No. 15-648

IN THE
Supreme Court of the United States

V.L., *Petitioner*
V.

E.L. AND GUARDIAN AD LITEM, AS REPRESENTATIVE OF MINOR CHILDREN, *Respondents.*

On Petition for a Writ of Certiorari
to the Alabama Supreme Court

BRIEF OF GAY & LESBIAN ADVOCATES & DEFENDERS, EQUALITY ALABAMA FOUNDATION, EQUALITY FEDERATION, GEORGIA EQUALITY, HUMAN RIGHTS CAMPAIGN, IMMIGRATION EQUALITY, NATIONAL CENTER FOR TRANSGENDER EQUALITY, NATIONAL BLACK JUSTICE COALTION, NATIONAL LGBTQ TASK FORCE, PFLAG, SOUTHERN POVERTY LAW CENTER, AND STONEWALL BAR ASSOCIATION OF GEORGIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

Gay & Lesbian Advocates & Defenders works in New England and nationally to eradicate discrimination against lesbian, gay, bisexual, and transgender ("LGBT") people and people with HIV/AIDS from all communities, through litigation, public policy advocacy, and education.[1] GLAD has participated as counsel or amicus in numerous state cases about adoption and parenting and has served as counsel in state and federal courts in cases about the families of same-sex couples.

Equality Alabama Foundation is an Alabama nonprofit organization, with a membership exceeding 8,000 throughout the State of Alabama. It seeks, through education and advocacy, to advance equality for LGBT Alabamians where they live, work, learn, and play. Equality Alabama has worked to advance the rights of same-sex couples to marry and raise children, and has participated in Alabama courts as amicus.

Equality Federation is a partner to state-based equality organizations advocating on behalf of lesbian, gay, bisexual, transgender, and queer people. Since 1997, it has worked throughout the country with its member organizations to make

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[1] Undersigned counsel has authored this *amicus* brief in whole, and no other person or entity has funded its preparation or submission. All counsel of record were given timely notice of the intention to file this brief, and have consented in correspondence on file with the clerk.

legislative and policy advances on marriage, nondiscrimination, safe schools, healthy communities, and more.

Georgia Equality's mission is to advance fairness, safety, and opportunity for LGBT communities throughout Georgia. In its twenty-year history, it has advocated for stronger protections for parents who may face discrimination based on their sexual orientation or gender identity.

Human Rights Campaign, the largest national LGBT political organization, envisions an America where LGBT people are ensured of their basic equal rights, and can be open, honest, and safe at home, at work, and in the community. Among those basic rights is freedom to have full legal recognition of our families.

Immigration Equality is the nation's largest legal service provider for LGBT and HIV-positive immigrants. Each year, Immigration Equality provides legal advice to nearly 5,000 individuals and families, maintains an active docket of more than 550 immigration cases, and regularly appears in federal circuit courts as counsel or amicus curiae.

The National Center for Transgender Equality, founded in 2003, is dedicated to improving the lives of transgender people and their families through advocacy, education, and collaboration. NCTE works with Congress, federal agencies, and state and local advocates and stakeholders to advance public policies that will improve transgender people's lives

in areas including employment, health care, housing, and education.

The National Black Justice Coalition is dedicated to the empowerment of Black LGBT people and families. Since 2003, NBJC has provided leadership at the intersection of national civil rights groups and LGBT organizations, advocating for the unique and often overlooked challenges and needs of the African American LGBT community. NBJC envisions a world where all people are fully empowered to participate safely, openly, and honestly in family, faith, and community, regardless of race, class, gender identity, or sexual orientation.

Since 1973, the National LGBTQ Task Force has worked to build power, take action, and create change to achieve freedom and justice for LGBT people and their families. As a progressive social justice organization, the Task Force works toward a society that values and respects the diversity of human expression and identity and achieves equity for all.

PFLAG is the nation's largest LGBTQ family and ally nonprofit organization, with more than 200,000 members and supporters and 400 affiliates, including eight chapters in Alabama and eight in Georgia. PFLAG's members are parents, children, grandparents, siblings, and friends of lesbian, gay, bisexual, transgender, and queer individuals. Founded in 1972, PFLAG is committed to advancing equality and full societal affirmation of LGBTQ people through its threefold mission of support, education, and advocacy.

The Southern Poverty Law Center is a nonprofit organization founded in 1971 that has worked to make this nation's constitutional ideals a reality for everyone since its inception. SPLC's LGBT Rights Project is dedicated to fighting discrimination against the LGBT community in all its forms, and defending the rights of LGBT people and their families.

