No. 09-30036

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,

vs.

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 U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NO. 07-6541-JCZ, HON. JAY C. ZAINEY, U.S. DISTRICT JUDGE

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF DEFENDANT-APPELLANT IN SUPPORT OF PETITION FOR REHEARING

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

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Dated: March 4, 2010

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF"), a nonprofit Illinois corporation, seeks leave to file this brief by motion. As its motion explains, Eagle Forum ELDF consistently defends federalism and supports the state and local right to protect their communities. For these reasons, Eagle Forum ELDF has a direct and vital interest in the issues before this Court.

SUMMARY OF ARGUMENT

On the merits, Louisiana complies with the Full Faith and Credit Clause and Privileges and Immunities Clause by evenhandedly denying revised birth certificates to unmarried adoptive couples, wherever their adoption took place (Section I). But the court should not reach the merits because it lacks jurisdiction to order Defendant-Appellant Smith (the "Registrar") to comply with state law, both because the Eleventh Amendment provides Louisiana immunity from federal suit (Section II) and because the Court cannot redress plaintiffs' injuries (Section III).

ARGUMENT

I. PLAINTIFFS' NEW YORK ADOPTION CANNOT COMPEL REGISTRAR TO ISSUE A REVISED BIRTH CERTIFICATE

The parties dispute whether the New York decree's application

here falls under the Full Faith and Credit Clause's "exacting" analysis versus the lesser "evenhandedness" analysis that applies to mere "enforcement measures." Slip Op. at 22; *Baker v. General Motors Corp.,* 522 U.S. 222, 235 (1998) ("[e]nforcement measures … remain subject to the evenhanded control of forum law"). *Amicus* Eagle Forum ELDF respectfully submits that the answer is *neither*. Instead, Louisiana provides an opportunity for married couples (but not unmarried couples) to obtain a revised birth certificate as a *privilege. Compare* LA. REV. STAT. ANN. §40:76 (out-of-state adoptions) *with id.* §40:79 (in-state adoptions). Nothing gives these plaintiffs greater privileges than Louisiana affords unmarried couples who adopt within Louisiana.

Full Faith and Credit provides a "constitutional obligation to enforce the rights and duties validly created under the laws of other states." *Howlett v. Rose,* 496 U.S. 356, 382 (1990) (*quoting Hughes v. Fetter,* 341 U.S. 609, 611 (1951)). That begs the question of what "rights and duties" the New York adoption decree created. Out-of-state adversarial proceedings clearly can provide issue preclusion and claim preclusion. *Baker,* 522 U.S. at 233 & n.5. But issue preclusion applies only to issues "joined, expressly litigated, and determined in the [New

York] proceeding," *Baker,* 522 U.S. at 237-38, so out-of-state settlements (like plaintiffs' adoption decree) provide no issue preclusion.

Because the New York decree did not purport to hold the plaintiffs entitled to a revised Louisiana birth certificate, *amicus* Eagle Forum ELDF respectfully submits that the plaintiffs have no rights under the Full Faith and Credit Clause to a revised birth certificate.[1] Although the Full Faith and Credit Clause and the Privileges and Immunities Clause are related in their aims to enhance federalism, *Toomer v. Witsell,* 334 U.S. 385, 395 (1948), the plaintiffs' rights, if any, flow from the Privileges and Immunities Clause for any benefits not *directly* tied either to the adoption decree itself or to enforcing that decree.

Insofar as Louisiana treats its in-state adoptions on an equal basis with out-of-state adoptions, the plaintiffs cannot assert a denial of any privileges that flow in Louisiana, under Louisiana law, from their out-

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[1] Of course, if New York had attempted to hold the plaintiffs entitled to a revised Louisiana birth certificate, New York clearly would have exceeded its jurisdiction. *See Baker,* 522 U.S. at 241 ("a Michigan decree cannot command obedience elsewhere on a matter the Michigan court lacks authority to resolve"); *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 805-06 (1985) ("judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no *res judicata* effect as to that party").

of-state adoption. *Bank of Augusta v. Earle,* 38 U.S. (13 Pet.) 519, 570 (1839) ("it cannot be doubted that citizens of Georgia and Pennsylvania are not entitled to more privileges and immunities in Alabama than that state vouchsafes to its own citizens"). Because the New York decree did not address revised birth certificates and because Louisiana does not discriminate between in-state and out-of-state adoptions, the plaintiffs cannot assert an "evenhandedness" violation of either the Full Faith and Credit Clause or the Privileges and Immunities Clause.

