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Chelsea Ann Miller

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ADAR v. SMITH

Who Do I Belong To?

Interstate Recognition of Adoptions by Unmarried Couples in *Adar v. Smith*

I. INTRODUCTION

Adar v. Smith presents important questions about the scope of the Full Faith and Credit Clause, as well as the meaning of the Equal Protection Clause, in regards to illegitimate children.¹ These issues arose because of Louisiana's refusal to provide an amended birth certificate to a sub-class of children based on the marital status of their adoptive parents. In the conflict that generated the *Adar v. Smith* litigation, Louisiana's Registrar of Vital Records and Statistics refused to issue an amended birth certificate, when the state, based on its own public policy, disapproved of an out-of-state judgment of adoption to an unmarried couple of the same-sex.

The Louisiana statute which the Registrar of Vital Records and Statistics relied on to deny Mr. Adar and Mr. Smith an amended birth certificate states:

(A) When a person [1] born in Louisiana [2] is adopted in a court of proper jurisdiction [3] in any other state or territory of the United States, the [Louisiana] state registrar may create a new record of birth in the archives (B) upon presentation of a properly certified copy of the final decree of adoption . . . (C) *Upon receipt of the certified copy of the decree, the state registrar shall make a new record in its archives, showing . . .* (3) the names of the adoptive parents and any other data about them that is available and adds to the completeness of the certificate of the adopted child.²

A divided en banc Fifth Circuit upheld the Registrar's refusal to issue an amended birth certificate, stating that the Full Faith and Credit Clause does not control the actions of non-

¹Adar v. Smith, 639 F.3d 146, 150 (5th Cir. 2011) (en banc).

²LA. REV. STAT. ANN. § 40:76(A)-(C) (emphasis added).

judicial state officials and is not enforceable as to such officers under 42 U.S.C. § 1983.³ The court also held that Louisiana did not violate the Equal Protection Clause in refusing to issue amended birth certificates to the children of adoptive, unmarried parents, based on the state's disapproval of those parents' marital status.⁴

A Petition for Writ of Certiorari was filed in the United States Supreme Court, but the Supreme Court denied the Petition for Writ of Certiorari on October 11, 2011.⁵ As a result of the denial, the Supreme Court leaves intact a Fifth Circuit Court of Appeals ruling that has created a public policy exception to the Full Faith and Credit Clause. Furthermore, by leaving intact the Fifth Circuit Court's ruling, the Supreme Court is subjecting adoptive children and their parents to uncertainty as to whether their familial status will be recognized by officials in other states. This case note will discuss both the Full Faith and Credit Clause and the Equal Protection Clause in depth with regards to adoption decree judgments and illegitimate children.

II. BACKGROUND

A. Statement of Facts

Oren Adar and Mickey Smith (Mr. Adar and Mr. Smith) are the parents of Infant J, a five-year old boy who was born in Shreveport, Louisiana and surrendered there for adoption.⁶ At the time of the adoption, Mr. Adar and Mr. Smith lived in Connecticut and they obtained an agency adoption of Infant J in the Family Court of Ulster County, New York, pursuant to New York state law that authorizes joint adoptions by unmarried same-sex couples.⁷ After the New York adoption decree was obtained, Mr. Adar and Mr. Smith arranged for the adoption decree to be forwarded to the Louisiana Office of Public Health, Vital Records Registry, to have an

³*Adar*, 639 F.3d at 162.

⁴*Id.*

⁵*Adar v. Smith*, 181 L. Ed. 2d 257 (U.S. 2011).

⁶*Adar*, 639 F.3d at 166.

⁷*Adar v. Smith*, 597 F.3d 697, 697 (5th Cir. 2010); (reversed, *Adar*, 639 F.3d 146 (5th Cir. 2011)).

amended birth certificate issued from Louisiana.⁸ The amended birth certificate would properly identify them both as Infant J’s legal parents.⁹ The harms alleged by Mr. Adar and Mr. Smith to be caused by lack of an amended birth certificate are: (1) difficulties encountered in enrolling Infant J in Mr. Smith’s health insurance plan; (2) problems encountered with airline personnel who suspected that the adoptive parents were kidnappers of Infant J; and (3) denial of the “emotional satisfaction” of “seeing both of their names on the birth certificate.”¹⁰

The Registrar, Darlene Smith, rejected the request to issue an amended birth certificate, stating that Louisiana law and public policy did not permit her to issue a birth certificate with the names of unmarried adoptive parents.¹¹ The Registrar stated that the Office of Vital Records and Statistics was “not able to accept the New York adoption judgment to create a new birth certificate because”: (1) Louisiana only authorizes in-state adoptions by single adults or married couples, (2) La. Rev. Stat. Ann. §40:76 vests the Registrar with full discretion in issuing amended birth certificates for out-of-state adoptions of Louisiana-born children, and (3) La. Rev. Stat. Ann. §40:76D only authorizes the Registrar to issue amended birth certificates in accordance with Louisiana law.¹² However, the Registrar offered to place either Mr. Adar or Mr. Smith’s name on the birth certificate, despite the fact that the New York adoption decree lists both men as Infant J’s lawful parents, because Louisiana allows single-parent adoptions.¹³

⁸*Id.*

⁹*Id.*

¹⁰*Id.* at 703; *see also*, Pet. for Cert. at 5 – Petitioners had great difficulty enrolling Infant J 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. 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. 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.

¹¹*Adar v. Smith*, 591 F. Supp. 2d 857, 859 (E.D. La. 2008).

¹²*Adar*, 597 F.3d at 697.

¹³*Adar*, 639 F.3d at 146.

After the Registrar refused to issue an amended birth certificate, Mr. Adar and Mr. Smith sued the Registrar under 42 U.S.C. § 1983 for declaratory and injunctive relief, asserting that her action denies full faith and credit to the New York adoption decree and equal protection to them and Infant J.¹⁴

On a motion for summary judgment, the United States District Court for the Eastern District of Louisiana issued a mandatory injunction, commanding the Registrar to issue the birth certificate on grounds that Louisiana owes full faith and credit to the New York adoption decree, and that there is no public policy exception to the Clause.¹⁵ Additionally, the district court held that the plain language of La. Rev. Stat. Ann. § 40:76 mandates that, on receipt of a duly certified copy of the New York adoption decree, the Registrar had to issue a certificate for Infant J that contained the names of Mr. Adar and Mr. Smith as his adoptive parents.¹⁶

Following the Registrar's appeal, a panel of the Fifth Circuit pretermitted the Full Faith and Credit claim, concluding instead that Louisiana law, properly understood, required the Registrar to reissue the birth certificate.¹⁷ The court stated that under the plain meaning of the statutes, Mr. Adar and Mr. Smith are the "adoptive parents" of Infant J for purposes of La. Rev. Stat. Ann §§ 40:76 and 40:77, and that under the Full Faith and Credit Clause, Louisiana owes full faith and credit to the New York adoption decree that declares Infant J. to be the adopted child of Mr. Adar and Mr. Smith.¹⁸ Additionally, the Fifth Circuit panel opinion held that § 40:76 does not vest the Registrar with discretion to refuse to make a new, correct birth certificate for a Louisiana-born child when, as here, his out-of-state adoption decree is evidenced by

¹⁴*Id.*

¹⁵*Adar*, 597 F.3d. at 702.