The Stonewall Bar Association of Georgia, Inc. was founded to develop a coalition of legal workers to utilize their professional expertise to support the rights of lesbian, gay, bisexual, and transgender people and oppose discrimination based on sexual or gender orientation, and to support individuals and organizations that make contributions to improving the quality of life for LGBT Georgians.

SUMMARY OF ARGUMENT

This case raises compelling grounds for review by this Court. Children and families nationwide rely on the security, stability, and predictability conferred by adoption and parentage judgments. Those judgments confirm and dignify the bonds formed between parent and child, encourage nurturing and secure relationships, and promise stability to families wherever they go. If children cannot rely on the filial bond with their parents, they, their parents, and society will all suffer harm.

Judgments of parentage and adoption, and the promise of love and nurturing that they carry, cannot be ephemeral in a humane society, and the Full Faith and Credit Clause must ensure that they are not. As this case demonstrates, if the Full Faith and Credit Clause can be as easily circumvented as it was by the Alabama Supreme Court, the parent-child relationship will be only as strong as the credit it will be given in the most restrictive states. Such a result will weaken adoption and parentage judgments nationwide.

This case is a part of our continuing national conversation about legal respect for the relations formed by and between same-sex couples, including those who raise children. These parents and their children rely on adoption and parentage judgments to protect their families. But state law still varies as to how, when, or even if these parent-child relationships will be given legal respect. According full faith and credit to adoption and parentage judgments that these families have obtained is

critical to their security and integrity given continuing objections to the families of same-sex couples.

The Alabama Supreme Court's disregard for the Full Faith and Credit Clause weakens the bonds that join our nation and our families. The Alabama court's ruling harms our most vulnerable citizens – our children – who need security and stability more than anyone else. This Court has a rich tradition of granting certiorari to ensure that full faith and credit is given to family-related judgments in times when family law differs from state to state. It should do so here.

ARGUMENT

I. Full Faith and Credit Is Critical for Same-Sex Couples and Their Children.

Like heterosexual couples, many same-sex couples share the basic human desire to have and nurture children. As this Court recognized in *Lawrence v. Texas*, "[p]ersons in a homosexual relationship… seek autonomy" for "personal decisions relating to marriage… family relationships, child rearing, and education." 539 U.S. 558, 574 (2003). Children of those families also desire "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013). Ensuring that full faith and credit is given to adoption and parentage judgments is crucial given the long history of discrimination against same-sex parents and the patchwork of state laws that confronts them.

A. Same-Sex Couples Rely on Adoption and Parentage Judgments to Protect their Families.

Same-sex couples with children are a part of the landscape of our nation's families. "[S]ame-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015). More than 125,000 households headed by same-sex couples are raising

nearly a quarter of a million children across the United States.[2] Including children raised by single parents, almost two million children are being raised by gay or lesbian parents in the United States.[3]

There are same-sex couples raising children in virtually every county in the United States, with the South having some of the highest rates of childrearing among same-sex couples.[4] According to Census data, in Georgia and Alabama alone, over 5,500 households headed by same-sex couples have children under age 18.[5] Same-sex couples of color are more likely than white couples to be raising children.[6]

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[2] Gary J. Gates, The Williams Institute, *LGBT Parenting in the United States* (2013), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf.

[3] Am. Acad. of Pediatrics, *Policy Statement, Promoting the Well-Being of Children Whose Parents are Gay or Lesbian*, 131 Pediatrics 827 (2013), *available at* http://pediatrics.aappublications.org/content/131/4/827.full.pdf.

[4] Gates, *supra* note 2.

[5] *See* U.S. Census Bureau, *Supplemental Table: Same-Sex Unmarried Partner or Spouse Households by Sex of Householder by Presence of Own Children: 2010 Census and 2010 American Community Survey*, http://www.census.gov/hhes/samesex/files/supp-table-AFF.xls (last visited Dec. 15, 2015).