II. ELEVENTH AMENDMENT BARS PLAINTIFFS' CLAIMS

Under the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI. Sovereign immunity arises also from the Constitution's structure and antedates the Eleventh Amendment, *Alden v. Maine,* 527 U.S. 706, 728-29 (1999), applying equally to suits by a states' own citizens. *Hans v. Louisiana,* 134 U.S. 1 (1890). "When a state agency is the named defendant, the Eleventh Amendment bars suits for both money damages and injunctive relief unless the state has

waived its immunity." *Cozzo v. Tangipahoa Parish Council--President Government,* 279 F.3d 273, 280-81 (5th Cir. 2002) (*citing Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 144 (1993)). Because the panel faults a state officer for violating state law, the panel exceeded its jurisdiction under the Eleventh Amendment.[2]

To determine whether a state has waived its immunity, "the Supreme Court has directed that we look to the general policy of the state as expressed in its Constitution, statutes and decisions." *Magnolia Venture Capital Corp. v. Prudential Sec., Inc.,* 151 F.3d 439, 444 (5th Cir. 1998) (interior quotations omitted); *Lor, Inc. v. Cowley,* 28 F.3d 19, 22 n.5 (5th Cir. 1994). Louisiana law provides that "[n]o suit against the state or a state agency or political subdivision shall be instituted in any

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[2] The panel claims that this action "arises under" federal law because the Registrar "refus[es] to give full faith and credit to the out-of-state adoption decree" by "den[ying plaintiffs] the rights afforded by Louisiana's out-of-state adoption certificating statute." Slip Op. at 12 n.20; *id.* at 20 n.43 (plaintiffs "only seek[] to be afforded the rights under Louisiana law to which the judgment entitles them"). The panel errs on both the linkage between the New York judgment and Louisiana law and the meaning of Louisiana law, and each error is independently fatal. *See* note 1 and accompanying text, *supra* (no linkage between New York decree and Section 40:76); Pet. at 8-12 (Section 40:76 does not provide these plaintiffs the right to a revised birth certificate).

court other than a Louisiana state court." LA. REV. STAT. ANN. §13:5106(A). Based on this provision, this Court has frequently and unequivocally stated that Louisiana has not legislatively waived its Eleventh Amendment immunity. *See, e.g., Delahoussaye v. City of New Iberia,* 937 F.2d 144, 147 (5th Cir. 1991); *Fireman's Fund Ins. Co. v. Dep't of Transp. & Development, State of La.,* 792 F.2d 1373, 1376 (5th Cir. 1986); *Cozzo,* 279 F.3d at 281. Significantly, "a state can create a limited waiver of this immunity by consenting to be sued *in its own state courts* without waiving its Eleventh Amendment immunity from suit *in federal courts*." *In re Allied-Signal, Inc.,* 919 F.2d 277, 281 n.4 (5th Cir. 1990) (*citing Port Authority Trans-Hudson Corp. v. Feeney,* 110 S.Ct. 1868, 1872 (1990)) (emphasis added). As the panel notes, Slip Op. at 9-10, the plaintiffs could sue in state court.

A. Louisiana Properly Raised Eleventh Amendment

"[F]ederal court[s] may ignore sovereign immunity until the state asserts it," *Frazier v. Pioneer Americas LLC,* 455 F.3d 542, 546-47 (5th Cir. 2006) (*citing Wisconsin Dep't of Corrections v. Schacht,* 524 U.S. 381, 389 (1998)). Once a state raises it, however, "eleventh amendment immunity is a jurisdictional issue that cannot be ignored, for a

meritorious claim to that immunity deprives the court of subject matter jurisdiction of the action." *McDonald v. Bd. of Miss. Levee Comm'rs,* 832 F.2d 901, 906 (5th Cir. 1987) (internal quotations and citation omitted); *Edelman v. Jordan,* 415 U.S. 651, 678 (1974) (States may raise sovereign immunity at any time). As Louisiana explains, Pet. at 14 n.18, this sovereign immunity issue arose when the appellate panel sidestepped the proffered federal claims and ruled on state law.

But even if Louisiana could have asserted *Pennhurst* earlier, that would not waive sovereign immunity. As explained, courts analyze immunity and waiver under state law. Unlike some states, *Sosna v. Iowa,* 419 U.S. 393, 396 n.2 (1975), Louisiana does not authorize either state officers or their attorneys to waive Louisiana's immunity. *Dagnall v. Gegenheimer,* 645 F.2d 2, 3-4 (5th Cir. 1981); *Freimanis v. Sea-Land Serv., Inc.,* 654 F.2d 1155, 1160 (5th Cir. 1981); *Magnolia Venture Capital,* 151 F.3d at 444. Consequently, no "waiver" could be premised on Louisiana's raising the defense for the first time at this stage: "Louisiana law does not clearly give attorneys for the State authority to waive its eleventh amendment immunity.... This means the attorney for the Department had no clearly expressed authority to waive the

eleventh amendment right of the State of Louisiana not to be sued … in a federal court." *Dagnall,* 645 F.2d at 3-4; *Freimanis,* 654 F.2d at 1160 (because "Louisiana has clearly expressed its intention to preserve its immunity," an "attorney for [a Louisiana] Department had no clearly expressed authority to waive Eleventh Amendment immunity").

