

William & Mary Journal of Race, Gender, and Social Justice

Volume 19 (2012-2013)
Issue 2 *William & Mary Journal of Women and
the Law*

Article 7

February 2013

Half Faith and Credit?: The Fifth Circuit Upholds Louisiana's Refusal to Issue a Revised Birth Certificate

Thomas M. Joraanstad

Follow this and additional works at: <https://scholarship.law.wm.edu/wmjowl>



Part of the [Constitutional Law Commons](#), and the [Family Law Commons](#)

Repository Citation

Thomas M. Joraanstad, *Half Faith and Credit?: The Fifth Circuit Upholds Louisiana's Refusal to Issue a Revised Birth Certificate*, 19 Wm. & Mary J. Women & L. 421 (2013),
<https://scholarship.law.wm.edu/wmjowl/vol19/iss2/7>

Copyright c 2013 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmjowl>

HALF FAITH AND CREDIT?:¹
THE FIFTH CIRCUIT UPHOLDS LOUISIANA'S
REFUSAL TO ISSUE A REVISED BIRTH CERTIFICATE

INTRODUCTION

I. BACKGROUND

- A. *The Full Faith and Credit Clause*
- B. *The Tenth Circuit Case: Finstuen v. Crutcher*
- C. *Adar v. Smith*
 - 1. *District Court and First Fifth Circuit Decision*
 - 2. *Fifth Circuit Rehearing en Banc*
 - a. *Full Faith and Credit Cannot Be Asserted in a § 1983 Action*
 - b. *The Action Should Have Been Brought in State Court*
 - c. *Issuing a New Birth Certificate Is Enforcement, Not Recognition*
 - d. *The Registrar's Action Did Not Violate the Equal Protection Clause*
 - 3. *Concurring Opinions*
 - 4. *Judge Wiener's Dissent*

II. ANALYSIS

- A. *Section 1983 Is a Proper Vehicle to Redress Full Faith and Credit Claims*
- B. *Louisiana Violated the Full Faith and Credit Clause by Refusing to Issue a Revised Birth Certificate*

CONCLUSION

INTRODUCTION

In recent years, states throughout the United States have extended rights to same-sex couples that have been traditionally denied.² Among these is the right for same-sex couples to adopt children.³ To accommodate same-sex couples, many states have allowed second parent adoptions, adoption by married same-sex couples,

1. *Adar v. Smith*, 639 F.3d 146, 168 (5th Cir. 2011) (en banc) (Weiner, J., dissenting) (stating in response to the offer to list one but not both parents on the birth certificate, "I have searched the Constitution in vain for a 'Half Faith and Credit Clause.'"), *cert. denied*, 132 S. Ct. 400 (2011).

2. See *Fla. Dept. of Children and Families v. Adoption of X.X.G.*, 45 So. 3d 79, 81 (Fla. Dist. Ct. App. 2010) (stating that only Florida completely bars adoption by a homosexual person, and even Florida allows a homosexual person to be a foster parent).

3. Rhonda Wasserman, *Are You Still My Mother?: Interstate Recognition of Adoptions by Gays and Lesbians*, 58 AM. U. L. REV. 1, 10–11 (2008).

and adoption by unmarried same-sex couples.⁴ However, hostility towards same-sex couples adopting children still exists in many states.⁵ Florida, Mississippi,⁶ and Utah⁷ ban adoption by same-sex couples, although a Florida court recently ruled the ban violated the equal protection clause of Florida's constitution.⁸ Many other states prohibit adoption by unmarried couples, which produces the same effect.⁹

This disparity in adoption rights creates a confusing situation for same-sex couples with adopted children.¹⁰ One situation that is a source of controversy occurs when same-sex couples from one state adopt a child born in a different state and seek an amended birth certificate listing both adopted parents on the birth certificate.¹¹ Most states have statutory mechanisms for issuing amended birth certificates to adoptive parents.¹² However, some states have refused to issue amended birth certificates to out-of-state adoptive parents if the parents are a same-sex couple.¹³ This places families in a difficult position, as their parental rights are seemingly subject to change depending on which state they enter.¹⁴ The ramifications that follow from non-recognition of parental rights can be quite serious.¹⁵

4. *Id.*

5. *See* Matter of Appeal in Pima Cnty. Juvenile Action B-10489, 727 P.2d 830, 835 (Ariz. Ct. App. 1986) (holding that considering an adoption applicant's bisexuality as evidence against allowing adoption certification is valid).

6. MISS. CODE ANN. § 93-17-3(5) (West 2011) ("Adoption by couples of the same gender is prohibited.")

7. UTAH CODE ANN. § 78B-6-117(3) (West 2012) ("A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state.")

8. Fla. Dept. of Children and Families v. Adoption of X.X.G., 45 So. 3d 79, 92 (Fla. Dist. Ct. App. 2010). *But cf.* Lofton v. Sec'y of the Dept. of Children and Family Servs., 358 F.3d 804, 827 (11th Cir. 2004) (holding that the ban did not violate the Equal Protection Clause of the federal Constitution), *cert. denied*, 125 S. Ct. 869 (2005).

9. *See, e.g.*, LA. CHILD. CODE ANN. art. 1221 (1992) ("A single person . . . or a married couple jointly may petition to privately adopt a child."). Because same-sex couples cannot marry in the vast majority of states, these statutes prevent same-sex couples from adopting.

10. Wasserman, *supra* note 3, at 13.

11. *Id.*

12. *Id.*; *see, e.g.*, LA. REV. STAT. ANN. § 40:76 (2011); OKLA. STAT. ANN. tit. 63, § 1-316 (West 2010).

13. *See* Adar v. Smith, 591 F. Supp. 2d 857 (E.D. La. 2008) (There are three *Adar v. Smith* cases. This case will be referred to as "*Smith I*" in the main text and in the footnotes when short form is acceptable.), *aff'd*, 597 F.3d 697 (5th Cir. 2010), *rev'd en banc*, 639 F.3d 146 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 400 (2011); *Finstuen v. Edmonson*, 497 F. Supp. 2d 1295, 1300 (W.D. Okla. 2006), *aff'd sub nom.* *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

14. Brief for Petitioner Adar as Amici Curiae Supporting Petitioners at 4 *Adar v. Smith*, 132 S. Ct. 400 (2011) (No. 11-46), 2011 WL 3608716 (*cert. denied*) ("The decision . . . opens the door to government officials potentially not recognizing parental ties established by out-of-state adoption judgments in various other circumstances beyond issuance . . .").

15. *E.g., id.* at 5, 18–19. These ramifications can include inability to make decisions during a medical emergency, inability to recover the child's body upon death, and inability to file tort actions on the child's behalf. *Id.*

Adoption decrees are judgments stemming from judicial proceedings, and the Full Faith and Credit Clause of the United States Constitution therefore controls the way states may treat them.¹⁶ Two recent circuit court decisions conflict as to whether the Full Faith and Credit Clause requires a state to issue a revised birth certificate naming both adoptive parents, regardless of the fact that the adoption would not have been legal if initiated in that state.¹⁷

The first decision occurred in 2007 when the Tenth Circuit held in *Finstuen v. Crutcher* that “adoption orders and decrees are judgments that are entitled to recognition by all other states under the Full Faith and Credit Clause.”¹⁸ The court further held that issuing a revised birth certificate under Oklahoma birth certificate law was “recognition” required by the Full Faith and Credit Clause and not “enforcement.”¹⁹ The Tenth Circuit ordered that the adoptive parents be awarded a revised certificate that listed both parents.²⁰

In 2011, the Fifth Circuit decided a case under nearly identical circumstances involving same-sex adoptive parents from New York who were seeking a revised Louisiana birth certificate.²¹ The court agreed that the Full Faith and Credit Clause did require states to recognize adoption decrees from other states, but requiring a state to issue a revised birth certificate was “enforcement,” not “recognition.”²² As such, Louisiana did not violate the Full Faith and Credit Clause by refusing to “enforce” the judgment through issuing a revised birth certificate.²³ The court separately held that a violation of full faith and credit could not be brought as a § 1983 action.²⁴ Although the lower court had not addressed the issue, the Fifth Circuit also held that denying a revised birth certificate to the adoptive parents did not violate the Equal Protection Clause of the United States Constitution.²⁵

16. U.S. CONST. art. IV, § 1, cl. 3 (“Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State.”); Ralph U. Whitten, *Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases*, 31 CAP. U. L. REV. 803, 804 (2003) (“[A]doption is accomplished through court proceedings, which result in judgments . . . [o]nce a valid judgment is rendered in an action, the implementing statutes to the Full Faith and Credit Clause limit the ability of the parties to the action . . .”).

