No. 15A522

In the Supreme Court of the United States

V.L.,

Applicant,

v.

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

Respondents

On Application for Stay from the Alabama Supreme Court

RESPONDENT E.L.'S OPPOSITION TO STAY APPLICATION

RANDALL W. NICHOLS
ANNE LAMKIN DURWARD
MASSEY, STOTSER & NICHOLS, PC
1780 Gadsden Highway
Birmingham, AL 35235
Tel: 205.838.9002
rnichols@msnattorneys.com

S. KYLE DUNCAN
Counsel of Record
DUNCAN PLLC
1629 K Street NW, Suite 300
Washington, DC 20006
Tel: 202.714.9492
kduncan@duncanpllc.com

Counsel for Respondent E.L.

November 30, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

Other Authorities

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Eleventh Circuit:

Introduction

The application for recall and stay of the Alabama Supreme Court's judgment should be denied. Petitioner V.L. claims that the Alabama Supreme Court erroneously failed to give full faith and credit to a Georgia adoption decree, but V.L. fails to show that her petition seeking review of that decision is certworthy. Instead of alleging that the decision implicates any split of authority, V.L. merely asks this Court to correct a perceived error in the Alabama Supreme Court's application of full faith and credit principles. Not only is error-correction a weak ground for seeking certiorari, but V.L. is wrong that there was any error in the Alabama Supreme Court's decision to begin with.

The court below simply applied the settled principle that a judgment does not merit full faith and credit if the rendering court lacked jurisdiction. Here, V.L. convinced a Georgia court to award her a type of adoption plainly barred by the Georgia adoption statutes—*i.e.*, an adoption on behalf of a non-spouse that leaves intact the rights of the existing parents. As the Alabama Supreme Court correctly found, the Georgia court had no authority under Georgia law to award such an adoption, which is therefore void and not entitled to full faith and credit. That was a correct application of well-established full faith and credit law, and V.L. fails to show that other state or federal courts have reached different outcomes in similar cases. That alone is enough to defeat her stay application.

V.L. also fails to show that denying her a stay would cause irreparable harm. She implies that a stay of the Alabama Supreme Court's decision will automatically restore her visitation rights to the three children. She neglects to mention, however, that her visitation rights were previously vacated by an intermediate Alabama appellate decision which she did not challenge. Thus, her ability to resume visitation rights depends, not on whether this Court grants her a stay, but on evidence yet to be adduced at a family court hearing that is not in the record. V.L. thus asks this Court essentially to assume the duties of a family court and weigh the equities in a contentious dispute over visitation rights based on a virtually non-existent record. The Court should decline that invitation.

Moreover, V.L.'s request for a stay fails the basic test that one seeking equity must have clean hands. The record shows that the parties' domicile in Georgia was a fiction designed solely to confer jurisdiction on a Georgia court that the parties calculated would be amenable to a non-spousal adoption that leaves intact the biological mother's rights. The Court should not award equitable relief based on an adoption decree obtained by such transparent jurisdictional gamesmanship.

Statement of the Case

A. Factual Background

Respondent E.L., a lifelong resident of Alabama, is the biological mother of three children through artificial insemination. In December 2002 she gave birth to S.L., and, in November 2004, to twins, N.L. and H.L. At the time, E.L. was living in Hoover, Alabama with petitioner V.L, a woman with whom she had been in a

relationship since 1995. V.L. acted as the children's parent along with E.L. *See generally Ex parte E.L.*, __ So.3d __, 2015 WL 5511249, at *1 (Ala. Sept. 18, 2015).

In 2006, V.L. and E.L. decided they wanted V.L. to adopt the children and make both women legal parents. According to V.L.'s affidavit, they began researching which jurisdictions might be "receptive" to that arrangement. *Id.* at *1. An attorney advised them that Georgia was a hospitable jurisdiction, but that V.L. "needed to be a resident of … Georgia, specifically Fulton County, for at least six (6) months to petition for adoption[.]" *Id.* In October 2006, V.L. and E.L. leased a house in Alpharetta, Georgia from the mother of E.L.'s college friend and subsequently began the adoption process. According to V.L.'s affidavit, "a background check request was submitted using the Alpharetta address," and "[o]n March 26, 2007, a home study was done at the address in Georgia; per my attorney this was a requirement for petitioning for adoption." *Id.* Throughout this period, however, the couple continued to live and work in Alabama, and spent only two nights in the Georgia house, as explained in E.L.'s affidavit:

> We never moved in[to the Georgia house]. We never lived there. We spent approximately two nights there, one before the "home study." That night, we packed up the kids in the SUV along with toys, photographs, refrigerator magnets, etc. and put these things around our friend's house. We hung a bird feeder the children had made in the backyard. This was done so it would appear to the home inspector that we lived there. After the "home study" was done, we packed up and returned to our home in Hoover, Alabama. The other night we spent [in Georgia] was the night before the adoption hearing.

