No. 09-30036

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OREN ADAR, Individually and as Parent and Next Friend of J.C.A.-S., a Minor ; and MICKEY RAY SMITH, Individually and as Parent and Next Friend of J.C.A.-S., a Minor,

PLAINTIFFS-APPELLEES,

v.

DARLENE W. SMITH, in Her Capacity as State Registrar and Director, Office of Vital Records and Statistics, State of Louisiana Department of Health and Hospitals;

DEFENDANT-APPELLANT.

On Appeal from the United States District Court
for the Eastern District of Louisiana

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA IN SUPPORT OF PLAINTIFFS-APPELLEES OREN ADAR AND MICKEY RAY SMITH AND IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Neither Amicus Curiae is a nongovernmental corporate entity with a parent corporation or a publicly held corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page(s)

STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE AND SOURCE OF AUTHORITY TO FILE

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members. The American Civil Liberties Union of Louisiana ("ACLU of Louisiana") is its Louisiana affiliate. Their members share a commitment to the core principle of equality that is guaranteed by the Constitution. The ACLU and ACLU of Louisiana regularly appear before courts in Louisiana and other jurisdictions in cases involving equality issues, including cases, like this one, asserting those rights on behalf of the children of gay and lesbian parents.

Amici therefore respectfully submit that they possess a unique, informed perspective on the equality issues in this case, namely, a child's right to have the State of Louisiana afford his out-of-state adoption decree full faith and credit equal to that of a Louisiana adoption decree, and that child's right to be treated in accordance with the equal protection rights secured by the U.S. Constitution.

Pursuant to Federal Rule of Appellate Procedure 29(a), Amici Curiae file this brief with the consent of all parties.

ARGUMENT

Amici support the position of Plaintiffs-Appellees and the rulings of the lower courts in this case. Amici submit this brief to focus on two key issues raised in the supplemental briefing. *See* Fifth Circuit Rule 29.2. First, Amici respectfully submit that individuals, like Infant J and Infant J's parents in this case, can vindicate rights against state actors under the Constitution's Full Faith and Credit Clause in an action brought pursuant to 42 U.S.C. § 1983. *See* 10/18/2010 Order, Question 2. Second, Amici argue that regardless of the disposition of the Full Faith and Credit claim, the Registrar's refusal to issue the amended birth certificate violates Infant J's equal protection rights by subjecting the child to disparate treatment based on factors over which he has no control, and for reasons that bear no relation to any legitimate, much less substantial state interest. *See* 10/18/2010 Order, Question 4.

I. INDIVIDUALS CAN VINDICATE RIGHTS UNDER THE FULL FAITH AND CREDIT CLAUSE IN AN ACTION BROUGHT PURSUANT TO 42 U.S.C. § 1983

A. Section 1983 Creates a Cause of Action for Violations of Constitutional Rights by State Actors and Is Broadly Construed

Plaintiffs-Appellees may pursue a claim for violation of their rights under the Full Faith and Credit Clause in an action brought pursuant to 42 U.S.C. § 1983. Section 1983 creates a cause of action against government

officials who, acting under color of state law, deprive a person "of *any* rights, privileges, or immunities secured by the Constitution and laws." (Emphasis added.)

The Supreme Court has "given full effect" to this "broad language," "recognizing that § 1983 provides a remedy, to be broadly construed, against all forms of official violation of federally protected rights," including rights arising from the Constitution itself. *Dennis v. Higgins*, 498 U.S. 439, 445 (1991) (internal quotation marks and citation omitted); *see also Monroe v. Pape*, 365 U.S. 167, 172 (1961) (§ 1983 was designed "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position."). The Court has "rejected attempts to limit the types of constitutional rights that are encompassed within the phrase 'rights, privileges, or immunities,'" and specifically has refused to "limit the phrase 'and laws' in § 1983 to civil rights or equal protection laws," or to "limit the phrase [rights, privileges, or immunities] to 'personal' rights, as opposed to 'property' rights." *Dennis*, 498 U.S. at 445 (citing *Maine v. Thiboutot*, 448 U.S. 1, 4, 6-8 (1980); *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543, 550-52 (1972)). Rather, the Court has "repeatedly held that the coverage of [§ 1983] must be broadly construed," *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 105 (1989), as it is "compelled by the

statutory language, which speaks of deprivations of '*any* rights, privileges or immunities,'" *Dennis*, 498 U.S. at 443. "The legislative history of the section also stresses that as a remedial statute, it should be 'liberally and beneficently construed.'" *Id.* (quoting *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 684 (1978)).