¹⁶*Id.*

¹⁷*Adar*, 639 F.3d. at 146.

¹⁸*Adar*, 597 F.3d. at 719.

documentation that indisputably satisfies the requirements of § 40:76(A) and (B).¹⁹ Accordingly, the panel opinion ordered that the Registrar issue a new, correct birth certificate for Infant J.²⁰ However, this court’s panel opinion was vacated by the court’s decision to rehear the case en banc.²¹

B. Issues

The following questions were presented to the Fifth Circuit Court of Appeal en banc during their review of their panel opinion:

- (1) Whether Mr. Adar and Mr. Smith’s claim for a reissued birth certificate rests on the Constitution’s Full Faith and Credit clause, and whether it is addressable in federal court in a § 1983 action; and
- (2) Whether Louisiana violated 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.²²

In particular, this case raises important questions about whether non-judicial officers 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.

i. Full Faith and Credit Clause

Mr. Adar and Mr. Smith contend that their claim arises under the Full Faith and Credit Clause.²³ The Full Faith and Credit Clause can be found in Article IV, § 1, of the United States Constitution. The Clause states, “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State. And that Congress may by general

¹⁹*Id.*

²⁰*Id.*

²¹Adar v. Smith, 622 F.3d 426 (5th Cir. 2010) (order to vacate).

²²Petition for Certiorari: *supra* note 3, at i.

²³*Id.* at 150.

Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof.”²⁴ Additionally, federal statutory law provides:

Such Acts, records and judicial proceedings or copies thereof [of any State, Territory, or Possession of the United States], so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.²⁵

Here, Infant J was adopted in a court proceeding in New York, as evidenced by a judicial decree.²⁶ As a result, Mr. Adar and Mr. Smith contend that Art. IV, § 1 and §1738 oblige the Registrar to “recognize” their adoption of Infant J by issuing a revised birth certificate.²⁷ Mr. Adar and Mr. Smith argue that either the Registrar’s refusal to issue an amended birth certificate with both names on it, or the state law on which she relied, effectively denies them and their child “recognition” of the New York decree.²⁸ Thus, the Registrar, under the color of the law, abridged rights created by the Constitution and laws of the United States.²⁹

a. En Banc Majority Opinion

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, rejected it, and remanded for dismissal of the action.³⁰ The majority did not agree with Mr. Adar and Mr. Smith’s argument that the Registrar’s refusal to issue an amended birth certificate with both names on it, denied them and their child “recognition” of the New York decree.³¹

²⁴U.S. CONST. art. IV, §1.

²⁵28 U.S.C. § 1738.

²⁶*Adar*, 639 F.3d at 151.

²⁷*Id.*

²⁸*Id.*

²⁹*Id.*

³⁰Petition for Certiorari *supra* note 3, at 8.

³¹*Adar*, 639 F.3d. at 150.

The majority began the opinion with a discussion of the history and purpose of the Full Faith and Credit Clause. The Supreme Court has long held that under the Full Faith and Credit Clause, state courts would be obliged to afford a sister-state judgment the same *res judicata* effect which the issuing court would give it.³² According to the Court, the purpose of the clause was to replace the international law rule of comity with a constitutional duty of sister states to honor the laws and judgments of sister states.³³ The Court still maintains that the Full Faith and Credit Clause imposes a duty on state courts to give a sister-state judgment the same effect that the issuing court would give it.³⁴

Mr. Adar and Mr. Smith asserted that plaintiffs may employ §1983 against any state actor who violates one's "right" to full faith and credit, since § 1983 provides remedies for the violation of constitutional and statutory rights.³⁵ However, the en banc majority held that the obligation created by the Full Faith and Credit Clause applies only to state *courts* as opposed to administrative bodies.³⁶ The majority maintains that while the Supreme Court has at times referred to the Clause in terms of individual "rights," it consistently identifies the violators of that right as state courts.³⁷ Consequently, the majority stated since the duty of affording full faith and credit to a judgment falls on *courts*, it was illogical to speak of vindicating full faith and credit rights against non-judicial state actors.³⁸ Finally, the majority stated that because the predicates triggering full faith and credit are determinable only by *courts*, state executive

³²Mills v. Duryee, 11 U.S. 481, 485 (1813).

³³Estin v. Estin, 334 U.S. 541, 546 (1948); *See also* Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943) (noting that "the clear purpose of the Full Faith and Credit Clause" was to establish the principle that "a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every court as in that where the judgment was rendered").

³⁴Thompson v. Thompson, 484 U.S. 174, 180 (1988).

³⁵Adar, 639 F.3d at 153.

³⁶*Id.*

³⁷Adar, 639 F.3d at 154 (discussing Barber v. Barber, 323 U.S. 77 (1944) "The refusal of the Tennessee Supreme Court to give credit to that judgment because of its nature is a ruling upon a federal right.").

³⁸Adar, 639 F.3d at 154.

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, so it makes little sense to impose full faith and credit obligations on non-judicial officers who are not equipped for such tasks.³⁹

In addition, the majority stated that even if a broader individual right exists under the Full Faith and Credit Clause; the Supreme Court of the United States has expressly indicated that the only remedy available for violations of the Full Faith and Credit Clause is review by the Supreme Court.⁴⁰ The majority explains the usual posture of full faith and credit cases as arising in the context of pending litigation—not as a claim brought against a party failing to afford full faith and credit to a state judgment, but as a basis to challenge the forum court’s decision.⁴¹ That is, such cases begin in state court, and the Supreme Court intervenes only after the *state court* denies the validity of a sister state’s law or judgment.⁴²

The primary case the majority relies on in making this determination is *Thompson v. Thompson*.⁴³ In that case, the Court held that the Parental Kidnapping Prevention Act (PKPA), which imposed full faith and credit duty on states to enforce child custody determinations entered by sister-state courts, did not give rise to an implied private cause of action.⁴⁴ The Court there reasoned that because Congress explicitly declined to rely on federal courts to enforce full faith and credit rights, the only remedy for full faith and credit violations must lie in Supreme Court review of state-court decisions.⁴⁵ According to the majority, although the Full Faith and Credit Clause is part of the Constitution within the meaning of 28 U.S.C. § 1331, “there is no jurisdiction because the relation of the constitutional provision and the claim is not sufficiently

³⁹*Id.* at 155.

⁴⁰*Id.* at 155.

⁴¹*Adar*, 639 F.3d at 154.

⁴²*Id.*

⁴³*Thompson v. Thompson*, 484 U.S. 174 (1988).

⁴⁴*Id.* at 185-187 (discussing 28 U.S.C. § 1738A (2011) (PKPA)).