E.L. Aff. (Mar. 11, 2014), at ¶ 5.

On April 10, 2007, V.L petitioned to adopt the three children in Fulton County, Georgia. *Ex parte E.L.*, 2015 WL 5511249, at *1. E.L. consented to the adoption, but

asserted that she did not "relinquish or surrender any parental rights to the children." Parental Consent to Adoption (Apr. 9, 2007), at 1. On May 30, 2007, the Georgia court entered a final decree granting V.L.'s petition. Sealed App'x to Stay App. ("App"), at 64a. The decree specified that V.L. would be recognized as the children's "second parent" but that E.L.'s parental rights as the "legal and biological mother" were "preserved intact." *Id.* While stating generally that V.L. had "complied with all relevant and applicable formalities regarding the [adoption]," App. 63a, the court's order did not address whether Georgia law authorized granting an adoption to V.L. (who was not married to E.L.) while simultaneously leaving E.L.'s parental rights intact. Nor did the court's order address whether V.L. was a bona fide domiciliary of Georgia.

In November 2011, V.L. and E.L.'s relationship ended, and, in January 2012, V.L. moved out of the house the women had shared in Alabama. *Ex parte E.L.*, 2015 WL 5511249, at *2.

B. Procedural Background

On October 31, 2013, V.L. filed a petition in a Jefferson County, Alabama circuit court alleging that E.L. was refusing her access to the children. She sought to have the Georgia adoption decree registered as a foreign judgment, to be declared a legal parent, and to be awarded custody or visitation. *Id*. The case was transferred to the Jefferson County Family Court, and E.L. moved to dismiss on various grounds, including that the Georgia decree did not merit full faith and credit because the Georgia court lacked jurisdiction to award the adoption to V.L. *Id.* Without holding

a hearing, the family court denied E.L.'s motion to dismiss and simultaneously granted V.L. visitation rights. *Id.* E.L. timely appealed to the Alabama Court of Civil Appeals.

Initially, the appeals court agreed with E.L. that the Georgia court lacked jurisdiction to award an adoption to a non-spouse without first terminating the rights of the current parent, and that the Georgia decree was consequently not entitled to Full Faith and Credit. *E.L. v. V.L.*, No. 2130683, slip op. at 9-13 (Ala. Civ. App. Oct. 24, 2014).[1] On rehearing, however, the court reversed itself. It decided that any defect in the Georgia adoption went to the merits and not to jurisdiction, and that it was therefore required to give the decree full faith and credit. *E.L. v. V.L.*, __ So.3d __, 2015 WL 836916, at **4-5 (Ala. Civ. App. Feb. 27, 2015). However, the court reversed the family court's award of visitation rights to V.L. The court explained that, before visitation could be awarded, due process required that E.L. be "entitled to due notice and an opportunity to be heard on the matter." *Id.* at *5 (citing *Ex parte Dean*, 137 So.3d 341, 345 (Ala. Civ. App. 2013)). The court concluded that "the family court erred in awarding V.L. visitation based simply on her status as an adoptive parent under the Georgia judgment without conducting an evidentiary hearing to inquire into the best interests of the children." *Id.* The court thus remanded for "an evidentiary hearing to decide the visitation issue." *Id.* at *6.

---

[1] Because this opinion has been withdrawn, it appears unavailable on Westlaw. *See* 2014 WL 5394513 (reporting opinion "withdrawn and superseded on grant of rehearing Feb. 27, 2015").

E.L. successfully sought certiorari from the Alabama Supreme Court, which reversed. The supreme court acknowledged that, in determining whether an out-of-state judgment merits full faith and credit, the court's "review … does not extend to a review of the legal merits of [that] judgment," but is instead "limit[ed] … to whether the rendering court had jurisdiction to enter the judgment sought to be domesticated." *Ex parte E.L.*, 2015 WL 5511249, at *3. Disagreeing with the court of appeals, however, the supreme court found that the defect in the adoption implicated the Georgia court's subject matter jurisdiction. After canvassing the Georgia adoption statutes and jurisprudence, the court agreed with E.L. that Georgia law "makes no provision for a non-spouse to adopt a child without first terminating the parental rights of the current parents." *Id.* at *8 (citing *Wheeler v. Wheeler*, 642 S.E.2d 103, 104 (Ga. 2007) (Carley, J., dissenting from denial of certiorari); *Bates v. Bates*, 730 S.E.2d 482, 484 (Ga. Ct. App. 2012)). As the court explained, Georgia law makes termination of the current parent's rights a necessary "condition" before an adoption may be granted to a non-spouse. *Ex parte E.L.*, 2015 WL 5511249, at *10 (citing Ga. Code Ann. § 19-8-5(a)). Consequently, the undisputed failure of E.L. to surrender her parental rights resulted in a "void" adoption that the Georgia court "was not empowered to enter." *Id.*

