

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; 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

APPELLANT’S PETITION FOR REHEARING EN BANC

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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. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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RULE 35 STATEMENT REGARDING REHEARING EN BANC

New York and Louisiana differ on a matter affecting children: New York allows unmarried couples to adopt, but Louisiana does not. That is why Appellees, an unmarried same-sex couple, adopted Infant J in New York and not Louisiana, the child’s birthplace. Louisiana has no wish to interfere with their relationships. But a panel of this Court has now ordered Louisiana to issue—contrary to its own constitution—a new birth certificate naming Appellees as Infant J’s two fathers. That will force Louisiana to re-engineer its vital records and begin issuing numerous birth certificates tracking the exact terms of other states’ same-sex adoptions. The panel’s decision—on “an issue of first impression in this circuit,” slip op. at 6—warrants *en banc* review because it disregards Supreme Court precedent, intrudes into Louisiana law, and violates the Eleventh Amendment. *See* FED. R. APP. P. 35(a).

The panel wrongly accuses Louisiana of denying *any* obligations to the New York adoption under the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1.¹ But Louisiana never denied that the adoption created binding relationships among the parties, finalizing matters such as custody, inheritance, and Appellees’ fitness

¹ *See, e.g.*, Slip op. at 12 (claiming that “[t]he Registrar asserts several rationalizations why Louisiana does not owe full faith and credit to the decree as a constitutional matter”); *id.* at 15 (asserting that “the Registrar tenaciously insists that there are exceptions to the application of the Clause that allow Louisiana to refuse to give full faith and credit to the instant adoption decree”).

to care for the child.² Those issues were never in question.³

This case concerns a different matter: the effect of the New York decree on Louisiana’s public records. Blue Br. 26-33; Gray Br. 8-16. Two centuries of Supreme Court jurisprudence teach that the New York adoption “can only be executed in [Louisiana] as its laws may permit.” *McElmoyle ex rel. Bailey v. Cohen*, 38 U.S. (13 Pet.) 312, 325 (1839). As instruments of its public records, Louisiana’s birth certificate laws operate independently of its constitutional obligations to the adoption. The panel disregarded this issue and thus undermined the principle that enforcement measures “do not travel with the sister state judgment as preclusive effects do.” *Baker v. General Motors Corp.*, 522 U.S. 222, 235 (1998). It also disregarded Louisiana’s strongest case—*Hood v. McGehee*, 237 U.S. 611 (1915)—in which Justice Holmes explained that full faith and credit did not invalidate Alabama’s exclusion of out-of-state adoptees from its inheritance laws. Blue Br. 29-30; Gray Br. 14.

Instead, the panel scrutinized state law. Ostensibly asking only whether the Registrar applies Louisiana law “evenhandedly,” slip op. at 26, the panel did far

² See, e.g., Gray Br. 30-31 (stating that “the New York adoption is valid among the parties, but it does not constitutionally compel alteration of Louisiana’s public records”).

³ See, e.g., Blue Br. 51 (arguing that “[w]hatever constitutional credit Louisiana might owe to the New York decree is not an issue in this case”); Gray Br. 3 (admitting that “Louisiana may well owe various forms of constitutional credit to sister-State adoptions” but arguing that full faith and credit “does not force Louisiana to inscribe in her public records parental relationships unrecognizable to her own law and constitution”).

more. “Proceeding on a blank slate,” *id.*, the panel gave the Registrar no deference, refused to certify the question to the Louisiana Supreme Court, and crafted a *res nova* interpretation of Louisiana law that forces the Registrar to violate the Louisiana Constitution. *Id.* at 25-35.

The panel’s decision thus violates the Eleventh Amendment, U.S. CONST. amend. XI. By severing its scrutiny of Louisiana law from any federal question, the panel ordered a Louisiana official to follow the panel’s view of Louisiana law. The Eleventh Amendment, however, bars a federal court from ordering a state official to obey state law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

En banc review is thus warranted to maintain the uniformity of the Court’s decisions with Supreme Court precedent, and also to resolve issues of exceptional importance to interstate comity and the administration of Louisiana law. FED. R. APP. P. 35(a). *En banc* review is also warranted because of “the overriding importance of the Eleventh Amendment in limiting the power of the federal courts over the sovereignty of the several states.” *Okpalobi v. Foster*, 244 F.3d 405, 411 (5th Cir. 2001) (en banc).