⁴⁵*Id.*

direct that the case ‘arises under’ the clause.’’⁴⁶ As a result, absent an independent source of jurisdiction over such claims, federal district courts may not hear such cases.⁴⁷ Therefore, to enforce the clause, the majority says that Mr. Adar and Mr. Smith should have sought to compel issuance of a new birth certificate in Louisiana courts, and then once their case was submitted to the state courts, the Full Faith and Credit Clause could provide the federal question necessary to support Supreme Court review.⁴⁸

The majority argues that Mr. Adar and Mr. Smith downplay the significance of *Thompson v. Thompson*, because the case did not involve a state actor refusing to accord full faith and credit to another state’s judgment, but was a suit against a private individual.⁴⁹ In fact, the majority states that the actual relief sought by the plaintiff in *Thompson* was for the federal district court to require the “state courts” to comply with the standards established by the PKPA.⁵⁰ Consequently, the majority makes it apparent that the only remedy for a state’s refusal to discharge its obligations under the clause is review by the Supreme Court of the United States.⁵¹

However, there has been at least one federal court decision which has permitted a full faith and credit claim to be brought in federal court pursuant to § 1983, *Finstuen v. Crutcher*.⁵² In *Finstuen*, a couple sued to invalidate an Oklahoma statute that officially denied recognition to out-of-state adoptions by same-sex couples.⁵³ The Tenth Circuit not only granted relief under § 1983, but also ordered a new birth certificate to be issued bearing the names of the same-sex

⁴⁶ *Adar*, 639 F.3d 146 at 157.

⁴⁷ *Id.*

⁴⁸ *Id.* at 158.

⁴⁹ *Adar*, 639 F.3d at 155.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

⁵³ *Id.* at 1156.

parents.⁵⁴ The en banc majority distinguishes *Finstuen* from the case at hand by stating that the bulk of the *Finstuen* opinion is devoted to the analysis of the allegedly unconstitutional state non-recognition statute, which is not the problem here.⁵⁵ Furthermore, *Finstuen* acknowledges the principle that “enforcement measures do not travel with the sister state judgment” for full faith and credit purposes, and then characterizes the birth certificate sought by the plaintiffs as an “enforcement mechanism.”⁵⁶ The discussion between recognition and enforcement mechanisms is discussed further in section III (A) (ii).

The majority argues that *Finstuen* is distinguishable not only because the Registrar here concedes the validity of Infant J’s adoption, but also because the Louisiana law, unlike the Oklahoma law, does not require issuing birth certificates to unmarried couples.⁵⁷ Additionally, the “enforcement measure” – issuance of a revised birth certificate – is critically different in the two states.⁵⁸ Because the en banc majority characterizes amending a birth certificate as an enforcement measure, it falls within Louisiana’s discretion to decide to issue a new birth certificate to an unmarried couple, which is not required in Louisiana.

Furthermore, the en banc majority stated, even if § 1983 provided a remedy against non-judicial actors for violations of the Full Faith and Credit Clause, Mr. Adar and Mr. Smith still could not prevail because the Registrar has not denied recognition to the New York adoption decree.⁵⁹ Citing Supreme Court precedent, the majority differentiates the credit owed to laws and the credit owed to judgments.⁶⁰ With regard to judgments, the Court has described the full

⁵⁴*Id.*

⁵⁵*Id.* at 1154.

⁵⁶*Id.*

⁵⁷*Adar*, 639 F.3d at 157.

⁵⁸*Id.*

⁵⁹*Id.* at 158.

⁶⁰*Baker v. General Motors Corp.*, 522 U.S. 222 (1998).

faith and credit obligation as “exacting.”⁶¹ The states’ duty to “recognize” sister state judgments, does not compel states to “adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments.”⁶² Rather, enforcement of judgments is “subject to the evenhanded control of forum law.”⁶³ “Evenhanded” means that the state executes a sister state judgment in the same way that it would execute judgments in the forum court.⁶⁴

The majority goes on to say that the Registrar has not refused to *recognize* the validity of the New York adoption decree and in fact, the Registrar concedes that the parental relationship of Mr. Adar and Mr. Smith with Infant J is final and cannot be revisited in its courts.⁶⁵ In addition, the Registrar offered to comply with Louisiana law and reissue a birth certificate showing one of the unmarried adults as the adoptive parent of Infant J.⁶⁶ As a result, the Registrar acknowledged that even though she would not issue the requested birth certificate with both names, she recognizes Mr. Adar and Mr. Smith as the legal parents of their adopted child.⁶⁷ The majority held that full faith and credit is not denied by Louisiana’s circumscribing the kind of birth certificate available to unmarried adoptive parents.⁶⁸ The Full Faith and Credit Clause does not compel “a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.”⁶⁹ The majority held that Louisiana has every right to channel and direct the rights created by foreign judgments, and

⁶¹*Id.* at 233.

⁶²*Id.* at 235.

⁶³*Id.*

⁶⁴*Id.*

⁶⁵*Adar*, 639 F.3d at 158.

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸*Id.* at 159.

⁶⁹*Adar*, 639 F.3d at 159 (citing *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988) (quoting *Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 501 (1939))).

obtaining a birth certificate falls in the heartland of enforcement, and therefore outside the full faith and credit obligation of recognition.⁷⁰

The Supreme Court continues to maintain a distinction between recognition and enforcement of judgments under the Full Faith and Credit Clause.⁷¹ Additionally, “the mechanisms for enforcing a judgment do not travel with the judgment itself for purposes of full faith and credit.”⁷² To this end, the majority held the New York adoption decree cannot compel within Louisiana “an official act within the exclusive province” of that state [the issuing of an amended birth certificate].⁷³ Rather, the adoption decree “can only be executed in Louisiana as its laws may permit.”⁷⁴ It follows that the Full Faith and Credit Clause does not oblige Louisiana to confer benefits on unmarried adoptive parents contrary to its law.⁷⁵ Forum state law governs the incidental benefits of a foreign judgment, and here Louisiana does not permit any unmarried couples, whether adopting out-of-state or in-state, to obtain revised birth certificates with both parents’ names on them.⁷⁶ Thus the Registrar’s refusal to place two names on the certificate can in no way constitute a denial of full faith and credit.⁷⁷ It follows that the majority held Louisiana has a right to issue birth certificates in the manner it deems fit.⁷⁸

b. En Banc Dissent

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

⁷⁰ *Adar*, 639 F.3d at 159.

⁷¹ *Baker*, 522 U.S. at 222.

⁷² *Id.* at 239.

⁷³ *Adar*, 639 F.3d at 159.

