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

REPLY BRIEF IN SUPPORT OF APPLICATION FOR RECALL AND STAY OF CERTIFICATE OF JUDGMENT OF ALABAMA SUPREME COURT

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INTRODUCTION

E.L.'s response brief gives no persuasive argument for denying a stay. E.L. contends that V.L. seeks mere "error correction" of the Alabama Supreme Court's ruling, ignoring the fact that the Alabama Supreme Court's ruling has far-reaching practical implications going well beyond the parties to this case. As explained below, although exact statistics do not exist, the available evidence establishes that the Alabama Supreme Court's decision would call into question the parental rights of thousands of adoptive parents if they ever traveled or moved to Alabama. V.L.'s petition to reverse that ruling goes far beyond "error correction."

Moreover, E.L. gives no colorable defense of the Alabama Supreme Court's remarkable and unprecedented ruling that it could overturn a Georgia adoption based on its *de novo* determination that the Georgia Superior Court misapplied Georgia's own adoption law. Finally, E.L. does not contest that depriving V.L. of visitation with her children will cause irreparable harm, and her assertion that a stay will not restore V.L.'s parental rights reflects a misunderstanding of the procedural posture of this case. The Application should be granted.

ARGUMENT

I. There Is a Reasonable Probability That This Court Will Grant Certiorari.

E.L.'s primary argument against the Application is that V.L.'s petition seeks mere "error correction," and thus will not warrant this Court's review. E.L. is incorrect. The decision below has profound practical effects stretching far beyond the parties to this case, which fully warrant granting certiorari. Moreover, the stark

departure of the opinion below from historic Full Faith and Credit jurisprudence justifies this Court's review.

1. The Application argued that the "severe practical consequences of the decision below" warrant this Court's review. Stay App. 30. Its lead argument was that the decision below "yields the ultimate conflict of authority: directly conflicting court orders in two different states," which will result in severe practical problems and forum-shopping for adoptive parents in Alabama. *Id.* E.L. denies none of this; instead, she ignores this argument altogether. Given that this Court has expressly stated that conflicting orders on parental rights are a basis for granting certiorari, *id.* at 31 (citing *Webb v. Webb*, 451 U.S. 493, 494 (1981)), there is at least a reasonable probability that this Court will grant certiorari for that reason alone.

2. The Application next explained that the Alabama Supreme Court's opinion effectively stripped all parents who obtained Georgia adoptions similar to V.L.'s of their parental rights, which will have catastrophic effects on those families. Stay App. 32. It also established that most states are similar to Georgia in that no statute expressly authorizes adoptions by an unmarried second parent, and no appellate case law expressly addresses whether such adoptions are permissible. Thus, the Alabama Supreme Court's decision would apply equally to parents who obtained similar adoptions in such states. Stay App. 34 & n.10. E.L. does not dispute that this is an accurate characterization of the opinion below. Instead, she argues that these practical impacts are insufficiently consequential for this Court's review, because V.L. has not

quantified the number of adoptions in which the court did not terminate the parental rights of an existing parent. Resp. 10-11.

That argument is not persuasive. Exact statistics on the number of such adoptions are not available, because most adoptions are under seal, and no central national database exists cataloguing the total number of adoptions. But the number is substantial. As the Application explained (and as E.L. does not dispute), prior to the availability of equal marriage rights for same-sex couples, the only way for the great majority of same-sex couples to obtain parental rights was for one of the partners to adopt a child while preserving the parental rights of the parent's same-sex partner. Stay App. 34. Even before the legalization of marriage for same-sex couples, many same-sex couples were raising children. *See United States v. Windsor*, 133 S. Ct. 2675, 2944 (2013) (stating that DOMA "humiliates tens of thousands of children now being raised by same-sex couples"); Gary J. Gates & Abigail M. Cooke, *United States Census Snapshot: 2010*, THE WILLIAMS INST., 3, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf?r=1 (Sept. 2011) (stating that 111,033 same-sex couples are raising children). And such couples frequently protected their parental rights through adoptions similar to V.L.'s. Such adoptions have been granted since at least the mid-1980s, long before same-sex couples could marry, and have been "routinely granted by trial court judges, even in the absence of appellate case law." Nancy D. Polikoff, *Recognizing Partners But Not Parents / Recognizing Parents But Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. Sch. J. Hum. Rts. 711, 731-32 (2000). For instance, the California Supreme

