardless of whether Louisiana may categorically exclude unmarried couples from adopting in Louisiana (an issue not presented by this case)[3], the Registrar's policy does

[3] *Amici* note that categorical rules are not consistent with standard adoption practices statutorily required in Louisiana and overwhelmingly endorsed by national child welfare organizations. These practices emphasize individualized assessments of the suitability of prospective adoptive parents to meet the particular needs of each prospective adoptive child. LA. CHILD CODE art. 1171-1177; Art, 1207 (2011) ; *see, e.g.*, CWLA Standards of Excellence for Adoption § 4.7 (rev. ed. 2000).

not rationally further that purported state interest, much less meet the more stringent demands of intermediate scrutiny. Because the Registrar's policy denies accurate birth certificates to a group of children who have *already* been validly adopted in another State, Louisiana could not rationally conclude that this policy furthers the interest of children born in Louisiana and awaiting adoption. The policy has no effect on the substantive provisions of other States' adoption laws, but serves only to disadvantage a subclass of children born in Louisiana and adopted elsewhere.[4] The denial of an accurate birth certificate to J.C.A.-S. (in this case) and to other children adopted by unmarried couples reduces, rather than promotes, the security and stability of their families by withholding crucial proof of these children's identity.

This case is not about whether Louisiana can establish its own preferences for who can adopt in Louisiana. Instead, the core issue is whether Louisiana can invoke its preference for adoption by married couples as a justification for refusing to apply its Vital Statistics statute to a subclass of children adopted in other States under the laws of those States. The Registrar's policy should be struck for violating the Equal Protection Clause. *Amici*

[4] The Registrar's policy to omit the name of one of a child's unmarried adoptive parents is also contrary to the face of the Vital Statistics statute itself, which requires the Registrar to create a new record showing "[t]he names of the adoptive parents and any other data about them that is available *and adds to the completeness of the certificate.*" LA. REV. STAT. § 40:76(c)(3) (emphasis added).

respectfully urge this Court to grant the Petition in order to do just that.

II. THE REGISTRAR'S POLICY HARMS CHILDREN ADOPTED BY UNMARRIED PARENTS BY DENYING THEM ACCURATE BIRTH CERTIFICATES AND BY STIGMATIZING THEM AND THEIR FAMILIES.

Denying accurate birth certificates only to children adopted by unmarried parents harms these children without advancing any legitimate, much less any important, state purpose. The Registrar's refusal to amend the birth certificates of children legally adopted by unmarried couples in other States creates a subclass of children that are treated differently under the law solely because of the marital status of their parents. The refusal burdens these children in their daily lives and undermines a core purpose of adoption, which is to promote permanency and stability for children.[5] In addition to inflicting serious tangible harms on these children, this selective denial also marks these children as less worthy of recognition and protection than children in other families, thereby stigmatizing

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[5] See Joan Heifetz Hollinger, Adoption Law and Practice, § 1.01 (Matthew Bender 1989); Prefatory Note, Uniform Adoption Act, 9 U.L.A. Part I (1994). Federal child welfare laws and policy identify adoption as the most appropriate permanent placement for children who cannot remain with their birth families. Adoption and Safe Families Act of 1997, 42 U.S.C. § 671(a)(15)(C).

them and their families and inviting further discrimination against them. At its core, the policy is a revival of the distinction between "legitimate" and "illegitimate" children that, many decades ago, this Court held violated the Equal Protection Clause. *See, e.g.*, *Levy*, 391 U.S. at 72.

A birth certificate is a universally recognized document used to prove a child's identity and parentage.[6] Children without accurate birth certificates face countless challenges to their identity and parentage, and have to repeatedly explain the circumstances of their adoption and the reasons why their birth certificates are incomplete.