⁷⁴ *Id.*

⁷⁵ *Id.* at 161.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

courts.”⁷⁹ When the drafters of the Constitution intended for a particular provision to bind only the courts of the states, they knew how to say so, as the text of the Supremacy Clause makes clear.⁸⁰ Judge Weiner explained that, “it is a foundational principle of constitutional interpretation that clauses of the Constitution that are worded differently are presumed to carry different meanings.”⁸¹ The dissent argues that the majority ignores this principle when it assigns the “each State” language of the Full Faith and Credit Clause the same meaning as the “Judges in every State” language of the Supremacy Clause.⁸²

The dissent disagreed with the majority’s decision to rely on *Thompson v. Thompson* as persuasive precedent that the Full Faith and Credit Clause does not create a private federal right that can be asserted via § 1983 against all state actors as distinct from private actors.⁸³ The dissent stated that *Thompson* is properly read as holding only that there is no private remedy against private parties for violations of the Full Faith and Credit Clause.⁸⁴ That reading is licit because in *Thompson*, the defendant was a private citizen, not a state official.⁸⁵ Therefore, properly understood, *Thompson* does not control the case at hand.⁸⁶ The reason there was no remedy to enforce in *Thompson* is because there is no implied cause of action for violations of the Full Faith and Credit Clause by private parties.⁸⁷ Here, when Mr. Adar and Mr. Smith are

⁷⁹*Id.* at 165.

⁸⁰U.S. CONST. art. VI, cl. 2 (“This Constitution...shall be the supreme Law of the Land; and the *Judges* in every State shall be bound thereby. . . .” (emphasis added)).

⁸¹*Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat) 304, 334 (1816) (“From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason. . . .”).

⁸²*Adar*, 639 F.3d at 169.

⁸³*Id.* at 170.

⁸⁴*Id.* at 171.

⁸⁵*Adar*, 639 F.3d at 173 (citing *Thompson*, 484 U.S. at 178 (suit by an ex-husband against an ex-wife)).

⁸⁶*Adar*, 639 F.3d at 171.

⁸⁷*Id.*

suing a state actor, they have no need for an implied cause of action: Section § 1983 expressly provides them with the only remedy they need.⁸⁸

Additionally, according to the dissent, the en banc majority fails to appreciate or acknowledge the role of § 1983 in providing a private remedy against state actors.⁸⁹ The Supreme Court has repeatedly pronounced that § 1983 is a remedial statute which is intended “to be broadly construed, against all forms of official violation of federally protected rights.”⁹⁰ Furthermore, the dissent relies heavily on *Dennis v. Higgins*, when arguing that even though a vast number of § 1983 actions involve violations of constitutional rights in individual circumstances, action brought via § 1983 may assert violations of non-individual constitutional rights as well.⁹¹

In *Dennis v. Higgins*, a motor vehicle carrier filed a § 1983 cause of action against Nebraska state officials for violating the Commerce Clause by imposing “retaliatory” taxes and fees on motor carriers that operated in Nebraska but used vehicles registered in other states.⁹² The Nebraska Supreme Court ruled that “claims under the Commerce Clause are not cognizable under § 1983 because the Commerce Clause does not establish individual rights against government, but instead allocates power between the state and federal governments.”⁹³ The Supreme Court nevertheless directed that “a broad construction of § 1983 is compelled by the statutory language and that the legislative history of the section stresses that as a remedial statute, it should be liberally and beneficently construed.”⁹⁴

⁸⁸*Id.*

⁸⁹*Id.* at 172.

⁹⁰*Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 700-01 (1978).

⁹¹*Adar*, 639 F.3d at 173.

⁹²*Dennis v. Higgins*, 498 U.S. 439 (1991).

⁹³*Id.* at 442.

⁹⁴*Id.* at 443.

Equally important is the en banc majority's dismissal of *Finstuen v. Crutcher* as "an outlier to the jurisprudence of the Full Faith and Credit Clause."⁹⁵ The dissent's argument is that *Finstuen* is both instructive and consistent with Supreme Court Full Faith and Credit Clause jurisprudence.⁹⁶ In *Finstuen*, Oklahoma's existing law governing the effect of adoption decrees—quite similar to Louisiana's own birth certificate law—specified rights to holders of final adoption decrees.⁹⁷ However, Oklahoma's law differed from Louisiana's, because Oklahoma's law had an additional statute that excluded specific subsets of out-of-state adoptive parents from entitlement to the benefits conferred by the general adoption law.⁹⁸ Oklahoma's "non-recognition" statute provided:

The courts of this state shall recognize a decree, judgment, or final order of adoption issued by a court or other governmental authority with appropriate jurisdiction. . . . Except that, this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.⁹⁹

Like Oklahoma's general adoption statute, Louisiana's general enforcement provision is nondiscriminatory; and like Oklahoma's non-recognition statute, the Registrar's specific exception "policy" is indisputably discriminatory.¹⁰⁰ It is that discrimination that ultimately prevented Mr. Adar and Mr. Smith from obtaining the revised birth certificate that they otherwise would have been able to obtain but for the Registrar's refusal to "accept" – give full faith and credit – to their valid out-of-state adoption decree.¹⁰¹ By invalidating a statute as violative of the Full Faith and Credit Clause, the Tenth Circuit clearly read the Full Faith and Credit Clause as binding on every branch of a state's government, and not just on state judges,

⁹⁵ *Adar*, 639 F.3d at 181.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 182.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

which is in direct tension with the en banc majority's reading of the Full Faith and Credit Clause.¹⁰² Accordingly, the en banc majority's holding, is in undeniable conflict with the Tenth Circuit's opinion, which ultimately held: "Because the Oklahoma statute at issue categorically rejects a class of out-of-state adoption decrees, it violates the Full Faith and Credit Clause."¹⁰³

Furthermore, the en banc dissent states that the Supreme Court has defined the right which is secured by the Full Faith and Credit Clause as one of "recognition" not "enforcement", therefore making three pronouncements: (1) "a final judgment in one State, qualifies for recognition throughout the land" and thereby "gains nationwide force,"¹⁰⁴ (2) although "enforcement measures do not travel with the sister state judgment as preclusive effects do, such measures remain subject to the even-handed control of forum law",¹⁰⁵ and (3) although "a court may be guided by the forum State's 'public policy' in determining the law applicable to a controversy," there is "no roving 'public policy exception' to the full faith and credit due judgments."¹⁰⁶

The dissent makes the argument that the majority mistakenly converted the notion of "recognition" into one of "enforcement," so as to conclude that "obtaining a birth certificate falls in the heartland of enforcement, and therefore outside the full faith and credit obligation of recognition."¹⁰⁷ If a forum state refuses to apply its enforcement measures to only some out-of-state judgments, i.e. doesn't maintain evenhanded control of forum law, it is essentially refusing to recognize the force of those disfavored out-of-state judgments in the forum state, and this is precisely what the Registrar has done here.¹⁰⁸ The Registrar has refused to recognize Mr. Adar

¹⁰² *Id.*

¹⁰³ *Id.* (citing *Finstuen v. Crutcher*, 496 F.3d at 1141).