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES i

RULE 35 STATEMENT REGARDING REHEARING EN BANC ii

TABLE OF CONTENTSv

TABLE OF AUTHORITIES vi

STATEMENT OF ISSUES MERITING EN BANC CONSIDERATION1

STATEMENT OF THE COURSE OF PROCEEDINGS1

STATEMENT OF FACTS.....2

ARGUMENT3

 I. THE PANEL FAILED TO RESOLVE THE CRITICAL ENFORCEMENT ISSUE.4

 II. THE PANEL UNNECESSARILY INTRUDED INTO LOUISIANA LAW.....8

 III. THE PANEL VIOLATED THE ELEVENTH AMENDMENT..... 12

CONCLUSION 15

CERTIFICATE OF SERVICE..... 16

CERTIFICATE OF COMPLIANCE 17

APPENDIX

Adar v. Smith, No. 09-30036, slip op. (5th Cir. Feb. 18, 2010) Tab A

TABLE OF AUTHORITIES

Constitutional Provisions

LA. CONST. art. XII, § 15	11
U.S. CONST. amend. XI.....	iv, 1, 4, 12
U.S. CONST. art. IV, § 1	ii, 3, 11, 15

Federal Cases

<i>Baker v. General Motors Corp.</i> , 522 U.S. 222 (1998)	passim
<i>Cox v. City of Dallas</i> , 256 F.3d 281 (5th Cir. 2001).....	12
<i>Ex parte Young</i> , 209 U.S. 123 (1908).....	12, 14
<i>Fall v. Eastin</i> , 215 U.S. 1 (1909).....	5, 6
<i>Finstuen v. Crutcher</i> , 496 F.3d 1139 (10th Cir. 2007).....	4, 6, 7
<i>Hood v. McGehee</i> , 237 U.S. 611 (1915).....	iii
<i>Lapides v. Bd. of Regents</i> , 535 U.S. 613 (2002).....	14
<i>Lynde v. Lynde</i> , 181 U.S. 183 (1901)	6
<i>Magnolia Venture Capital Corp. v. Prudential Securities, Inc.</i> , 151 F.3d 439 (5th Cir. 1998)	14
<i>McElmoyle ex rel. Bailey v. Cohen</i> , 38 U.S. (13 Pet.) 312 (1839).....	iii, 4, 5, 6
<i>Neinast v. Texas</i> , 217 F.3d 275 (5th Cir. 2000).....	14
<i>Okpalobi v. Foster</i> , 244 F.3d 405 (5th Cir. 2001)	iv, 15
<i>Pennhurst State Sch. & Hosp. v. Halderman</i> , 465 U.S. 89 (1984).....	iv, 12, 13, 14
<i>Saahir v. Estelle</i> , 47 F.3d 758 (5th Cir. 1995).....	13
<i>Thompson v. Whitman</i> , 85 U.S. 457 (1873).....	5

State Cases

Crescionne v. La. State Police Retirement Bd., 455 So.2d 1362 (La. 1984)..... 11

Davenport v. Little-Bowser, 611 S.E.2d 366 (Va. 2005)..... 12

Forum for Equality PAC v. McKeithen, 2004-2477 (La. 1/19/05); 893 So.2d 715 11

In re Heilig, 816 A.2d 68 (Md. 2003).....7

In re Nixon, 763 N.W.2d 404 (Neb. 2009)6

Matter of Garrett, 841 N.Y.S.2d 731 (N.Y. Sur. Ct. 2007)2

Matter of Jacob, 660 N.E.2d 397 (N.Y. 1995)..... 11

Schwegmann Bros. Giant Super Markets v. McCrory, 112 So.2d 606 (La. 1959)..... 10

