

No. 09-30036

IN THE  
United States Court of Appeals  
for the Fifth Circuit

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

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

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**BRIEF OF *AMICUS CURIAE***  
**FAMILY WATCH INTERNATIONAL**

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## CERTIFICATE OF INTERESTED PERSONS

No. 09-30036, *Oren Adar et al. v. Darlene W. Smith.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case.

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Director, Office of Vital Records and Statistics,  
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*Defendant – Appellant.*

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**INTRODUCTION**

*Amicus curiae* Family Watch International (FWI) is a non-profit, non-partisan organization working to solve social problems at the international, national, and local level by stemming and reversing the tide of family disintegration and fragmentation. In this effort, FWI recognizes the vital importance of defending and promoting fundamental social institutions such as the family.

Appellants and appellees in this case have consented to the filing of this *amicus* brief.

*Amicus* believe this case raises crucial issues of constitutional and

public policy that will affect the interests of children and families throughout the United States and potentially create precedent relevant to issues of parenting, marriage and family life and to the ability of States to protect these social institutions.

Appellants have correctly identified the relevant law controlling this case. These legal principles make clear that the District Court, and the Tenth Circuit case on which it relied, misapplied relevant constitutional and statutory law in a way that threatens both the Federal character of the U.S. Constitutional system and the child-centered family policy of Louisiana. This court can promote fidelity to constitutional principles and preserve State prerogatives regarding family policy by rejecting the holding of the Court below.

## ARGUMENT

### **I. THE LONGSTANDING DISTINCTION BETWEEN RECOGNITION AND ENFORCEMENT OF JUDGMENTS PROTECTS THE INTEGRITY OF OUR FEDERAL SYSTEM OF FRIENDLY BUT AUTONOMOUS JURISDICTIONS.**

Our Federal system of government “in which political authority is divided between” the national government and State governments<sup>1</sup> provides essential protections to citizens that would be threatened by a centralized administrative State. Threats to this system of divided authority derive not

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<sup>1</sup> JAMES MCLELLAN, LIBERTY, ORDER, AND JUSTICE 297 (3d ed. 2000).

only from a centralized national government too large and distant to be truly accountable to those it governs but also from overreaching of Sister States.

This second threat is a central concern of the Full Faith and Credit Clause. Professor Jeffrey L. Rensberger notes that the Clause “is concerned not only with uniformity; rather it is a complex balance between uniformity and a competing policy” which Professor Rensberger describes as “interstate pluralism.”<sup>2</sup> “Interstate pluralism is the feature of our federal system that reflects the ability of each state to establish itself as a distinct community. It entails the ability to make and enforce choices on foundational matters such as fundamental ordering of . . . family relations” and “seeks to protect each state’s ability to create and enforce these fundamental orderings and thereby define its society.”<sup>3</sup> As Professor James McLellan notes, “federalism protects minority rights—the rights of communities or whole regions to maintain their customs, their diversity and individuality, their self-rule.”<sup>4</sup>

Our Federal system prevents one State from imposing on other States policies at odds with their “different preferences and needs.”<sup>5</sup> Professor

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<sup>2</sup> Jeffrey L. Rensberger, *Interstate Pluralism: The Role of Federalism in the Same-Sex Marriage Debate* 2008 BYU L. REV. 1703, 1707.

<sup>3</sup> *Id.* at 1723.

<sup>4</sup> JAMES MCLELLAN, *LIBERTY, ORDER, AND JUSTICE* 316 (3d ed. 2000).

<sup>5</sup> John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery* 90 CAL. L. REV. 485, 510 (2002).

Rensberger notes the empirical fact that “in culture, conditions, and social values, the states are fundamentally different from one another.”<sup>6</sup> Failing to take account the diversity of the citizens of different States would leave these citizens “alienated from their government.”<sup>7</sup>

One way in which the interstate pluralism aspect of the Federal system is preserved is the longstanding distinction between *recognition* of one State’s judgments in another State and the *enforcement* of these judgments. Recognition is mandated by the Full Faith and Credit Clause in order to ensure that State court judgments will not be undone by or relitigated in other States. Recognizing States, however, can apply their own law to enforce the judgment. This distinction was recognized early on in *McElmoyle ex rel. Bailey v. Cohen*, 13 Pet. 312, 325 (1839) and has been consistently reiterated, perhaps most recently in *Baker v. General Motors Corp.*, 522 U.S. 222 (1998), where the Court said:

Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and *mechanisms* for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the even-handed control of forum law. *Id.* at 235 (emphasis added).<sup>8</sup>

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<sup>6</sup> Rensberger, *supra* note 2 at 1792.