¹⁰⁴ *Adar*, 639 F.3d at 176 (citing *Baker*, 522 U.S. at 233).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 177.

and Mr. Smith’s nationwide, lawful status as “adoptive parents” by denying them the “adoptive parent” rights created in Louisiana’s birth certificate statute.¹⁰⁹ In other words, the problem is that Louisiana is refusing rights created by its own law, but only to a subset of valid out-of-state adoptions, and in favoring some out-of-state adoptions over others, the Registrar is refusing to give full faith and credit to all of them, i.e. she is not enforcing Louisiana law in an evenhanded manner.¹¹⁰

Overall, when Mr. Adar and Mr. Smith legally adopted Infant J in New York, each gained the status of “adoptive parent” for purposes of the laws of every other state, including Louisiana. Consequently, when they duly requested a birth certificate, as “adoptive parents”, pursuant to the Louisiana statute, the Registrar violated the Full Faith and Credit Clause by refusing to accept their request.¹¹¹ By refusing to treat both Mr. Adar and Mr. Smith as lawful “adoptive parents” under Louisiana’s birth certificate law, the Registrar failed to *recognize* their status as defined by the New York judgment.¹¹²

The Louisiana statute at issue, directs the Registrar to record all validly certified out-of-state adoption decrees, inscribing the names of all “adoptive parents” on revised birth certificates.¹¹³ When carefully examined, the Registrar’s actual policy is to issue new birth certificates containing the names of every adoptive parent for some out-of-state adoptions but not for others, specifically, not for adoptions by two unmarried parents.¹¹⁴

Finally, the dissent states that the Registrar’s policy to refuse amended birth certificates to unmarried couples is discriminatory. It is that discrimination that prevented Mr. Adar and Mr.

¹⁰⁹*Id.*

¹¹⁰*Id.* at 178.

¹¹¹*Id.* at 179.

¹¹²*Id.*

¹¹³*Id.*

¹¹⁴*Id.* at 180.

Smith from obtaining the revised birth certificate that they would have been able to obtain but for the Registrar's refusal to "accept" and give full faith and credit to their valid out-of-state adoption decree for purposes of Louisiana's law.¹¹⁵

ii. Equal Protection Clause

As previously mentioned, the Louisiana law at issue requires state officials to issue amended birth certificates to all adopted Louisiana-born children. However, the Registrar has a policy of selectively refusing to apply this statute to children adopted in other states by unmarried couples. As a result of Louisiana's selective process, Mr. Adar and Mr. Smith filed a claim against the Registrar for violation of the Equal Protection Clause. Mr. Adar and Mr. Smith's second theory contends that denying a revised birth certificate to children of unmarried couples is a violation of the Equal Protection Clause.¹¹⁶ Their theory is that Louisiana treats a subset of children, (adoptive children of unmarried parents), differently from adoptive children with married parents, and this differential treatment does not serve any legitimate governmental interest.¹¹⁷

a. En Banc Majority

The en banc majority finds this theory unavailing in the face of the state's rational preference for stable adoptive families, and the state's decision to have its birth certificate requirements flow from its domestic adoption law.¹¹⁸ Additionally, the majority states that Mr. Adar and Mr. Smith have not explained why an adoptive child of unmarried parents falls into a suspect classification.¹¹⁹ Furthermore, the majority does not agree with Mr. Adar and Mr.

¹¹⁵*Id.* at 182.

¹¹⁶*Id.* at 161; *see also* U.S. CONST. amend. XIV, §1 – "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

¹¹⁷*Id.*

¹¹⁸*Id.*

¹¹⁹*Id.*

Smith's reliance on the *Levy v. Louisiana* line of cases to support the inference that heightened scrutiny is required here, because the classification in those cases relates to illegitimacy.¹²⁰ The majority makes the argument that because Infant J's birth status is irrelevant to the Registrar's decision, these cases cannot support the conclusion that he belongs to a suspect class provided by heightened scrutiny; therefore, the Louisiana law will be upheld if it is rationally related to a legitimate state interest.¹²¹

Louisiana has "a legitimate interest in encouraging a stable and nurturing environment for the education and socialization of its adopted children."¹²² The Registrar cites to the research institution Child Trends' report underscoring the importance of stable family structures for the well-being of children.¹²³ The report noted that marriage, when compared to cohabitation, "is associated with better outcomes for children," since marriage is more likely to provide the stability necessary for healthy development of children.¹²⁴ The majority agreed that this fact alone provides a rational basis for Louisiana's adoption regime and corresponding vital statistics registry.¹²⁵ As a result, the majority held that the law here does not attempt to encourage marriage or discourage behavior deemed immoral, but rather is meant to ensure stable environments for adopted children, and the court has sufficient basis to hold the Louisiana law does not run afoul of the Equal Protection Clause.¹²⁶

¹²⁰*Id.*

¹²¹*Id.* at 162.

¹²²*Adar*, 639 F.3d at 162 (citing *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004)).

¹²³*Id.* at 162 (citing Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, CHILD TRENDS RESEARCH BRIEF, at 6 (2002)); available at <http://www.childtrends.org/files/marriagerb602.pdf>.

¹²⁴*Id.*

¹²⁵*Id.*

¹²⁶*Id.*

b. En Banc Dissent

The dissent criticized the majority for reaching the Equal Protection claim “before the district court or even a panel of this court had done so.”¹²⁷ However, in 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.”¹²⁸

Rational basis review directs that a challenged state action be sustained “if the classification drawn by the action is rationally related to a legitimate state interest.”¹²⁹ The dissent agrees that the Registrar tendered a worthy defense of Louisiana’s in-state adoption laws, which prohibit Louisiana adoptions by unmarried couples; however, the instant case does not involve a Louisiana adoption at all and poses no threat whatsoever to Louisiana’s adoption laws or adoption policy.¹³⁰ Mr. Adar and Mr. Smith’s claim has nothing to do with adoption laws, particularly not Louisiana’s adoption laws, and has everything to do with ensuring that the applicable Louisiana public records contain accurate and complete information, pursuant to Louisiana’s Vital Statistics Laws.¹³¹ Therefore, in the dissent’s view, the interest asserted by the Registrar 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.”¹³² Furthermore, because the Registrar’s action occurred long after Infant J had already been adopted, the dissent explained, “there is no way that the potential stability of Infant J’s

¹²⁷*Id.* at 182.

¹²⁸*Id.* at 183.

¹²⁹*City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 400 (1985).

¹³⁰*Adar*, 639 F.3d at 184.

¹³¹*Id.*

¹³²*Id.*

home could have been improved by the Registrar's post hoc action" of denying an amended birth certificate.¹³³

Additionally, the dissent makes the argument that the appropriate comparative class is not "married adoptive parents versus unmarried adoptive parents," but "unmarried biological parents versus unmarried adoptive parents."¹³⁴ In fact, by statute, Louisiana recognizes and issues birth certificates to unmarried biological parents, irrespective of its policy preference that children only have parents who are married to one another.¹³⁵ Just as Mr. Adar and Mr. Smith are the unmarried legal parents of Infant J by virtue of the New York adoption decree, Louisiana cannot control or change the fact that, both in and outside Louisiana, unmarried couples have and adopt children.¹³⁶

The dissent's final argument runs that because Louisiana will issue a birth certificate listing both members of an unmarried couple as parents when they are the biological parents of the child, the Registrar must identify a legitimate government interest that is served by distinguishing between and treating differently for purposes of issuing birth certificates (1) a couple comprising unmarried non-biological adoptive parents and (2) a couple comprising unmarried biological parents, all of whom have equal rights under the law.¹³⁷ The Registrar defended her policy as a refusal "to recognize permanently in Louisiana public records, a parent-child relationship that cannot exist under Louisiana law."¹³⁸ According to the en banc dissent, her statement is false because some unmarried couples (unmarried biological parents), can and do maintain parent-child relationships that are recognized under Louisiana law and are recorded

¹³³*Id.*

¹³⁴*Id.* at 185.