State ex rel. Guillot v. Central Bank & Trust Co., 79 So. 857 (La. 1918)9

Witowski v. Roosevelt, 199 P.3d 1072 (Wyo. 2009).....6

Federal Statutes

FED. R. APP. P. 35(a) ii, iv

State Statutes

ARIZ. REV. STAT. ANN. § 36-336(A)(1).....7

ARIZ. REV. STAT. ANN. § 36-337(A)(1).....7

FLA. STAT. ANN. § 382.016(1)(d)(2).....8

LA. CHILD. CODE ANN. art. 1221.....2

LA. REV. STAT. ANN. § 40:76..... passim

LA. REV. STAT. ANN. tit. 40, ch. 2.....2

TENN. CODE ANN. § 68-3-312(f)..... 7, 8

TEX. HEALTH & SAFETY CODE ANN. § 192.008(a)7

Other Authorities

13 WRIGHT, MILLER, COOPER & FREER FED. PRAC. & PROC. 3d § 3524.3 13

18B WRIGHT, MILLER & COOPER FED. PRAC. & PROC. 2d § 44675

BLACK’S LAW DICTIONARY 11

JOSEPH STORY, COMMENTARY ON THE CONFLICT OF LAWS § 6095

MODEL STATE VITAL STATISTICS ACT § 127

WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH
LANGUAGE 10

STATEMENT OF ISSUES MERITING EN BANC CONSIDERATION

When presented with out-of-state adoptions of Louisiana-born children, the Registrar consistently interprets Louisiana’s supplemental birth certificate statute—LA. REV. STAT. ANN. § 40:76 (2001)—to allow only *married* adoptive couples on a new certificate. But the panel held that, given Louisiana’s full-faith-and-credit obligations, § 40:76 requires the Registrar to name an unmarried, same-sex couple who adopted a Louisiana-born child in New York.

- (1). Did the panel disregard the longstanding principle that, independent of full faith and credit, States are free to determine “the time, manner, and mechanisms for enforcing [sister-state] judgments”? *See Baker v. General Motors Corp.*, 522 U.S. 222, 235 (1998); *Hood v. McGehee*, 237 U.S. 611 (1915).
- (2). Did the panel exceed its authority by independently interpreting § 40:76 without any deference to the Registrar? At a minimum, should the panel have certified its *res nova* interpretation to the Louisiana Supreme Court?
- (3). Did the panel violate the Eleventh Amendment by grounding its order on the Registrar’s alleged violation of state law?

STATEMENT OF THE COURSE OF PROCEEDINGS

The district court held that Appellant Darlene Smith, the Louisiana Vital Records Registrar (“Registrar”), denied full faith and credit to a New York adoption by refusing to issue a Louisiana birth certificate naming both Appellees as the child’s fathers. ROA 532-42. A panel of this Court affirmed, holding that Louisiana owed credit to the adoption, and that Louisiana law compelled the Registrar to name both men as fathers on the certificate. Slip op. at 12-24, 24-35.

STATEMENT OF FACTS

“Infant J” was born in Louisiana in 2005. ROA 422; 435. His mother gave him to Appellees, who adopted him in New York in 2006. ROA 435; 422-24; 444. Unlike Louisiana, New York allows adoption by cohabiting unmarried couples.⁴ Appellees asked the Registrar⁵ for a new birth certificate identifying both men as fathers, pursuant to section 40:76 of the vital statistics laws. *See* ROA 372-73; 435-36; 444; LA. REV. STAT. ANN. § 40:76. Part A of 40:76 provides that, on receiving an out-of-state adoption decree of a Louisiana-born person, the Registrar “may create a new record of birth.” *Id.* § 40:76(A) (1990). Part C says the Registrar “shall make a new record ... showing ... the names of the adoptive parents.” *Id.* § 40:76(C).

The Registrar denied Appellees’ request. ROA 373. She explained that § 40:76 did not authorize placing two unmarried persons on a certificate, because in Louisiana law the phrase “adoptive parents” includes only married couples. ROA 426-27. This has always been the Registrar’s policy regarding out-of-state adoptions by unmarried couples. ROA 373-74; 390-95.

⁴ As one court explained, “[i]t is undeniable that the area of [New York] adoption law has undergone a significant transformation in recent years.” *Matter of Garrett*, 841 N.Y.S.2d 731, 732 (N.Y. Sur. Ct. 2007); *cf.* LA. CHILD. CODE ANN. art. 1221 (2004) (allowing joint adoption by married couples only).