Court noted that 10,000 to 20,000 second parent adoptions had been granted in California alone before its decision in 2003 expressly authorizing such adoptions. *Sharon S. v. Superior Court*, 73 P.3d 554, 568 (Cal. 2003). Extrapolating nationwide, and including both same-sex and opposite-sex unmarried couples, it is likely that the number of adoptions granted to a parent's unmarried partner numbers in the hundreds of thousands.

E.L. asserts that there have been a small number of reported cases involving collateral attacks on adoptions by second parents, and concludes that this issue is therefore unimportant. Resp. 11. But counting up the number of such reported cases provides a misleading picture of the effect of the Alabama Supreme Court's ruling. Only a tiny fraction of adoptions yield subsequent custody disputes in which a parent tries to invalidate the adoption retroactively; yet the Alabama Supreme Court's decision will invalidate *all* adoptions similar to V.L.'s, even for parents who are still together. Moreover, even though collateral attacks on such adoptions are relatively infrequent relative to the total number of such adoptions, they are not uncommon in absolute terms. The Application catalogued several Full Faith and Credit disputes involving such adoptions, Stay App. 29-30, and there is a large body of law addressing collateral challenges to such adoptions within the States in which they were originally granted. E.L. cites a case from North Carolina authorizing such a collateral challenge;[1] she neglects to mention the substantial number of appellate decisions holding that collateral challenges to such adoptions are not permitted regardless of whether the

[1] Resp. Br. 11, 14 (citing *Boseman v. Jarrell*, 704 N.E.2d 494, 501 (N.C. 2010)).

adoptions were legal in the first instance.[2] Nor does she mention the similarly substantial number of appellate decisions holding that such adoptions are permissible, even in the absence of explicit statutory authorization.[3] To be sure, the permissibility of such adoptions remains an open question in many states (including Georgia), which is precisely why the Alabama Supreme Court's opinion is so consequential—any such adoption granted in those States is subject to collateral attack in Alabama under the Alabama Supreme Court's reasoning. Yet the volume of case law that already exists defeats any argument that such adoptions are too rare to warrant the attention of this Court.

And this case law is likely to multiply. Before the Alabama Supreme Court's decision, a lawyer in a child custody, probate, wrongful death, or any other dispute

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[2] *See, e.g., In re Adoption of D.P.P.*, 158 So. 3d 633 (Fla. Dist. Ct. App.), *review denied sub nom. C.P. v. G.P.*, 148 So. 3d 769 (Fla. 2014); *Mariga v. Flint*, 822 N.E.2d 620 (Ind. Ct. App. 2005); *Schott v. Schott*, 744 N.W.2d 85 (Iowa 2008); *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804 (Ky. Ct. App. 2008); *Usitalo v. Landon*, 829 N.W.2d 359 (Mich. Ct. App. 2012); *Hansen v. McClellan*, No. 269618, 2006 WL 3524059 (Mich. Ct. App. Dec. 6, 2006); *In re Adoption of T.A.M.*, 791 N.W.2d 573 (Minn. Ct. App. 2010); *In re Adoption Petition of Rebecca M.*, 178 P.3d 839 (N.M. Ct. App. 2008); *Goodson v. Castellanos*, 214 S.W.3d 741 (Tex. App. 2007); *Hobbs v. Van Stavern*, 249 S.W.3d 1 (Tex. App. 2006); *In the Interest of S.D.S.-C*, No. 04-08-00593-CV, 2009 WL 702777 (Tex. App. Mar. 18, 2009).