[6] Movement Advancement Project et al., *LGBT Families of Color: Facts At A Glance* 2 (2012), *available at*

Same-sex couples often form their families through adoption. These couples are four times more likely than their different-sex counterparts to be raising an adopted child.[7] Thirteen percent of same-sex parents have adopted a child.[8] In total, more than 16,000 same-sex couples are raising about 22,000 adopted children in the United States.[9]

Legal respect for the parent-child relationship often springs from state adoption and parentage laws. "Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents." *Obergefell*, 135 S. Ct. at 2600. This provides "powerful confirmation from the law itself that gays and lesbians can create loving, supportive families." *Id.*

Adoption and parentage judgments provide children and families the stability they need. Adoption, like marriage, "affords the permanency and stability important to children's best interests." *Id.* Legal respect for parent-child relationships provides security to children and confers dignity on the family and the parent-child relationship. *See Lehman v. Lycoming Cnty. Children's Servs. Agency*,

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http://nbjc.org/sites/default/files/lgbt-families-of-color-facts-at-a-glance.pdf.

[7] Gates, *supra* note 2.

[8] *Id.*

[9] *Id.*

458 U.S. 502, 513 (1982) ("[C]hildren require secure, stable, long-term, continuous relationships with their parents.… There is little that can be as detrimental to a child's sound development as uncertainty over" that relationship.). An adoption or a finding of parentage confers legal and social meaning on the child's bonds with his or her parent and should be respected no matter where the child or parent may go. *See Windsor*, 133 S. Ct. at 2694 (discussing benefits to children of legal recognition of marriages); *Obergefell*, 135 S. Ct. at 2600 (same).

Thus, adoption and parentage judgments must be respected to ensure permanency and stability. As one state appellate court has recently emphasized in giving full faith and credit to an out-of-state adoption:

> The importance of finality in the lives of the children involved in the adoption process is so obvious as to require little elaboration. One of the most crucial elements of a healthy childhood is the availability of a stable home in which each family member has a secure and definite place.… [If full faith and credit is denied,] such children – as well as their adoptive families – would be forever relegated to a state of legal limbo.… Clearly, such a result… cannot be tolerated in a legal system that concerns itself with humane values.…

Kemp & Assocs. v. Chisholm, 162 So. 3d 172, 178 (Fla. Dist. Ct. App. 2015) (quoting *In re Robert O. v. Russell K.*, 604 N.E.2d 99, 106–07 (N.Y. 1992) (Titone, J., concurring)).

For this reason, Georgia's adoption statute recognizes that state's "interest in… providing stable and permanent homes for adoptive children.… Adoptive children have a right to permanence and stability in adoptive placements." Ga. Code Ann. § 19-8-12(a)(1), (2). *Accord* Idaho Code Ann. § 16-1501A(2)(a), (c); Mont. Code Ann. § 42-1-108(2)(b), (d) (2015); S.C. Code Ann. § 63-9-810; Utah Code Ann. § 78B-6-102(5)(a), (c).

Legal respect for the parent-child relationship confers benefits on children and parents alike. It allows parents to obtain family health insurance covering the children and to make medical decisions for them. *See Adoption of Tammy*, 619 N.E.2d 315, 320 (Mass. 1993); *In re Jacob*, 660 N.E.2d 397, 399 (N.Y. 1995).[10] Parents without a legal relationship to their children may not be able to claim their children as dependents for tax purposes. *See* 26 U.S.C. § 152(f)(1).

If the parents' relationship dissolves, legal parentage protects children from being "denied the affection of a functional parent who has been with them since birth." *Adoption of Tammy*, 619 N.E.2d at 320. Without an adoption or parentage judgment, parents and their children risk being denied visitation. In some cases, an adoptive parent may seek to ***avoid*** responsibility for the child after a

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[10] *See generally* Movement Advancement Project et al., *All Children Matter: How Legal and Social Inequalities Hurt LGBT Families* 79–80, 87 (2011), *available at* http://www.lgbtmap.org/file/all-children-matter-full-report.pdf.

separation, and an adoption or parentage judgment can ensure that the child will receive support. *E.g.*, *Elisa B. v. Superior Court*, 117 P.3d 660, 669 (Cal. 2005).

In the event of a parent's death, an adoption or parentage judgment allows a child to obtain Social Security benefits,[11] to inherit from family trusts,[12] to inherit by intestate succession,[13] to bring wrongful death claims,[14] and to receive life insurance benefits.[15] Legal recognition of the surviving parent can ensure that the child can remain in that parent's custody after tragedy.[16] Legal respect for the parent-child relationship is so important for children's well-being that many medical and professional

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[11] *Adoption of Tammy*, 619 N.E.2d at 320; *In re Jacob*, 660 N.E.2d at 399; 42 U.S.C. §§ 402(d), 416(e).

[12] *Adoption of Tammy*, 619 N.E.2d at 317, 320.