⁵ The Registrar is the custodian of Louisiana vital certificates and records, and her general duties appear in Louisiana’s Public Health and Safety Law. *See* LA. REV. STAT. ANN. tit. 40, ch. 2 (2001 & Supp. 2010).

Appellees sought federal declaratory and injunctive relief under § 1983, alleging that the Registrar violates the Full Faith and Credit Clause. ROA 116-20. The district court granted Appellees summary judgment. ROA 542; 543. The court reasoned that Louisiana owes the decree credit as another state's "judgment." ROA 539. While recognizing that Louisiana retains some control over "mechanisms for enforcing" the decree, the court read § 40:76 to require both men's names on the certificate. ROA 539-42.

A panel of this Court affirmed. First, the panel held that Louisiana owes full faith and credit to the adoption. Slip op. at 12-24. Second, while the panel was "doubtful" whether § 40:76 was an enforcement mechanism, it declined to resolve the issue and instead found the Registrar's application was not "evenhanded." *Id.* at 25-26. Refusing any deference to the Registrar and "[p]roceeding on a blank slate," slip op. at 26, the panel decided a *res nova* issue in Louisiana: it held the phrase "adoptive parents" in § 40:76 includes two unmarried men jointly constituted "fathers" by another state. *Id.* at 26-35. Finding § 40:76 "clear and unambiguous," the panel refused to certify its interpretation to the Louisiana Supreme Court. *Id.* at 24-25.

ARGUMENT

The panel is only the second nationwide to construe the Full Faith and Credit Clause as binding one state's vital records to the exact terms of another state's

same-sex adoption. *See Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007). The panel's ruling warrants *en banc* review because: (1) it undermines forum states' latitude to administer their own enforcement mechanisms, in conflict with longstanding Supreme Court precedent and especially with *Hood v. McGehee*, 237 U.S. 611 (1915); (2) it independently examines § 40:76 without deferring to the Registrar's consistent application and without any direct guidance from Louisiana courts, crafting a *res nova* interpretation that forces the Registrar to violate the Louisiana Constitution; and (3) it violates the Eleventh Amendment by ordering the Registrar to conform her conduct to *state* law.

I. THE PANEL FAILED TO RESOLVE THE CRITICAL ENFORCEMENT ISSUE.

Contrary to the panel's analysis, the Registrar agreed that Louisiana owes full faith and credit to sister-state adoptions. *See* Blue Br. 26-27, 46-47; Gray Br. 23. She addressed a different issue. The Registrar explained that laws like § 40:76 are, at best, "enforcement measures" that "do not travel with a judgment as preclusive effects do," and therefore "remain subject to the evenhanded control of forum law." *Baker*, 522 U.S. at 235 (citing *McElmoyle*, 38 U.S. at 325); *see* Blue Br. 27-33; Gray Br. 8-16. The Registrar made alternative arguments *only* because it was unclear whether the district court accepted this principle and, even then, she contested the decree's effects *only on Louisiana public records*. Blue Br. 44-45; Gray Br. 24. The panel, however, treated her alternative arguments as primary,

thus engaging in an unnecessary disquisition on full faith and credit and creating the false impression that Louisiana denies credit to adoptions. Slip op. at 12-24.

The enforcement principle marks the furthest reaches of full faith and credit. *See* Blue Br. 27-30; Gray Br. 8-11. As Justice Story explained, the Constitution “did not make the judgments of other States domestic judgments to all intents and purposes.” JOSEPH STORY, COMMENTARY ON THE CONFLICT OF LAWS § 609 (7th ed. 1872) (quoted in *Thompson v. Whitman*, 85 U.S. 457, 462-63 (1873)). Consequently, a sister-state judgment “can only be executed in the latter [State] as its laws may permit.” *McElmoyle*, 38 U.S. at 325. Whereas a judgment “conclusively adjudicate[s] the rights and obligations running between the parties,” *Baker*, 522 U.S. at 235 (emphasis in original), it “does not carry with it into another state the efficacy of a judgment upon property or persons, to be enforced by execution.” *Fall v. Eastin*, 215 U.S. 1, 12 (1909). Thus, the question of judgment enforcement—raised by laws like § 40:76—presents one of “many situations in which the *res judicata* effects of a state-court judgment are properly controlled by the domestic rules of a second state.” 18B WRIGHT, MILLER, & COOPER FED. PRAC. & PROC. 2d § 4467 at 14 (2002).