Because it resolved the case on those grounds, the Alabama Supreme Court did not reach E.L.'s alternative argument that the Georgia court lacked jurisdiction to award an adoption to V.L. because she had lacked a bona fide domicile in Georgia. *Id.* at 10 n.10; *see* Ga. Code Ann. § 19-8-3(a)(3) (to petition for adoption a person

must, *inter alia*, have "been a bona fide resident of [Georgia] for at least six months immediately preceding the filing of the petition").

Legal Standard

To obtain a stay pending disposition of a certiorari petition, an applicant must show (1) a "reasonable probability" that four Justices will vote to grant certiorari; (2) a "fair prospect" that a majority of the Court will find the decision below to be wrong; and (3) a "likelihood that 'irreparable harm [will] result from the denial of a stay.'" *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). The applicant bears the burden to "rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct." *Planned Parenthood of SE Pa. v. Casey*, 510 U.S. 1309, 1310 (1994) (Souter, J., in chambers) (quotations omitted). "Denial of … in-chambers stay applications is the norm; relief is granted only in extraordinary cases." *Conkright*, 556 U.S. at 1402 (quotations omitted).

Argument

I. It is improbable that four Justices will vote to grant certiorari.

V.L.'s application fails to clear the first hurdle for obtaining a stay: it makes no serious attempt to show that her case is certworthy. She claims only that the Alabama Supreme Court misapplied full faith and credit doctrine in concluding that the Georgia court lacked jurisdiction to grant the adoption. Stay App. at 13-26. Nowhere, however, does V.L. argue that the decision below implicates any split of authority among lower courts. V.L. thus merely asks this Court to correct what she

thinks is an erroneous application of settled law. *But see* II, *infra* (explaining that lower court was correct). Error-correction is the weakest ground for seeking certiorari. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of … the misapplication of a properly stated rule of law."); *Tolan v. Cotton*, 134 S.Ct. 1861, 1868 (2014) (Alito, J., concurring) (observing that "'error correction … is outside the mainstream of the Court's functions and … not among the 'compelling reasons' … that govern the grant of certiorari'") (quoting S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013)) (brackets omitted).

V.L. broadly claims that the Alabama Supreme Court's decision is a "gross deviation" from this Court's (and other courts') full faith and credit jurisprudence. Stay App. at 27. She is mistaken about that, *see* II, *infra*, but the more salient point is that she avoids asserting that the Alabama decision *conflicts* with any decision from this Court, from a federal circuit court, or from another state supreme court. And there is good reason for that. The Alabama Supreme Court simply applied the settled principle that an out-of-state judgment merits full faith and credit "only if the court of the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment." *Williams v. North Carolina*, 325 U.S. 226, 229 (1945). Every case V.L. cites, *see* Stay App. at 27-28, recognizes that venerable limitation on the Full Faith and Credit Clause. *See, e.g., Mack v. Mack*, 618 A.2d 744, 750 (Md. Ct. App. 1993) (explaining that, because "[t]he mandate of [the Full Faith and Credit Clause] is not absolute, … [i]t is proper for a forum court to examine the

jurisdiction of the deciding court to determine whether the foreign judgment must be accorded full faith and credit") (citing, *inter alia*, *Milliken v. Meyer*, 311 U.S. 457, 462 (1940)). In the decision below, the Alabama Supreme Court recited and applied precisely that principle in finding that the Georgia court lacked power to award an adoption unauthorized by Georgia law. *See Ex parte E.L.*, 2015 WL 5511249, at *7 (noting this Court's "distinction between a subject-matter jurisdiction challenge and a merits-based challenge" under the Full Faith and Credit Clause) (and discussing *Fauntleroy v. Lum*, 210 U.S. 230, 234-35 (1908)).