[13] *In re Jacob*, 660 N.E.2d at 399; *Adoption of Tammy*, 619 N.E.2d at 320.

[14] *In re Jacob*, 660 N.E.2d at 399.

[15] *Id.*

[16] *See* Brief for The Donaldson Adoption Institute, et al. as Amici Curiae Supporting Petitioners at 18, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556); *Adoption of Tammy*, 619 N.E.2d at 320 n.9.

organizations have long supported legal respect for families headed by same-sex couples.[17]

B. Full Faith and Credit Ensures the Stability and Reliability of Judgments Given the Variance in State Law.

In many same-sex families, the adults set out to form a family by, for example, fostering children in state care, adopting a child, or using medically available assisted reproductive services. Before the nationwide availability of marriage in *Obergefell*, and with it the possibility of step-parent adoption or

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[17] American Academy of Pediatrics: Am. Acad. of Pediatrics, *supra* note 3, at 828;

American Medical Association: Am. Med. Assoc., *H-60.940: Partner Co-Adoption*, http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glbt-advisory-committee/ama-policy-regarding-sexual-orientation.page;

American Psychological Association: Am. Psychological Assoc., *Sexual Orientation, Parents, and Children* (2004), http://www.apa.org/ about/policy/parenting.aspx;

American Psychiatric Association: Am. Psychiatric Assoc., *Adoption and Co-parenting of Children by Same-sex Couples: Position Statement* (Nov. 2002);

National Association of Social Workers: Nat'l Assoc. of Soc. Workers, *Social Work Speaks: National Association of Social Workers Policy Statements*, 2003-2006 (6th ed.);

American Association of Family Physicians: Am. Assoc. of Family Physicians, *Children's Health* (2002), http://www.aafp.org/ about/policies/all/children-health.html.

joint adoption as a married couple, often there was only one legal parent in a family headed by a same-sex couple: the one adoptive parent or the birth parent.

During this period, states developed varying approaches to the children of same-sex couples. At least twelve states and the District of Columbia have now, by statute or appellate court decision, authorized second-parent adoption, through which an unmarried adult co-parent may adopt the child of his or her partner.[18] Trial or county courts in other states have also recognized such adoptions.[19]

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[18] California: *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003); Colorado: Colo. Rev. Stat. § 19-5-203(1)(d.5); Connecticut: Conn. Gen. Stat. § 45a-724(a)(3); District of Columbia: *In re M.M.D.*, 662 A.2d 837 (D.C. 1995); Idaho: *In re Doe*, 326 P.3d 347 (Idaho 2014); Illinois: *In re K.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995); Indiana: *In re Adoption of K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004); Maine: *Adoption of M.A.*, 930 A.2d 1088 (Me. 2007); Massachusetts: *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); Montana: Mont. Code Ann. § 42-4-302(2); New Jersey: *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); New York: *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); Pennsylvania: *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002); Vermont: *In re B.L.V.B.*, 628 A.2d 1271 (Vt. 1993); Vt. Stat. Ann. tit. 15A, § 1-102.

[19] *See generally* Am. Civil Liberties Union, *Map of States Where Same-Sex Couples Are Able to Get Joint or Second Parent Adoption,* https://www.aclu.org/map-states-where-same-sex-couples-are-able-get-joint-or-second-parent-adoption (last visited Dec. 16, 2015).

Courts allowing such adoptions have resolved disputed questions of statutory interpretation based on the language and purposes of the adoption statutes in accord with established canons of construction. For example, in *In re B.L.V.B.*, 628 A.2d at 1273, the Vermont Supreme Court ruled that the state's adoption statutes must be interpreted to "avoid results that are irrational, unreasonable, or absurd." The court continued,

> [W]e cannot conclude that the legislature ever meant to terminate the parental rights of a biological parent who intended to continue raising a child with the help of a partner. Such a narrow construction would produce the unreasonable and irrational result of defeating adoptions that are otherwise indisputably in the best interests of children.

Id. at 1274. Many other states have reached similar conclusions.[20]

Other states have allowed same-sex couples to obtain parentage judgments through state parentage laws,[21] which empower courts to declare the

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[20] *See, e.g.*, *Sharon S.*, 73 P.3d at 561; *Adoption of Tammy*, 619 N.E.2d at 321; *In re Jacob*, 660 N.E.2d at 399, 404; *In re Adoption of Two Children by H.N.R.*, 666 A.2d at 538; *In re Adoption of Infant K.S.P.*, 804 N.E.2d at 1257.