The panel, however, avoided that question. It asserted the Registrar had no “direct authority for her bald assertion” that § 40:76 is an enforcement mechanism. Slip op. at 25. Not so. The only other circuit decision on point, *Finstuen*,

explicitly treated Oklahoma’s birth certificate law as an enforcement mechanism. Gray Br. 11 (citing 496 F.3d at 1154). The Registrar also analogized § 40:76 to recognized enforcement measures—such as title transfer provisions, statutes of limitation, sequestration measures, and land devolution laws.⁶ Like those laws, supplementary birth certificate provisions determine how sister-state judgments are translated into the forum’s legal architecture. Blue Br. 30-33; Gray Br. 8-16. They are “collateral” to a judgment’s preclusive effects, and so “may move free from the law of the judgment state.” See WRIGHT, MILLER & COOPER, *supra*, § 4467 at 19.

The panel also failed to account for Justice Holmes’s opinion in *Hood v. McGehee*. Blue Br. 29-30; Gray Br. 14. Although Alabama excluded children adopted in sister states from inheritance, Holmes wrote that Alabama did not “fail[] to give full credit to the [Louisiana] adoption of the plaintiffs.” 237 U.S. at 615. Alabama “d[id] not deny the effective operation of the Louisiana [adoption] proceedings,” Holmes explained, but said only that “whatever may be the status of the plaintiffs, whatever their relation to the deceased ... the law does not devolve his estate upon them.” *Id.* *Hood* is still valid,⁷ but the panel disregarded it. *Cf.* slip op. at 15 n. 34 (citing *Hood* for a different proposition). Just as Alabama inheritance did not flow automatically from a Louisiana adoption in *Hood*, neither

⁶ See Blue Br. 30-33 (relying on *Fall*, 215 U.S. at 12; *McElmoyle*, 38 U.S. at 327; *Lynde v. Lynde*, 181 U.S. 183, 187 (1901); and *Hood*, 237 U.S. at 615).

⁷ See, e.g., *Witowski v. Roosevelt*, 199 P.3d 1072, 1078 (Wyo. 2009); *In re Nixon*, 763 N.W.2d 404, 409-10 (Neb. 2009); *Finstuen*, 496 F.3d at 1156 & n.14 (all discussing *Hood*).

should a lock-step adjustment of Louisiana records flow from the New York decree.

Ultimately, the panel found it “doubtful” that laws like § 40:76 were enforcement mechanisms. But virtually every state has such laws,⁸ and states need to understand how they interact with full faith and credit—particularly where they facially limit recognition of sister-state adoptions.⁹ Conversely, states like New York that create novel family structures need to know how their status determinations affect other states’ public records. By avoiding the enforcement question, the panel neglected the pivotal issue in this case.

The *en banc* Court should confirm that supplementary birth certificate laws like § 40:76 are wholly independent from states’ full-faith-and-credit obligations, or, at best, are enforcement mechanisms that simply require evenhanded application. Only one other circuit court has addressed this question, *see Finstuen*, 496 F.3d at 1153-54, and the Supreme Court has never squarely examined it (although it has

⁸ For instance, the Model States Vital Statistics Regulations contain provisions on supplementary birth certificates that have been adopted by numerous states. *See* MODEL STATE VITAL STATISTICS ACT § 12 (Nat’l Ctr. for Health Statistics 1992), *available at*: <http://www.cdc.gov/nchs/data/misc/mvsact92b.pdf> (last visited March 2, 2010); *see also In re Heilig*, 816 A.2d 68, 82 (Md. 2003) (discussing model act).

⁹ *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 192.008(a) (2005) (requiring a “supplementary birth certificate ... must be in the names of the adoptive parents, one of whom must be a female, named as the mother, and the other of whom must be a male, named as the father”); *see also* ARIZ. REV. STAT. ANN. §§ 36-336(A)(1); 36-337(A)(1) (2004) (providing form to amend birth certificate must include “[i]nformation ... about the adoptive father and adoptive mother”); TENN. CODE ANN. § 68-3-312(f) (1977) (requiring new birth certificate, but only if out-of-state adoption is “not in conflict with Tennessee adoption laws”); *see also* Gray Br. 15-16.

regularly confirmed the validity of enforcement mechanisms, *see Baker*, 522 U.S. at 235-36, 239). This question, vitally important to interstate comity, merits *en banc* review.