B. Eleventh Amendment Bars Relief in Federal Court

Since Louisiana has validly raised the Eleventh Amendment, that defense bars this Court's jurisdiction under the two means of enforcing the plaintiffs' purported rights in federal court. "[T]wo [post-Civil War] statutes, together, after 1908, with the decision in *Ex parte Young,* established the modern framework for federal protection of constitutional rights from state interference." *Perez v. Ledesma,* 401 U.S. 82, 106-07 (1971). First, the Civil Rights Act of 1871, 17 Stat. 13, provided what now are 42 U.S.C. §1983 and 28 U.S.C. §1343(3). *Id.* Second, the Judiciary Act of 1875, 18 Stat. 470, provided what now is 28 U.S.C. §1331. *Id.* Neither prong in this two-pronged framework allows suing state officers in federal court for violations of state law.

On the other hand, *both prongs* are available in state courts. First, §1983 suits are available under the doctrine of concurrent jurisdiction.

Haywood v. Drown, 129 S.Ct. 2108, 2114 (2009) ("state courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law"); *Martinez v. California,* 444 U.S. 277, 284 (1980). Second, *Ex parte Young* officer suits are available because Louisiana courts recognize the *Ex parte Young* doctrine. *See State ex rel. McEnery v. Nicholls,* 42 La.Ann. 209, 223-24, 7 So. 738, 743-44 (La.1890); *Di Vincenti Bros., Inc. v. Livingston Parish Sch. Bd.,* 355 So.2d 1, 5 (La. App. 1977) (*en banc*); *General Oil Co. v. Crain,* 209 U.S. 211, 226-28 (1908). Although the plaintiffs cannot press their claims under Section 40:76 in federal court, nothing stops their resorting to state court.

1. *Ex Parte Young* Suits Cannot Enforce State Law

Ex parte Young, 209 U.S. 123 (1908), is a narrow jurisdictional exception to sovereign immunity to allow federal suit to enjoin ongoing violation of *federal* law. As Louisiana explains, Pet. at 12-14, *Young* cannot circumvent state sovereign immunity to compel compliance with state law: "This need to reconcile competing interests is wholly absent, however, when a plaintiff alleges that a state official has violated *state* law.... On the contrary, it 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." *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 106 (1984) (emphasis in original); *Karpovs v. State of Miss.,* 663 F.2d 640, 643-44 (5th Cir. 1981) ("eleventh amendment applies unless a federally created right is at issue"); *Cuesnongle v. Ramos,* 835 F.2d 1486, 1497 (1st Cir. 1987) ("federal cause of action will be grounded exclusively on federal law, even where state law causes of action might be dispositive"); *Treleven v. Univ. of Minn.,* 73 F.3d 816, 819 n.4 (8th Cir. 1996) ("*Young* [exception] does not extend to lawsuits seeking to enjoin state officers from violating state law"). *Ex parte Young* cannot support federal relief for state-law violations.

2. Section 1983 Suits Cannot Enforce State Law

"There are three elements to establish liability through a Section 1983 action. There must be (1) a deprivation of a right secured by federal law (2) that occurred under color of state law, and (3) was caused by a state actor." *Victoria W. v. Larpenter,* 369 F.3d 475, 482 (5th Cir. 2004) (citation omitted). The panel fails the first element, focusing on Louisiana's purported violation of *state* law. "In determining whether we have jurisdiction of claims based on section 1983, … we are

reminded by *Baker v. McCollan,* 443 U.S. 137, 140 (1979), first to determine whether the claimant has been deprived of a right secured by the Constitution and laws of the United States." *Gamza v. Aguirre,* 619 F.2d 449, 452 (5th Cir. 1980); *Young v. City of Killeen,* 775 F.2d 1349, 1352 (5th Cir. 1985). With no federal violation, there is no §1983 action.

Quite simply, a "court err[s] in plaintiff's favor" when it "focus[es] exclusively on whether defendants breached state law duties." *Williams v. Kelley,* 624 F.2d 695, 697 (5th Cir. 1980); *cf. Braden v. Texas A&M Univ. Sys.,* 636 F.2d 90, 93 (5th Cir. 1981) ("Section 1983 … does not make a federal case out of every breach of contract by a state agency"). Instead, courts must examine "defendants' conduct independent of its lawfulness or unlawfulness at state law." *Williams,* 624 F.2d at 697. The panel plainly did not examine the Registrar's conduct independent of state law, which would make the panel wrong on the §1983 merits if the Eleventh Amendment did not deny this Court jurisdiction.