The potential harm faced by a child without an accurate birth certificate is not amorphous, superficial or remote. This harm could be particularly grave in situations where a child has an urgent need for medical care, where the additional time required to establish an adoptive parent's status can put a child at risk. But the instances when a child can face harm because of inaccurate information on his or her birth certificate about identity and parentage are legion, involving the health, safety, education and financial interests of the child. Birth certificates are routinely required by numerous entities as proof of identity, including:

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[6] *See, e.g.*, *Birth Certificate Fraud*, Office of the Inspector Gen., March 1988, at Preface (". . . the foundation, or breeder document, for almost any other kind of identification for citizens is the birth certificate.") (citation and quotation omitted).

- by schools to register a new student, establish an emergency contact, and determine who may grant permission for the student to engage in certain activities and who may claim the student from school (*see, e.g.*, LA. REV. STAT. §§ 17:167 ("All children upon entering a parish or city school system or private school in the state of Louisiana for the first time shall be required to present a copy of their official birth record to the school principal."), 17:222(B) § (same);
- by doctors, nurses, and other health care personnel as proof of legal parentage;
- by the U.S. State Department, to issue a passport for a child under 14 years of age (and many countries require a parent traveling with a minor child to provide the child's birth certificate as well as a passport);
- by the U.S. government to determine eligibility for Social Security benefits as a surviving child or for other types of surviving child benefits;
- by financial institutions, to conduct financial transactions for a minor child, such as setting up an account in a child's name or for the benefit of a child; and

- by insurance companies, to determine a child's eligibility as a beneficiary or to verify a child's entitlement to a parent's pension or other retirement benefits.

These examples (and there are many more) demonstrate that both the public and private sectors rely on birth certificates to provide an accurate statement of a child's identity and parentage – a fact that is recognized by Louisiana's statutory requirement that amended birth certificates of adopted children be "*complete*." LA. REV. STAT. § 40:76(c) (emphasis added).[7] While alternative means of proving parentage are sometimes (but not always) available, these alternatives are more likely to result in potentially harmful delays, bureaucratic complications and increased costs. Moreover, no legitimate, much less any important, state interest is served by forcing children to seek alternative ways to prove who they are, especially when there is an established preference in the law and in the community for birth certificates to establish identity and parentage. By having birth certificates that accurately name their legal parents, children are protected from being required to disclose the circumstances of their birth and adoption every time a birth certificate is requested. Adopted children

[7] The failure to amend the birth certificates of children adopted by unmarried parents also undermines the accuracy of Louisiana's vital records by allowing a birth record to remain on file that shows as the child's legal parents one or more of the biological parents who, by virtue of the child's adoption, are in fact no longer the child's legal parents.

deserve the same respect for their privacy as everyone else, regardless of who their adoptive parents may be.

Denying accurate birth certificates to some adopted children because the State disapproves of their families stigmatizes these children. This selective denial sends a message that these children's families are less worthy of recognition and encourages third parties to discriminate against them. The psychological harm these children face because of this stigma is compounded because they are forced to repeatedly explain the reasons why their birth certificates do not recognize their adoptive parents.

III. THE FIFTH CIRCUIT'S OPINION BROADLY THREATENS THE RIGHTS OF ADOPTED CHILDREN BY PERMITTING STATES TO REFUSE TO RECOGNIZE SISTER-STATE ADOPTIONS UNDER THE GUISE OF ENFORCEMENT AUTHORITY.

The Fifth Circuit's opinion also misapplied the Full Faith and Credit Clause and threatens harm to children beyond the birth certificate context. The Fifth Circuit's erroneous application of the distinction between "enforcement" and "recognition" of judgments is a striking departure from this Court's precedents and conflicts with the Tenth Circuit's holding in *Finstuen*. In direct contravention of established Full Faith and Credit doctrine, the

opinion below allows a State to refuse to recognize judgments on public policy grounds.[8] The Supreme Court should grant the petition for a writ of *certiorari* to resolve this split between the Circuits and to correct the Fifth Circuit's misapprehension of the demands of Full Faith and Credit.

Under the Fifth Circuit's erroneous reading of the Full Faith and Credit Clause, a State could deny children adopted by unmarried parents the legal and economic incidents of adoption, including a wide range of critical benefits. This reading not only nullifies a State's obligation to enforce sister-State judgments under the Full Faith and Credit clause; it also invites the denial of equal protection to a subclass of children, taking us back to a time when States were permitted to deny critical rights to children based on the circumstances of their birth or the conduct of their parents.