[3] *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003); *In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. 1995); *In re Adoption of Doe*, 326 P.3d 347 (Idaho 2014); *In re Petition of K.M. & D.M. to Adopt Olivia M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995); *In re Adoption of K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004); *In re Adoption of M.M.G.C.*, 785 N.E.2d 267 (Ind. Ct. App. 2003); *Adoption of M.A.*, 930 A.2d 1088 (Me. 2007); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re the Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); *Adoption of Susan*, 619 N.E.2d 323 (Mass. 1993);*In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); *In re Adoption of Carolyn B.*, 6 A.D.3d 67 (N.Y. App. Div. 2004); *In re Adoption of R.B.F. & R.C.F.*, 803 A.2d 1195 (Pa. 2002); *In re Adoption of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993).

dependent on parental rights, might have been dissuaded from collaterally challenging an out-of-state adoption based on a purported statutory defect, on the ground that no such challenges had succeeded in American history. Stay App. 29. Now, such arguments have been transformed from frivolous into—under Alabama law—meritorious. At a minimum, the Alabama Supreme Court's decision will inject great uncertainty into such disputes by providing a potent counterexample to the ancient principle that once a parent adopted her child, she would be that child's parent forever.

3. Even worse, the Alabama Supreme Court's reasoning applies to *all* adoptions, not just adoptions like V.L.'s. The Alabama Supreme Court held that the Georgia Superior Court's error was "jurisdictional" based on Georgia case law holding that adoption is purely a matter of statute and that adoption statutes should be strictly construed. This reasoning would apply in indistinguishable form to *any* statutory defect in *any* adoption in *any* state. Stay App. 32-33.

E.L. asserts that the Alabama Supreme Court "merely referenced the common interpretative principle that adoption statutes, because they are in derogation of common law, should be strictly construed in favor of the rights of natural parents," but that "the court never suggested that any and every statutory flaw in an adoption would amount to a jurisdictional defect." Resp. 15. This is simply wrong. The strict-construction principle formed the *entire* legal basis of the Alabama Supreme Court's jurisdictional holding. App'x 29a-30a. The court identified nothing about the purported statutory defect in V.L.'s adoption that would make it any more "jurisdictional" than any other purported statutory defect. We reiterate the unrebutted statement of the

dissent: "this case creates a dangerous precedent that calls into question the finality of adoptions in Alabama: Any irregularity in a probate court's decision in an adoption would now arguably create a defect in that court's subject-matter jurisdiction." App'x 43a-44a.

4. Finally, the stark departure of the decision below from historic full faith and credit jurisprudence warrants this Court's review. E.L. makes the unremarkable point that judgments can be collaterally challenged and denied full faith and credit for lack of subject-matter jurisdiction, Resp. 8-10, but refuses to acknowledge that the decision below is different from any previous successful collateral challenge. As E.L. apparently concedes, aside from "wrong forum" challenges, the decision below is the first successful collateral attack *ever* on an out-of-state judgment for lack of subject-matter jurisdiction. Stay App. 28-29. It is also the first case *ever* refusing to grant full faith and credit to an adoption on the ground that a state court misinterpreted its own state's adoption requirements.[4] *Id.* at 29. The Alabama Supreme Court's remarkable conclusion that a Georgia judgment could be overturned because a Georgia judge misinterpreted his own state law is a historic blow to interstate comity that lacks any

[4] E.L. argues that *Russell v. Bridgens*, 647 N.W.2d 56 (Neb. 2002), supports the Alabama Supreme Court's decision. Resp. 9-10. It does not. In *Russell*, the Nebraska Supreme Court reversed a decision denying recognition to a Pennsylvania adoption similar to V.L.'s based on the insufficiency of the summary judgment record, while noting that an impending Pennsylvania Supreme Court case would moot the Nebraska litigation by deciding the propriety of such adoptions under Pennsylvania law. 647 N.W.2d at 60. A concurring opinion made almost the identical arguments that V.L. advances here. *Id.* at 61-64 (Gerrard, J., concurring). A few months later, the Pennsylvania Supreme Court held that such adoptions were permissible. *In re Adoption of R.B.F. & R.C.F.*, 803 A.2d 1195 (Pa. 2002).

precedent in the case law of this or any other Court. A certiorari petition seeking to reverse that ruling goes beyond mere "error correction."