V.L. also mistakenly claims that the Alabama Supreme Court's decision is a "stark departure" from how other state supreme courts have addressed the full faith and credit due to sister-state adoptions. Stay App. at 29. To the contrary, the state decisions V.L. cites recognize exactly the same limitation on full faith and credit as the one applied by the court below.[2] And, again, V.L. avoids claiming that the lower court's decision conflicts with any of those decisions. In fact, the most factually similar case she cites, *Russell v. Bridgens*, 647 N.W.2d 56 (Neb. 2002), may well

[2] *See, e.g., In re Trust Created by Nixon*, 763 N.W.2d 404, 409 (Neb. 2009) (noting that while "the U.S. Constitution prohibits a Nebraska court from reviewing the merits of a judgment rendered in a sister state, … a foreign judgment can be collaterally attacked by evidence that the rendering court was without jurisdiction over the parties or the subject matter"); *Giancaspro v. Congleton*, 2009 WL 416301, at *2 (Mich. Ct. App. Feb. 19, 2009) (observing that "[a] state need not give full faith and credit to a judgment issued by a court that lacked subject-matter jurisdiction over the litigation or jurisdiction over the parties"); *Hersey v. Hersey*, 171 N.E. 815, 819 (Mass. 1930) (explaining that, with respect to recognizing an out-of-state adoption, "[c]omplete inquiry is permissible into the circumstances of a judgment of a sister state to determine whether it binds the person against whom it is invoked," and confirming that "[t]here may be searching investigation into the jurisdiction of the court in which the judgment is rendered, over the subject-matter, or the parties affected by it, or into the facts necessary to give such jurisdiction") (quotations omitted).

support the Alabama Supreme Court's analysis. In *Russell*, the Nebraska Supreme Court suggested that a Pennsylvania court may have lacked jurisdiction to award a non-spousal adoption where the child's parent had not surrendered her rights. *See id.* at 59-60 (considering whether, due to alleged lack of termination of parental rights, parent may "collaterally attack the judgment on the basis that the Pennsylvania court lacked subject matter jurisdiction").[3] Thus, far from showing that the Alabama Supreme Court's decision "departs" from other state supreme courts, the cases V.L. cites show that it is consistent with those courts' treatment of the full faith and credit due out-of-state adoptions.

Finally, V.L. urges as a ground for granting certiorari the "harm" that the lower court's decision may cause to an unspecified number of Alabama families who may have adopted children in Georgia under similar circumstances. Stay App. at 30. V.L. fails, however, to show that this hypothetical possibility of harm makes the full faith and credit issue in this case "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). She claims that V.L. "is not the only parent in this situation," but she does not even estimate how many other Georgia adoption orders have "allowed an unmarried second parent to adopt without terminating the existing parent's rights." Stay App. at 31. She also claims that trial courts "in many other states" have granted similar adoptions, but she provides no indication of how many of these adoptions have taken place, whether

[3] The court did not reach the issue, however, because no evidence showed the parent's failure to surrender her rights. *Id.* In the present case, of course, "it is undisputed that E.L. did not surrender her parental rights[.]" *Ex parte E.L.*, 2015 WL 5511249, at *10.

they complied with the granting states' law, or whether they have led to interstate disputes like the one in this case. *Id.* at 34.

Indeed, if the practice of granting adoptions like the one below were as prevalent as V.L. claims, one would expect to see a significant number of lower court decisions exploring whether those adoptions merit full faith and credit in another state. Yet V.L. has cited only *one*, *Russell v. Bridgens*, which, as explained above, may support the Alabama Supreme Court's decision that courts may lack jurisdiction under state adoption statutes to grant such adoptions. *See Russell*, 647 N.W.2d at 59-60; *see also, e.g., Boseman v. Jarrell*, 704 N.E.2d 494, 501 (N.C. 2010) (concluding that North Carolina courts lacked subject-matter jurisdiction to award a non-spousal adoption that failed to terminate the existing rights of the child's biological parent). In any event, if the full faith and credit question arises in future cases, a division of authority may develop justifying this Court's intervention. V.L.'s inability to cite any current split on this issue, however, shows that the moment has not arrived.

II. It is unlikely that a majority of the Court would find the Alabama Supreme Court's judgment erroneous.

Most of V.L.'s stay application (*see* Stay App. at 13-26) argues that the Alabama Supreme Court's decision was erroneous. She claims the decision: (1) attacked the *merits* of the Georgia adoption, in violation the full faith and credit principle authorizing re-examination only of the court's *jurisdiction* to enter the decree (*id.* at 14-15, 16-18); (2) failed to grant the presumption that the Georgia court, as a court of general subject matter jurisdiction, did have jurisdiction (*id.* at 15, 18-20); and (3) ignored the rule that even jurisdictional collateral attacks are barred if the court

issuing the judgment made its own "jurisdictional determination" (*id.* at 15-16, 23-25). V.L. is mistaken on all three grounds.

A. The Alabama Supreme Court correctly found that the defect in the Georgia adoption went to jurisdiction and not to merits.