<sup>7</sup> McGinnis, *supra* note 5 at 510.

<sup>8</sup> *See also id.* at 241 (Scalia, J., concurring) (“I agree with the Court that enforcement measures do not travel with sister-state judgments as preclusive effects do.”); *Dunn v. City of Elgin*, 347 F.3d 641, 647 (7<sup>th</sup> Cir. 2003).

Indeed, the Restatement (Second) of Conflict of Laws §99 (1971) provides: “The local law of the forum determines the method by which a judgment of another state is enforced.”

Applying the distinction to this case means that New York’s interest is protected because Louisiana is prevented from relitigating or voiding the adoption judgment validly finalized in New York but Louisiana’s interest is protected because New York is prevented from substituting its common law on adoption (allowing joint adoptions for same-sex couples) for Louisiana’s birth certificate statute (which provides no mechanism for creating a certificate with two fathers or two mothers).

There is no novelty in the application of the recognition/enforcement distinction to adoption cases. The Restatement (Second) of Conflict of Laws §209 (1971) says an adoption “will usually be given the same effect in another state as is given by the other state to a decree of adoption rendered by its own courts.” A few decades ago, a commentator noted that “[a]n overwhelming majority of the cases in this country hold that the existence of the status of adoption is to be determined by the law of the state in which it was decreed or otherwise effected, but that the incidents thereof are those which are attributed to the status under the law of the state which governs

the principal question.”<sup>9</sup> There are a number of cases to the point as noted by commentators who have differing opinions on the underlying policy questions involved.<sup>10</sup> If a court can apply its own state law on inheritance to an adoption from another State, what principle would prevent that court from also applying its State’s birth certificate statutes to that adoption judgment?

The court below, and the Tenth Circuit panel on which it relied (*Finstuen v. Crutcher*, 496 F.3d 1139 (10<sup>th</sup> Cir. 2007)), conflated the recognition/enforcement distinction by holding that the mere existence of a judgment of adoption by a same-sex couple meant that local law on birth certificates should yield. This is to miss a step. The first question these courts asked was whether there was a valid judgment. Having answered affirmatively, the next step should have been to ask which State’s law regarding birth certificates would apply to a request to enforce the judgment by issuing an amended certificate. The court below and the *Finstuen* panel,

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<sup>9</sup> Charles W. Taintor, II, *Adoption in the Conflict of Laws* 15 U. PITT. L. REV. 222, 256 (1954).

<sup>10</sup> See Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbian and Gay Adoption*, 3 AVE MARIA L. REV. 561, 598-610 (2005) (collecting cases); Susan Frelich Appleton, *Surrogacy Arrangements and the Conflict of Laws* 1990 WIS. L. REV. 399, 419. For examples, see *In re Estate of Sandonas v. Paltasavias*, 381 P.2d 752, 754 (Wash. 1963) (“The rule is one of uniformity; all adopted children in a state should have the same rights of inheritance regardless of where they acquired their status as adopted children.”); *Mott v. First National Bank of St. Petersburg*, 124 So. 36, 37 (Fla. 1929) (“Within itself, the decree of adoption in Connecticut has no extraterritorial effect in respect to the inheritance of real estate in other states.”).

only asked the first question. This was an incorrect application of the relevant law. As such, the decisions in these cases undercut the important principles, primarily interstate pluralism, the distinction is meant to protect.

If the distinction between recognition and enforcement is not respected in this case, Louisiana would be forced to apply New York common law (allowing adoptions by same-sex couples) that is at odds with its own State policy. Precedent noted by the Court below clearly dictates a different result. The U.S. Supreme Court explained: “Our precedent differentiates between the credit owed to laws (legislative matters *and common law*) and to judgments.” *Baker*, 522 U.S. at 232 (emphasis added). This is so because “the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling 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.” *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493, 501 (1939). Thus, the Court says, “the Full Faith and Credit Clause does not require a State to apply another State’s law in violation of its own legitimate public policy.” *Nevada v. Hall*, 440 U.S. 410, 422 (1979).