[21] Many of these laws are modeled on the Uniform Parentage Act, first promulgated in 1973. *See generally* Nancy D. Polikoff, *A Mother Should not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the*

existence of legal parent-child relationships based on facts such as birth, marriage, or "holding out" a child as one's own. *See, e.g.*, *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *Chatterjee v. King*, 280 P.3d 283, 288 (N.M. 2012); *see also In re the Parental Responsibilities of A.R.L.*, 318 P.3d 581 (Colo. App. 2013); *Charisma R. v. Kristina S.*, 96 Cal. Rptr. 3d 26 (Cal. Ct. App. 2009).

While most state appellate courts considering second-parent adoptions have concluded that these adoptions are permissible, some state courts (including Alabama's) have held that second-parent adoptions by an unmarried same-sex couple are not permissible under those states' adoption statutes, even where the statutes themselves may be similar to those interpreted more broadly in other states.[22] This divergence among state laws has the potential to wreak havoc unless the states accord full faith and credit to one another's adoption and parentage judgments.

Twenty-First Century, 5 Stan. J. C.R. & C.L. 201, 211, 217–18 (2009).

[22] Alabama: *In re K.R.S.*, 109 So. 3d 176 (Ala. Ct. App. 2012). *See also* Kentucky: *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804 (Ky. Ct. App. 2008); North Carolina: *Boseman v. Jarrell*, 704 S.E.2d 494 (N.C. 2010); Nebraska: *B.P. v. State* (*In re Adoption of Luke*), 640 N.W.2d 374 (Neb. 2002); Ohio: *In re Adoption of Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1998); Wisconsin: *Georgina G. v. Terry M.* (*In the Interest of Angel Lace M.*), 516 N.W.2d 678 (Wis. 1994).

C. Full Faith and Credit Is Particularly Important for Same-Sex Couples Because of Continued Objections to Their Families.

The Alabama Supreme Court's decision in this case must be viewed against the backdrop of objections to same-sex couples' relationships and parenting. Objectors have long argued that the law should not recognize the relationships between people of the same sex and should not recognize their status as parents.[23] These objections featured in arguments, already familiar to this Court, that parenting by a biological mother and father is "optimal," and that same-sex couples should, therefore, be disqualified from marriage. *See, e.g.*, Brief for Respondent Michigan at 39–40, 46, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-571). The State of Alabama was among the objectors, asserting its interest in promoting

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[23] *See, e.g.,* Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. Ill. L. Rev. 833, 838 (1997) (acknowledging same-sex couples as partners or parents "shift[s]… the legal and social assumptions and legal model of parenting"); Lynn D. Wardle, *Sexual Orientation: Law and Policy: Parenthood and the Limits of Adult Autonomy*, 24 St. Louis U. Pub. L. Rev. 169, 178 (2005) (adoptions by same-sex couples "redefine parenthood" from a relationship that requires "commitment of both men and women together to the best interests of children" to one furthering the "child-rearing interests of any one or more autonomous adults"); *id.* at 187–88 (such adoptions deprive children of gender-differentiated parenting).

> ties of kinship between children and both of their biological parents because, in general, those parents together are best suited to provide optimal care for their children.... In contrast, children raised in same-sex households are necessarily raised without one or both biological parents in the home.

Brief for Alabama as Amici Curie Supporting Respondents at 5, *Obergefell v. Hodges*, 135 S. Ct. 2584 (No. 14-556).

These objections found expression in bans on gays and lesbians adopting or fostering children over the last several decades. Florida enacted an adoption ban in 1977.[24] That ban, originally upheld by the Eleventh Circuit in *Lofton v. Sec'y Dept. of Children & Family Serv's*, 358 F.3d 804, 827 (11th Cir. 2004), was invalidated on state constitutional grounds only five years ago. *Fla. Dep't of Children & Families v. X.X.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010). In 1985, Massachusetts instituted a policy of foster care placement in "traditional family settings," and its Department of Social Services removed two boys from their foster care placement with a gay couple.[25] This led neighboring New Hampshire to

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[24] David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 Fam. L.Q. 523, 534 (1999).