Contrary to V.L.'s argument, the Alabama Supreme Court expressly recognized the settled full faith and credit rule allowing collateral attacks only on the jurisdiction, but not on the merits, of a sister-state judgment. *See Ex parte E.L.*, 2015 WL 5511249, at *3 ("emphasiz[ing]" that "our review does not extend to a review of the legal merits of the Georgia judgment … because we are prohibited from making any inquiry into the merits of the Georgia judgment by Art. IV, § 1, of the United States Constitution"); *id.* at *9 (noting that any error in the Georgia decree "is ultimately of no effect unless it implicates the subject-matter jurisdiction of the Georgia court"). Indeed, the court quoted at length from this Court's seminal discussion of the distinction between jurisdiction and merits in *Fauntleroy v. Lum*, in which Justice Holmes explained that it "sometimes may be difficult to decide" whether a statutory requirement is framed in terms of a court's "power" or "duty," but that the answer ultimately comes down to "a question of construction and common sense." *See id.* at *8 (quoting *Fauntleroy*, 210 U.S. at 234-25).

Using those basic parameters laid down by Justice Holmes, the Alabama Supreme Court correctly determined that the Georgia adoption statutes simply "*make no provision* for a non-spouse to adopt a child without first terminating the parental rights of the current parents." *Id.* at *8 (emphasis added). Thus, the decree purporting to *grant* parental rights to V.L., while expressly *preserving* the parental

rights of E.L., was "void" because it contravened the basic "condition that must exist before [Georgia] courts can grant adoptions to third parties such as V.L."—namely the surrender of rights by all living parents of the children. *Id.* at *10 (citing Ga. Code Ann. § 19-8-5(a)). The court properly concluded that this flaw in the decree was jurisdictional because it went not merely to the "duty" of the Georgia court, but rather to its "power" to grant the adoption at all. *See id.* at *10 (concluding "the Georgia court *was not empowered* to enter the Georgia judgment declaring V.L. to be an adoptive parent of the children") (emphasis added); *id.* at *8 (a merits-based requirement only "define[s] the duty of the court," whereas a jurisdictional requirement "is meant to limit its power") (quoting *Fauntleroy*, 210 U.S. at 234-35).

Notably, V.L. does not cite a single decision from Georgia or anywhere else standing for the proposition that the flaw in the Georgia decree goes only to the merits and not to jurisdiction.[4] She dismisses statements from a Georgia Supreme Court Justice and the Georgia court of appeals strongly suggesting that the Alabama Supreme Court was right: Georgia law does not authorize its courts to grant the kind of adoption granted in this case, which is therefore void. *See Wheeler*, 642 S.E.2d at 104 (Carley, J., dissenting from denial of certiorari) (stating that Georgia law "specifically proscribes" a second-parent adoption in favor of a non-

[4] With respect to the jurisdictional inquiry, V.L. points out that the Georgia court had exclusive jurisdiction over adoptions and says that "should have been the end of the matter for purposes of the Full Faith and Credit Clause." Stay App. at 16. That begs the question. The fact that the court had "exclusive" jurisdiction over adoptions does not answer whether the adoption granted here was within the authority conferred by Georgia law. Here, as the Alabama Supreme Court concluded, the adoption granted to V.L. was of a kind not recognized by Georgia law. The fact that the court that granted it had "exclusive" jurisdiction over adoptions cannot create authority where there is none to begin with.

spouse and questioning whether courts have "'the power to grant such an adoption under the existing adoption statutes'") (quoting *In the Interest of Angel Lace M.*, 516 N.W.2d 678, 681 (Wis. 1994))[5]; *Bates*, 730 S.E.2d at 484 (noting in *dicta* that "[t]he idea that Georgia law permits a 'second parent' adoption is a doubtful one") (citing *Wheeler*, 642 S.E.2d at 103 (Carley, J., dissenting from denial of certiorari). And she fails to address numerous decisions from other jurisdictions questioning the power of state courts to grant second-parent adoptions to persons not married to the child's living parent. *See S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 823 & n.13 (Ky. App. Ct. 2008) (collecting cases recognizing that state courts lack authority to grant such adoptions); *see also Boseman*, 704 N.E.2d at 501 (holding that North Carolina courts lacked subject-matter jurisdiction to grant such adoptions).[6]

---

[5] V.L. argues that Justice Carley would have found that the defect goes to the merits and not to jurisdiction because he identified it as a "nonamendable defect" under Georgia Code § 9-11-60(d)(3), instead of § 9-11-60(d)(1) (dealing with lack of jurisdiction over "the person or the subject matter"). Stay App. at 19. V.L. is mistaken. First, the section referenced by Justice Carley refers, not merely to a failure to state a claim, but rather to a defect that "affirmatively show[s] no claim in fact existed." Ga. Code Ann. § 9-11-60(d)(3). Second, Justice Carley's opinion emphasized that the defect in question was not a "technical flaw" in the adoption but rather an indication that the adoption was "unauthorized" and "specifically proscribe[d]" by Georgia law. *Wheeler*, 642 S.E.2d at 104-05 (Carley, J., dissenting from denial of certiorari). Thus, the defect identified by Justice Carley went, not merely to the merits of whether the adoption should have been granted, but rather to the power of the court to grant it in the first place.