The court below, following *Finstuen*, did not follow this precedent

even though it noted it. The decisions of the trial court and the *Finstuen* panel seem to reflect confusion about the significance of the adoption judgment involved. The question in this case, whether New York or Louisiana’s birth certificate law applies, is answered by the recognition of statutes cases. The court below seems to have used the analysis appropriate to the first question (will Louisiana law recognize a New York judgment?) to answer the second, distinct, question (which law applies to issuing amended birth certificate?). The court below said it was applying Louisiana law for amending birth certificates, but as explained below, Louisiana statutes do not provide for the outcome the court below adopted. Given this, it is clear that New York common law (allowing designation of two legal parents of the same-sex), was actually being applied.

This needless “project[ion] of [New York] laws across [Louisiana] state lines” (*Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493, 504 (1939)) undercuts the latter’s status as a “distinct community” and its “ability to make and enforce choices on fundamental matters” of family policy. It derogates from the self-rule of Louisiana’s citizens.

**II. ALLOWING LOUISIANA TO RECOGNIZE A NEW YORK JUDGMENT WHILE STILL APPLYING ITS OWN LAW REGARDING PARENTING AND BIRTH CERTIFICATES PROTECTS THE REASONABLE EXPECTATION OF THE STATE THAT ITS LAW WILL BE RESPECTED RATHER THAN SUBORDINATED TO THE POLICIES OF OTHER STATES.**

Appellees will presumably argue that Louisiana statutes allow for the result reached by the court below—that Louisiana has voluntarily surrendered its policy to New York’s common law by allowing for an amended birth certificate for foreign adoptions. Appellant has explained why this interpretation is fundamentally misguided. *Amicus* would point out that there is additional evidence that Louisiana has no mechanism for enforcing an out-of-state adoption judgment by issuing a two father birth certificate even when the State has chosen to issue an amended birth certificate in response to a foreign adoption.

The court below<sup>11</sup> read the amended birth certificate statute (LA. REV. STAT. ANN. § 40:76) in isolation, as if those seeking an amended birth certificate would receive a generic form created wholly according to the whim of applicants or to the law of whatever State’s adoption is at issue. Those seeking to avail themselves of this section, however, are asking for a *Louisiana* birth certificate. Such a certificate is created pursuant to the

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<sup>11</sup> The same mistaken analysis seems to have been at work in *Finstuen* and a similar Virginia case ordering issuance of an amended birth certificate listing two parents of the same-sex. *Davenport v. Little-Bowser*, 611 S.E.2d 366 (Va. 2005). At any rate, the statutory schemes at issue in these cases were not the same as Louisiana’s.

authority of another statute, LA. REV. STAT. ANN. § 40:34, which specifies the contents of a birth certificate and provides: “The certificate of birth *shall* contain, as a minimum, the following items” (emphasis added). The list that follows includes the “Maiden name of the mother.” It also includes “Full name of the father” although a father’s name can be omitted if the mother is not married or if there is no agreement as to the identity of the father. Nowhere does the statute allow for a “second parent” or similar formulation. The section does allow for amendments of original birth certificates “in accordance with Louisiana laws or a final court order which specifically orders the amendments, *provided the court’s order complies with existing Louisiana laws*” (emphasis added). Surely the relevant Louisiana law would include LA. CHILD. CODE art 1198 which allows only joint adoptions by married couples. An analogous statute is LA. REV. STAT. ANN. § 40:44, which requires the state registrar not to accept “certificates which contain erasures, liquid paper, type-overs, or other evidence of alteration in the legal section.” In other words, Louisiana’s “administrative machinery” is not well “adapted to giving the remedy afforded by” New York. *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493, 502 (1939).

Applying Louisiana’s birth certificate law to out-of-state adoptive parents produces an entirely “even-handed” (*Baker* at 235) result since out-

of-state adoptive parents are treated precisely the same as Louisiana adoptive parents, neither of whom can get from the State a birth certificate listing two legal parents of the same sex. Any other result would allow residents of other States a legal result not possible for residents of Louisiana.

### **III. LOUISIANA’S BIRTH CERTIFICATE STATUTE ADVANCES A COMPELLING INTEREST IN PROVIDING A LEGAL MOTHER AND FATHER FOR CHILDREN WHEREVER POSSIBLE.**

Louisiana’s interests in applying its own law to the matter of amended birth certificates is at least as compelling as any of the interests recognized in U.S. Supreme Court precedent allowing States to use their own forum law in disputes with other States. It affects a most fundamental human relationship and a foundational concern of State law.

