No. 11-46

In The
Supreme Court of the United States

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

Petitioners,

v.

DARLENE W. SMITH, In Her Capacity as State Registrar and Dir., Office of Vital Records and Statistics, State of Louisiana Dep't of Health and Hospitals,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, law firm and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights, freedoms and structural safeguards it guarantees.

This case raises important questions about the scope and enforceability of the Full Faith and Credit Clause of Article IV. As an organization dedicated to the Constitution's text and history, CAC has an interest in safeguarding the constitutional requirement of full faith and credit and the prohibition against state-on-state discrimination on which it rests.

SUMMARY OF ARGUMENT

Forbidding what James Madison called the "trespasses of the States on each other," the Full Faith and Credit Clause of the Constitution secures individual rights as well as the viability of the

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[1] Counsel for all parties received notice at least 10 days prior to the due date of this brief of *amicus*'*s* intention to file this brief; all parties have consented to its filing. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

Union, and is properly enforceable by federal courts in a Section 1983 action. In safeguarding the equal dignity of states in the Union, the Full Faith and Credit Clause also protects the rights of individuals, requiring states to respect judgments issued by the courts of the other states that make up the Union. The protection of federalism, here as elsewhere in our constitutional scheme, secures liberty. As the Court recently held in *Bond v. United States*, "[f]idelity to principles of federalism are not for the States alone to vindicate." 131 S. Ct. 2355, 2364 (2011).

The Petition for a Writ of Certiorari should be granted in this case to resolve a troubling split among the federal courts of appeal concerning the scope of, and the authority of federal courts to enforce, the Full Faith and Credit Clause. Below, in a deeply divided *en banc* decision, the Fifth Circuit held that the Full Faith and Credit Clause of Article IV applies only to state courts, and may not be enforced by federal courts in a Section 1983 action when a state executive-branch officer, in the course of her official duties, refuses to give full faith and credit to an out-of-state judgment. Applying its stunted construction of the Full Faith and Credit Clause, the Fifth Circuit held that Louisiana was free to discriminate against out-of-state judgments of adoption, exactly the kind of parochial local bias that the Full Faith and Credit Clause was meant to prohibit.

By holding that the Full Faith and Credit Clause does not require state officials to give full faith and credit to out-of-state judgments, the

decision below threatens core constitutional values at the heart of our federal system. The Full Faith and Credit Clause requires a state, not merely its courts, to respect the judgments and laws of its sister states, treating each state in the Union with equal dignity. Written into the Constitution against the backdrop of significant state-on-state discrimination, the Full Faith and Credit Clause was written by the Framers to help secure "a more perfect Union," giving judgments issued in one state nationwide force. As this Court has recognized on many occasions, no state may discriminate against another state's judgments and laws, refusing to enforce them. The decision below is sharply at odds with the text and history of the Full Faith and Credit Clause and this Court's precedents interpreting it.

Amicus urges the Court to grant the Petition for a Writ of Certiorari. Review is necessary here because the court below "entered a decision in conflict with the decision of another United States court of appeals" and "decided an important question of federal law that has not been, but should be, settled by this Court." S. Ct. Rule 10(a), (c).

ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT THE FULL FAITH AND CREDIT CLAUSE PROTECTS INDIVIDUAL RIGHTS PROPERLY VINDICATED UNDER SECTION 1983.

Louisiana's actions at issue here violate the Full Faith and Credit Clause. The State's refusal to issue an accurate, amended birth certificate to unmarried adoptive parents is exactly the sort of discrimination that the Full Faith and Credit Clause was meant to prevent. Louisiana failed to honor its constitutional obligation to give full faith and credit to out-of-state judgments that grant adoptions to unmarried couples when it refused to recognize such an adoption as equal in authority to adoptions adjudged in Louisiana.

Instead of ensuring that the rights of Oren Adar and Mickey Smith as parents, and the rights of J.C. as their son, recognized by the New York judgment of adoption, "are given nation-wide application," *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943)—as the Full Faith and Credit Clause commands—Louisiana has denied those rights. By refusing to name Adar and Smith on J.C.'s birth certificate as his parents, Louisiana—the state of J.C.'s birth and thus the only state that can provide him with a birth certificate—has denied J.C. his right, guaranteed by state law, to an accurate birth certificate listing his adoptive parents. S*ee* LA. REV. STAT. ANN. §§ 40:76(A), (C); 40:77 (2011). The New York judgment of adoption

settled that Oren Adar and Mickey Smith are J.C's parents; as parents, they have the right to be accurately listed on their son's birth certificate, and J.C. has the right to have them so listed. As Petitioners have detailed, J.C.'s lack of a birth certificate correctly identifying his parents substantially threatens and has already burdened his access to important rights and benefits. *See* Pet. at 3-6.