[25] Philip W. Johnston, *Policy Statement on Foster Care* (May 24, 1985), *reprinted in* Boston Globe, May 25, 1985, at 24; Chambers & Polikoff, *supra* note 24, at 533, 536–37.

pass the first law banning gay people from serving as foster or adoptive parents or operating a day care facility, a ban that was upheld by the New Hampshire Supreme Court. *Opinion of the Justices*, 525 A.2d 1095 (N.H. 1987).[26] These bans, not reversed until the 1990s, were fueled, at least in part, by fears of AIDS and stereotypes of gay people as predators.[27]

From the mid-1990s on, similar proposed bans were defeated in seven states but passed in others.[28] For example, Utah law provides that a person in a cohabiting and non-marital sexual relationship may not adopt. Utah Code Ann. § 78B-6-117(3). This foreclosed same-sex couples from adopting until they recently became able to do so as married couples. An Arkansas regulation forbidding foster parenting whenever a gay person was in the home, adopted in 1991, was invalidated less than a decade ago in *Department of Human Services v. Howard*, 238 S.W.3d 1 (Ark. 2006). The Arkansas courts also struck a subsequent ballot initiative forbidding adoption and foster care by an unmarried person

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[26] The Massachusetts policy was changed in 1991, and the New Hampshire law was repealed in 1999. *See* H.R. 90, 1999 Sess. (N.H. 1999), *available at* http://gencourt.state.nh.us/SofS_Archives//1999/house/HB90H.pdf.

[27] *See, e.g.*, Ralph Jimenez, *N.H. Near Repeal of Antigay Provision, Foster Parenting, Adoption at Issue*, Boston Globe, Apr. 23, 1999, at B1 (quoting local officials about "AIDS hysteria" and fears of child molestation as animating the ban).

[28] Chambers & Polikoff, *supra* note 24, at 540–41.

cohabiting with a partner. *Ark. Dept. Human Servs. v. Cole*, 380 S.W.3d 429 (Ark. 2011). Mississippi's ban on adoption by same-sex couples, enacted in 2015, remains in place. *See* Miss. Code. Ann. § 93-17-3(5) ("Adoption by couples of the same gender is prohibited.").

Sexual orientation has also been used to deny or limit gays' and lesbians' custodial or visitation rights upon divorce or separation. Through the 1970s and 1980s, gay and lesbian litigants lost more appellate visitation and custody cases than they won.[29] Some state courts used sexual orientation to deny parental rights altogether. *See, e.g.*, *Pulliam v. Smith*, 501 S.E.2d 898 (N.C. 1998) (ordering reinstatement of judgment stripping father of custody because he was living with a partner of the same sex); *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995) (awarding custody of two-year-old to grandmother because mother was a lesbian and therefore unfit).

Even though most state parenting bans have been repealed or overturned, erroneous stereotypes linger. Because Alabama's courts are the focus of this case, a snapshot of the climate in that state and its courts is illuminating. The Alabama Supreme Court has on several occasions denied gay and lesbian parents child custody and visitation based, in part, on the rationale that these parents' sexual orientation made them unsuitable. *See, e.g.*, *Ex parte H.H.*, 830 So. 2d 21, 25–26 (Ala. 2002)

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[29] *See* Chambers & Polikoff, *supra* note 24, at 533, 536–37.

(deferring to trial court's assessment of insufficient basis for lesbian mother's proposed modification of custody award); *id.* at 33–35 (Moore, C.J., concurring) ("Homosexuality is strongly condemned in the common law because it violates both natural and revealed law.… The common law designates homosexuality as an inherent evil, and if a person openly engages in such a practice, that fact alone would render him or her an unfit parent."); *Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) ("Exposing her children to such a lifestyle, one that is illegal under the laws of this state and immoral in the eyes of most of its citizens, could greatly traumatize them."); *Ex parte J.M.F.*, 730 So. 2d 1190, 1196 (Ala. 1998) (transferring custody from lesbian mother and her partner to re-married father because "[w]hile the evidence shows that the mother loves the child and has provided her with good care," she was exposing her child "to a lifestyle" that was "neither legal in this state, nor moral in the eyes of most of its citizens").

In addition, the Alabama courts have shown a stunning disrespect for federal court judgments, even judgments of this Court, that broaden protections available to same-sex couples. In January 2015, after a federal district court ruled that Alabama's marriage ban was unconstitutional in *Searcy v. Strange*, 81 F. Supp. 3d 1285 (S.D. Ala. 2015) and *Strawser v. Strange,* 2015 U.S. Dist. LEXIS 8439 (S.D. Ala. Jan. 26, 2015), and while an application for a stay was pending in this Court, the Chief Justice of the Supreme Court of Alabama wrote a letter to the Alabama Governor pledging to uphold the state's constitutional marriage

amendment, which banned marriages between same-sex couples. The Alabama Chief Justice then ordered probate judges and state officials not to "issue or recognize a marriage license" contrary to Alabama law.[30] The next day, after this Court denied a stay, marriage licensing began in several counties, only to be halted by a March 3, 2015 ruling by the Alabama Supreme Court prohibiting such licenses statewide. *Ex parte State ex rel. Ala. Policy Inst.*, 2015 Ala. LEXIS 33, at *148–49 (Ala. Mar. 3, 2015) (per curiam).