Louisiana law, and its birth certificate form, recognizes the reality that some children will be deprived of a relationship with one or both parents. This does not mean, however, that Louisiana must endorse the notion that mothers and fathers are interchangeable by treating them as such on an official State legal document.

In fact, Louisiana’s adoption law advances compelling policy considerations.<sup>12</sup> Professor Bruce Hafen has explained that:

the commitments inherent in formal families do increase the

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<sup>12</sup> See William C. Duncan, *Marital Status and Adoption Values* 6 J. L. & FAM. STUDIES 1 (2004).

likelihood of stability and continuity for children. Those factors are so essential to child development that they alone may justify the legal incentives traditionally given to permanent kinship units based on marriage. The same factors can justify the denial of legal protection to unstable social patterns that threaten children's developmental environment."<sup>13</sup>

Social science research makes clear that children benefit from being raised by a mother and father.<sup>14</sup>

Research also indicates that cohabiting relationships are on average less stable and more likely to involve risk factors for children than are marriages.<sup>15</sup> Professor Eric G. Andersen has noted: "The empirical basis for the social interest favoring the marital family over unmarried cohabitation is

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<sup>13</sup> Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy* 81 MICH. L. REV. 463, 475-476 (1983).

<sup>14</sup> See LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER AND BETTER-OFF FINANCIALLY* (2000); ELIZABETH MARQUARDT, *BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE* (2005); Amici Curiae Brief of James Q. Wilson, et al., In re Marriage Cases, Case No. A110449 (Cal. Ct. App. 2006); INST. FOR AM. VALUES & INST. FOR MARRIAGE AND PUB. POLICY, *MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES* (2006); ELIZABETH MARQUARDT, *FAMILY STRUCTURE AND CHILDREN'S EDUCATIONAL OUTCOMES* (Institute for American Values 2005); W. BRADFORD WILCOX, ET AL., *WHY MARRIAGE MATTERS, SECOND EDITION: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES* (Institute for American Values 2005); Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 THE FUTURE OF CHILD. 75 (Fall 2005); THE WITHERSPOON INSTITUTE, *MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES* (2006); LORRAINE BLACKMAN, OBIE CLAYTON, NORVAL GLENN, LINDA MALONE-COLON & ALEX ROBERTS, *THE CONSEQUENCES OF MARRIAGE FOR AFRICAN AMERICANS: A COMPREHENSIVE LITERATURE REVIEW* (Institute for American Values 2005).

<sup>15</sup> Much of this research is collected in William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation* 82 OREGON L. REV. 1001 (2003).

becoming increasingly clear.”<sup>16</sup> Professor Andersen has suggested that “[t]he law ignores something deeper and more abiding than simple tradition if, to satisfy an egalitarian ideology, it assumes that mothers and fathers should or can routinely replicate each other's relationship with, and influence on, their children.”<sup>17</sup> He further notes: “men and women are not fungible in relation to child rearing. They have distinct contributions to make.”<sup>18</sup>

Other State’s courts have recognized these important interests in the context of challenges to State definitions of marriage. *See Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006); *Hernandez v. Robles*, 7 N.Y.3d 338 (N Y. Court of Appeals 2006).

## CONCLUSION

At stake in this litigation is the ability of the State of Louisiana to preserve its ability to make policy regarding and to protect the most crucial of legal and familial relationships. This Court’s decision can provide a much needed defense for the principles of Federalism, interstate pluralism and the best interests of children.

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<sup>16</sup> Eric G. Andersen, *Children, Parents and Non-Parents: Protected Interests and Legal Standards* 1998 BYU LAW REVIEW 935, 946 (1998).

<sup>17</sup> *Id.* at 944.

<sup>18</sup> *Id.* at 998.

For the foregoing reasons, amicus respectfully urge this Court to reverse the decision of the court below.

Respectfully submitted,

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I hereby certify that two true and correct copies of the foregoing Brief of Appellant, as well as a computer disc containing an electronic version of the brief in Adobe Portable Document Format, were sent by U.S. Postal Service to counsel this 26<sup>th</sup> day of May, 2009:

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

- This brief contains 2,964 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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- This brief has been prepared in a proportionally spaced typeface using Microsoft Office 2007, in Times New Roman 14-point font (12-point for footnotes).

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Dated: May 26, 2009