II. There Is a Fair Prospect That the Court Will Reverse.

The decision below is irreconcilable with a century of Full Faith and Credit jurisprudence. If the Court grants certiorari, it is highly likely to reverse.

1. E.L. offers no meaningful response to the Application's argument that whether the Georgia Superior Court was required to strip E.L. of her parental rights as a condition of granting V.L. an adoption is an argument that goes to the merits of the Georgia judgment, not to the Georgia court's jurisdiction. Stay App. 16-18. Her assertions that this requirement goes to the "power" to grant an adoption rather than the "duty" are nothing but *ipse dixit*. *See* Resp. 13-14 & n.6. She makes no attempt to reconcile the Alabama Supreme Court's decision with this Court's oft-stated rule that jurisdictional limitations in a statute must be stated clearly. Stay App. 17. Nor does she reconcile the decision below with the dissent's observation that Georgia Superior Courts are authorized to award custody even when the statutory requirements for an adoption are not met. Stay App. 18. And, remarkably, she abandons the basis for the Alabama Supreme Court's holding that the parental-termination provision is jurisdictional. The Alabama Supreme Court rested its jurisdictional determination on the fact that the adoption statutes must be strictly construed, App'x 29a-30a; yet E.L. asserts that the Alabama Supreme Court "merely referenced" this "common interpretive principle," Resp. 15, and does not defend its reliance on that principle as a basis to characterize the parental-termination provision as a jurisdictional requirement.

2. E.L. is also unable to reconcile the decision below with this Court's case law holding that under the Full Faith and Credit Clause, a court is required to *presume* that an out-of-state court of general jurisdiction possessed jurisdiction to enter a judgment. Stay App. 15, 18-20. There is nothing in Georgia's statutes or case law that would defeat this presumption. Like the Alabama Supreme Court, E.L. rests her position entirely on two cases which obviously do not defeat the presumption: a *dissenting* opinion, *Wheeler v. Wheeler*, 642 S.E.2d 103 (Ga. 2007) (Carley, J., dissenting from denial of certiorari),[5] and an opinion expressly *refusing* to reach the question presented, *Bates v. Bates*, 730 S.E.2d 482 (Ga. Ct. App. 2012). Resp. 13-14. Perhaps recognizing the lack of support for her position, E.L. relies on the *absence* of Georgia authority, arguing that "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." Resp. 13. But this gets the law exactly backwards: it was *E.L.*'s burden to establish that the Georgia Superior Court *did not* have jurisdiction, a burden she plainly failed to meet. E.L. also argues that "the undisputed record" establishes that "E.L. did not surrender her parental rights," Resp. 16, but this argument misses the point. E.L.'s burden is not to prove that she retained her parental

[5] Moreover, in *Wheeler*, Justice Carley did *not* argue that the failure to terminate the existing parent's rights was a jurisdictional defect; rather, he argued that the adoption contained a "nonamendable defect." Stay App. 19. In response, E.L. states that under Georgia law, a "nonamendable defect" establishes that "no claim in fact existed." Resp. 14 n.5. That is true, but it does not transform Justice Carley's argument into a "jurisdictional" objection. Georgia law expressly distinguishes between judgments with a "nonamendable defect" and judgments void for lack of jurisdiction, *see* Ga. Code Ann. § 9-11-60(d)(3), and only the latter can be collaterally attacked under the Full Faith and Credit Clause.

rights; it is to show that her retention of parental rights stripped the Superior Court of jurisdiction. She has failed to meet this burden.