The Petition for a Writ of Certiorari in this case presents an important, recurring, and unresolved question concerning the scope and enforceability of the Full Faith and Credit Clause of the Constitution that has divided the federal courts of appeal: whether an individual may bring suit in federal court under 42 U.S.C. § 1983 to enforce the constitutional obligation of full faith and credit when a state official refuses to give full faith and credit to an out-of-state judgment. *Compare* Pet. App. 5a-22a (decision below) *with Finstuen v. Crutcher*, 496 F.3d 1139, 1152-56 (10th Cir. 2007); s*ee also Rosin v. Monken*, 599 F.3d 574 (7th Cir. 2010) (adjudicating full faith and credit claim against state actors on the merits); *United Farm Workers v. Ariz. Agric. Emp't Relations Bd.*, 669 F.2d 1249 (9th Cir. 1982) (same). *See* Pet. at 14-18.

Section 1983 creates a federal cause of action against state officials who, acting under color of state law, violate "any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983 (2006). This Court has "rejected attempts to limit the types of constitutional rights that are

encompassed within the phrase 'rights, privileges, or immunities." *Dennis v. Higgins*, 498 U.S. 439, 445 (1991). In direct contravention of the statute's plain language and this Court's precedents interpreting it, the Fifth Circuit below held that federal courts lack authority under Section 1983 to enforce the Full Faith and Credit Clause of Article IV. To support this result, the Fifth Circuit invented—without support in text, history, or precedent—a new limitation on the scope of the Full Faith and Credit Clause. In the Fifth Circuit's view, the Clause applies only to a state's courts, and does not limit the acts of a state's legislature or its executive branch officials.

The ruling below sharply conflicts with the text of the Full Faith and Credit Clause, which requires a state, not merely its courts, to give full faith and credit to the judgments and laws of its sister states, and its history, which recognizes that the "more perfect Union" created by the Constitution would be fatally undermined if state actors were free to discriminate against out-of-state judgments or laws.

A. The Text, History and Purpose of the Full Faith and Credit Clause Require States, Not Merely State Courts, To Respect the Equal Dignity of Sister States and Recognize Rights Protected by an Out-of-State Judgment.

The Full Faith and Credit Clause of Article IV provides that "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." U.S. CONST., art. IV, § 1.

The Full Faith and Credit Clause is one of a number of provisions in Article IV "incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign states into a nation." *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948). Aiming to prevent discrimination by one state against another, the Full Faith and Credit Clause "alter[ed] 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 others" and made them "integral parts of a single nation throughout which a just remedy might be demanded as of right, irrespective of the state of its origin." *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935); *see also Haywood v. Drown*, 129 S. Ct. 2108, 2125 n.5 (2009) (Thomas, J., dissenting) (describing the Full Faith and Credit Clause as a "prohibition on discrimination" designed to "address state-to-state discrimination").

The framers wrote the Full Faith and Credit Clause against the backdrop of what James Madison called "the trespasses of the States on each other." 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 317 (Max Farrand ed., 1911). Before "We the People" formed "a more perfect Union," state-on-state discrimination was prevalent. States refused to respect the judgments

and laws of their sister states, denied to citizens of other states the privileges and immunities of citizenship, and imposed discriminatory restrictions on out-of-state commerce. *See* James Madison, *Vices of the Political System of the United States*, *in* 2 THE WRITINGS OF JAMES MADISON 361, 362-63 (Gaillard Hunt ed. 1901); *see also* THE FEDERALIST No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (describing history of "bickering and animosities" that "may spring up among the members of the Union"); These "alarming symptoms," Madison observed, "may be daily apprehended." *See* Madison, *Vices*, *supra*, at 362.