17. Compare *Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011) (en banc) (This particular case will be referred to as “*Smith III*” in the main text and in the footnotes when short form is acceptable.), *cert. denied*, 132 S. Ct. 400 (2011), with *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

18. *Finstuen v. Crutcher*, 496 F.3d at 1156.

19. *Id.* at 1154. The distinction between recognition and enforcement is extremely important in determining whether the Full Faith and Credit Clause applies. This distinction will be discussed in detail later.

20. *Id.* at 1156.

21. *Smith III*, 639 F.3d at 149.

22. *Id.* at 160.

23. *Id.*

24. *Id.* at 153.

25. *Id.* at 162.

This Note will discuss the jurisprudence of the Full Faith and Credit Clause and its application in both of these important cases. After discussing each case, the Note will then explore the main conflicts between the two cases: whether a full faith and credit claim is redressable using § 1983 and whether requiring states to issue revised birth certificates is recognition or enforcement. Through this analysis, the Note will argue that a § 1983 claim is a valid method to redress full faith and credit violations and further, that states with statutory mechanisms for issuing new birth certificates to adoptive parents are required by the Full Faith and Credit Clause to recognize the judgments of other states and list both names of the adoptive parents, regardless of whether the adoption law or public policy of the state would not have allowed the adoption in the first place. This analysis will demonstrate that the en banc majority opinion of the Fifth Circuit is incorrect in its holdings regarding § 1983, the difference between recognition and enforcement as applied to *Smith III*, and its ultimate determination that the actions of the Louisiana Registrar did not violate the Full Faith and Credit Clause.

I. BACKGROUND

A. *The Full Faith and Credit Clause*

The Full Faith and Credit Clause of the Constitution reads in part: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”²⁶ The Supreme Court has described the purpose of the clause as “to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation”²⁷ So long as the state that issued the judgment had jurisdiction over the parties, other states must respect and give effect to the judgment.²⁸

The Supreme Court has clarified that there is a distinction between judgments and statutes.²⁹ A state is not bound to apply a statute of another state but must give full faith and credit to its judgments.³⁰

26. U.S. CONST. art. IV, § 1, cl. 3. The Full Faith and Credit Clause was implemented by Congress in 1790 and is currently codified as 28 U.S.C. § 1738 (2006).

27. *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935).

28. *Nevada v. Hall*, 440 U.S. 410, 421 (1979).

29. *Finstuen v. Crutcher*, 496 F.3d 1139, 1152 (10th Cir. 2007) (citing *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232–33 (1998)).

30. *Hall*, 440 U.S. at 421.

In *Baker*, the Court defined this distinction by acknowledging that there is a difference between recognizing the forum state's judgment and enforcing the judgment.³¹ The state maintains the ability to determine the method by which it enforces the judgment so long as it applies the law in an "evenhanded" manner.³² However, the state may not refuse to recognize the judgment, even if it violates the state's public policy; the Full Faith and Credit Clause does not recognize a public policy exception for judgments.³³

The Supreme Court has demonstrated the difference between recognition and enforcement when applied to out-of-state adoptions.³⁴ In *Hood*, a man had adopted children in Louisiana and owned land in Alabama.³⁵ Upon his death, the adopted children could not inherit his land in Alabama because Alabama law prevented children adopted out-of-state from inheriting land.³⁶ The children sued, claiming Alabama had violated the Full Faith and Credit Clause.³⁷ Justice Holmes held that Alabama had fulfilled its duty to give the judgment full faith and credit.³⁸ Alabama *recognized* the Louisiana judgment—that the children were legally adopted—and then applied Alabama law to *enforce* the judgment.³⁹ Alabama was not required to import Louisiana's *law*, which allowed adopted children to inherit land so long as they recognized their status as adopted children and applied this status to Alabama law.⁴⁰ Because adoptions are judgments stemming from judicial proceedings, a valid adoption decree from one state must be recognized by another regardless of public policy.⁴¹

B. *The Tenth Circuit Case: Finstuen v. Crutcher*

In 2002, Oklahoma-born baby "E." was legally adopted by two women (the "Doels") in California.⁴² After moving to Oklahoma, the

31. *Baker*, 522 U.S. at 223–24 ("Full faith and credit, however, does not mean that enforcement measures must travel with the sister state judgment.").

32. *Id.* at 224.

33. *Id.* at 223 ("[T]his Court's decisions support no roving 'public policy exception' to the full faith and credit due judgments." (citing *Estin v. Estin*, 334 U.S. 541, 546 (1948))).

34. See *Hood v. McGehee*, 237 U.S. 611, 615 (1915).

35. *Id.* at 614.

36. *Id.* at 615.

37. *Id.* at 614.

38. *Id.* at 615.

39. *Id.*

40. *Hood v. McGehee*, 237 U.S. 611, 615 (1915).

41. Mark Strasser, *Interstate Recognition of Adoptions: On Jurisdiction, Full Faith and Credit, and the Kinds of Challenges the Future May Bring*, 2008 BYU L. REV. 1809, 1814 (2008).

42. *Finstuen v. Edmonson*, 497 F. Supp. 2d 1295, 1301 (W.D. Okla. 2006), *aff'd sub nom.* *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

Doels requested a revised birth certificate from the Oklahoma Department of Health (ODH) that listed both of the Doels as parents.⁴³ The ODH refused to issue a revised birth certificate, and the Oklahoma legislature responded in kind by amending a statute to prohibit Oklahoma from recognizing same-sex adoption judgments from other states.⁴⁴ The Doels sued the Oklahoma Attorney General in federal district court, alleging that the amendment violated the Full Faith and Credit, Equal Protection, and Due Process Clauses of the Constitution.⁴⁵ The district court held that the amendment violated the Full Faith and Credit Clause because it “impair[ed] the proper recognition of . . . out-of-state decrees.”⁴⁶

On appeal, the Tenth Circuit affirmed the district court’s ruling that the amendment violated the Full Faith and Credit Clause.⁴⁷ Oklahoma argued that, although there was no public policy exception, requiring Oklahoma to issue a revised birth certificate was an “impermissible, extra-territorial application of California law in Oklahoma.”⁴⁸ The court responded that this was not an application of California law, but simply a recognition of California’s judgment within an Oklahoma statutory framework.⁴⁹ Judge Ebel explained:

A California court made the decision That decision is final. If Oklahoma had no statute providing for the issuance of supplementary birth certificates for adopted children, the Doels could not invoke the Full Faith and Credit Clause in asking Oklahoma for a new birth certificate. However, Oklahoma has such a statute—i.e., it already has the necessary “mechanism [] for enforcing [adoption] judgments.” The Doels merely ask Oklahoma to apply its *own law* to “enforce” their adoption order in an “even-handed” manner.⁵⁰

The right of the Doels to an amended birth certificate came from Oklahoma law and its application, not California law.⁵¹

43. *Id.*

44. OKLA. STAT. ANN. tit. 10, § 7502-1.4(A) (West 2011) (“[T]his 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”); *Finstuen v. Edmonson*, 497 F. Supp. 2d at 1300. The legislature passed the amendment in response to an Oklahoma Attorney General Opinion stating that the Full Faith and Credit Clause might require the ODH to issue the revised birth certificate. *See Finstuen v. Crutcher*, 496 F.3d at 1142.