II. THE PANEL UNNECESSARILY INTRUDED INTO LOUISIANA LAW.

The panel avoided the enforcement question by purportedly finding that the Registrar does not apply § 40:76 “in an ‘evenhanded’ manner.” Slip op. at 25-26; *see Baker*, 522 U.S. at 224 (explaining that “enforcement measures ... remain subject to the evenhanded control of forum law”). But the panel did not assess the Registrar’s “evenhandedness” and did not even define what the term means. Rather, it pored over Louisiana law and concluded, independently, that the Registrar had misread it. The panel exceeded its purview and created serious conflicts within Louisiana law.

How the Registrar applies § 40:76 was undisputed. She reads the section to authorize a new certificate only in the names of couples who could have jointly adopted in Louisiana—hence they must be *married*. ROA 373-75, 390-95, 403, 426-27. This is not novel: Louisiana does by construction what Tennessee and Florida, for instance, do by explicit command.¹⁰ The Registrar thus treats persons adopting Louisiana-born children in other states no better or worse than persons

¹⁰ *See, e.g.*, TENN. CODE ANN. § 68-3-312(f) (1977) (requiring new birth certificate, but only if out-of-state adoption is “not in conflict with Tennessee adoption laws”); FLA. STAT. ANN. § 382.016(1)(d)(2) (2005) (disallowing addition of adoptive father to birth certificate if “the father would not be eligible to adopt under the laws of this state”).

adopting in-state. There was no evidence that the Registrar discriminates according to whether unmarried couples are same-sex or opposite-sex. The Registrar's interpretation has never been questioned by the Department Secretary, the Governor, or the Attorney General.

Throughout, the Registrar has defended her application of § 40:76, but only because it has never been clear what constraints full faith and credit places on her. Blue Br. 33-40. Her basic point, however, was that federal courts “should strongly defer to [her] consistent construction of 40:76,” since, as the Louisiana Supreme Court has long held, “[t]he practical construction given to a doubtful statute by the public officers of the state ... is perhaps decisive in a case of doubt.” Gray Br. 18-19 (quoting *State ex rel. Guillot v. Central Bank & Trust Co.*, 79 So. 857, 859 (La. 1918)).¹¹

The panel's authority stopped with the undisputed evidence of the Registrar's application of § 40:76: she consistently distinguishes between *married* and *unmarried* couples. Why that is not “evenhanded” under *Baker*, the panel did not explain.¹² Instead, the panel independently canvassed Louisiana administrative and constitutional law, concluding—not that the Registrar was not

¹¹ See also Blue Br. 40 (asserting Registrar's “prerogative ... of determining how the New York decree is enforced” in Louisiana vital records).

¹² Whether the panel understood “evenhandedness” to include an equal protection component, it did not say. Appellees did bring an equal protection challenge to the Registrar's application of § 40:76, but neither the district court nor the panel addressed it. See slip op. at 3-4, 36 n.76.

“evenhanded”—but that the panel *disagreed* with her interpretation *as a matter of state law*. Slip op. at 27-33 (interpreting § 40:76(A) under non-delegation principles); *id.* at 33-35 (interpreting “adoptive parents” in § 40:76(C)). That state-law excursus exceeded the terms of the panel’s own analysis. *See id.* at 26.¹³

The panel’s construction of Louisiana law drew on no direct authority. Most notably, it reasoned that the phrase “adoptive parents” in § 40:76(C) “unambiguously” includes two men constituted “fathers” by another state. Slip op. at 33-35. For that proposition, the panel relied only on a dictionary definition of “parent” as “father or mother.” Slip op. at 34 (citing WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1989 ed.)).¹⁴ But one can accept the singular *parent* as meaning “father or mother,” without also accepting that the plural *parents* can mean “father and father.” More, surely, is required to establish that as the “usual and generally understood” meaning of “parents” in Louisiana. *See* slip op. at 34 (quoting *Crescienne v. La. State Police Retirement*