E.L. also states that there are "numerous decisions from other jurisdictions" supporting her position that the Georgia Superior Court lacked jurisdiction to grant an adoption to V.L. without terminating E.L.'s rights. Resp. 14. But there is only one reported case that has ever permitted collateral attacks on such adoptions: *Boseman v. Jarrell*, 704 S.E.2d 494, 501 (N.C. 2010). E.L. cites *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 823 (Ky. App. Ct. 2008), but in that case, the court held that, even though such adoptions were inconsistent with Kentucky law, collateral attacks on such adoptions were *not* permissible a year after they were granted, *id.* at 829; and numerous other courts have similarly held that, regardless of the legality of such adoptions under state law as an initial matter, they were not subject to collateral attack. *See supra* note 2. Moreover, many other courts have held that such adoptions are *permissible* under state law. *See supra* note 3. In any event, a North Carolina decision interpreting North Carolina law, which the Alabama Supreme Court did not even cite, cannot defeat the presumption that the Georgia Superior Court interpreted Georgia law correctly and had jurisdiction to enter a Georgia adoption.

3. Even if the Georgia Superior Court lacked jurisdiction to grant the adoption, the Alabama Supreme Court would still have been barred from overturning its judgment, because the Georgia Superior Court's jurisdictional determination was itself entitled to *res judicata*. Stay App. 23-25. E.L.'s response to this point is remarkable: She argues that *even though* the Georgia Superior Court made the explicit

"Conclusion of Law" that V.L. should be permitted to adopt the children without terminating E.L.'s parental rights, App'x 50a, and *even though* the Georgia Superior Court made the explicit "Conclusion of Law" that V.L. had "complied" with all "formalities ... in accordance with the laws of the State of Georgia," *id.*, the Georgia Superior Court somehow overlooked the question of whether permitting V.L. to adopt the children without terminating E.L.'s parental rights accorded with the laws of Georgia. Resp. 17-18. Significantly, Georgia courts have an independent duty to determine whether they have subject-matter jurisdiction, *see Turner v. Flournoy*, 594 S.E.2d 359, 361 n.1 (Ga. 2004); E.L. contends that the Georgia Superior Court violated its duty by ignoring that question. Thus, E.L. advocates that the Court should adopt a contorted reading of the Superior Court's adoption order, *in order to show that the Georgia Superior Court violated its own duties under Georgia state law.* This argument has no basis in this Court's Full Faith and Credit case law; indeed, it is an affront to the interstate comity interests underlying the Full Faith and Credit Clause. *Cf. Johnson v. Williams*, 133 S. Ct. 1088, 1094-96 (2013) (holding that federal habeas courts must presume that state courts addressed legal issues on the merits even if they do not say so explicitly).[6] V.L. also suggests that the absence of *litigation* on the jurisdictional question establishes that *res judicata* does not apply. Resp. 17-18. To the extent she is

[6] Moreover, the Georgia adoption would not have been susceptible to collateral attack in the courts of Georgia. E.L. repeats the error of the Alabama Supreme Court on this issue: she cites dicta in *Bates v. Bates*, 730 S.E.2d 482 (Ga. Ct. App. 2012), holding that adoptions like V.L.'s might be inconsistent with Georgia law, while steadfastly ignoring dicta in that very opinion stating that regardless of the legality of such adoptions under Georgia law, parents in E.L.'s position who participated in the adoption are estopped from subjecting them to collateral attack. Stay App. 24-25.

making this argument, it is wrong in light of this Court's case law establishing the precise opposite. *Underwriters Nat'l Assur. Co. v. N.C. Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 710 (1982) ("A party cannot escape the requirements of full faith and credit and res judicata by asserting its own failure to raise matters clearly within the scope of a prior proceeding.").

III. Applicant Has Established Irreparable Harm.

E.L. does not dispute the common-sense proposition that depriving V.L. of access to her children would cause irreparable harm. Instead, she argues that staying the decision below might not restore V.L.'s visitation rights, and asserts that V.L. asks to "convert this Court into a family court." Resp. 19-21. She misunderstands the record.