45. *Finstuen v. Edmonson*, 497 F. Supp. 2d at 1300.

46. *Id.* at 1307.

47. *Finstuen v. Crutcher*, 496 F.3d at 1156.

48. *Id.* at 1153.

49. *Id.* at 1153–54. Oklahoma law states that “[t]he State Registrar, upon receipt of a certificate of a decree of adoption, shall prepare a supplementary birth certificate in the new name of the adopted person with the *names of the adoptive parents listed as the parents.*” OKLA. STAT. ANN. tit. 10, § 7505-6.6(B) (West 2011) (emphasis added).

50. *Finstuen v. Crutcher*, 496 F.3d at 1154 (emphasis added) (citations omitted).

51. *Id.*

The court concluded that the Oklahoma amendment banning recognition of same-sex adoption decrees was unconstitutional.⁵² Even without the explicit ban, Oklahoma would violate the Full Faith and Credit Clause if it refused to issue a revised birth certificate because it would be “denying the ‘effective operation’ of out-of-state adoption proceedings.”⁵³ The court did not consider the equal protection claim.⁵⁴

C. Adar v. Smith

1. District Court and First Fifth Circuit Decision

In 2005, a Louisiana-born child, Infant J, was adopted by an unmarried same-sex couple in New York and issued a New York adoption decree.⁵⁵ The adopted parents requested a revised birth certificate listing both parents’ names, and the Louisiana Registrar denied their request.⁵⁶ The parents brought suit in the federal Eastern District Court of Louisiana alleging that the Registrar’s refusal to issue a birth certificate with both their names violated the Full Faith and Credit and Equal Protection Clauses of the Constitution.⁵⁷

The district court, citing the Tenth Circuit’s *Finstuen* opinion and using similar reasoning, ruled that the Registrar’s refusal was a violation of the Full Faith and Credit Clause.⁵⁸ The court ruled that because Louisiana’s statutes provided the mechanism for the state to issue an amended birth certificate to out-of-state adoptive parents, the Full Faith and Credit Clause required the provision of a birth certificate.⁵⁹

On appeal, the Fifth Circuit affirmed the lower court.⁶⁰ The court considered two issues: first, whether Louisiana owed full faith

52. *Id.* at 1156.

53. *Id.*

54. *Id.*

55. *Adar v. Smith*, 591 F. Supp. 2d 857, 859 (E.D. La. 2008), *aff’d*, 597 F.3d 697 (5th Cir. 2010), *rev’d en banc*, 639 F.3d 146 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 400 (2011).

56. *Id.* The Registrar explained that Louisiana law and public policy did not allow naming both unmarried adoptive parents on the birth certificate.

57. *Id.*

58. *Id.* at 861–62 (“The [Registrar] . . . confuses the issues of Louisiana’s obligation . . . [T]here is no question that the rights granted by the adoption decree are final and enforceable under the full faith and credit clause.” (internal citations omitted) (citing *Finstuen v. Crutcher*, 496 F.3d 1139, 1153–55 (10th Cir. 2007))).

59. *Id.* at 864. The relevant statute states in part “[w]hen a person born in Louisiana is adopted in a court of proper jurisdiction in any other state . . . [u]pon receipt of the certified copy of the decree, the state registrar shall make a new record in its archives, showing . . . [t]he names of the adoptive parents.” LA. REV. STAT. ANN. § 40:76 (2011).

60. *Adar v. Smith*, 597 F.3d 697, 701 (5th Cir. 2010) (This case will be referred to as “*Smith II*” in the main text and in the footnotes when the short form is acceptable.), *rev’d en banc*, 639 F.3d 146 (5th Cir. 2011), *cert. denied*, 132 U.S. 400 (2011).

and credit to the New York adoption decree and, if yes, whether Louisiana's adoption statute required the Registrar to issue an amended birth certificate.⁶¹

Citing Supreme Court precedent, the court found that full faith and credit did apply to out-of-state adoption decrees, the decrees must be recognized, and there is no public policy exception.⁶² The court rejected the Registrar's arguments and further held that the plain language of § 40:76 mandated that the Registrar issue a revised birth certificate once given a proper out-of-state adoption decree.⁶³

2. *Fifth Circuit Rehearing en Banc*

On a rehearing en banc, the Fifth Circuit reversed *Smith II*.⁶⁴ The court made a number of holdings: first, full faith and credit obligations could not be asserted in a § 1983 action; second, the action should have been brought in state court; third, even if the action were feasible, the Registrar did not deny full faith and credit to the New York adoption decree in refusing to issue a revised birth certificate; and finally, the Louisiana law that prohibited issuing amended birth certificates to married couples does not violate the Equal Protection Clause.⁶⁵

a. Full Faith and Credit Cannot Be Asserted in a § 1983 Action

The first issue the en banc panel addressed was whether a Full Faith and Credit Clause violation is correctable in federal court with a § 1983 action.⁶⁶ Although the issue had not been addressed in the previous decisions, the en banc panel held that it was not correctable.⁶⁷ The court reasoned that the purpose of the Full Faith and Credit Clause and its implementing statute was to bind judgments from one state court to only other state and federal courts.⁶⁸ The

61. *Id.* at 706.

62. *Id.* at 707–08 (citing *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 223 (1998); *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935)).

63. *Id.* at 718 (“This interpretation avoids the Registrar’s manifestly strained and unconstitutional attempt to go beyond the plain language of the statute.”).

64. *Adar v. Smith*, 639 F.3d 146, 147 (5th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 400 (2011).

65. *Id.*

66. 42 U.S.C. § 1983 (2006) (allowing an individual to bring a cause of action for equitable relief against state actors for a violation of the individual’s Constitutional rights); *Smith III*, 639 F.3d at 151.

67. *Smith III*, 639 F.3d at 151–52 (“Section 1983 has no place in the clause’s orchestration of inter-court comity . . .”).

68. *Id.* at 151.

court reasoned that “[t]he cases thus couple the individual right [of having one’s judgment given full faith and credit] with the *duty of courts*”⁶⁹ The court claimed that the Tenth Circuit’s decision in *Finstuen* was the only federal case to date that supported the proposition of bringing a § 1983 action for a violation of the Full Faith and Credit Clause.⁷⁰ On the contrary, the court argued Supreme Court history demonstrates that the Court “intervenes only after the *state court* denies the validity of a sister state’s law or judgment.”⁷¹ Thus, because courts have the duty to recognize judgments, it does not follow that individuals should be able to bring an action against “non-judicial state actors.”⁷² State officials, the court said, lack the ability to determine “whether a judgment is entitled to full faith and credit” so it would not make sense that an action could be brought against them.⁷³

The en banc panel also relied heavily on the Supreme Court case *Thompson v. Thompson*.⁷⁴ *Thompson*, the court said, showed that Congress had not intended to involve federal courts in the adjudication of full faith and credit cases.⁷⁵ Full Faith and Credit Clause violations were supposed to be brought in state courts, with final review available by the Supreme Court.⁷⁶ After reiterating that *Finstuen v. Crutcher* was the only federal court that had allowed a § 1983 action in such cases, the en banc panel concluded that full faith and credit violations could not be addressed with a § 1983 action.⁷⁷

b. The Action Should Have Been Brought in State Court

The en banc panel also held that the adoptive parents should have pursued the action in state court because the Full Faith and Credit Clause on its own is “insufficient to invoke federal question jurisdiction.”⁷⁸ Once the action has been brought in state court, the

69. *Id.* at 154.

70. *Id.* at 153 (“Only one federal case [*Finstuen*] . . . appears to support this proposition.”).