Because of its broad reach, the Supreme Court has recognized that § 1983 allows individuals to seek relief for the claimed deprivations of numerous constitutional rights, including both rights arising under the Fourteenth Amendment and those arising under the Constitution's structural provisions. *See*, *e.g.*, *Wallace v. Kato*, 549 U.S. 384, 386 (2007) (§ 1983 action for alleged violation of Fourth Amendment rights); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 694 (1999) (§ 1983 action for alleged violation of Fifth Amendment rights); *Collins v. City of Harker Heights*, 503 U.S. 115, 119-20 (1992) ("The First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and other provisions of the Federal Constitution afford protection to employees who serve the government as well as to those who are served by them, and § 1983 provides a cause of action for all citizens injured by an abridgment of those protections."); *Dennis*, 498 U.S. 439 (§ 1983 provides cause of action for violation of Article I's Commerce Clause).

B. The Full Faith and Credit Clause Confers "Rights, Privileges or Immunities" Within the Meaning of § 1983

The Full Faith and Credit Clause of Article IV, Section 1 provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The Supreme Court has explained that with respect to court judgments,

> the full faith and credit obligation is exacting. 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. For claim and issue preclusion (res judicata) purposes, in other words, the judgment of the rendering State gains nationwide force.

Baker v. General Motors Corp., 522 U.S. 222, 232-33 (1998).

The Full Faith and Credit Clause protects an individual's right to make effective in all states a judgment obtained in his or her favor in a first state. As the Supreme Court has explained, the Clause is designed "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." *Pacific Emprs Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939). "The very purpose of the full-faith and credit clause was … to make [the several states] integral parts of a single nation throughout which a remedy upon a just obligation might be demanded *as of right*, irrespective of

the state of its origin." *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 276-77 (1935) (emphasis added). Unsurprisingly then, the Supreme Court has referred specifically to the "rights" arising under the Full Faith and Credit Clause. *See Brown v. Gerdes*, 321 U.S. 178, 191 (1944) (Frankfurter, J., concurring) ("rights directly secured by the Constitution, such as those guaranteed by the Full Faith and Credit Clause"); *Manhattan Life Ins. Co. of New York v. Cohen*, 234 U.S. 123, 134 (1914) ("rights under the full faith and credit clause, § 1, article 4 of the Constitution"); *cf. Dennis*, 498 U.S. at 448 (relying in part on Court's prior description of "Commerce Clause as conferring a 'right' to engage in interstate trade free from restrictive state regulation" in finding that suit for violation of Commerce Clause could proceed under § 1983). Likewise, where the issue has been presented directly, § 1983 has been recognized as a remedy for suits to enforce individual rights against state actors under the Full Faith and Credit Clause. *See Finstuen v. Crutcher*, 496 F.3d 1139, 1156 (10th Cir. 2007) (finding in § 1983 action that state law forbidding recognition of adoptions by same-sex couples denied the full faith and credit due to first state's adoption decree, and ordering state official to issue amended birth certificate in name of adoptive parents).

C. Rights Arising Under the Full Faith and Credit Clause Can Be Vindicated in a § 1983 Action

Despite the wide breadth of § 1983 and the "exacting" obligation of the Full Faith and Credit Clause, the Registrar argues that no suit may be brought under § 1983 for violations of the Full Faith and Credit Clause, even where a party is challenging the constitutionality of a state statute. The Registrar makes two arguments, neither of which has merit. First, the Registrar asserts that § 1983 is not available because the Full Faith and Credit Clause "plays a structural role in the Constitution." (Appellant's Supp. Br. 9.) Second, the Registrar argues that the Supreme Court has held that the Full Faith and Credit Clause does not give rise to a right that can be vindicated under 42 U.S.C. § 1983. Each argument is addressed in turn.