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[8] The Fifth Circuit majority attempted to distinguish *Finstuen* by characterizing the Registrar's actions here as merely involving "enforcement" rather than "recognition" of out-of-state adoptions. As Judge Weiner explained in his dissent, the majority's ruling "[c]reates a circuit split on the full faith and credit that must be afforded to valid, out-of-state adoption decrees by the adopted child's birth state..." App. to Pet. Cert. 41a (citing *Finstuen*); *see also id.* at 66a ("the Registrar has still failed to meet her obligation to afford full faith and credit to Appellees' out-of-state adoption decree by refusing to recognize it and to issue revised birth certificates to 'adoptive parents' evenhandedly").

A. The Fifth Circuit's Opinion Misconstrued the Distinction Between "Enforcement" And "Recognition" Of Sister-State Adoptions.

The Full Faith and Credit Clause requires each State to recognize sister-State judgments, regardless of any public policy concerns they may harbor. *See, e.g., Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998); *Williams v. North Carolina*, 317 U.S. 287, 294 (1942); *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935); *Fauntleroy v. Lum*, 210 U.S. 230, 237-38 (1908). It is well accepted that this obligation to recognize sister-State judgments extends to final adoption decrees. *See, e.g., Finstuen*, 496 F.3d at 1156 (holding that "final adoption orders and decrees are judgments that are entitled to recognition by all other states under the Full Faith and Credit Clause"); *Embry v. Ryan*, 11 So.3d 408, 409-10 (Fla. App. 2 Dist. 2009); *Wheeler v. Winters*, 134 S.W.3d 774, 777 (Mo. Ct. App. 2004); *Nixon v. Nixon*, 763 N.W.2d 404, 406, 408 (Neb. 2009); *Delaney v. First Nat'l Bank*, 386 P.2d 711, 714 (N.M. 1963); Robert G. Spector, The Unconstitutionality of Oklahoma's Statute Denying Recognition to Adoptions by Same-Sex Couples From Other States, 40 TULSA L. REV. 467, 470 (2005); Rhonda Wasserman, Are You Still My Mother? Interstate Recognition of Adoption by Gays and Lesbians, 58 AM. U. L. REV. 1, 82 (2008).

Although the Fifth Circuit acknowledged that the Full Faith and Credit Clause permits no public policy exception for judgments, its decision flouted this principle by claiming the Registrar's policy denies only "enforcement" but not "recognition" of the judgment. In so concluding, the Fifth Circuit critically misapplied the well-accepted proposition that while States must recognize valid sister-State judgments, they are not required to "adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments." *Baker*, 522 U.S. at 235 (citations omitted). Or, in other words, "it is left to the forum state to regulate the mechanism for enforcing a judgment, e.g., what types of collection actions may be used, how a judgment must be registered or otherwise established in the forum state, and what court or other proceedings must be used to enforce the judgment." *Finstuen v. Edmondson*, 497 F. Supp. 2d at 1306.[9] While the

[9] The Fifth Circuit's opinion erroneously seeks to draw support from a century-old real property case, *Hood v. McGehee*, 237 U.S. 611 (1915), which is outdated and inconsistent with this Court's later Full Faith and Credit decisions. *See, e.g., Baker*, 522 U.S. at 233; *Hughes v. Fetter*, 341 U.S. 609, 611-14 (1951). *Hood* is best understood as a real property case. *See Williams*, 317 U.S. at, 294 n. 5 (1942) (stating that the decisions in *Hood, Fall v. Eastin*, 215 U. S. 1 (1909) and *Olmsted v. Olmsted*, 216 U. S. 386 (1910) "refuse to require courts of one state to allow acts or judgments of another to control the disposition or devolution of realty in the former. They seem to rest on the doctrine that the state where the land is located is 'sole mistress' of its rules of real property.") (citations omitted). *Amici* believe that *Hood* is anachronistic and has no bearing on the instant case. Not only is it about the devolution of real property; it also arose at a time when most States granted limited inheritance rights to adopted

enforcing State may apply its own enforcement mechanisms, it "*may not*, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause . . . ." *Broderick v. Rosner*, 294 U.S. 629, 643 (1935) (emphasis added).