71. *Id.* at 154 (citing *Allen v. Alleghany Co.*, 196 U.S. 458, 465 (1905); *Johnson v. N.Y. Life Ins. Co.*, 187 U.S. 491, 495 (1903); *Chicago & A.R. Co. v. Wiggins Ferry Co.*, 108 U.S. 18, 18 (1883)).

72. *Id.* (“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.”).

73. *Smith III*, 639 F.3d at 155.

74. *Id.* at 155–56 (citing *Thompson v. Thompson*, 484 U.S. 174 (1988)).

75. *Id.* at 156.

76. *Id.*

77. *Id.* at 157. The en banc panel declared that *Finstuen* had “granted relief under § 1983.” Curiously though, *Finstuen* never actually mentions § 1983. *Finstuen v. Crutcher*, 496 F.3d 1139, 1156 (10th Cir. 2007).

78. *Id.*

court stated that only then could the action be reviewable in federal court, and even then only by the Supreme Court.⁷⁹

*c. Issuing a New Birth Certificate Is Enforcement,
Not Recognition*

After holding that the adoptive parents did not have a right to initially bring the action in federal court, the en banc panel held that even assuming they did, the Registrar did not violate the Full Faith and Credit Clause by denying the parents an amended birth certificate with both parents' names listed.⁸⁰

The court began its analysis by acknowledging that full faith and credit is owed to judgments issued by sister states, but a distinction exists between "recognition" and "enforcement" of these judgments.⁸¹ The court continued that the Registrar had fully recognized the adoptive parents' status and, therefore, the issue could not be relitigated in Louisiana.⁸² However, forcing the Registrar to list both parents on the birth certificate was enforcement, not recognition.⁸³ Although Louisiana must recognize New York's judgment, Louisiana law "determines what incidental property rights flow from a validly recognized judgment."⁸⁴

After discussing *Hood*, the court reasoned that the facts in *Smith III* were analogous; Louisiana law prohibits listing two unmarried adoptive parents on a Louisiana birth certificate.⁸⁵ Because Louisiana law determines the rights of adoptive parents, the unmarried adoptive parents are not entitled to a revised birth certificate with both parents' names listed.⁸⁶ The Full Faith and Credit Clause does not force the sister state to substitute its own statute for that of the forum state.⁸⁷ The court concluded that because Louisiana does not allow the issuance of this type of birth certificate, no right under Louisiana law was being denied to the adoptive parents, and thus there was no full faith and credit violation.⁸⁸

79. *Smith III*, 639 F.3d at 158.

80. *Id.*

81. *Id.* at 158–59 (citing *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998)).

82. *Id.* at 159.

83. *Id.*

84. *Id.*

85. *Smith III*, 639 F.3d. at 159–60 (citing *Hood v. McGehee*, 237 U.S. 611 (1915)).

86. *Id.* at 160 ("Louisiana can be described as the 'sole mistress' of revised birth certificates . . . [and] has every right to channel and direct the rights created by foreign judgments." (quoting *Hood*, 237 U.S. at 615)).

87. *Id.* at 160 (citing *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (quoting *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n.*, 306 U.S. 493, 501 (1939))).

88. *Id.* at 161.

d. The Registrar's Action Did Not Violate the Equal Protection Clause

Finally, a more divided court⁸⁹ concluded that the Registrar's action did not deny the parents equal protection under the law.⁹⁰ The majority held that adopted children of unmarried parents did not represent a suspect class, and rational basis review was the appropriate standard.⁹¹ Judge Jones reasoned that "Louisiana has 'a legitimate interest in encouraging a stable and nurturing environment for . . . its adopted children.'"⁹² The court cited a study suggesting that child development improved when children were raised by married couples.⁹³ For the court, this study demonstrated that the Louisiana law was rationally related to the state's legitimate interest.⁹⁴ Thus, the parents did not have a valid claim under equal protection.⁹⁵

3. Concurring Opinions

Three concurring opinions were filed in *Smith III*.⁹⁶ Judge Reavley's concurring opinion took no issue with the majority opinion but simply expressed disappointment with the dissent.⁹⁷ In their separate concurring opinions, Judges Southwick and Haynes took issue with the majority's decision to address the parents' equal protection claim.⁹⁸ Both judges agreed that the usual practice of appellate courts is to refrain from deciding an issue that has not been addressed by the lower trial court.⁹⁹ As such, they argued that the majority opinion should not have addressed the equal protection claims.¹⁰⁰

89. The case was heard by a sixteen member en banc panel of judges. Eleven judges joined the majority opinion in its analysis and judgment regarding the Full Faith and Credit Clause. However, only nine judges joined the majority in its analysis of equal protection, with seven judges agreeing that the majority should not have addressed the equal protection claim. *Id.* at 147.

90. *Id.* at 161.

91. *Smith III*, 639 F.3d at 162.

92. *Id.* (quoting *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004)).

93. *Id.* (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, June 2002, at 6, available at <http://www.childtrends.org/files/marriagerb602.pdf>).

94. *Id.* at 162.

95. *Id.*

96. *Id.* at 147.

97. *Smith III*, 639 F.3d at 162–63 (Reavley, J., concurring).

98. *Id.* at 165 (Southwick, J., concurring) (arguing that the majority should have concluded its opinion when it determined that the full faith and credit claim could not be brought under § 1983); *id.* (Haynes, J., concurring and dissenting) (arguing that the court should not have reached the equal protection claim).

99. *Id.* (Reavley, J., concurring); *id.* (Haynes, J., concurring and dissenting).

100. *Id.*

4. Judge Wiener's Dissent

In his dissent, Judge Wiener disagreed with the majority for four main reasons: the majority opinion takes away federal courts' subject matter jurisdiction over full faith and credit claims; it overly restricts the use of § 1983; it creates a circuit split; and it addresses and dismisses an equal protection claim that the district court did not adjudicate.¹⁰¹

Judge Wiener began by criticizing the majority's reasoning that the Full Faith and Credit Clause applied only to state courts and not to non-judicial state actors.¹⁰² He argued that the majority "read words into the [Full Faith and Credit] Clause that simply are not there."¹⁰³ The dissent reasoned that because the Full Faith and Credit Clause text did not support the majority's position, the majority purposefully misconstrued the Court's decision in *Thompson* by ignoring crucial differences between the two cases.¹⁰⁴ *Thompson* involved an action between two private parties.¹⁰⁵ The instant case involved a private individual suing a state actor and, as such, Judge Wiener argued *Thompson* was not controlling precedent.¹⁰⁶

Wiener explained that the Court's decisions in *Dennis* and *Golden State* laid out the proper framework for addressing the full faith and credit claims and whether § 1983 is a proper way to redress these claims.¹⁰⁷ After applying both case precedents to the facts of the instant case, the dissent concluded that § 1983 is "indisputably . . . an appropriate remedy."¹⁰⁸

Judge Wiener next argued that the Louisiana Registrar did violate the Full Faith and Credit Clause when she refused to issue a birth certificate with both adoptive parents listed.¹⁰⁹ The dissent elucidated that the majority improperly confused the ideas of "recognition" and "enforcement."¹¹⁰ By refusing to issue the birth certificate, the Registrar failed to recognize New York's judgment and apply

101. *Id.* at 166–67 (Wiener, J., dissenting).

102. *Id.* at 170 (Wiener, J., dissenting).

103. *Smith III*, 639 F.3d. at 169 (Wiener, J., dissenting).

104. *Id.* at 170–71 ("The . . . majority's second misstep, then, is its twisting of . . . *Thompson v. Thompson* The en banc majority errs, therefore, in cherry-picking passages of *Thompson* out of context and applying them here, failing all the while to acknowledge *Thompson's* naturally limited holding . . ." (citing *Thompson v. Thompson*, 484 U.S. 174, 187 (1988))).

105. *Thompson*, 484 U.S. at 174.

106. *Smith III*, 639 F.3d at 171 (Wiener, J., dissenting).

107. *Id.* at 173–74.