1. "Structural" provisions of the Constitution can give rise to rights that may be vindicated under Section 1983

Provisions of the Constitution that purport to allocate power or regulate relations among the states can give rise to rights that individuals may vindicate under § 1983. In *Dennis v. Higgins*, the Supreme Court determined that the Commerce Clause, which "speaks only of Congress' power over commerce," gives rise to a "'right, privilege, or immunity' under the ordinary meaning of those terms." 498 U.S. at 446-47. The Court emphasized that although "the Commerce Clause is a power-allocating

provision," it "does more than confer power on the Federal Government; it is also a substantive restriction on permissible state regulation of interstate commerce." *Id.* at 447 (internal quotation marks and citation omitted).[1]

Like the Commerce Clause, the Full Faith and Credit Clause is a power-allocating provision that confers constitutional rights. As the Supreme Court has explained, the Full Faith and Credit Clause is a substantive restriction on the powers of the states, curtailing powers that they held prior to the Constitution's ratification: "[The Clause] altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application." *Magnolia Petr. Co. v. Hunt*, 320 U.S. 430, 439 (1943). The Clause requires that a judgment obtained in one state be recognized and enforced throughout the United States, providing a "right" to those affected to insist upon enforcement of the obligation, "irrespective of the state of its origin." *M.E. White Co.*, 296 U.S. at 277. As the Tenth Circuit recognized

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[1] The Court rejected the argument that the Commerce Clause could not confer a right "because it is subject to qualification or elimination by Congress," noting that "federal statutory rights may also be altered or eliminated by Congress." *Id.* at 450.

in *Finstuen* then, the Full Faith and Credit Clause applies to the states and state actors themselves. That obligation, in turn, bestows rights upon persons like the plaintiffs in this case. It is irrelevant that the Full Faith and Credit Clause, like the Commerce Clause, reallocated the power of the states. The important point is that it did so in a way that bestowed constitutional rights. Those rights may be vindicated under § 1983.

2. The implied cause of action cases do not address the issue of whether rights arising under the Full Faith and Credit Clause can be vindicated under § 1983

The Registrar's argument regarding federal jurisdiction over claims that invoke the Full Faith and Credit Clause fails to acknowledge the significance of § 1983, which provides a right of action (and thus federal jurisdiction) for violations of "any" constitutional or federal rights by state actors. What little analysis of § 1983 the Registrar does provide is fundamentally flawed. The Registrar simply argues (Appellant's Supp. Br. 9) that the Supreme Court's observation in *Thompson v. Thompson*, 484 U.S. 174, 182 (1988), that the Full Faith and Credit Clause standing alone "does not give rise to an implied federal cause of action" means that the Full Faith and Credit Clause therefore cannot give rise to a right that can be vindicated under § 1983. But that argument relies on decisions that did not involve challenges to the constitutionality of actions by government officials

under color of law under § 1983, and that therefore never considered the § 1983 question at issue here. The Registrar's argument also ignores basic principles of the Supreme Court's § 1983 jurisprudence.

Thompson did not address the question of whether the Full Faith and Credit Clause gives rise to a right that can be vindicated against government officials under § 1983. Rather, the question before the Court in *Thompson* was whether a party could seek enforcement of a child custody order in federal court. The Court declined to infer a private cause of action from a different statute—the Parental Kidnapping Prevention Act of 1980 ("PKPA"), 28 U.S.C. § 1738A. *See* 484 U.S. at 181-82. In that context, the Court observed that the Full Faith and Credit Clause itself "does not give rise to an implied federal cause of action," *id.* at 183, and thus did not, by itself, confer upon a party a right that could be vindicated in federal court. The *Thompson* Court relied, in turn, on *Minnesota v. Northern Securities Co.*, 194 U.S. 48 (1904), in which the Court noted that the Clause "has nothing to do with the conduct of individuals or corporations, and to invoke the rule which it prescribes does not make a case arising under the Constitution or laws of the United States."

