

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**

Lawrence J. Joseph, D.C. Bar #464777  
1250 Connecticut Ave, NW, Suite 200  
Washington, DC 20036  
Tel: 202-669-5135  
Fax: 202-318-2254

Counsel for *Amicus Curiae* Eagle Forum  
Education & Legal Defense Fund

## 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.

<b>Status</b>	<b>Name</b>	<b>Counsel</b>
Appellant	Darlene W. Smith	James D. “Buddy” Caldwell Kyle Duncan Carol L. Haynes
Appellees	Oren Adar Mickey Ray Smith	Kenneth D. Upton, Jr. Regina O. Matthews Spencer R. Doody
<i>Amici Curiae</i>	Family Research Council Louisiana Family Forum	Brian W. Raum Austin R. Nimocks Timothy J. Tracey
<i>Amicus Curiae</i>	Liberty Counsel	Mathew D. Staver Stephen M. Crampton Mary Elizabeth McAlister
<i>Amici Curiae</i>	American Civil Liberties Union American Civil Liberties Union of Louisiana	Katharine M. Schwartzmann
<i>Amicus Curiae</i>	Family Watch Int’l	William Duncan
<i>Amici Curiae</i>	Louisiana Conference of Catholic Bishops	Richard Arthur Bordelon Ralph Joseph Aucoin, Sr.
<i>Amicus Curiae</i>	Eagle Forum Education & Legal Defense Fund	Lawrence J. Joseph

Dated: March 4, 2010

Respectfully submitted,

/s/ Lawrence J. Joseph

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Lawrence J. Joseph, D.C. Bar #464777  
1250 Connecticut Ave, NW, Suite 200  
Washington, DC 20036  
Tel: 202-669-5135  
Fax: 202-318-2254

*Counsel for Amicus Curiae Eagle  
Forum Education & Legal Defense  
Fund*

## TABLE OF CONTENTS

Certificate of Interested Persons .....	i
Table of Contents.....	iii
Table of Authorities .....	iv
Identity, Interest and Authority to File .....	1
Summary of Argument.....	1
Argument .....	1
I. Plaintiffs’ New York Adoption Cannot Compel Registrar to Issue a Revised Birth Certificate.....	1
II. Eleventh Amendment Bars Plaintiffs’ Claims.....	4
A. Louisiana Properly Raised Eleventh Amendment .....	6
B. Eleventh Amendment Bars Relief in Federal Court.....	8
1. <i>Ex Parte Young</i> Suits Cannot Enforce State Law .....	9
2. Section 1983 Suits Cannot Enforce State Law .....	10
III. Plaintiffs Lack Standing .....	12
Conclusion.....	15

## TABLE OF AUTHORITIES

### CASES

<i>Adar v. Smith</i> , No. 09-30036 (5 <sup>th</sup> Cir. Feb. 18, 2010).....	2, 5, 6, 13
<i>Alden v. Maine</i> , 527 U.S. 706 (1999).....	4
<i>Baker v. General Motors Corp.</i> , 522 U.S. 222 (1998) .....	2-3
<i>Baker v. McCollan</i> , 443 U.S. 137 (1979).....	11
<i>Bank of Augusta v. Earle</i> , 38 U.S. (13 Pet.) 519 (1839) .....	4
<i>Braden v. Texas A&amp;M Univ. Sys.</i> , 636 F.2d 90 (5 <sup>th</sup> Cir. 1981) .....	11, 12
<i>Cozzo v. Tangipahoa Parish Council--President Government</i> , 279 F.3d 273 (5 <sup>th</sup> Cir. 2002) .....	4-5, 6
<i>Cuesnongle v. Ramos</i> , 835 F.2d 1486 (1 <sup>st</sup> Cir. 1987) .....	10
<i>Dagnall v. Gegenheimer</i> , 645 F.2d 2 (5 <sup>th</sup> Cir. 1981) .....	7, 8
<i>Delahoussaye v. City of New Iberia</i> , 937 F.2d 144 (5 <sup>th</sup> Cir. 1991) .....	6
<i>Di Vincenti Bros., Inc. v. Livingston Parish Sch. Bd.</i> , 355 So.2d 1 (La. App. 1977) ( <i>en banc</i> ) .....	9
<i>Edelman v. Jordan</i> , 415 U.S. 651 (1974).....	7
<i>Ex parte Young</i> , 209 U.S. 123 (1908) .....	8-10
<i>Fireman’s Fund Ins. Co. v. Dep’t of Transp. &amp; Development</i> , <i>State of La.</i> , 792 F.2d 1373 (5 <sup>th</sup> Cir. 1986) .....	6
<i>Frazier v. Pioneer Americas LLC</i> , 455 F.3d 542 (5 <sup>th</sup> Cir. 2006).....	6
<i>Freimanis v. Sea-Land Serv., Inc.</i> , 654 F.2d 1155 (5 <sup>th</sup> Cir. 1981) .....	7, 8
<i>FW/PBS, Inc. v. City of Dallas</i> , 493 U.S. 215 (1990) .....	12
<i>Gamza v. Aguirre</i> , 619 F.2d 449 (5 <sup>th</sup> Cir. 1980) .....	11, 12
<i>General Oil Co. v. Crain</i> , 209 U.S. 211 (1908) .....	9
<i>Hans v. Louisiana</i> , 134 U.S. 1 (1890) .....	4
<i>Haywood v. Drown</i> , 129 S.Ct. 2108 (2009) .....	9
<i>Howlett v. Rose</i> , 496 U.S. 356 (1990) .....	2
<i>Huron Valley Hosp., Inc. v. City of Pontiac</i> , 887 F.2d 710 (6 <sup>th</sup> Cir. 1989) .....	11-12