¹³⁵*Id.* (citing LA. REV. STATE. ANN. § 40:34 (B)(1)(h)(ii) – If a child is born outside of marriage, the full name of the father shall be included on the record of birth of the child only if the father and mother have signed a voluntary acknowledgement of paternity or a court of competent jurisdiction has issued an adjudication of paternity).

¹³⁶*Id.*

¹³⁷*Id.*

¹³⁸*Id.* at 185.

on Louisiana birth certificates.¹³⁹ As such, according to the dissent, it is strongly arguable that there is no legitimate governmental interest served by refusing to issue Infant J. an accurate birth certificate with Mr. Adar and Mr. Smith's names on it, particularly given that, neither Louisiana law nor the Registrar prevents *all* unmarried couples from being named as parents on birth certificates in Louisiana's permanent public records.¹⁴⁰

III. ANALYSIS:

A. Full Faith and Credit Clause

i. Legal Background

The Full Faith and Credit Clause of the Constitution demands that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."¹⁴¹ The Supreme Court first interpreted the Full Faith and Credit Clause to require that an out-of-state judgment be given the same effect in the several states as it would be given in the adjudicating state.¹⁴² The purpose of the Clause was to alter the status of the several states as independent foreign sovereignties, 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.¹⁴³ Put differently, the purpose of the Full Faith and Credit Clause was to "transform an aggregation of independent, sovereign States into a nation."¹⁴⁴

Supreme Court precedent differentiates the credit owed to laws and to judgments.¹⁴⁵ Credit must be given to the judgment of another state although the forum would not be required

¹³⁹*Id.*

¹⁴⁰*Id.*

¹⁴¹U.S. CONST. art. IV, § 1.

¹⁴²*Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 485 (1813).

¹⁴³*Baker*, 522 U.S. at 222.

¹⁴⁴*Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948).

¹⁴⁵*Baker*, 522 U.S. at 231.

to entertain the suit on which the judgment was founded.¹⁴⁶ However, the Full Faith and Credit Clause does not compel “a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.”¹⁴⁷ Regarding judgments, the full faith and credit obligation is exacting.¹⁴⁸ 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.¹⁴⁹

The Supreme Court has repeatedly and forcefully held that states must recognize sister-state judgments even if they find them offensive on public policy grounds.¹⁵⁰ Therefore, a court may be guided by the forum state’s “public policy” in determining the law applicable to a controversy, but the Supreme Court’s decisions support no roving “public policy exception” to the full faith and credit due to judgments.¹⁵¹

Finally, full faith and credit does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments.¹⁵² Enforcement measures do not travel with sister state judgments as preclusive effects do; such measures remain subject to the even-handed control of forum law.¹⁵³

ii. Personal Analysis

When the en banc majority found that the Louisiana Registrar of Vital Records and Statistics did not have to amend Infant J’s birth certificate, it violated the Full Faith and Credit Clause. The dissent correctly read the Full Faith and Credit Clause as applying to the *states* and

¹⁴⁶Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935).

¹⁴⁷Pacific Employers Ins. Co. v. Industrial Accident Comm’n, 306 U.S. 493, 501 (1939).

¹⁴⁸*Baker*, 522 U.S. at 233.

¹⁴⁹*Id.*

¹⁵⁰*Baker*, 522 U.S. at 233 (rejecting a public policy exception).

¹⁵¹*Id.*

¹⁵²*Id.* at 235.

¹⁵³*Id.*; see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 99 (1969) (“The local law of the forum determines the methods by which a judgment of another state is enforced.”).

not just the state's courts. By reading the Full Faith and Credit Clause to apply to *states*, it forces the state's officials and administrative bodies to abide by the Full Faith and Credit Clause when recognizing all sister-state judgments; including adoption decrees.

There are three rationales offered by those who question the obligation to give full faith and credit to adoption decrees: (1) a public policy rationale – the argument is that states which deny unmarried couples, including gays and lesbians, the right to adopt may also decline to recognize adoptions deemed fundamentally inconsistent with their public policy,¹⁵⁴ (2) since many adoption proceedings are uncontested, questions have been raised as to whether a final adoption decree issued in the absence of an adversarial hearing is sufficiently reliable to be entitled to recognition under the Full Faith and Credit Clause,¹⁵⁵ and (3) while the law of the rendering state determines the status of the adopted child vis-à-vis her biological parents, other states may apply their own enforcement mechanisms and their own laws to determine the incidents or consequences of that status [i.e. enforcement vs. recognition argument].¹⁵⁶

None of these rationales justify non-recognition of sister-state adoption decrees. The Supreme Court has repeatedly held that states must recognize sister-state judgments even if they find them offensive on public policy grounds.¹⁵⁷ Public policy does not justify denying a judgment of another State for two reasons: (1) Supreme Court precedent states that there is no public policy exception to the Full Faith and Credit Clause, and (2) a public policy exception would in effect be unjust to the child and his adoptive parents if the subsequent state could decline to recognize their legal adoption decree based on the public policy of the second state.

¹⁵⁴Rhonda Wasserman, *Are You Still My Mother?: Interstate Recognition of Adoptions by Gays and Lesbians*, (2009) 58 AM. U.L. REV. 1 (citing *Finstuen*, 497 F. Supp. 2d at 1304 (identifying Oklahoma's arguments) (reversed by *Finstuen v. Crutcher*, 496 F.3d 1139 10th Cir. Okla.2007)).

¹⁵⁵*Id.* (citing *Finstuen*, 497 F. Supp. 2d at 1305).

¹⁵⁶*Id.* (citing *Finstuen*, 497 F. Supp. 2d at 1306).

¹⁵⁷*Baker*, 522 U.S. 222 at 233 (rejecting a public policy exception).

Furthermore, final adoption decrees are issued by courts at the conclusion of judicial proceedings, and as a result, the Full Faith and Credit Clause requires all states to recognize these judgments, even if the adoptive parents are gay and even if the adoption law of the enforcing state prevents adoptions by unmarried couples.