Even *Obergefell* did not settle matters for the Alabama Supreme Court.[31] On June 29, 2015, that court issued an order inviting parties to file briefs on the effect of *Obergefell* on the Alabama court's orders

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[30] Chris Geidner, *With U.S. Supreme Court Silent, Alabama Chief Judge Aims to Stop Same-Sex Marriages*, BuzzFeed (Feb. 8, 2015), http://www.buzzfeed.com/chrisgeidner/with-us-supreme-court-silent-alabama-chief-justice-aims-to-s (includes the Order).

[31] The Chief Justice of the Alabama Supreme Court has publicly stated that he is "engaged in a conflict with" this Court, calling *Obergefell* "a horrendous decision" that "contradicts the Constitution." Randall Terry, *Episode 699 - Chief Justice Roy Moore Interview on Supreme Court's Abuse of Power* (July 7, 2015), https://m.youtube.com/watch?v=ATaYTPGjY8U at 00:17. He later elaborated: "Just because he [Justice Kennedy] writes it doesn't make it law…." *Id.* at 28:39.

and suggesting that its earlier March ruling was still in effect.[32]

It was not until July 14, in response to a lawsuit, that the Alabama Attorney General confirmed that *Obergefell* was binding on the state.[33] Since then, a probate judge has requested a declaration that he be exempted from issuing marriage licenses to same-sex couples.[34] In October, activists opposed to marriage equality filed yet another motion in the Alabama Supreme Court urging the judiciary to defy *Obergefell*, this time joined by an Alabama probate judge. *Ex Parte State ex rel. Ala. Policy Inst. v. Alan L. King*, No. 1140460 (Ala. Filed Oct. 5, 2015).

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[32] *Ex parte State ex rel. Ala. Policy Inst.*, No. 1140460 (Ala. June 29, 2015) (Corrected Order), *available at* https://localtvwhnt.files.wordpress.com/2015/06/1140460-order.pdf. Later statements from the Alabama Chief Justice suggested that the court was not advising about local officials' obligations to issue licenses. Chris Geidner, *Alabama Chief Justice's Comments Cause Confusion for Marriage Equality in the State*, BuzzFeed (July 1, 2015), http://www.buzzfeed.com/chrisgeidner/alabama-supreme-court-order-causes-confusion-for-marriage-eq.

[33] Kent Faulk, *Alabama will grant equal rights to married gay couples, lawyers say*, AL.com (July 14, 2015), http://www.al.com/news/birmingham/index.ssf/2015/07/state_agencies_will_grant_same.html.

[34] Kent Faulk, *Alabama judge asks not to have to wed same-sex couples, rejects 'license to engage in sodomy'*, AL.com (Sept. 16, 2015), http://www.al.com/news/birmingham/index.ssf/2015/09/probate_judge_asks_alabama_sup.html.

Some Alabama probate court judges still refuse to issue marriage licenses to otherwise qualified same-sex couples. In fact, Alabama accounts for the vast majority of counties nationwide refusing to grant such licenses. Over 75% of the thirteen counties nationally that do not grant such licenses are in Alabama.[35] About 15% of Alabama's counties refuse to grant same-sex marriage licenses, compared to near-universal compliance in the rest of the country.[36] As a result, almost 6% of Alabama's population lives in a county that refuses to issue same-sex marriage licenses, dwarfing the nationwide rate of 0.1%.[37]

This history demonstrates that hostility towards gay people is still entrenched in Alabama and its courts. This state of affairs makes it even more essential to enforce the Full Faith and Credit Clause to ensure that local stereotypes do not undermine judgments upon which children and families have relied.

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[35] Ballotpedia, *Local government responses to Obergefell v. Hodges* (Oct. 29, 2015), https://ballotpedia.org/Local_government_responses_to_Obergefell_v._Hodges.