To prevent states from discriminating against the judgments and laws of other states and to ensure "maximum enforcement in each state of the obligations created or recognized by . . . sister states," *Hughes v. Fetter*, 341 U.S. 609, 612 (1951), the framers wrote the Full Faith and Credit Clause as an affirmative command binding on the states. The plain text of the Clause clearly requires "each State," not merely its courts, to give full faith and credit to the judgments and acts of its sister states, treating them as equal in authority to the state's own judgments and laws.

By including in the text of our nation's charter a constitutional requirement of full faith and credit, binding on the states, the framers demanded that each state respect the equal dignity of its sister states by giving out-of-state judgments and acts "not some but full [faith and] credit." *Davis v. Davis*, 305 U.S. 32, 40 (1938). *See* 3 JOSEPH STORY,

COMMENTARIES ON THE CONSTITUTION, § 1304, at 180 (1833) (explaining that "*full* faith and credit" requires a state to give out-of-state judgments and laws "positive and absolute verity, so that they cannot be contradicted, or the truth of them denied, any more than in the state they originated"). Anything less would undermine the federal system designed by the framers.

In making the Full Faith and Credit Clause a part of the Constitution, the framers "'form[ed] a more perfect Union,'" giving "each state a higher security and confidence in the others, by attributing a superior sanctity and conclusiveness to the public acts and judicial proceedings of each" and ensuring that "rights and property would belong to citizens of every state in many other states than th[e one] in which they resided." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, *supra*, § 1303, at 179. In the new nation, Americans could freely travel from state to state without fear that rights secured in one state would be dismissed or nullified in another. No state could discriminate against another's laws and judgments, refusing to recognize and enforce them.

Other aspects of Article IV, too, addressed the state-on-state discrimination that Madison had condemned as "trespasses of the States on each other." 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 317. The Privileges and Immunities Clause, which follows the Full Faith and Credit Clause in the text of Article IV, prohibits a state from discriminating against citizens of other states, a requirement Alexander Hamilton called "the

basis of the Union." *See* THE FEDERALIST No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 2003). Without this requirement of equality, "the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869).

The drafting history of the Full Faith and Credit Clause confirms what the text makes clear: the Full Faith and Credit Clause is an affirmative command binding on the states. The framers chose language that required states to respect the judgments and acts of their sister states, rejecting proposed language that did not create any clear constitutional command on the states.

An early version of the Full Faith and Credit Clause proposed by the Committee of Eleven[2] did not create any self-executing command of full faith and credit, but instead left the scope of the Clause to the judgment of Congress. On September 1, 1787, the Committee of Eleven proposed that "[f]ull faith and credit *ought* to be given in each State" and that "the Legislature *shall* by general laws prescribe the manner in which such acts, Records, & proceedings shall be proved, and the effect which Judgments obtained in one State, shall have in another." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 485 (Max Farrand ed., 1911) (emphasis

[2] The Committee of Eleven, consisting of one member from each of the states represented at the Convention, was one of the committees appointed during the Convention to draft the text of the Constitution.

added). In the debate that ensued a few days later, James Madison successfully moved to make the Full Faith and Credit Clause a self-executing command—striking out the word "ought" and replacing it with the word "shall"—and gave Congress legislative power to implement the constitutional requirement of full faith and credit. *Id.* at 489; *see also* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 292 (1992) ("The effect of Madison's amendment was to make the clause self-executing, commanding full faith and credit in the constitutional text and making congressional action discretionary, instead of commanding congressional action and leaving the clause dependent on implementation of the command to Congress.").

Consistent with this text and history, this Court has many times held that "[r]egarding 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." *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998). A judgment "may not be denied enforcement based on some disagreement with the laws of the State of rendition. Full faith and credit forbids the second State to question a judgment on those grounds." *Id.* at 243 (Kennedy, J., concurring). "[C]redit must be given to the judgment of another state, although the forum would not be required to entertain the suit on which the judgment was founded." *Milwaukee*

County, 296 U.S. at 277. As these consistent holdings reflect, the Full Faith and Credit Clause "ordered submission by one State to hostile policies reflected in the judgment of another State, because the practical operation of the federal system . . . demanded it." *Estin v. Estin*, 334 U.S. 541, 546 (1948); *see also Baker*, 522 U.S. at 233.

Text, history, and this unbroken line of Supreme Court precedent establish that a state has a constitutional obligation to give full faith and credit to the judgments of the courts of other states that make up our federal system. While questions concerning the meaning of the requirement of full faith and credit are most often presented to the state courts, the constitutional command of full faith and credit applies to all state actors. No state actor may discriminate against an out-of-state judgment, refusing to recognize, or nullifying, the rights it secures.