Numerous other circuits recognize that §1983 does not authorize federal courts to order compliance with state law. *See, e.g., Huron Valley Hosp., Inc. v. City of Pontiac,* 887 F.2d 710, 714 (6th Cir. 1989) ("Section 1983 … is thus limited to deprivations of *federal* statutory and

constitutional rights" and "does not cover official conduct that allegedly violates *state* law) (emphasis in original); *Wideman v. Shallowford Community Hosp., Inc.,* 826 F.2d 1030, 1032 (11th Cir. 1987); *Washington v. District of Columbia,* 802 F.2d 1478, 1480 (D.C. Cir. 1986). Even if the *en banc* Court would overrule *Larpenter, Gamza, City of Killeen, Williams,* and *Braden* to allow §1983 suits with no federal violation, the Court would need to consider the resulting circuit split.

III. PLAINTIFFS LACK STANDING

Constitutional standing involves a tripartite test of a cognizable injury to the plaintiff, caused by the defendant, and redressable by the court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). Moreover, standing is jurisdictional, and "every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it." *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990). Without jurisdiction, federal courts "have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 95 (1998).

The plaintiffs alleged three injuries: "(1) difficulties encountered in enrolling Infant J in Smith's health insurance plan; (2) problems encountered with airline personnel who suspected that the Adoptive Parents were kidnappers of Infant J; and (3) denial of the 'emotional satisfaction' of 'seeing both of their names on the birth certificate.'" Slip Op. at 8. According to the panel, the Registrar's failure to issue a birth certificate – notwithstanding that Louisiana law allegedly requires one – constitutes its own constitutionally cognizable injury in fact. *Id.* The panel analyzed only the last point, because it viewed standing to exist whenever defendants invade a right created by state or federal law. Slip Op. at 9 (*citing Warth v. Seldin,* 422 U.S. 490, 500 (1975)).

Assuming *arguendo* that Section 40:76 creates a state-law right in these plaintiffs, Louisiana's sovereign immunity under the Eleventh Amendment denies this Court the subject-matter jurisdiction to order compliance with Section 40:76. *See* Section II, *supra.* For the reasons stated in Louisiana's petition and its prior briefing, Eagle Forum ELDF does not concede that Section 40:76 creates any rights in these plaintiffs, but the point here is that this Court cannot redress the plaintiffs' claimed injuries *even if the plaintiffs are right.*

To the extent that plaintiffs assert the denial of a birth certificate as their injury, this Court cannot redress the injury because this Court lacks jurisdiction for injunctive relief to compel Louisiana to comply with Louisiana law.[3] Indeed, if this Court refuses to address Louisiana's sovereign immunity, any resulting court order would not redress the plaintiffs' injuries because Louisiana could simply refuse to comply and defend itself in a collateral proceeding on jurisdictional grounds. *U.S., v. Troup,* 821 F.2d 194, 197 (3rd Cir. 1987) ("lack of subject matter jurisdiction goes to the very power of a court to hear a controversy; ... [the] earlier case can be accorded no weight either as precedent or as law of the case") (alterations in original); *Orff v. U.S.,* 358 F.3d 1137, 1149-50 (9th Cir. 2004) (same). If it lacks jurisdiction to compel a new birth certificate, this Court cannot redress plaintiffs' asserted injury.[4]

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[3] Because "standing is not dispensed in gross," *Lewis v. Casey,* 518 U.S. 343, 358 n.6 (1996), plaintiffs' Full Faith and Credit Clause claims cannot rely on injuries alleged under the Equal Protection Clause.

[4] Even if federal courts could order new birth certificates, plaintiffs did not establish standing by evidence (as distinct from allegations and conjecture), which does not support merits relief. *Summers v. Earth Island Institute,* 129 S.Ct. 1142, 1151 (2009); *Renne v. Geary,* 501 U.S. 312, 316 (1991) (courts "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record").

However harsh it may seem to deny relief on plaintiffs' purported state-law rights, it is inherent in sovereignty for an unconsented plaintiff to have no basis on which to sue. *Molzof v. U.S.,* 502 U.S. 301, 304-05 (1992) (prior to enactment of the Federal Tort Claims Act, "sovereign immunity … prevented those injured by the negligent acts of federal employees from obtaining redress through lawsuits"). Of course, if the plaintiffs are correct about Louisiana law, they will succeed in Louisiana court. Even if they are not correct about Louisiana law, they retain the right to petition the Louisiana legislature to redress their injury. *Id.* But neither state-law rights nor state-law avenues for relief provide a basis for *this Court* to redress plaintiffs' state-law injuries.

CONCLUSION

For the foregoing reasons and those stated in Louisiana's petition, the petition for rehearing *en banc* should be granted.

Dated: March 4, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2010, I electronically filed the foregoing document with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit via the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

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

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

This brief contains fifteen pages, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

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Dated: March 4, 2010

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