[36] *Id.*

[37] *Id.*

II. Certiorari Should Be Granted to Undo the Damage the Alabama Court Has Done to Adoption and Parentage Judgments Nationwide.

The patchwork of state laws affecting the children of same-sex parents creates a grave threat to the security of children of same-sex couples when they move from a state that respects their family arrangements to one that does not. *See supra* Section I.A. The Alabama court's holding typifies this threat and casts doubt on the consistency and predictability of adoption and parentage judgments nationwide.[38] If this Court allows the Alabama court's judgment to stand, dissatisfied parents or even third parties will be emboldened to challenge sister-state adoption judgments with which they disagree. For example, parents seeking to avoid adoption and parentage judgments could, after separation, move to Alabama and make the same arguments made by Respondent. Many adoption and parentage judgments would be worth only the respect that Alabama or other restrictive states would accord them: none at all. The result would be a back-door revival of the discredited "public policy exception" to the principle of full faith and credit. *See Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (there is "no roving public policy exception to the full faith and credit due judgments").

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[38] Amici concur with Petitioner's analysis of the Full Faith and Credit Clause and Georgia adoption law indicating that the Alabama court disregarded both.

Such a result would be disastrous. A parent-child relationship that should carry the promise of stability and security should not be nullified by relocation. The parent-child bond does not flicker on and off as state lines are crossed. As this Court explained in *Obergefell*:

> Being married in one state but having that valid marriage denied in another is one of "the most perplexing and distressing complication[s]" in the law of domestic relations. Leaving the current state of affairs in place would maintain and promote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines. In light of the fact that many states already allow same-sex marriage… the disruption caused by the recognition bans is significant and ever-growing.

135 S.Ct. at 2607 (first alteration in original) (quoting *Williams v. North Carolina*, 317 U.S. 287, 299 (1942)). Those concerns apply with even more force to adoptions, given the vulnerability of children, their dependency on the parent-child bond, and their need for security and stability. Once a court issues a judgment of adoption or parentage, parents, children, and society must be able to count on that judgment. The Alabama decision means they no longer can.

Granting certiorari is also consistent with this Court's precedent. This Court has a rich history of granting certiorari to define the contours of the Full Faith and Credit Clause in the context of family law. As views on divorce evolved throughout the early-to-mid-20th century, a divide developed among the states, with some favoring restrictive divorce laws and others favoring permissive ones. During that time, this Court considered several cases to refine the scope of the Full Faith and Credit Clause as applied to divorce, alimony, and other rights. *See, e.g.*, *Atherton v. Atherton*, 181 U.S. 155 (1899); *Williams v. North Carolina* (*Williams I*), 317 U.S. 287 (1942); *Williams v. North Carolina* (*Williams II*), 325 U.S. 226 (1945); *Coe v. Coe*, 334 U.S. 378 (1948); *Estin v. Estin*, 334 U.S. 541 (1948); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957).

In granting certiorari in and deciding these cases, the Court recognized the importance in the family law context of the stability and predictability that the Full Faith and Credit Clause ensures. As Justice Douglas wrote for the Court, if marital status were not subject to "the essential function of the full faith and credit clause," "a rule would be fostered which could not help but bring considerable disaster to innocent persons and bastardize children hitherto supposed to be the offspring of lawful marriage." *Williams I*, 317 U.S. at 301 (internal quotations omitted); *see also Obergefell*, 135 S. Ct. at 2607 (quoting *Williams I*, 317 U.S. at 299). Thus this Court has emphasized the "obvious importance" of enforcing the Full Faith and Credit Clause in the context of family relations. *Williams II*, 325 U.S. at 227; *see also Sherrer v. Sherrer*, 334 U.S. 343, 356

(1948); (noting that "vital interests" were involved); *Johnson v. Muelberger*, 340 U.S. 581, 583–84 (1951) (case raised "important" issues); *Sutton v. Lieb*, 342 U.S. 402, 405 (1952) (same).

The Court has emphasized that "[t]he Full Faith and Credit Clause is not to be applied, accordion-like, to accommodate our personal predilections." *Estin*, 334 U.S. at 545–46. If that admonition is to have any meaning, this Court must grant certiorari to define and enforce the Full Faith and Credit Clause in times like these, when state laws are in conflict, and there is a risk that policy preferences will override the Constitutional guarantee of full faith and credit. *See* App. 31a (concurring opinion below opining that Alabama "has a legitimate interest in encouraging that children be adopted into the optimal family structure, *i.e.*, one with both a father and a mother.").

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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