[6] Instead of discussing any cases about state jurisdiction to award second-parent adoptions, V.L. relies on inapposite federal cases finding non-jurisdictional requirements such as the Title VII employee threshold (*Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006)), a territorial requirement in the securities fraud statute (*Morrison v. Nat'l Australia Bank, Ltd.*, 561 U.S. 247 (2010)), and the requirement of finding undue hardship before discharging student loan debt in bankruptcy (*United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)). Stay App. at 17. The statutory prerequisites in those cases, however, did not go to the "tribunal's power" but only to "whether the allegations the plaintiff makes entitle him to relief." *Morrison*, 561 U.S. at 247 (quotations omitted). By contrast, the surrender of parental rights goes to the *power* of Georgia courts to enter an adoption at all.

V.L. also claims that the Alabama Supreme Court held that *any* statutory error in an adoption proceeding would leave an adoption open to collateral attack in other states, thereby "creat[ing] a massive loophole in the Full Faith and Credit Clause." Stay App. at 20-21. This vastly overstates the lower court's holding. The Alabama Supreme Court merely referenced the common interpretive principle that adoption statutes, because they are in derogation of common law, should be strictly construed in favor of the rights of natural parents. *Ex parte E.L.*, 2015 WL 5511249, at *10 (citing *In re Marks*, 684 S.E.2d 364, 367 (Ga. 2009)); *see also, e.g., Matter of Adoption of Robert Paul P.*, 471 N.E.2d 424, 426 (N.Y. Ct. App. 1984) (explaining that, "because adoption is entirely statutory and is in derogation of common law, the legislative purposes and mandates must be strictly observed") (citations omitted). The lower court correctly applied this principle to determine whether Georgia law authorized an adoption in favor of a third party without terminating the existing parent's rights. *See Ex parte E.L.*, 2015 WL 5511249, at *10 (interpreting Ga. Code Ann. § 19-8-5(a)). But the court never suggested that any and every statutory flaw in an adoption would amount to a jurisdictional defect. To the contrary, after identifying the specific defect in this case, the court remarked that "[o]ur inquiry does not end here, however, as that error is ultimately of no effect unless it implicates the subject-matter jurisdiction of the Georgia court." *Ex parte E.L.*, 2015 WL 5511249, at *9.

As the lower court found, an adoption that fails to terminate the current parent's rights is a legal impossibility under Georgia law and is therefore void.

In sum, the Alabama Supreme Court canvassed Georgia law and correctly determined that the defect in the Georgia decree implicated, not (or not only) the *merits* of the adoption, but rather the court's *power* to award it in the first place. Thus, the lower court properly recognized that the Georgia adoption is not entitled to full faith and credit. *See, e.g., Williams*, 325 U.S. at 229 (explaining that, under the Full Faith and Credit Clause, "[a] judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment").

B. Any presumption of jurisdiction is defeated by the undisputed fact that E.L. did not surrender her rights in the adoption decree.

Alternatively, V.L. argues that the Alabama Supreme Court was required to apply a "presumption" that the Georgia court had jurisdiction to award the adoption to V.L. because, as "a court of general jurisdiction," it has subject-matter jurisdiction to rule on adoptions. Stay App. at 18. V.L. misunderstands the law. As she recognizes elsewhere in her application, this "presumption" of jurisdiction applies "unless disproved by extrinsic evidence, or by the record itself." Stay App. at 15 (quoting *Milliken*, 311 U.S. at 462). In this case, the Georgia court's lack of jurisdiction to award the adoption to V.L. is amply displayed by "the record itself": it was "undisputed" that E.L. did not surrender her parental rights, as the adoption decree expressly reflects. *Ex parte E.L.*, 2015 WL 5511249, at *10. As the Alabama Supreme Court explained, E.L.'s failure to surrender her parental rights defeats the basic "condition that must exist" before a Georgia court can grant an adoption. *Id.*

The undisputed record in this case overcomes whatever presumption of jurisdiction may operate in favor of the Georgia decree.

C. The Alabama Supreme Court's examination of jurisdiction is not foreclosed by res judicata.

Alternatively, V.L. argues that the Georgia court's jurisdiction is *res judicata* because the Georgia court made a "determination of its own jurisdiction" to award the adoption without terminating E.L.'s parental rights. Stay App. at 24. V.L. thus claims that the Alabama Supreme Court's re-examination of the Georgia court's jurisdiction is barred by full faith and credit, which applies equally to a ruling on jurisdiction as to one on the merits. *Id.* at 15. V.L. is again mistaken.