108. *Id.* at 176 (citing *Dennis v. Higgins*, 498 U.S. 439, 439 (1991); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 116 (1989)).

109. *Id.* at 176–77.

110. *Id.* at 177.

it to Louisiana's laws, which constituted an impermissible violation of the Full Faith and Credit Clause.¹¹¹ The dissent maintained that, by allowing the Registrar to deny the adoptive parents a proper birth certificate, the majority not only allowed a constitutional violation, but also created a circuit split.¹¹² The dissent concluded by chastising the majority for addressing the "very likely winning" equal protection claim when the district court did not hear that claim.¹¹³

II. ANALYSIS

The decision of the divided Fifth Circuit en banc panel raises a number of questions regarding the proper interpretation of the Full Faith and Credit Clause.¹¹⁴ Despite denying that it had created a circuit split, the Fifth Circuit issued an en banc decision in direct conflict with the Tenth Circuit's decision in *Finstuen*.¹¹⁵ By addressing each of the Fifth Circuit's holdings regarding the Full Faith and Credit Clause in turn, it should become clear that the Fifth Circuit misconstrued Supreme Court precedent. First, § 1983 is a proper vehicle for redressing violations of the Full Faith and Credit Clause. Second, denying a revised birth certificate to the adoptive parents is a violation of the Full Faith and Credit Clause.

A. Section 1983 Is a Proper Vehicle to Redress Full Faith and Credit Claims

The purpose of § 1983 is to provide a "federal remedy for 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.'"¹¹⁶ By examining Supreme Court precedent, the text of the Full Faith and Credit Clause, and the implications of the Fifth Circuit's holding, it will be demonstrated that the Full Faith and Credit Clause creates rights that are enforceable through a § 1983 claim.

111. *Id.* at 178.

112. *Smith III*, 639 F.3d at 181 (Wiener, J., dissenting) (arguing that "[t]he en banc majority superficially dismisses *Finstuen v. Crutcher* as 'an outlier to the jurisprudence of full faith and credit,' implicitly disrespecting the Tenth Circuit, . . . the State of Oklahoma and the district court where that case was filed . . .").

113. *Id.* at 166–67.

114. The vote was eleven to five holding that Louisiana did not violate the Full Faith and Credit Clause, and nine to seven in favor the majority's decision regarding the equal protection claim. *Id.* at 147.

115. *Compare id. with* *Finstuen v. Edmonson*, 497 F. Supp. 2d 1295 (W.D. Okla. 2006), *aff'd sub nom.* *Finstuen v. Crutcher*, 496 F.3d 1129 (10th Cir. 2007).

116. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989) (quoting 42 U.S.C.A. § 1983 (2006)).

In *Golden State*, the Supreme Court reiterated the factors to be addressed in determining whether a Constitutional provision or federal law creates an enforceable right that can be remedied with a § 1983 claim¹¹⁷ and whether Congress had “specifically foreclosed a remedy under § 1983.”¹¹⁸ The three factors to determine whether there is an enforceable right are: first, “whether the provision in question creates obligations binding on the governmental unit”; second, whether the plaintiff’s interest is “‘too vague and amorphous’ to be ‘beyond the competence of the judiciary to enforce’”; and finally, “whether the provision in question was ‘intend[ed] to benefit’ the putative plaintiff.”¹¹⁹ An examination of these three factors demonstrates that the Full Faith and Credit Clause creates a judicially enforceable right.¹²⁰

First, the Full Faith and Credit Clause creates a binding obligation on states to recognize the judgments of other states.¹²¹ The Supreme Court has reiterated this obligation on numerous occasions.¹²² Second, the obligation of states to recognize out-of-state judgments is not vague; rather, it is a concrete command that courts have been enforcing for almost two hundred years.¹²³ Third, the Full Faith and Credit Clause was specifically designed to benefit plaintiffs, like the adoptive parents, whose judgment was not being recognized by another state.¹²⁴

Furthermore, the Court made it clear in *Dennis v. Higgins* that the construction of the Full Faith and Credit Clause suggests that it should be broadly construed.¹²⁵ In *Dennis*, an individual brought

117. *Id.* at 105–07.

118. *Id.* at 106 (citing *Smith v. Robinson*, 468 U.S. 992, 1005, n.9 (1984) (citations omitted), *found superceded by statute in* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995)).

119. *Id.* (citing *Wright v. Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 431–32 (1987); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 19 (1981)).

120. *Adar v. Smith*, 639 F.3d 146, 174 (5th Cir. 2011) (Wiener, J., dissenting) (citing *Dennis v. Higgins*, 498 U.S. 439, 448–49 (1991)), *cert. denied*, 132 S. Ct. 400 (2011); *see also* U.S. Brief for Adar as Amici Curiae Supporting Petitioners at 1 *Adar v. Smith*, 132 S. Ct. 400 (2011) (No. 11-46), 2011 WL 3584748.

121. *See* U.S. CONST. art. IV, § 1, cl. 3 (“Full Faith and Credit *shall* be given in each State to the . . . judicial Proceedings of every other State.” (emphasis added)).

122. *See, e.g.*, *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 223 (1998); *Nevada v. Hall*, 440 U.S. 410, 421 (1979).

123. *See, e.g.*, *Mills v. Duryee*, 11 U.S. 481 (1813); U.S. Brief for Adar as Amici Curiae Supporting Petitioners at 5 *Adar v. Smith*, 132 S. Ct. 400 (2011) (No. 11-46), 2011 WL 3584748.

124. *Smith III*, 639 F.3d at 174–75 n.44 (citing *Thomas v. Wa. Gas Light Co.*, 448 U.S. 261, 278 n.23 (1980) (“[T]he purpose of [the Full Faith and Credit Clause] was to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states . . .”).

125. *Id.* at 173 (“[A] broad construction of § 1983 is compelled by the statutory language. . . .” (quoting *Dennis v. Higgins*, 498 U.S. 439, 443 (1991))).

a § 1983 claim under the Commerce Clause, challenging the constitutionality of a Nebraska statute that imposed retaliatory fees on motor carriers registered in different states.¹²⁶ The Court rejected the argument that a § 1983 claim could not be brought for Commerce Clause violations.¹²⁷

The Court began its analysis by confirming that the language of § 1983 should be broadly construed, focusing on the word “any” in § 1983 as well as on the Court’s historically broad interpretation of § 1983.¹²⁸ The Court reasoned that the Commerce Clause does more than allocate power between the state and federal government.¹²⁹ After applying the three-factor test from *Golden State*, the Court concluded that the Commerce Clause conferred an individual right because the plaintiff there was “engaged in interstate commerce” and fell into the “‘zone of interests’ protected by the Commerce Clause.”¹³⁰ This individual right could be enforced by bringing a § 1983 claim.¹³¹

If the dormant Commerce Clause creates a right redressable with a § 1983 claim, it follows that the Full Faith and Credit Clause does as well, considering the shared purpose behind both clauses.¹³² The Full Faith and Credit Clause and Commerce Clause were both included in the Constitution to unify the country by restricting the states.¹³³

The language and construction of the Full Faith and Credit Clause are even more specific than they are in the Commerce Clause.¹³⁴ As the dissent in *Smith III* explained: “In like manner, the [Full Faith and Credit] Clause expressly limits the power of states to deny full faith and credit to the judgments of other states.”¹³⁵ Further, while the Commerce Clause is a grant of authority to Congress to limit the states if it chooses, the Full Faith and Credit Clause is an express limitation.¹³⁶ This limitation creates an individual

126. *Dennis*, 498 U.S. at 441.

127. *Id.* at 447.

128. *Id.* at 443 (The Court explained “we have ‘repeatedly held that the coverage of [§ 1983] must be broadly construed.’ The legislative history also stresses that . . . it should be ‘liberally and beneficently construed.’” (citations omitted)).

129. *Id.* at 447.

130. *Id.* at 449.