Just as States may apply their own enforcement apparatus to sister-State judgments, they also are free to apply their own laws to determine the incidents of status determinations (such as adoptions and divorces) made in sister-State judgments. *See, e.g.*, Restatement (Second) of the Conflict of Laws §§ 238(1), 262(1) & 290 (1971); *Estin v. Estin*, 334 U.S. 541, 544-45 (1948). As the Tenth Circuit noted in *Finstuen*, the enforcing State "continues to exercise authority over the manner in which adoptive relationships should be enforced [within its borders] and the rights and obligations in [the State] flowing from an adoptive relationship." *Finstuen*, 496 F.3d at 1154.

But it bears emphasizing that "states may not tinker with [their enforcement mechanisms] in an effort to avoid their obligation to recognize or enforce sister-State judgments." Wasserman, *supra*, 58 AM. U. L. REV. at 73. As the New Jersey Supreme Court stated when striking down a facially-neutral New Jersey law that had been enacted specifically to frustrate enforcement of Pennsylvania tax judgments, "it is clear that a state may not, by unduly burdening the means to enforce a foreign

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individuals. Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1126-36 (2003).

judgment, refuse to give full faith and credit to that judgment." *City of Phila. v. Bauer*, 478 A.2d 773, 778 (N.J. 1984).

Thus, while States are free to apply their own laws to determine, for example, what ministerial procedures must be followed to obtain a new birth certificate, or to register an out-of-state custody order regarding a child adopted in another State[10], a State may not decline to apply its laws and ministerial procedures to a valid sister-State judgment by asserting that the judgment violates the public policy of the forum. Such conduct is properly understood as a denial of recognition, not an exercise of enforcement autonomy.

Louisiana may not claim to recognize the New York adoption decree while actually refusing to apply its own laws regarding the rights of adoptive children based on asserted public policy concerns. Louisiana may not deny the family a birth certificate memorializing their legal relationship – a document it routinely gives to adoptive parents – because in this case it disapproves of the family created under New York law. The same conclusion would hold if, instead of being concerned with the unmarried status of the adoptive parents, the State were concerned with the interracial status of the adoptive parents.

The Fifth Circuit's erroneous application of the so-called "enforcement" exception to the exacting mandate of full faith and credit threatens to render

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[10] Any enforcement mechanisms must be applied in an evenhanded way. *See Baker*, 522 U.S. at 235.

nugatory the underlying Full Faith and Credit recognition obligation, with particularly disastrous consequences for adopted children and their parents.

B. Unless Reversed, the Fifth Circuit's Opinion May be Relied Upon by States to Deny Adoptive Families a Broad Range of Rights and Protections.

If the Fifth Circuit's opinion is not reversed, the rights of many adoptive parents and adopted children and their families will be placed in jeopardy, left subject to the whim of state officials and inconsistent court rulings. Such a result would offend the well-settled principle that the rights and benefits enjoyed by adoptive parents and their adopted children are no different than the rights and benefits enjoyed by all other legal parents and their children. *See, e.g.*, LA. CIV. CODE art. 199 ("Upon adoption, the adopting parent becomes the parent of the child for all purposes."); *State ex rel A.R.*, 765 So.2d 395, 399 (La. App. 2000) ("There is no legal basis for treating [an] adoptive parent's authority as somehow less than that of a natural parent."); *see also Smith v. Org. of Foster Families for Equality & Reform,* 431 U.S. 816, 845, n.51 (1977) (Stewart, J., concurring in judgment) ("Adoption, for example, is recognized as the legal equivalent of biological parenthood.").

The Fifth Circuit's misapplication of the distinction between "recognition" and "enforcement" permits States to strip away or disregard legal and economic rights to which adopted children became

entitled upon their adoption. For example, if J.C.A.-S. and his adoptive parents moved to Louisiana, it is not clear whom Louisiana would allow to act as his parent. The Fifth Circuit's rationale could also justify a State's refusal to permit one of the parents of a child adopted in another State to seek custody of that child or a State's refusal to permit a child to sue for the wrongful death of one or both of her adoptive parents.