The *res judicata* rule to which V.L. refers demands, as she concedes, that the issuing court have "made a jurisdictional determination that is itself entitled to *res judicata*." *Id.* at 15-16. This means that questions pertaining to jurisdiction must "'have been fully and fairly litigated and finally decided in the court which rendered the original judgment'." *Underwriters Nat'l Assur. Co. v. N.C. Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 (1982) (quoting *Durfee v. Duke*, 375 U.S. 106, 111 (1963)). With respect to this case, then, the question is whether the Georgia court "fully and fairly litigated" its authority to grant an adoption to a non-spouse without terminating the parental rights of the current parents.

The answer is obviously no. Nothing in the adoption proceedings, or in the decree itself, suggests that the question of whether Georgia law authorizes the kind of adoption at issue was even considered, much less "fully and fairly litigated." Sensing this absence, V.L. struggles to argue that the Georgia court "specifically

addressed" jurisdiction in its conclusion of law that declined to terminate E.L.'s parental rights. Stay App. at 23. But that legal conclusion did not address, nor even mention, the court's statutory authority to grant the adoption; rather, it stated only that it would be "contrary to the children's best interests" not to recognize both women as their legal parents. *Id.*[7] Whether an adoption is in a child's best interests, however, has nothing to do with prior question of the court's authority to grant the adoption in the first place. *See, e.g., Angel Lace M.*, 516 N.W.2d at 681 ("[T]he fact that an adoption—or any other action affecting a child—is in the child's best interests, by itself, does not authorize a court to grant the adoption."). Moreover, the Alabama Supreme Court did not question whether the adoption was in the children's best interests. Rather, it questioned whether the adoption was void because the Georgia court had no statutory authority to enter it.[8]

In sum, the Georgia court did not address whether it had jurisdiction to grant the adoption in this case. Therefore, that court's jurisdiction was not *res judicata* and the Alabama Supreme Court could properly examine it.

---

[7] V.L. also attempts to rely on the Georgia court's finding that she "complied with all relevant and applicable formalities" for the adoption petition. Stay App. at 23-24. Quite obviously, that boilerplate recitation does not even mention the court's authority to enter the adoption at issue; *a fortiori*, it cannot amount to a "full and fair litigation" of that issue for purposes of full faith and credit.

[8] V.L. incorrectly claims that Georgia law forecloses a jurisdictional challenge to a court's determination of parental rights by a parent who participated in prior litigation. Stay App. at 24. The cases she cites, however, fail to support that assertion. *Amerison v. Vandiver*, 673 S.E.2d 850, 851 (Ga. 2009), holds only that under some circumstances laches may bar a parent's jurisdictional challenge to a termination of rights. To the extent *Marshall v. Marshall*, 360 S.E.2d 572 (Ga. 1987), ever supported the proposition V.L. asserts, the decision is no longer good law. *See Scott v. Scott*, 644 S.E.2d 842, 844 (Ga. 2007) (overruling *Marshall*).

III. It is unlikely that denying a stay will cause irreparable harm.

V.L. argues that a stay is necessary to prevent irreparable harm because, absent a stay, she "will be unable to have contact with the children during the pendency of her petition to this Court." Stay App. at 34. She asserts that she had visitation rights "[d]uring most of this litigation," and that those rights were suspended only when the Alabama Supreme Court stayed visitation pending its consideration of E.L.'s petition. *Id.* at 35. Drawing on social science literature, she asserts that even a temporary disruption of her contact with the children will irreparably harm them and her. *Id.* at 36-38. She then invites the Court to "balance the equities" between the parties and find that the "balance of harms favors V.L." *Id.* at 39. The Court should reject V.L.'s irreparable harm argument.

While V.L. points out that "the trial court ordered that she have visitation," *id.* at 35, she neglects to mention that the Alabama Court of Civil Appeals subsequently *vacated* that order. The appellate court found that the trial court violated due process by "awarding V.L. visitation rights without affording [E.L.] a hearing." *E.L. v. V.L.*, __ So.3d __, 2015 WL 836916, at *5 (Ala. Civ. App. Feb. 27, 2015). The court explained that it was error to "award[ ] V.L. visitation based simply on her status as an adoptive parent under the Georgia judgment without conducting an evidentiary hearing to inquire into the best interests of the children." *Id.* Based on that error, the appellate court "reverse[d] the judgment of the family court" [awarding visitation] and remanded for the court "to forthwith conduct an evidentiary hearing to decide the visitation issue." *Id.* at **5-6. The record does not reflect that V.L. sought review of the decision vacating her visitation rights.