Neither *Thompson* nor *Northern Securities*, properly read, establishes that the rights conferred by the Full Faith and Credit Clause are outside the

scope of rights that may be enforced pursuant to § 1983. *Thompson* did not consider the § 1983 issue at all and, more importantly, did not involve circumstances like those presented here—where a state actor overtly refuses to accord full faith and credit to a sister state's judgment. Nothing in *Thompson* suggests that Plaintiffs-Appellees' only remedy is to bring some other lawsuit and plead the Full Faith and Credit Clause in response to defenses raised by the Registrar,[2] rather than challenge directly the constitutionality of the Registrar's refusal to accord full faith and credit to the New York judgment pursuant to § 1983.

Northern Securities is also distinguishable. There, the Court addressed a lawsuit brought by the Minnesota attorney general's office seeking to enforce Minnesota antitrust *laws* against private corporations,

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[2] The Registrar quotes language (Appellant's Supp. Br. 21) from the concurring opinion in *Baker* that reads, "the Clause and its implementing statute 'establish a rule of evidence, rather than of jurisdiction.'" 522 U.S. at 242. The language quoted in that concurring opinion is from *Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265, 291-92 (1888), a case that several subsequent Supreme Court decisions have found no longer to be good law. *See M.E. White Co.*, 296 U.S. at 278 (*Pelican Insurance Co.* was "discredited" in *Fauntleroy v. Lum*, 210 U.S. 230, 236 (1908), and *Kenney v. Supreme Lodge*, 252 U.S. 411, 414 (1920)); *Sherrer v. Sherrer*, 334 U.S. 343, 353 (1948) (*Pelican Insurance Co.* "was, insofar as pertinent, overruled in *Milwaukee County v. M.E. White Co.*"). Even if *Pelican Insurance Co.* were still good law, the import of the quoted passage is that the Full Faith and Credit Clause does not establish its own jurisdiction and can operate as a "rule of evidence" – not that the Clause can *only* function as a "rule of evidence."

who had sought removal of the case to federal court. Unlike the instant case, *Northern Securities* dealt with according full faith and credit to a statute rather than a court judgment, where it is clear that the Full Faith and Credit Clause does not have the same "exacting" operation.[3] Also, like *Thompson*, *Northern Securities* never considered the § 1983 issue presented here because that case did not involve a state actor refusing to accord full faith and credit to another state's judgment.

Unlike *Thompson* and *Northern Securities*, this case does involve a state actor—the Registrar—refusing to accord full faith and credit to a sister state's judgment—an act that offends the very interests the Full Faith and Credit Clause was designed to protect. Under the Registrar's view, no direct relief would be available when a state actor ignores another state's judgment, or even in a circumstance where a state statute directly prohibits recognizing court orders issued from another state. The vast network of state administrative law, which has only grown in the more than hundred years since *Northern Securities* was decided, would be substantially shielded from the strictures of the Full Faith and Credit Clause. Such a result would

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[3] "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.'" *Baker*, 522 U.S. at 232 (quoting *Pacific Emprs Ins. Co.*, 306 U.S. at 501).

significantly undermine the very point of the Clause. In a lawsuit under § 1983, these actors can be sued in federal court for refusals to accord full faith and credit to out-of-state judgments.[4]

II. THE REGISTRAR'S REFUSAL TO ISSUE AN AMENDED BIRTH CERTIFICATE VIOLATES INFANT J'S RIGHTS UNDER THE EQUAL PROTECTION CLAUSE BY DRAWING AN IMPERMISSIBLE CLASSIFICATION AMONG ADOPTED LOUISIANA-BORN CHILDREN

Notably, in its discussion of equal protection, the Registrar ignores the important equal protection rights of *children* that are at stake. Indeed, the Registrar's practice of denying accurate, amended birth certificates to Louisiana-born children of unmarried parents—while amending birth certificates for similarly situated children of married parents—violates the equal protection rights of innocent children, who, through no fault of their own, have parents who are not married.