The first rationale to be addressed is the public policy rationale. The public policy rationale posits that non-adoption states which retain or develop an interest in the adoptee and his or her family should be free to advance their public policies, and if necessary, deny recognition to adoptions finalized in sister-states that violate those policies.¹⁵⁸ However, the public policy rationale fails to justify non-recognition of sister-state adoption decrees. As previously stated, the Supreme Court has repeatedly rejected the public policy rationale for non-recognition of judgments.¹⁵⁹ In *Baker*, the Supreme Court stated that “regarding judgments . . . the full faith and credit obligation is exacting. . . .”¹⁶⁰ A valid judgment rendered in one State will be recognized and enforced in a sister-state even though the strong public policy of the latter state would have precluded recovery in its courts on the original claim.¹⁶¹

For instance, if the state to which the family moved were to refuse to recognize the adoption, in the absence of a legally recognized parent-child relationship, the “would-be” parents (i.e. Mr. Adar and Mr. Smith), might not be able to secure employer-provided health insurance for Infant J, authorize medical care and emergency treatment for him, make educational decisions on his behalf, obtain a Social Security card for the child, or take him on international flights.¹⁶² This is the exact result from the en banc majority’s holding. Denying Infant J’s

¹⁵⁸Wasserman, *supra* note 154, at 272.

¹⁵⁹*Baker*, 522 U.S. 222 at 233.

¹⁶⁰*Id.*

¹⁶¹*Id.*

¹⁶²Linda S. Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of Their Relationship*, 5 PIERCE L. REV. 1, 18 (2006) (discussing the effects of non-recognition of legally-recognized parent-child relationships).

adoptive parents the right to an amended birth certificate, makes it difficult for Mr. Adar and Mr. Smith to provide Infant J with some of the most basic benefits a child receives from his or her parents. Furthermore, allowing a public policy exception to the Full Faith and Credit Clause would create substantial uncertainties and anxiety in regards to the adoptive family. For example, this public policy exception could have the effect of deterring both unmarried and same-sex adoptive families from moving to different states, in fear that their family unit may not be recognized. Non-recognition of the legal adoption decree would change the legal status of their families, and question whether the adoptive parents are still the legal parents of the child, once in the new state. All in all, a public policy exception to the recognition of adoption decrees would change the benefits of the parent-child relationship, to their detriment.

The second rationale which supports opposition to the recognition of adoption decrees is the unreliability rationale of non-adversarial adoption decrees. States have made the argument that an adoption decree is not the type of judgment to which the Full Faith and Credit Clause applies, but rather is “a matter of contract between the birth parents and the prospective adoptive parents, and not a judicial proceeding in the usual sense of the word.”¹⁶³ In short, the underlying premise is that adoption proceedings are non-adversarial in nature, resolved by private agreement rather than by judicial determination.¹⁶⁴ However, there are important differences between adoption proceedings and private agreements between parties. For instance, adoptions require the sanction of a judicial officer, which comes in the form of a judgment.¹⁶⁵ Furthermore, adoption proceedings usually have experts present who evaluate both the prospective parents and their home to determine whether the placement is in the child’s best interests. Although adoption

¹⁶³Finstuen v. Edmondson, 497 F. Supp. 2d 1295, 1304 (W.D. Okla. 2006) (describing the defendant’s arguments).

¹⁶⁴*Id.* at 1305.

¹⁶⁵*Id.*

proceedings may be non-adversarial in nature, an adoption decree is still the result of a judgment and therefore entitled to interstate recognition.

The last rationale to address is the enforcement versus recognition rationale. This rationale posits that states need not “adopt the practices of other States regarding the time, manner and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister-state judgment . . .; such measures remain subject to the evenhanded control of forum law.”¹⁶⁶ It is well established that states are free to apply their own enforcement measures to sister-state judgments;¹⁶⁷ but states may not tinker with enforcement mechanisms in an effort to avoid their obligation to recognize sister-state judgments.¹⁶⁸ Here, the Louisiana Registrar of Vital Records and Statistics stated the issuance of an amended birth certificate fell into the realm of “enforcement” and therefore outside the reach of the Full Faith and Credit Clause. By categorizing birth certificates as an enforcement mechanism, the Registrar says that she has not in fact denied *recognition* of the New York adoption decree of Infant J., because by offering to place *either* Mr. Adar *or* Mr. Smith’s name on his birth certificate, she is in fact *recognizing* the New York adoption decree. Because Louisiana does not allow unmarried couples to adopt within its State; the Registrar said she did not have to enforce the New York adoption statute, which allowed unmarried couples to adopt, because the issuance of a revised birth certificate fell within the enforcement mechanism of Louisiana. To this end, the en banc majority’s decision effectively places unmarried adoptive parents of Louisiana born children at a disadvantage because the State in fact denied *recognition* to the legal adoption decree in its refusal to issue an amended birth certificate, because in its opinion, birth certificates fall into the realm of

¹⁶⁶*Baker*, 522 U.S. 222 at 235.

¹⁶⁷*Id.*; see also RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 99 (1971) (“The local law of the forum determines the methods by which a judgment of another state is enforced.”).

¹⁶⁸Wasserman, *supra* note 154, at 321.

enforcement. However, by denying an amended birth certificate with *both* adoptive parents' names is denying *recognition* to the legal adoption decree and therefore a violation of the Full Faith and Credit Clause.

B. Equal Protection Clause

The Supreme Court has made it clear that government discrimination against children based on their parents' marital status must be viewed with suspicion and subjected to heightened scrutiny.¹⁶⁹ Unlike other Louisiana born children, Louisiana born children who are adopted in other jurisdictions by unmarried couples are denied a birth certificate that identifies each of their legal parents. As a result, these children are disadvantaged in each context in which a birth certificate is used to confirm the legal parent-child relationship. Here, the proper inquiry is whether denying accurate birth certificates to Louisiana born children adopted by out-of-state unmarried couples, while granting complete and accurate birth certificates to other Louisiana born children, is substantially related to an important governmental objective.

i. Legal Background

In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court applies different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental interest purpose.¹⁷⁰ Classifications based on race or national origin,¹⁷¹ and classifications affecting fundamental rights,¹⁷² are given the most exacting scrutiny.¹⁷³ Between these extremes of rational basis review and strict scrutiny lies a level of intermediate

¹⁶⁹Clark v. Jeter, 486 U.S. 456, 461 (1988).

¹⁷⁰Clark, 486 U.S. at 461 (citing San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973)).

¹⁷¹Clark, 486 U.S. at 461(citing Loving v. Virginia, 388 U.S. 1, 17 (1967)).

¹⁷²Id. (citing Harper v. Virginia Bd. of Elections, 383 U.S. 663, 672 (1966)).

¹⁷³Id.

scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.¹⁷⁴

The Supreme 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.¹⁷⁵ To withstand intermediate scrutiny, the statutory classification must be substantially related to an important governmental objective.¹⁷⁶ Consequently, the Supreme Court has invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because “visiting this condemnation on the head of an infant is illogical and unjust.”¹⁷⁷

In fact, there has been a series of Supreme Court decisions which established the principles that the Equal Protection and Due Process Clauses prohibit states from penalizing children because their parents are unmarried.¹⁷⁸ In *Levy* and subsequent cases, the Supreme Court rejected the common law rule that treated non-marital children disparately, and invalidated a state provision denying children of unmarried parents the right to bring claims for wrongful death.¹⁷⁹ Additionally, the Supreme Court noted, it is “illogical and unjust” to penalize non-marital children for the circumstances of their birth by denying them important rights and protections.¹⁸⁰

Furthermore, the Supreme 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

¹⁷⁴*Id.* (citing *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982)).