<i>In re Allied-Signal, Inc.</i> , 919 F.2d 277 (5 <sup>th</sup> Cir. 1990).....	6
<i>Karpovs v. State of Miss.</i> , 663 F.2d 640 (5 <sup>th</sup> Cir. 1981).....	10
<i>Lewis v. Casey</i> , 518 U.S. 343 (1996) .....	14
<i>Lor, Inc. v. Cowley</i> , 28 F.3d 19 (5 <sup>th</sup> Cir. 1994) .....	5
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992) .....	12
<i>Magnolia Venture Capital Corp. v. Prudential Sec., Inc.</i> , 151 F.3d 439 (5 <sup>th</sup> Cir. 1998).....	5, 7
<i>Martinez v. California</i> , 444 U.S. 277 (1980).....	9
<i>McDonald v. Bd. of Miss. Levee Comm’rs</i> , 832 F.2d 901 (5 <sup>th</sup> Cir. 1987) .....	6-7
<i>Molzof v. U.S.</i> , 502 U.S. 301 (1992) .....	15
<i>Orff v. U.S.</i> , 358 F.3d 1137 (9 <sup>th</sup> Cir. 2004).....	14
<i>Pennhurst State Sch. &amp; Hosp. v. Halderman</i> , 465 U.S. 89 (1984) .....	7, 10
<i>Perez v. Ledesma</i> , 401 U.S. 82 (1971) .....	8
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797 (1985).....	3
<i>Renne v. Geary</i> , 501 U.S. 312 (1991).....	14
<i>Sosna v. Iowa</i> , 419 U.S. 393 (1975).....	7
<i>State ex rel. McEnery v. Nicholls</i> , 42 La. Ann. 209, 7 So. 738 (La.1890) .....	9
<i>Steel Co. v. Citizens for a Better Env’t</i> , 523 U.S. 83 (1998).....	12
<i>Summers v. Earth Island Institute</i> , 129 S.Ct. 1142 (2009) .....	14
<i>Toomer v. Witsell</i> , 334 U.S. 385 (1948).....	3
<i>Treleven v. Univ. of Minn.</i> , 73 F.3d 816 (8 <sup>th</sup> Cir. 1996).....	10
<i>U.S., v. Troup</i> , 821 F.2d 194 (3 <sup>rd</sup> Cir. 1987) .....	14
<i>Victoria W. v. Larpenfer</i> , 369 F.3d 475 (5 <sup>th</sup> Cir. 2004).....	10
<i>Washington v. District of Columbia</i> , 802 F.2d 1478 (D.C. Cir. 1986) ...	12
<i>Wideman v. Shallowford Community Hosp., Inc.</i> , 826 F.2d 1030 (11 <sup>th</sup> Cir. 1987) .....	12
<i>Williams v. Kelley</i> , 624 F.2d 695 (5 <sup>th</sup> Cir. 1980).....	11, 12

*Young v. City of Killeen*, 775 F.2d 1349 (5<sup>th</sup> Cir. 1985)..... 11, 12

**STATUTES**

Full Faith and Credit Clause, U.S. CONST. art IV, §1 ..... 1-5, 14

Privileges and Immunities Clause, U.S. CONST. art IV, §2 ..... 1-4

Eleventh Amendment, U.S. CONST. amend XI..... 1, 4-8, 10, 11, 13

Equal Protection Clause, U.S. CONST. amend. XIV, §1, cl. 4..... 14

28 U.S.C. §1331..... 8

28 U.S.C. §1343(3) ..... 8

42 U.S.C. §1983..... 8, 10-12

Civil Rights Act of 1871, 17 Stat. 13..... 8

Judiciary Act of 1875, 18 Stat. 470 ..... 8

LA. REV. STAT. ANN. §13:5106(A)..... 5-6

LA. REV. STAT. ANN. §40:76..... 2, 5, 9, 13

LA. REV. STAT. ANN. §40:79..... 2

## **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.<sup>1</sup> 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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<sup>1</sup> 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 (5<sup>th</sup> 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.<sup>2</sup>