¹³ Incidentally, the Registrar rejects the panel’s analysis on the merits. For example, the panel concluded that the Registrar’s interpretation would violate non-delegation because it “allows her *unfettered discretion* to issue or not issue a birth certificate.” Slip op. at 30 (emphasis added). But the Registrar never claimed any such unstructured discretion. Rather, she merely argued that the statute allowed her to determine whether out-of-state applicants would qualify as “adoptive parents” under Louisiana law. *See, e.g.,* ROA 390-95, 426-27. The panel’s own authorities validate that *actual* exercise of discretion. As the Louisiana Supreme Court explained, “[t]he Legislature may make the operation or application of a statute contingent upon the existence of certain conditions, and may delegate the power to determine the existence of such facts and carry out the terms of the statute.” Slip op. at 29 (quoting *Schwegmann Bros. Giant Super Markets v. McCrory*, 112 So.2d 606, 613 (La. 1959)).

¹⁴ The panel remarked that “adoptive parents” was not “expressly defined in the Louisiana Civil Code, the State’s statutes, or the case law.” Slip op. at 28.

Bd., 455 So.2d 1362, 1364 (La. 1984)). Indeed, the panel might have drawn a contrary inference from the legal definition of “parent” as “commonly includ[ing] ... either the adoptive father or the adoptive mother of a child.” BLACK’S LAW DICTIONARY 1222 (9th ed. 2009).

Regardless, the panel’s construction violates the Louisiana Constitution, which provides:

No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.

LA. CONST. art. XII, § 15 (2004). That provision forbids a state official from recognizing not only same-sex marriage *per se*, but also its “rights, civil effects, and legal incidents.” *Forum for Equality PAC v. McKeithen*, 2004-2477, p. 31 (La. 1/19/05); 893 So.2d 715, 736. It is no answer that Appellees were not married: New York allowed them joint parental rights only by equating their relationship with marriage. *See, e.g., Matter of Jacob*, 660 N.E.2d 397 (N.Y. 1995) (allowing adoption by unmarried partners of children’s biological parents); Blue Br. 1-3.

The *en banc* Court should review whether the Full Faith and Credit Clause authorizes a independent examination of Louisiana law, or whether the Clause is satisfied, as *Baker* suggests, by the Registrar’s undisputedly “evenhanded” application of § 40:76. *See* 522 U.S. at 224. *If* examination of § 40:76 is

necessary—a provision the panel admitted had never been interpreted by any Louisiana court, slip op. at 26—the *en banc* Court should certify the question to the Louisiana Supreme Court. Blue Br. 40-44.¹⁵ Either way, the *state* law question of what § 40:76 means cannot substitute for the *federal* question of whether it is independent from Louisiana’s constitutional obligations.

III. THE PANEL VIOLATED THE ELEVENTH AMENDMENT.

The more fundamental problem with the panel’s foray into Louisiana law, however, is that it violates the Eleventh Amendment. The panel’s independent construction of Louisiana law—and its failure to connect that construction to any *federal* obligation—leave only one intelligible basis for the panel’s order: its conclusion that the Registrar violated *state* law. The Eleventh Amendment bars resolution of the case on that basis.

A federal court cannot order a state official to follow state law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). To be sure, it may enjoin a state official to vindicate *federal* rights. *Ex parte Young*, 209 U.S. 123 (1908).¹⁶ But *Young* does not reach a state official’s alleged violation of state law:

¹⁵ For instance, in *Davenport v. Little-Bowser*, 611 S.E.2d 366 (Va. 2005), the Virginia Supreme Court disposed of a similar issue purely on state law grounds, thus avoiding federal constitutional questions. Unlike the Virginia Supreme Court, however, this Court has no independent authority to interpret state law.

¹⁶ *See also, e.g., Cox v. City of Dallas*, 256 F.3d 281, 307 (5th Cir. 2001) (explaining that *Young* “is premised on the concept that a state cannot authorize its officials to violate the Constitution and laws of the United States”).

[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

Pennhurst, 465 U.S. at 106 (emphasis added).¹⁷ Federal courts simply “[do] not have jurisdiction to order state officials to conform their conduct to state law.” *Saahir v. Estelle*, 47 F.3d 758, 761 (5th Cir. 1995).