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[4] The Registrar's reliance on cases examining whether a federal statute contains an implied right of action, such as *Gonzaga University v. Doe*, 536 U.S. 273 (2002), is easily dispensed with. The implied right of action analysis applies to the determination of whether federal *statutes* create rights that can be vindicated under § 1983. *Id.* at 283 ("our implied right of action cases should guide the determination of whether a *statute* confers rights enforceable under § 1983") (emphasis added). The full faith and credit rights that Appellees seek to vindicate here arise from Article IV, § 1 of the Constitution, and the Supreme Court has never held that the Constitution must contain an implied right of action before a constitutional right can be vindicated under § 1983.

A. The Registrar's Practice Improperly Treats Adopted Louisiana-Born Children Differently Based on the Marital Status of Their Adoptive Parents

It is well-established that the Equal Protection Clause prohibits the Government from drawing classifications among similarly situated persons for illegitimate or discriminatory reasons. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike"). In accordance with these principles, the United States Supreme Court has long recognized that laws that disadvantage a class of children based on factors beyond their control are unconstitutional.

For example, in *Weber v. Aetna Casualty & Surety Co*., 406 U.S. 164, 175-76 (1972), the Supreme Court held that Louisiana's workmen's compensation law, which relegated "unacknowledged illegitimate children" to a lower priority status in the distribution of benefits than "legitimate children," violated the equal protection rights of children born out of wedlock. The Court explained that:

> imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

Id. Indeed, in the wake of *Weber*, the Supreme Court has repeatedly held that laws that disadvantage children who are born to unmarried parents are subject to heightened scrutiny. *See, e.g.*, *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982) (restrictions on support suits by children born out of wedlock "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest"); *United States v. Clark*, 445 U.S. 23, 27 (1980); *Lalli v. Lalli*, 439 U.S. 259, 264-65 (1978) (plurality opinion); *see also Gomez v. Perez*, 409 U.S. 535, 538 (1973) ("a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally").

The rationale of *Weber* has been extended beyond the class of children born out of wedlock. In *Plyler v. Doe*, 457 U.S. 202, 205 (1982), the challenged state law withheld state funds for the education of children who were not "legally admitted" into the United States, and permitted local school districts to deny enrollment to such children. Applying a heightened level of scrutiny, the Court found that the children's "'parents have the ability to conform their conduct to societal norms,' and presumably the ability to remove themselves from the State's jurisdiction; but the children … 'can affect neither their parents' conduct nor their own status.'" *Id*. at 220 (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)). Because the

law imposed a "lifetime hardship on a discrete class of children not accountable for their disabling status," the Court examined whether the state's legislative goals and the evidence to support those goals was sufficiently substantial to outweigh the "countervailing costs" of discriminating against "innocent children." *Id.* at 223-24. The Court held that the State had failed to satisfy its burden and affirmed the lower court's injunction against enforcement of the statute. *Id.* at 230.

Here, the record is clear—and the Registrar does not dispute—that the Registrar's policy divides Louisiana-born children who are adopted pursuant to an out-of-state adoption decree into at least two categories: those for whom the Registrar will issue an amended birth certificate under § 40:76 because their adoptive parents are a married couple, and those for whom the Registrar will deny such a birth certificate because their adoptive parents are an unmarried couple.[5] The Registrar's sole basis for this classification is Louisiana's public policy with respect to the marital status (and ipso facto here, the sexual orientation) of the adoptive parents. (*See* Appellant's Supp.

[5] Although these arguments are advanced on behalf of the child of an unmarried, same-sex adoptive couple, the Equal Protection challenge would apply as forcefully on behalf of the child of an unmarried, opposite-sex adoptive couple who was denied an amended birth certificate under § 40:76-77. In neither case does denying the child an accurate birth certificate on the basis of his parents' marital status or sexual orientation rationally further a legitimate governmental interest.

Br. 3 ("She explained that the phrase 'adoptive parents' in section 40:76(C) means only a *married* couple, in light of Louisiana's determination that only married couples may jointly adopt.").) The Registrar therefore distinguishes among Louisiana-born children who are adopted out-of-state based on the marital status of their adoptive parents, despite the fact that such status is indisputably beyond the children's control and utterly unrelated to whether those children, like any others, should be able to possess an accurate birth certificate.