131. *Id.* at 451.

132. U.S. Brief for Adar as Amici Curiae Supporting Petitioners at 2 *Adar v. Smith*, 132 S. Ct. 400 (2011) (No. 11-46), 2011 WL 3584748.

133. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943) (explaining that “[t]he full faith and credit clause like the commerce clause thus became a nationally unifying force”); *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935).

134. *Compare* U.S. CONST. art. IV, § 1, *with* U.S. CONST. art. I, § 8, cl. 3.

135. *Adar v. Smith*, 639 F.3d 146, 174 (5th Cir. 2011) (Wiener, J., dissenting), *cert. denied*, 132 S. Ct. 400 (2011).

136. *Id.*; U.S. Brief for Adar as Amici Curiae Supporting Petitioners at 9, *Adar v. Smith*, 132 S. Ct. 400 (2011) (No. 11-46), 2011 WL 3584748.

right enforceable under § 1983 using the Court's reasoning in *Dennis* and *Golden State*.¹³⁷

The Fifth Circuit in *Smith III* mistakenly relied on the Court's decision in *Thompson* to hold that the Full Faith and Credit Clause did not give rise to a "vindicable . . . § 1983 action."¹³⁸ The issue in *Thompson* was whether, under the Parental Kidnapping Prevention Act (PKPA),¹³⁹ an individual could enforce a child custody order in federal court.¹⁴⁰ The Court held that the PKPA did not confer "an implied [private] cause of action."¹⁴¹ Therefore, the Fifth Circuit found it likely that because the PKPA contained a full faith and credit obligation within its statutory language, the Court would also find that full faith and credit violations are not addressable with a § 1983 claim.¹⁴²

The Fifth Circuit erred in relying so heavily on *Thompson*. First, the Court was analyzing the claim in the context of the PKPA.¹⁴³ The Court held that Congress did not intend to apply full faith and credit principles to the enforcement of the PKPA.¹⁴⁴ Because the PKPA was "addressed to States and to state courts," Congress "did not intend the federal courts to play the enforcement role."¹⁴⁵ This holding implies that an individual could not bring a § 1983 claim in federal court for a violation of the PKPA because Congress has specifically provided a statutory remedy.¹⁴⁶ This holding is, therefore, limited to claims under the PKPA over state court denials of full faith and credit.¹⁴⁷

137. *Smith III*, 639 F.3d at 174–75 (Wiener, J., dissenting) (explaining that the Full Faith and Credit Clause creates an enforceable right under the dissent's more narrow test in *Dennis*); see also U.S. Brief for Adar as Amici Curiae Supporting Petitioners at 9, *Adar v. Smith*, 132 S. Ct. 400 (2011) (No. 11-46), 2011 WL 3584748 ("Given this common purpose, it makes sense that both [the Commerce and Full Faith and Credit Clauses] confer enforceable rights: judicial enforcement of the limits on state authority embodied in both Clauses is essential to ensure that these provisions achieve their common structural purpose.").

138. *Smith III*, 639 F.3d at 153.

139. 28 U.S.C. § 1738 (2006).

140. *Thompson v. Thompson*, 484 U.S. 174, 182 (1988).

141. *Id.* at 182–83.

142. *Id.* at 182.

143. *Id.* at 181.

144. *Id.* at 174.

145. *Id.*

146. This is because under the framework laid out in *Golden State*, the Court looks to see if Congress "specifically foreclosed a remedy under § 1983." It appears Congress did so in the PKPA when it set up a different remedy framework. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 116 (1989) (citing *Smith v. Robinson*, 468 U.S. 992, 1005, n. 9 (1984) (internal quotation marks omitted)).

147. *Adar v. Smith*, 639 F.3d 146, 164 (5th Cir. 2011) (Southwick, J., concurring) (stating that the majority opinion was incorrect to rely on *Thompson* alone to conclude that the Full Faith and Credit Clause did not give rise to a § 1983 claim: "By referring to a 'cause of action,' the Court [in *Thompson*] might have been concluding that strictly based on the

It does not mean that all Full Faith and Credit Clause claims cannot be brought under § 1983.

The majority opinion in *Smith III* reads too much into the Court's opinion in *Thompson*, ignoring other crucial differences.¹⁴⁸ One important distinction between these two cases is that a private individual brought the *Thompson* claim against another private individual, and there was no state actor involved.¹⁴⁹ Moreover, the Court held that there was no *implied* cause of action against a *private* citizen in *Thompson*, but a § 1983 action is an *express* remedy to a Constitutional violation by a *state* actor.¹⁵⁰ The Court also never mentioned § 1983 in the *Thompson* opinion.¹⁵¹

Despite these distinguishable facts, the majority opinion chose to use *Thompson* to hold that under no circumstances can a § 1983 claim arise from the Full Faith and Credit Clause.¹⁵² Further, it seems strange that the majority opinion also did not analyze the decision under the test laid out by the Court in *Golden State*. This decision seems more strange considering the Court had recently applied the test in *Dennis* (a decision that came three years after *Thompson*) to a Constitutional provision that was similar in purpose and construction to the Full Faith and Credit Clause.¹⁵³

Finally, the Fifth Circuit opinion creates far-reaching ramifications for the Full Faith and Credit Clause. The court began its analysis by determining that the Full Faith and Credit Clause applied only to state *courts*.¹⁵⁴ The court further held that, in the underlying claim, the Registrar was a non-judicial state actor.¹⁵⁵ The

specific statute there involved and on the Constitution itself, there was not both a personal right and a remedy for a violation. The Court did not consider Section 1983." (citations omitted)), *cert. denied*, 132 S. Ct. 400 (2011); see also U. S. Brief for Adar as Amici Curiae Supporting Petitioners at 18 *Adar v. Smith*, 132 U.S. 400 (2011) (No. 11-46), 2011 WL 3584748.

148. *Smith III*, 639 F.3d at 170–71 (Wiener, J., dissenting) (citing *Thompson*, 484 U.S. at 174–75).

149. *Id.* at 171.

150. *Id.*

151. *Thompson*, 484 U.S. 174.

152. *Smith III*, 639 F.3d at 155–56.

153. *Dennis v. Higgins*, 498 U.S. 439, 439 (1991) (holding that violations of the Commerce Clause can give rise to a § 1983 action); *Golden State Transit Corp. v. City of Los Angeles*, 439 U.S. 103, 103 (1989) (holding that a § 1983 claim was available despite extensive regulations); *Smith III*, 639 F.3d at 164–65 (Southwick, J., concurring) ("Another reason to treat the old construction of Full Faith and Credit as outdated would have been [because] . . . the dormant Commerce Clause was found to create individual rights assertable in the Section 1983 action. The majority analytically relegates *Dennis* to a footnote . . ." (citations omitted)).

154. *Smith III*, 639 F.3d at 152–53.

155. *Id.* at 154 ("Consequently, since the duty of affording full faith and credit to a judgment falls on courts, it is incoherent to speak of vindicating full faith and credit rights against non-judicial state actors.").

court asserted that non-judicial state actors 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.”¹⁵⁶

By denying the plaintiffs a remedy through § 1983, the Fifth Circuit creates an untenable situation in which a state can deny full faith and credit to other states’ judgments by simply delegating the task to non-judicial actors.¹⁵⁷ The dissent noted that nearly every state (including Louisiana) had adopted the Revised Uniform Enforcement of Foreign Judgment Act, which allows states to delegate the registering of sister state judgments by non-judicial state officials.¹⁵⁸ If, as the Fifth Circuit contends, the Full Faith and Credit Clause applies only to state courts, what remedy does a plaintiff have other than a § 1983 claim in federal court?¹⁵⁹

The Fifth Circuit’s holding leaves an individual with no remedy to enforce that individual’s valid out-of-state adoption.¹⁶⁰ Instead, the decision allows a state unfettered freedom to delegate judgment registration to a non-judicial state actor while simultaneously holding that those non-judicial state actors are not subject to the Full Faith and Credit Clause requirements.¹⁶¹ Because the purpose of the Full Faith and Credit Clause is to limit state sovereignty and constitutionally require recognition of sister state judgments, it cannot possibly follow that states can simply avoid this obligation.¹⁶²

An examination of the Fifth Circuit’s opinion and the Court’s jurisprudence concerning § 1983 shows the *Smith III* holding that

156. *Id.* at 155.