The panel’s opinion belies any notion that interpreting state law was necessary to vindicate federal rights under full faith and credit. The *only* federal justification the panel identified for construing § 40:76 was whether the Registrar’s application was “evenhanded.” Slip op. at 26. But the panel did not answer that question; instead, it construed state law as an original matter. The two questions are obviously different. The Full Faith and Credit Clause empowers a federal court to determine whether state enforcement is “evenhanded,” *Baker*, 522 U.S. at 224, but not to second-guess a state official’s interpretation of her own state-law duties. That is particularly so here, where it is undisputed that the Registrar consistently applies § 40:76 to distinguish between married and unmarried couples. The panel obviously thought her construction violates *state* law, but it did not explain why it violates *federal* law.

Ultimately, then, the panel “instruct[ed] [the Registrar] on how to conform [her]

¹⁷ See also generally 13 WRIGHT, MILLER, COOPER & FREER FED. PRAC. & PROC. 3d § 3524.3 at 388-89 (2008) (discussing *Young* and *Pennhurst*).

conduct to state law.” *Pennhurst*, 465 U.S. at 106. That conclusion raises, for the first time, an Eleventh Amendment violation under *Pennhurst*.¹⁸ Up to now, the federal question posed under *Ex parte Young* was simply whether the Registrar’s application of § 40:76 denied the New York decree full faith and credit. The Registrar argued that: (1) § 40:76 is, at best, an enforcement mechanism, (2) therefore, her duty under it was a state law question only, and (3) therefore, the terms of a new certificate could “move free from the law of the judgment state.” Blue Br. 33 (quoting WRIGHT, MILLER & COOPER § 4467 at 19). That is a federal question, but the panel did not answer it and instead took a decisional path that violated the Eleventh Amendment.

By avoiding the federal questions posed in this case, the panel deprived itself of any jurisdictional foundation for its order. That defect *alone* merits *en banc* consideration because of “the overriding importance of the Eleventh Amendment in limiting the power of the federal courts over the sovereignty of the several

¹⁸ The State may raise the Eleventh Amendment at any stage of the proceedings. *See, e.g., Neinast v. Texas*, 217 F.3d 275, 279 & n.18 (5th Cir. 2000). The Registrar has not waived the defense for a number of reasons. Principally, *Pennhurst* became directly and concretely applicable only with the publication of the panel opinion. Moreover, the Registrar’s prior litigation conduct did not voluntarily invoke federal jurisdiction. *Cf. Lapidus v. Bd. of Regents*, 535 U.S. 613, 624 (2002) (holding that State may waive Eleventh Amendment by voluntarily invoking federal jurisdiction through removal). In fact, the Registrar raised an Eleventh Amendment defense below but the district court rejected it, ROA 35-37, 79-83, because it deemed the plaintiffs’ lawsuit a straightforward *Young* action—which indeed it seemed to be until publication of the panel decision. Finally, neither the Registrar nor the Attorney General have the authority to waive Louisiana’s Eleventh Amendment immunity. *See, e.g., Magnolia Venture Capital Corp. v. Prudential Securities, Inc.*, 151 F.3d 439, 444 (5th Cir. 1998) (explaining that the Louisiana Department of Transportation “had no clearly expressed authority to waive Eleventh Amendment immunity” by entering into a consent judgment).

states.” *Okpalobi v. Foster*, 244 F.3d 405, 411 (5th Cir. 2001) (en banc). The *en banc* Court should confront the *federal* questions the panel avoided—*i.e.*, whether § 40:76 is independent of Louisiana’s constitutional obligations to the New York decree and, if so, whether Louisiana may decline to enforce the decree’s terms that are inconsistent with Louisiana’s vital records machinery. If the longstanding enforcement principle is to have any meaning, the answer must be yes.

CONCLUSION

The Court should grant the petition for rehearing *en banc*, vacate the panel’s decision, and uphold the Registrar’s application of § 40:76 as valid under the Full Faith and Credit Clause.

Respectfully submitted,

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I hereby certify that on March 4, 2010, this Petition for Rehearing En Banc was electronically transmitted to the Clerk of Court using the Court's ECF filing system. Based on the records currently on file, the ECF system will transmit notice of electronic filing and an electronic copy of the Petition to opposing counsel:

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