On April 3, 2014, the trial court in this case ordered that V.L. have visitation. Initially, the Alabama Civil Court of Appeals reversed this decision and stayed V.L.'s visitation pending further appellate proceedings. However, on rehearing, the Alabama Court of Civil Appeals lifted that stay and on February 27, 2015 upheld the trial court's determination that V.L. is the children's adoptive parent, but directed the trial court on remand to comply with Alabama's procedural requirement to conduct an evidentiary hearing to determine the amount and type of visitation in the best interests of the children. App'x 61a. The Court of Civil Appeals did not stay the visitation order permitting V.L. to have contact with her children. Thus, following the February 27, 2015 decision, V.L. continued to have visitation with her children. V.L. lost access to the children only after the Alabama Supreme Court stayed the Alabama Court of Civil

Appeals' decision on April 15, 2015, and ultimately issued its Certificate of Judgment reversing the Alabama Court of Civil Appeals' decision.

In this Court, V.L. seeks only a stay of enforcement and recall of the Certificate of Judgment; she does not seek an order of visitation from this Court or request any other relief. If the Court grants such relief, then the effect of the Alabama Supreme Court's ruling would be suspended, and V.L. would be restored to the situation following the Alabama Court of Civil Appeals' ruling—*i.e.*, she would have visitation with the children. V.L. does not ask this Court to interfere with any of the lower court orders or proceedings.

E.L. also argues that the Court should deny a stay because V.L. has "unclean hands," on the theory that the parties' domicile in Georgia was a "fiction" that reflected "gamesmanship." Resp. 21. Yet the Alabama Supreme Court expressly rejected E.L.'s argument that the adoption is subject to collateral attack on the ground that it was supposedly "fraudulent," App'x 16a-17a n.7, and E.L. does not challenge that ruling. Given that E.L. is barred from advancing this argument as a matter of law, she may not smuggle it into the case by asserting that it is an equitable basis for the Court to deny relief. *See Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1385 (2015) ("Courts of equity can no more disregard ... constitutional requirements and provisions than can courts of law" (quotation marks omitted)). In any event, the record does not establish any "unclean hands." It establishes that both parties consulted with a Georgia attorney, who advised them on the legal requirements for obtaining a Georgia adoption;

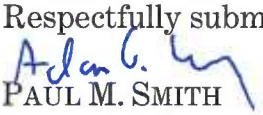
they followed the attorney's advice; and the adoption was granted. App'x 6a. There is no evidence whatsoever of any false statements or unethical conduct.[7]

CONCLUSION

The application for recall and stay of the Certificate of Judgment should be granted.

[7] E.L. suggests that the Alabama Supreme Court's decision might be upheld on the alternative ground that the Georgia Superior Court's judgment could be collaterally attacked because of the parties' alleged failure to meet Georgia's residency requirement. Resp. 21. That is not a basis to deny a stay. It will be irrelevant to this Court's decision to grant certiorari: The Alabama Supreme Court did not reach that question, App'x 30a-31a n.10, and it is not within the question presented. Moreover, the Alabama Court of Civil Appeals squarely rejected this contention, *id.* 57a-58a, and E.L. identifies no error in that court's reasoning.

Respectfully submitted,



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Petitioner,

v.

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

Respondents.

CERTIFICATE OF SERVICE

I, Adam G. Unikowsky, hereby certify that I am a member of the Bar of this Court, and that I have this 1st day of December 2015, caused one copy of the Reply Brief in Support Application for Recall and Stay of Certificate of Judgment of Alabama Supreme Court to be served via overnight mail and an electronic version of the document to be transmitted via electronic mail to:

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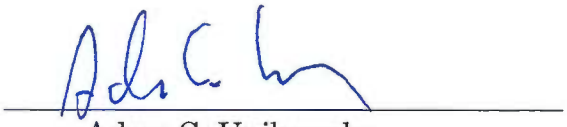

Adam G. Unikowsky