Given that procedural history, it is difficult to credit V.L.'s argument that a stay of the Alabama Supreme Court's judgment will automatically restore her visitation rights. As the appellate court explained, V.L. is not necessarily entitled to visitation with the children based on the Georgia judgment alone (even assuming it merits full faith and credit). Rather, whether she obtains visitation would depend on the family court's consideration of evidence adduced at a hearing. Thus, V.L.'s insistence that a stay of the Alabama Supreme Court's decision will automatically restore her visitation rights appears inaccurate, which defeats the whole premise for her irreparable harm argument.

In light of that, V.L.'s request that this Court balance the "equities" in considering her stay application takes on deeply problematic aspect. Assessing the relative equities between V.L. and E.L. regarding visitation must depend—as the appellate court explained—on evidence that has yet to be adduced and that is, by definition, not part of the record. This Court ought to decline V.L.'s invitation to balance the harms of allowing or not allowing visitation based on a virtually non-existent evidentiary record and guided by nothing more than general social science principles. While it is true that the Court may "balance the equities" in assessing a close stay application, *Conkright*, 556 U.S. at 1402, V.L. would co-opt that principle to convert this Court into a family court. The Court should decline that ill-considered invitation. *Cf. Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (noting that this Court has "customarily declined to intervene in the realm of domestic relations"); *Ankenbrandt v. Richards*, 504 U.S. 689 704, 703 (1992)

(explaining that, under the "domestic relations exception" to federal jurisdiction, federal courts "lack power" to "issue divorce, alimony, and child custody decrees").

Finally, given that V.L. asks for equitable relief, the Court should be guided by "the equitable maxim that 'he who comes into equity must come with clean hands.'" *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814 (1945). The record in this case shows that the parties' domicile in Georgia was a fiction designed solely to confer jurisdiction on a Georgia court that the parties calculated would be amenable to an adoption by V.L. that would not require surrender of E.L.'s rights. *See supra* at 3 (discussing parties' affidavits); *see also* Ga. Code Ann. § 19-8-3(a)(3) (to petition for adoption a person must, *inter alia*, have "been a bona fide resident of [Georgia] for at least six months immediately preceding the filing of the petition"). The Court should not award equitable relief based on an adoption decree that was obtained by such transparent jurisdictional gamesmanship. *See, e.g., Precision Instrument Mfg. Co.*, 324 U.S. at 814-15 (observing that, "while 'equity does not demand that its suitors shall have led blameless lives,' as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy at issue") (quoting *Loughran v. Loughran*, 292 U.S. 216, 229 (1934)).[9]

[9] In the courts below, E.L. raised V.L.'s failure to establish a bona fide Georgia domicile as an alternate ground for resisting full faith and credit to the Georgia decree. The Alabama Supreme Court did not reach that argument because it resolved the case on the ground of the Georgia court's lack of subject matter jurisdiction. *Ex parte E.L.*, 2015 WL 5511249, at *10. E.L. could, of course, defend the Alabama Supreme Court's judgment in this court on the alternative ground of V.L.'s lack of a Georgia domicile. *See, e.g., Williams v. North Carolina*, 325 U.S. at 235-36 (allowing reconsideration of parties' Nevada domicile for purposes of resisting full faith and credit to Nevada divorce judgment).

Conclusion

The petitioner's stay application should be denied.

Respectfully submitted,

Randall W. Nichols
Anne Lamkin Durward
MASSEY, STOTSER & NICHOLS, PC
1780 Gadsden Highway
Birmingham, AL 35235
Tel: 205.838.9002
rnichols@msnattorneys.com

S. Kyle Duncan
Counsel of Record
DUNCAN PLLC
1629 K Street NW, Suite 300
Washington, DC 20006
Tel: 202.714.9492
kduncan@duncanpllc.com

Counsel for Respondent E.L.

November 30, 2015

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2015 I sent an copy by U.S. Mail and an electronic copy of the foregoing to the following counsel of record:

SHANNON MINTER
CATHERINE SAKIMURA
EMILY HAAN
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street,
Suite 370
San Francisco, CA 94102
415.392.6257
sminter@mclrights.org

PAUL M. SMITH
ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW,
Suite 900
Washington, D.C. 20001
202.639.6000
aunikowsky@jenner.com

TRACY OWEN VELLA
VELLA & KING
3000 Crescent Ave.
Birmingham, AL 35209
205.868.1555
tvella@vellaking.com

HEATHER FANN
BOYD, FERNAMBUCQ, DUNN
& FANN, P.C.
3500 Blue Lake Drive,
Suie 220
Birmingham, AL 35243
205.930.9000
hfann@bfattorneys.com

Counsel for Applicant

S. Kyle Duncan
Counsel for Respondent E.L.