B. The Registrar's Practice Improperly Denies the Impartial Assistance of State Government Services to Innocent Children Who Have No Other Recourse

Infant J, by and through his adoptive parents, sought the assistance of Louisiana government officials to obtain a birth certificate that accurately reflects the parent-child relationship codified by the New York adoption decree. There is no dispute in the Record that the Registrar, as "custodian of all vital certificates and records," LA. REV. STAT. ANN. § 40:36(A), is the only government official who "may create a new record of birth" upon the issuance of an out-of-state adoption decree, § 40:76(A). However, based on Louisiana state policy disfavoring adoption by unmarried couples, the Registrar shut the Government's door on an innocent child who had sought her impartial assistance. *See Romer*, 517 U.S. at 633 ("Central both to the

idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."). By construing and enforcing § 40:76 in the manner at issue in this case, the State of Louisiana has closed its doors to a discrete class of children that has done nothing more than seek its assistance in obtaining a document that most people take for granted, an accurate birth certificate. *Id.* ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").

The Registrar does not dispute that, based on the New York adoption decree, Plaintiffs-Appellees Adar and Smith are the legal parents of Infant J. (*See* Appellant's Supp. Br. 2.) Nor does the Registrar dispute that the ability to obtain an accurate, amended birth certificate is an important right afforded (at the very least) to Louisiana-born children of married couples. (*See* ROA 159-60; 177-78.) Thus, it is Louisiana-born children of unmarried couples *alone* who are left in legal limbo, unable to obtain the accurate birth certificate that other children with married parents are readily afforded. If the Equal Protection Clause is to mean anything, it must certainly prohibit this kind of arbitrary denial of government services to children who are

powerless to obtain a commensurate remedy from any entity, private or public.

C. The State Can Put Forth No Rational Reason, Let Alone a Substantial One, to Justify the Classification

Because the Registrar cannot demonstrate that its policy satisfies heightened scrutiny, the policy is unconstitutional. *See, e.g.*, *Plyler*, 457 U.S. at 224. The Registrar's policy does not survive even rational basis review, because there is no legitimate governmental interest that is served by denying a discrete class of children, including Infant J, a birth certificate that accurately reflects the parent-child relationship simply on account of the fact that their adoptive parents are unmarried.

The Supreme Court has made clear that the Government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446 (citations omitted); *see also Romer*, 517 U.S. at 632 (a classification may not be "so discontinuous with the reasons offered for it that [it] seems inexplicable by anything but animus toward the class it affects"). Thus, under even the most deferential standard of review, the Government must put forth a sufficiently rational explanation for any discriminatory classification. *See, e.g.*, *Zobel v. Williams*, 457 U.S. 55, 61-64 (1982) (Alaska dividend distribution law violates Equal Protection Clause

because granting greater dividends based on duration of residency does not rationally promote asserted state interests); *Williams v. Vermont*, 472 U.S. 14, 22 (1985) (Vermont use taxation scheme violates Equal Protection Clause because providing a tax "credit only to those who were residents at the time they paid the sales tax to another State is an arbitrary distinction"); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985) (New Mexico tax exemption for Vietnam veterans violated the Equal Protection Clause because classifying by date of residency "is not supported by any identifiable state interest").

The record is clear that the Registrar is unable to state *any* reasons justifying the prohibition on listing the names of both unmarried parents on a child's birth certificate. ROA 163-64. The Registrar merely parrots the Attorney General's opinion, which states that Louisiana has a strong public policy against unmarried persons adopting jointly. ROA 199. But denying modification of the birth certificate cannot affect that interest. The New York court already has determined that Plaintiffs-Appellees Adar and Smith are Infant J's parents. Amendment of the birth certificate serves a different purpose—establishing accuracy in one of Infant J's most important legal documents. Regardless of the merits of Louisiana's policy against joint adoption by unmarried parents, the policy should have no bearing on

whether the Registrar is constitutionally justified in refusing to treat Infant J on "impartial terms" when he, like any other Louisiana-born adopted child, seeks the State's assistance to obtain an accurate birth certificate pursuant to a valid adoption decree.[6]