¹⁷⁵*Clark*, 486 U.S. at 461; *see also Plyler v. Doe*, 457 U.S. 202, 220 (1982).

¹⁷⁶*Clark*, 486 U.S. at 461.

¹⁷⁷*Id.* (citing *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)).

¹⁷⁸*Levy v. Louisiana*, 391 U.S. 68 (1968); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Clark v. Jeter*, 486 U.S. 456 (1988).

¹⁷⁹*Levy v. Louisiana*, 391 U.S. 68 (1968).

¹⁸⁰*Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972).

parents.¹⁸¹ In *Plyler v. Doe*, the Supreme Court struck down a law that barred undocumented immigrant children from attending public school, holding that “even if the State found it expedient to control the conduct of the 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.”¹⁸² Additionally, in *Trimble v. Gordon*, the Supreme Court rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on their children.¹⁸³

ii. Personal Analysis

It is important to note that although illegitimacy is not as big of an issue today as it was roughly thirty years ago when the illegitimacy cases were decided by the Supreme Court, it is still necessary to ensure that certain sub-sets of children are not treated less favorably than others based on their legal relationship to their parents. Today, illegitimacy and Equal Protection claims arise more often in regards to adoptive children and their parents, which is the claim here with Mr. Adar, Mr. Smith and Infant J. The first step to determine whether the en banc majority’s decision violated the Equal Protection Clause is to determine the appropriate standard of review to apply. There are three types of scrutiny to choose from: (1) strict scrutiny, (2) intermediate scrutiny, and (3) rational basis review. Based on the previous discussion regarding the standards of review to be applied in Equal Protection claims, the appropriate standard of review for the case at hand is intermediate scrutiny.

In applying intermediate scrutiny to the case at hand, there is no important governmental interest that is substantially related to Louisiana’s refusal to provide an accurate birth certificate to a Louisiana born child adopted in another state by an unmarried couple. Here, the Registrar

¹⁸¹*Plyler v. Doe*, 457 U.S. 202 (1982).

¹⁸²*Id.* at 220.

¹⁸³*Trimble v. Gordon*, 439 U.S. 762 (1977).

claims her policy of refusing to issue amended birth certificates to children adopted by unmarried parents is justified because of Louisiana's interest in preventing unmarried couples from adopting. However, the Supreme Court has held that States cannot deny important rights or benefits to children in order to encourage marriage or the creation of marital families.¹⁸⁴ The Registrar's policy does not further the purported state interest, nor does it satisfy the demands of intermediate scrutiny.

Furthermore, even *if* rational basis were applied to justify the Registrar's refusal to amend the birth certificate, the Registrar's policy does not rationally further a legitimate state interest because the Registrar's policy in effect, denies accurate birth certificates to a group of children who have already been validly adopted in another State. A child adopted by an unmarried couple will be parented by the unmarried couple regardless of whether or not his or her birth certificate lists each of his or her legal parents. The relationship between denying accurate birth certificates to children adopted by unmarried couples, and any interest in preventing children from being parented by unmarried couples is too attenuated to be credited. Due to the fact that denying an accurate birth certificate to children adopted by unmarried couples does not further any interest in preventing children from being parented by unmarried couples, its purpose is only to express disapproval of the unmarried couple, which is not an important governmental interest that is substantially related to Louisiana's refusal to provide an accurate birth certificate to Infant J.

Additionally, the Registrar's policy harms children adopted by unmarried parents, because it deprives them of "substantial benefits accorded to children generally,"¹⁸⁵ allegedly for the purpose of encouraging adoptions by married parents. In fact, by the Registrar refusing to

¹⁸⁴ *Levy*, 391 U.S. at 72.

¹⁸⁵ *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

amend the birth certificate of children legally adopted by unmarried couples in other states, Louisiana is creating a subclass of children who are being treated differently solely because of the marital status of their parents. Denying accurate birth certificates to only children adopted by unmarried parents harms these children without advancing any legitimate, much less any important, state purpose, and therefore violates the Equal Protection Clause.

IV. CONCLUSION:

Parents and their children cross state borders assuming that their parent-child relationship will be recognized wherever they go. However, the result of *Adar v. Smith* demonstrates that this is not always the case. Given that the Full Faith and Credit Clause: (1) requires judgments rendered in one state to be recognized in a sister state, and (2) applies to *states*, not just state courts, the Louisiana Registrar of Vital Records and Statistics should have issued an amended birth certificate to Infant J, listing both Mr. Adar and Mr. Smith as his legal parents. Furthermore, because there is no roving public policy exception to the Full Faith and Credit Clause, Louisiana should not have been allowed to deny the amended birth certificate on the grounds that Louisiana does not allow unmarried parents to adopt Louisiana born children. Additionally, issuing an amended birth certificate is a recognition mechanism, not an enforcement mechanism, and as a result, the en banc majority's refusal to issue an amended birth certificate to Infant J in effect, denies Mr. Adar and Mr. Smith recognition of their adoption decree.

It is true that under an Equal Protection analysis, the issue of illegitimacy does not receive strict scrutiny, but it also does not receive rational basis review. The proper standard of review for an illegitimacy claim is intermediate scrutiny. Here, the Registrar does not have an important governmental interest for denying an amended birth certificate to children of

unmarried adoptive parents. A child adopted by an unmarried couple will be parented by the unmarried couple regardless of whether or not his or her birth certificate lists each of his or her legal parents. It follows that the Registrar should have recognized and enforced the New York adoption decree because they did not satisfy intermediate scrutiny. In all, interstate recognition of adoption decrees would halt the unequal treatment that unmarried and same-sex adoptive families receive from states that do not approve of their lifestyle and provide the unmarried adoptive families with the benefits conferred upon all other recognized families.

Although family law has traditionally been viewed as the province of the states,¹⁸⁶ there is presently a federal bill which has been introduced to Congress, the “Every Child Deserves a Family Act”. The bill is intended to prohibit discrimination in adoption or foster care placements based on the sexual orientation, gender identity, or marital status of any prospective adoptive or foster parent, or the sexual orientation or gender identity of the child involved.¹⁸⁷ However, this bill runs counter to the interests of the state. The state in which an individual is domiciled typically views itself as “most concerned in his personal relations” and therefore justified in applying its law to determine matters of personal status.¹⁸⁸ It will be interesting to see how the Act will affect the relationships between potential adoptive families and states. The Act goes against many of the states’ adoption statutes and policies which prevent adoptions by certain groups of people (i.e. same-sex couples and unmarried couples), to allow the adoption of a child by an individual, regardless of their sexual orientation, gender identity, or marital status. As a result, the child’s best interests would be placed ahead of the state’s interest in having children raised in a nuclear family. After all, is it not in the best interests of the child to have a loving family, regardless of whether he or she has two moms, two dads, or unmarried parents?

¹⁸⁶Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992).

¹⁸⁷Every Child Deserves a Family Act, H.R. 1681, 112th Cong. (2011).

¹⁸⁸Wasserman, *supra* note 154, at 269.