B. Principles of Federalism in Article IV's Full Faith and Credit Clause Vindicate Individual Rights.

The Full Faith and Credit Clause's protection of federalism is a matter of individual right, properly vindicated in an action under Section 1983. In designing our federal system, the framers of the Constitution "split the atom of sovereignty" creating "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995)

(Kennedy, J., concurring). As this Court recognized last Term in *Bond v. United States*, 131 S. Ct. 2355 (2011), the "allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Id.* at 2364. Accordingly, "[a]n individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States . . . . Fidelity to principles of federalism are not for the States alone to vindicate." *Id.*

These principles apply with equal force to Article IV's Full Faith and Credit Clause. As the text and history above demonstrate, the Full Faith and Credit Clause both protects the equal dignity of states *and* secures individual rights to all persons. In this regard, the Full Faith and Credit Clause is quite similar to the Privileges and Immunities Clause which, as noted above, follows it in Article IV. *See Austin v. New Hampshire*, 420 U.S. 656, 662 (1975) (observing that the Privileges and Immunities Clause of Article IV "implicates not only the individual's right to nondiscriminatory treatment but also . . . the structural balance essential to the concept of federalism").

The Full Faith and Credit Clause requires a state to treat the other states that make up the Union on the basis of equality, prohibiting a state from discriminating against an out-of-state judgment and ensuring that a judgment, once issued by a court having jurisdiction over the

matter, "gains nationwide force." *Baker*, 522 U.S. at 233. In preventing the state-on-state discrimination the framers so feared, the Full Faith and Credit Clause secures to individuals protection of their vested legal rights, ensuring "maximum enforcement in each state of the obligations or rights created or recognized by . . . sister states." *Hughes*, 341 U.S. at 612.

At the same time, the Full Faith and Credit Clause of Article IV secures a vibrant federal Union in which individuals are free to move from state to state in search of greater opportunities and freedom without fear that rights secured by a judgment in one state will be denied recognition in another. The Full Faith and Credit Clause secures freedom for all persons by providing that "rights judicially established in any part are given nation-wide application." *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943).

There is no reason in text, history, or precedent to exclude the individual rights secured by the Full Faith and Credit Clause from those rights enforceable against state actors under Section 1983. Section 1983 creates a federal cause of action against state officials who, acting under color of state law, violate "any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983 (2006). This Court has never suggested that the individual liberty and protection guaranteed by the Full Faith and Credit Clause cannot be enforced by Section 1983 actions.

As this case shows, compromising the structure of our constitutional system, in which full faith and credit must be given in all states to the judgments of a sister state, injures individuals as well as the Union. Louisiana's "disregard of the federal structure of our Government," *Bond*, 131 S. Ct. at 2366-67, in "contravention of constitutional principles of federalism," *id.* at 2365, carries severe and burdensome consequences for young J.C. and his family. Without an accurate birth certificate, J.C. may be denied, and already has had obstacles in securing, many important rights and benefits, such as the right to obtain a passport and social security card, the right to health care coverage under his parents' insurance plans, and the right to register for school. *See* Pet. at 3-6.

The Fifth Circuit, however, brushed aside these concerns and opined that Louisiana, despite its own law providing for the issuance of an amended birth certificate to an adopted child naming his adoptive parents, is entitled to "issue birth certificates in the manner it deems fit," Pet. App. 28a, denying recognition of the New York judgment of adoption given to an unmarried couple. But there is "no roving 'public policy exception' to the full faith and credit due *judgments*." *Baker*, 522 U.S. at 233 (emphasis in original). The text and history of the Full Faith and Credit Clause prohibit a state from refusing to enforce another state's judgment based on disagreement with that state's public policy. In writing the Full Faith and Credit Clause, the framers required a state to treat the judgments of the other states in the Union as equal in authority to their own, prohibiting the state-on-

state discrimination that had been so pervasive before the ratification of the Constitution.

The Full Faith and Credit Clause guarantees that rights secured by a judgment in one state will be recognized in another. Petitioners' right to the protection of the Full Faith and Credit Clause is enforceable under Section 1983. The decision of the lower court is in error.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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