Whatever else the Equal Protection Clause may command, it certainly means that Government officials cannot do harm to innocent children who seek their assistance to obtain public records to which they are legally entitled based on a public policy stance about whether their parents can be,

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[6] The Registrar asserts that her policy applies to *any* out-of-state adoption by unmarried couples, whether gay or heterosexual. (Appellant's Supp. Br. 3; ROA 373-74; 390-95.) But unlike a family unit with unmarried heterosexual adoptive parents who could lawfully marry under Louisiana law in order to meet the Registrar's arbitrary interpretation of §40:76, Infant J's adoptive parents can do no such thing. LSA-Const. Art. 12, § 15; LSA-C.C. Art. 86. Where a state limits marriage to heterosexual couples and then conditions a privilege on being married, it cannot be said that this is not discrimination on the basis of sexual orientation. *See Alaska Civil Liberties Union v. State*, 122 P.3d 781, 788 (Ak. 2005) (holding that statute created classification based on sexual orientation because "[s]ame-sex unmarried couples . . . have no way of obtaining these benefits, whereas opposite-sex unmarried couples may become eligible for them by marrying," and so the "programs consequently treat same-sex couples differently from opposite-sex couples"); *Tanner v. Oregon Health Sciences Univ.*, 157 Or. App. 502, 516, 971 P.2d 435, 443 (Or. App. 1998) (holding that policy limiting insurance benefits to married couples discriminated on the basis of sexual orientation because "there can be no question but that the effect of OHSU's practice of denying insurance benefits to unmarried domestic partners, while facially neutral as to homosexual couples, effectively screens out 100 percent of them from obtaining full coverage for both partners" because "under Oregon law, homosexual couples may not marry").

or should be, married under state law. Like the undocumented school-age children in *Plyler*, whom the Supreme Court found were "not accountable for their disabling status," 457 U.S. at 224, the adopted children who are disadvantaged by the Registrar's policy have no control over the marital status of their adoptive parents, nor did they have a voice in the determination of the definition of "marriage" in Louisiana.

D. Expressing Moral Disapproval of the Marital Status or Sexual Orientation of Adoptive Parents Is Not a Legitimate Government Interest

Nor may the State justify its refusal to issue Infant J an amended birth certificate on the basis of moral disapproval of marriage for same-sex couples or parenting by them. The Supreme Court has quite clearly admonished that animus targeted at a specific class of people falls far short of a legitimate state interest under equal protection jurisprudence. *See ,e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) ("Moral disapproval of [gay individuals] cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be drawn for the purpose of disadvantaging the group burdened by the law."); *Romer*, 517 at 632 ("[T]he amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group….[I]ts sheer breadth is so discontinuous with the

reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."); *see also Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare…desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

The State's inability to put forth a rational reason to deny Infant J an amended birth certificate that is independent of the marital status of his adoptive parents, or their ability to marry, strongly suggests that the State of Louisiana is motivated by a bald desire to punish Infant J and similarly situated adopted children for the status of their parents. *See, e.g.*, *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) ("[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing"); *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) ("[V]isiting condemnation upon the child in order to express society's disapproval of the parents' liaisons is illogical and unjust."). (citations and quotations omitted).

Such an inference is supported by the fact that the record in this case otherwise demonstrates that the State has disavowed any interest in preventing children from actually being parented by gay couples. ROA 489.

Even if the State had asserted that interest, and even were it deemed to be legitimate, the Registrar's actions would not, as a practical matter, rationally further such an interest, because children such as Infant J will nevertheless be parented by gay (or unmarried) couples regardless of whether the Registrar amends the birth certificate to reflect both parents' names.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 20, 2010, I sent two paper copies and one electronic copy of Brief of Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Louisiana in Support of Plaintiffs- Appellees Oren Adar and Mickey Ray Smith and in Support of Affirmance by United States mail to each of the following sets of counsel:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 4,857 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font size and Times New Roman type style.

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