157. U.S. Brief for Adar as Amici Curiae Supporting Petitioners at 18 *Adar v. Smith* 132 S. Ct. 400 (2011) (No. 11-46), 2011 WL 3584748.

The majority itself was plainly uncomfortable with its conclusion that state executive officials can violate the Full Faith and Credit Clause with impunity But its suggested remedy is flatly inconsistent with its constitutional analysis. If . . . a state executive officer is not subject to the Full Faith and Credit Clause, then recognition of an out-of-state judgment is . . . a discretionary act [T]he officer is under no constitutional duty to recognize the judgment, it is difficult to understand on what ground this Court could order a state court to supply a remedy. *Id.*

158. *Smith III*, 639 F.3d at 171, 182 (Wiener, J., dissenting) (“This blesses Louisiana’s cynical ploy of having its Registrar and Attorney General do, by *executive fiat*, that which the Tenth Circuit ruled Oklahoma’s *legislature* could not do statutorily.”), *cert. denied*, 132 S. Ct. 400 (2011).

159. *See supra* note 157 and accompanying text.

160. *See supra* note 157 and accompanying text.

161. *See supra* note 157 and accompanying text.

162. The idea that states can avoid giving full faith and credit to sister state judgments for public policy reasons has been explicitly rejected by the Court. *See Baker v. Gen. Motors Corp.*, 522 U.S. 222, 223 (1998) (“This Court’s decisions support no roving ‘public policy exception’ to the full faith and credit due *judgments*.” (citing *Estin v. Estin*, 334 U.S. 541, 546 (1948))).

a Full Faith and Credit Clause cannot give rise to a § 1983 claim is incorrect. Section 1983 is meant to be widely construed, and the Court has broadly interpreted it to be a valid remedy to a variety of Constitutional violations.¹⁶³ Under the *Golden State* test as well as the Court's reasoning in *Dennis*, the Full Faith and Credit Clause confers an individual right that should be redressable via a § 1983 claim.¹⁶⁴ Finally, the potential consequences of the Fifth Circuit's opinion demonstrate its invalidity.

B. Louisiana Violated the Full Faith and Credit Clause by Refusing to Issue a Revised Birth Certificate

After deciding that the plaintiffs did not have a judiciable claim under § 1983,¹⁶⁵ the Fifth Circuit undertook an analysis of whether Louisiana's registrar violated the Full Faith and Credit Clause by denying a revised birth certificate with both the adoptive parents' names listed.¹⁶⁶ Through questionable reasoning, the Fifth Circuit held that the Registrar did not violate the Full Faith and Credit Clause in refusing to issue a revised birth certificate.¹⁶⁷

After summarily dismissing the Tenth Circuit's ruling in *Finstuen*,¹⁶⁸ the majority held that forcing the Registrar to issue the birth certificate would go beyond "recognition" and be "enforcement" of New York law, which is not required under the Full Faith and Credit Clause.¹⁶⁹

In applying the Full Faith and Credit Clause, the Supreme Court has recognized that there is a distinction between recognition and enforcement.¹⁷⁰ A state is not compelled under full faith and credit principles to enforce the law of another state,¹⁷¹ but a state must recognize the sister state's judgment and then apply the outcome of that judgment to its own statutory scheme.¹⁷² Finally, there is no public

163. See *Dennis v. Higgins*, 498 U.S. 439, 443–45 (1991).

164. *Id.* at 439–40; *Golden State Transit Corp. v. City of Los Angeles*, 439 U.S. 103, 116 (1989).

165. *Adar v. Smith*, 639 F.3d 146, 146–47 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 400 (2011).

166. *Id.* at 158–61.

167. *Id.*

168. *Id.* at 157 ("The bulk of the [*Finstuen*] opinion is devoted to analysis of the allegedly unconstitutional state non-recognition statute, a problem different from the one here.").

169. *Id.* at 160.

170. See *Finstuen v. Crutcher*, 496 F.3d 1139, 1152 (10th Cir. 2007) (citing *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232–33 (1998)).

171. *Nevada v. Hall*, 440 U.S. 410, 421 (1979).

172. *Baker*, 522 U.S. at 224.

policy exception.¹⁷³ A state cannot change or modify its own enforcement scheme to avoid its full faith and credit obligations.¹⁷⁴

The Fifth Circuit was incorrect to label the Registrar's denial of the birth certificate as a constitutionally allowable denial of the enforcement of other states' laws.¹⁷⁵ The court reasoned that the Registrar had recognized the New York adoption decree by offering to list one parent on the birth certificate.¹⁷⁶ The court continued that the New York decree could only be executed in Louisiana as Louisiana law allows.¹⁷⁷ Because Louisiana law forbids unmarried couples from adopting children, the birth certificate could not be issued with both parents' names.¹⁷⁸

The court's rationale is mistaken and conflicts directly with the line of reasoning both the Supreme Court and the Tenth Circuit have used.¹⁷⁹ The New York court issued a judgment naming the parents in *Smith III* the adoptive parents.¹⁸⁰ The parents in *Smith III* therefore have the status of the child's adoptive parents via the New York judgment.¹⁸¹ As the adoptive parents, Louisiana must apply (recognize) this status (adoptive parents) to its birth certificate law.¹⁸²

The Fifth Circuit majority used the wrong law when it concluded that this status had been applied fairly to Louisiana statutes.¹⁸³ The judge cited the Louisiana Children's Code, which prohibits unmarried couples from adopting.¹⁸⁴ This Code makes no mention of any

173. *Id.* at 223.

174. *Id.* (holding "this Court's decisions support no roving 'public policy exception' to the full faith and credit due judgments" (citing *Estin v. Estin*, 334 U.S. 541, 546 (1948))); *see also* Wasserman, *supra* note 3, at 23 (stating that states cannot decline to recognize the judgments of other states).

175. *Adar v. Smith*, 639 F.3d 146, 159 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 400 (2011).

176. *Id.*

177. *Id.* at 160.

178. *Id.* at 161.

179. *Hood v. McGehee*, 237 U.S. 611, 611 (1915); *Finstuen v. Crutcher*, 496 F.3d 1139, 1139 (10th Cir. 2007). In his dissent, Judge Wiener discusses the problem with the majority's reliance on *Hood*:

[T]he only proper *Hood* analogy to the instant case would be if New York law *would* allow all adoptive parents to obtain revised birth certificates but Louisiana law would *not*. In this hypothetical example, Appellees would not be entitled to a revised Louisiana birth certificate simply because of the New York law But [h]ere, the Registrar is not refusing to apply New York birth certificate law; she is refusing to "accept" the New York adoption decree and recognize the corresponding status determination for purposes of Louisiana's birth certificate law.

Smith III, 639 F.3d at 178 (Wiener, J., dissenting).

180. *Smith III*, 639 F.3d at 149.

181. *Id.* at 159.

182. *Id.* at 178 (Wiener, J., dissenting).

183. *Id.* at 177.