These concerns are not farfetched. The case of *Embry v. Ryan*, 11 So.3d 408 (Fla. App. 2 Dist. 2009) is instructive. Embry and Ryan had a child together. Ryan, the biological mother, is one of the child's legal parents; Embry became her second legal parent through an adoption granted in the State of Washington where the family lived. The family moved to Florida, where the two mothers later separated and Embry filed a lawsuit seeking shared custody of her adopted child. The Florida trial court ruled in Ryan's favor, finding that despite the Florida statutes providing that all legal parents have standing to sue for custody, the State was entitled to deprive Embry of the right to seek custody because her parental status offended Florida public policy. The Florida Court of Appeal reversed this decision, holding that full faith and credit as well as the State's own laws mandate recognition of adoptions granted by sister States, and that Florida statutes further clarify that "the rights and obligations of the parties on matters within the jurisdiction of this state shall be determined *as though the judgment were issued by a court of this state.*" *Embry*, 11 So.3d at 410 (quoting Fla. Stat. § 63.192). In other words,

the adoptive mother was entitled to be treated like everyone else who became an adoptive parent by virtue of a Florida judgment of adoption.

Amici are concerned that courts in Louisiana and other States may rely on the Fifth Circuit's decision to do as the trial court did in the *Embry* case[11] and refuse to apply their standard child custody laws evenhandedly to all children.

The potential broader impact of the Fifth Circuit's erroneous reading of the Full Faith and Credit Clause does not end with child custody. A rule that States can refuse to apply their laws to certain parents and their children based on public policy concerns could be applied to deny children a number of rights and benefits, including: the right to support from one of their parents, to inherit from and through one of their parents, to be included in a class of beneficiaries, to sue for the wrongful death of one of their parents, and to receive worker's compensation benefits through one of their parents.

The disparate treatment permitted by the Fifth Circuit's opinion inflicts substantial harm on children like J.C.A.-S. as well as on their adoptive families and may inflict further harm in the future. This result is untenable. The Fifth Circuit's opinion nullifies a State's obligation to enforce sister-States'

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[11] Trial courts in Nebraska and Michigan have also refused to recognize valid adoptions from other states based on public policy arguments but, as in *Embry*, have been reversed on appeal. *Russell v. Bridgens*, 647 N.W.2d 56 (Neb. 2002); *Giancaspro v. Congleton*, No. 283267, 2009 WL 416301 (Mich. Ct. App., Feb. 19, 2009).

judgments under the Full Faith and Credit Clause. It also invites the denial of equal protection to certain children by taking us back to a time when States were permitted to deny critical rights to children based on the circumstances of their birth or the conduct of their parents.

In sum, unless the Fifth Circuit's decision is reversed, every determination that rests on a recognition of parentage – including a parent's power to make educational and health care decisions for their child, custody assessments, and standing in probate actions – could be denied by a State if it regards a certain kind of parent-child relationship as contrary to its "public policy." This is precisely the result that the Equal Protection Clause and the Full Faith and Credit Clause are designed to prevent.

CONCLUSION

Louisiana should not be allowed to punish children because of the status or actions of their parents; to do so runs afoul of the Equal Protection Clause and established precedent dating back to *Levy*. Nor should the Full Faith and Credit Clause be interpreted to allow States to disregard final sister-State adoptions. To remedy these wrongs, *amici* respectfully request that this Court grant Petitioners' writ of *certiorari* to correct the opinion of the Fifth Circuit below.

Respectfully submitted,

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APPENDIX

Descriptions of *amici curiae*:

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Cynthia Grant Bowman is the Dorothea S. Clarke Professor of Law at Cornell Law School. She is the lead author of a casebook on Feminist Jurisprudence. Her most recent book explores the ways in which nonmarital couples and their children are subject to harmful discrimination under U.S. law.

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