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 (5<sup>th</sup> Cir. 1998) (interior quotations omitted); *Lor, Inc. v. Cowley*, 28 F.3d 19, 22 n.5 (5<sup>th</sup> 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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<sup>2</sup> 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 (5<sup>th</sup> Cir. 1991); *Fireman’s Fund Ins. Co. v. Dep’t of Transp. & Development, State of La.*, 792 F.2d 1373, 1376 (5<sup>th</sup> 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 (5<sup>th</sup> 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 (5<sup>th</sup> 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 (5<sup>th</sup> 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 (5<sup>th</sup> Cir. 1981); *Freimanis v. Sea-Land Serv., Inc.*, 654 F.2d 1155, 1160 (5<sup>th</sup> 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 (5<sup>th</sup> Cir. 1981) (“eleventh amendment applies unless a federally created right is at issue”); *Cuesnongle v. Ramos*, 835 F.2d 1486, 1497 (1<sup>st</sup> 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 (8<sup>th</sup> 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. Larpenster*, 369 F.3d 475, 482 (5<sup>th</sup> 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 (5<sup>th</sup> Cir. 1980); *Young v. City of Killeen*, 775 F.2d 1349, 1352 (5<sup>th</sup> 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 (5<sup>th</sup> Cir. 1980); *cf. Braden v. Texas A&M Univ. Sys.*, 636 F.2d 90, 93 (5<sup>th</sup> 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 (6<sup>th</sup> 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 (11<sup>th</sup> Cir. 1987); *Washington v. District of Columbia*, 802 F.2d 1478, 1480 (D.C. Cir. 1986). Even if the *en banc* Court would overrule *Larpenfer*, *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.<sup>3</sup> 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 (3<sup>rd</sup> 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 (9<sup>th</sup> Cir. 2004) (same). If it lacks jurisdiction to compel a new birth certificate, this Court cannot redress plaintiffs' asserted injury.<sup>4</sup>

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<sup>3</sup> 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.

<sup>4</sup> 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,

/s/ Lawrence J. Joseph

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Lawrence J. Joseph  
1250 Connecticut Ave. NW  
Suite 200  
Washington, DC 20036  
Tel: 202-669-5135  
Fax: 202-318-2254

*Counsel for Amicus Curiae Eagle  
Forum Education & Legal Defense  
Fund*

## CERTIFICATE OF SERVICE

I hereby certify that on the 4<sup>th</sup> 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.

Kenneth Dale Upton, Jr.  
Lambda Legal Defense &  
Education Fund, Inc.  
3500 Oak Lawn Ave., Suite 500  
Dallas, TX 75219  
Email: kupton@lambdalegal.org

Regina O. Matthews  
Spencer R. Doody  
Martzell & Bickford  
338 Lafayette Street  
New Orleans, LA 70130  
Email: sdoody@mbfirm.com

Katharine M. Schwartzmann  
American Civil Liberties Union  
Foundation of Louisiana  
P.O. Box 56157  
New Orleans, LA 70156  
E: kschwartzmann@laaclu.org

Stuart Kyle Duncan  
Assistant Attorney General  
Louisiana Department of Justice  
1885 N. 3rd Street  
Baton Rouge, LA 70802  
Email: duncank@ag.state.la.us

Richard Arthur Bordelon  
Ralph Joseph Aucoin, Sr.  
Denechaud & Denechaud, L.L.P.  
1010 Common Street, Suite 3010  
New Orleans, LA 70112  
Email: rablaw@bellsouth.net

Austin R. Nimocks  
Alliance Defense Fund  
801 G Street, N.W., Suite 509  
Washington, DC 20001  
Email: animocks@telladf.org

William Duncan  
Marriage Law Foundation  
1868 N 800 E  
Lehi, UT 84043  
Email: duncanw@  
marriagelawfoundation.org

Mathew D. Staver  
Stephen M. Crampton  
Mary Elizabeth McAlister  
Liberty Counsel, 2nd Floor  
1055 Maitland Center Commons  
Maitland, FL 32751-7214  
Email: liberty@lc.org

/s/ Lawrence J. Joseph

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Lawrence J. Joseph



## 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:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Century Schoolbook 14-point font.

Dated: March 4, 2010

Respectfully submitted,

/s/ Lawrence J. Joseph

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Lawrence J. Joseph, D.C. Bar #464777  
1250 Connecticut Ave, NW, Suite 200  
Washington, DC 20036  
Tel: 202-669-5135  
Fax: 202-318-2254

*Counsel for Amicus Curiae Eagle  
Forum Education & Legal Defense  
Fund*