184. *Id.* at 161 (citing LA. CHILD. CODE ANN. art. 1221 (1992)).

rules or regulations concerning the issuance of Louisiana birth certificates.¹⁸⁵ The plaintiffs had requested the birth certificate from the Registrar under Louisiana birth certificate law codified in the Louisiana Revised Statutes Annotated, which is separate from the Louisiana Children's Code.¹⁸⁶ The Louisiana birth certificate law requires the State Registrar, upon receipt of a valid out-of-state adoption decree, to issue a Louisiana birth certificate listing both of the adoptive parents.¹⁸⁷ To give full faith and credit to the parents' New York judgment, Louisiana must apply the couple's status as the adoptive parents under the applicable law (in this case the birth certificate law). Because Louisiana law orders the Registrar to list both names of the adoptive parents on the birth certificate, and the couple has been adjudged to be the adoptive parents, the Registrar cannot simply refuse.¹⁸⁸

By refusing to issue the revised birth certificate, the Registrar is not equally applying Louisiana law.¹⁸⁹ The Court declared that there is no public policy exception in the Full Faith and Credit Clause.¹⁹⁰ Louisiana cannot use its public policy concerns regarding adoptions by same-sex couples to selectively exclude the recognition of out-of-state judgments.¹⁹¹ But this is exactly what the Registrar did in this instance; she refused to issue the birth certificate based on Louisiana's public policy concerns.¹⁹² In his dissenting opinion, Judge Wiener correctly asserted that "[t]he real problem is that Louisiana is refusing rights *created by its own law*, but *only* to a subset of valid out-of-state adoptions."¹⁹³ This type of discretion from a state actor is the antithesis of the evenhanded application requirement under the Full Faith and Credit Clause.¹⁹⁴

If the majority in *Smith III* is correct, it is difficult to imagine what the Full Faith and Credit Clause would require. The outcome of the majority argument is that the Registrar has given valid

185. LA. CHILD. CODE ANN. art. 1221 (1992).

186. LA. REV. STAT. ANN. § 40:76 (2011); *Smith III*, 639 F.3d at 149.

187. LA. REV. STAT. ANN. § 40:76 (2011).

188. *Smith III*, 639 F.3d at 179–80.

189. *Id.* at 180 (Wiener, J., dissenting) (“[T]he 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 As such, the Registrar’s pick-and-choose recognition policy violates the FF&C Clause.”).

190. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 223 (1998).

191. *Smith III*, 639 F.3d at 177 (Wiener, J., dissenting) (“[The Registrar] has refused to recognize Appellees’ nationwide, lawful status as ‘adoptive parents’ by denying them the ‘adoptive parent’ rights created in *Louisiana’s* birth certificate (not adoption) statute.”).

192. *Id.* at 149–50.

193. *Id.* at 178 (Wiener, J., dissenting).

194. *Id.*

recognition to New York's judgment simply by conceding that the parents are the adoptive parents, even if the Registrar refuses to treat the parents as adoptive parents under Louisiana law.¹⁹⁵

Through an analysis of the majority opinion and the Supreme Court's jurisprudence regarding the meaning and distinction between recognition and enforcement, it becomes clear that the majority opinion is incorrect in concluding that the Registrar did not violate the Full Faith and Credit Clause. The Registrar must recognize the adoption judgment of the New York court. Offering to list one parent on the birth certificate when the applicable Louisiana law specifically states that both parents must be listed is not recognition.¹⁹⁶

The majority opinion confuses the issue by discussing Louisiana adoption law and its prohibition of joint adoption by unmarried couples while ignoring the plain language of the applicable birth certificate law.¹⁹⁷ Furthermore, the Registrar's refusal to issue the birth certificate because the couple is same-sex is an unequal application of Louisiana law.¹⁹⁸ Finally, if the majority were correct, a state would be able to avoid its full faith and credit obligations by delegating administrative duties to a non-judicial state actor.¹⁹⁹ In doing so, non-judicial state actors would be able to use their discretion to arbitrarily refuse out-of-state judgments based on public policy concerns.²⁰⁰ Not only would this be an alarming constitutional end-around, but it would also be contrary to a long line of Supreme Court precedent.²⁰¹

CONCLUSION

On October 11, 2011, the Supreme Court denied the appellants writ of certiorari.²⁰² With no clear standard, the Supreme Court leaves same-sex couples at the mercy of the individual states.²⁰³ This is a frightening prospect to same-sex couples with adopted children, especially considering the hostility that many states still show

195. *Id.* at 180.

196. *Id.* at 168.

197. *Smith III*, 639 F.3d at 177.

198. *Id.* at 178.

199. *See id.* at 172.

200. *See supra* note 157 and accompanying text.

201. *See supra* note 157 and accompanying text.

202. *Adar v. Smith*, 132 S. Ct. 400, 400 (2011).

203. *See Wasserman, supra* note 3, at 32–33 (elaborating on the potential dangers same-sex couples face when they cross state borders with their adopted children).

towards same-sex couples.²⁰⁴ With the Tenth Circuit's holding in *Finstuen v. Crutcher*, it temporarily appeared that same-sex couples with adopted children had some degree of certainty concerning the recognition of their adoptive parents status by other states.²⁰⁵ This momentary security was significantly reduced after the Fifth Circuit's en banc decision in *Adar v. Smith*.²⁰⁶

The Tenth Circuit's decision in *Finstuen v. Crutcher* requires states to give full faith and credit and thus recognize the adoption decrees of other states.²⁰⁷ This recognition requires that a state apply the a same-sex couple's status equally under the relevant statutory framework and issue a birth certificate listing both parents if statutorily required.²⁰⁸

In the Fifth Circuit, the *Adar* decision also held that a state must recognize the adoption decrees of other states under the Full Faith and Credit Clause.²⁰⁹ However, the Fifth Circuit held that applying a same-sex couple's status as adoptive parents under the state's statutory framework to force a Registrar to issue a revised birth certificate listing both adoptive parents in a same-sex couple is unconstitutional enforcement.²¹⁰ Further, the majority concluded that a violation of the Full Faith and Credit Clause cannot be redressed with a claim under § 1983, and a full faith and credit claim cannot be brought against a non-judicial state actor.²¹¹

As this Note demonstrates, the Fifth Circuit's en banc decision is incorrect and confuses the difference between recognition and enforcement. The majority incorrectly relied on the Court's decision in *Thompson* to hold that a full faith and credit claim could not be brought under § 1983.²¹² In doing so, the majority ignored the specific framework that the Court laid out in *Golden State* and applied broadly in *Dennis*.²¹³

Without the availability of § 1983 against non-judicial state actors, a state can avoid giving full faith and credit to judgments with which it disagrees by simply delegating the administration of the judgment to a non-judicial state actor. The Fifth Circuit's holding

204. *See id.* at 10–12.

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

206. *Adar v. Smith*, 639 F.3d 146, 147 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 400 (2011).

207. *Finstuen v. Crutcher*, 496 F.3d at 1156.

208. *Id.* at 1141.

209. *Smith III*, 639 F.3d at 180 (Weiner, J., dissenting).

210. *Id.* at 152.

211. *Id.* at 151–52, 154.

212. *Id.* at 156.

213. *See Dennis v. Higgins*, 489 U.S. 439, 443 (1991); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106–07 (1989).

leaves an individual with a valid out-of-state adoption decree no remedy if a state refuses to recognize their status as an adoptive parent. This contradicts the purpose of the Full Faith and Credit Clause: to encourage unity between states and limit a state's ability to arbitrarily refuse valid judgments.²¹⁴ By ignoring the applicable precedent and reading conclusions into previous Court decisions that simply are not there, the Fifth Circuit has not only created a circuit split but has endangered the constitutional rights of same-sex couples and their adopted children.

THOMAS M. JORAANSTAD*

214. *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 276–77 (1935).

* J.D. Candidate at William & Mary Law School. Thank you to the Executive Board of the *William & Mary Journal of Women and the Law* for all of your feedback and support. Special thanks to Bailey Roesse, Marissa Goldberg, Paige Nestel, and Kathleen Cornelsen. I would also like to thank my awesome fiancée Alexandra Cooper, for putting up with me throughout law school. Finally, thanks to my mother and father, for all of their (financial) support. A final thanks to my roommates at Blackacre, Elderidge Nichols and Stephen Torok. Any errors are mine, except the glaring ones.