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

PETITIONER'S REPLY BRIEF

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The Court should grant certiorari and reverse the Alabama Supreme Court's decision. The decision below calls into question the parental rights of thousands of adoptive parents if they ever travel or move to Alabama. And it does so based on an application of the Full Faith and Credit Clause that is irreconcilable with long-settled teachings of this Court and lower courts. A decision carrying such serious practical and jurisprudential implications warrants this Court's review.

I. This Case Warrants This Court's Review.

E.L.'s primary argument against this Court's review is that V.L.'s petition seeks mere "error correction." E.L. is incorrect. As the seven amicus briefs in support of the petition should make clear, the decision below has profound practical effects stretching far beyond the parties to this case.

First, the Petition argued that the "severe practical consequences of the decision below" warrant this Court's review. Pet. 32. It explained 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. *Id.* E.L. denies none of this; instead, she simply asserts that there is no conflict of authority, and 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 33 (citing *Webb v. Webb*, 451 U.S. 493, 494 (1981)), this Court's review is warranted for that reason alone.

Second, the Petition 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. Pet. 33-34. It also established that most states in which trial courts routinely grant such adoptions are similar to Georgia in that no statute or appellate case law expressly addresses whether they are permissible. Thus, the Alabama Supreme Court's decision would apply equally to the thousands of parents who obtained similar adoptions in such states. Pet. 34-36 & n.10.

E.L. does not dispute that this is an accurate characterization of the decision below. In fact, she openly embraces the proposition that adoptions similar to V.L.'s from the majority of states that grant such adoptions—not just Georgia—are now invalid in Alabama. Resp. 16.

The effect of the Alabama Supreme Court's decision—even if confined to adoptions by unmarried second parents—is staggering. Contrary to E.L.'s conclusory assertion, such adoptions are not "unusual." Resp. 1. As the Petition explained (and as E.L. does not dispute), prior to the availability of equal marriage rights for same-sex couples, the only way for most 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 partner. Pet. 36. 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, 2694 (2013) (stating that DOMA "humiliates tens of thousands of children now being raised by same-sex

couples"). 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. Many, if not most, of these adoptions will now be unrecognized in Alabama.

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 requires further "percolation." 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 infrequent relative to the *total* number of such adoptions, they are not uncommon in *absolute* terms. The Petition catalogued several Full Faith and Credit disputes involving such adoptions, Pet. 30-31, 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 which is the only case that has ever authorized such a collateral challenge;[1] she neglects to mention the substantial number of decisions barring such collateral challenges,[2] and the similarly substantial number of decisions affirmatively authorizing such adoptions, even in the absence of explicit statutory authorization.[3] To be sure, the permissibility of such

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1 Resp. Br. 14 n.4, 21 (citing *Boseman v. Jarrell*, 704 N.E.2d 494, 501 (N.C. 2010)).

2 *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); *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).

3 *E.g.*, *Sharon S.*, 73 P.3d 554; *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); *Adoption of M.A.*, 930 A.2d 1088 (Me. 2007); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re Jacob*, 660 N.E.2d 397 (N.Y.

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. The volume of cases already addressing such attacks underscores that this case is worthy of this Court's review.

Third, and 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 statutes should be strictly construed. This reasoning would apply in indistinguishable form to *any* statutory defect in *any* adoption in *any* state. Pet. 34-35.

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 flaw in an adoption qualifies as jurisdictional." Resp. 12. In fact, however, the strict-construction principle formed the *entire* legal basis of the Alabama Supreme Court's jurisdictional holding. App. 23a-24a. Neither the Alabama Supreme Court, nor E.L., identifies anything

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1995); *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).

about the purported statutory defect in V.L.'s adoption that would make it any more "jurisdictional" than any other purported statutory defect. As the dissent correctly stated: "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. 35a.

Fourth, the stark departure of the decision below from full faith and credit jurisprudence warrants this Court's review. E.L. makes the unremarkable point that other courts have recognized that judgments can be denied full faith and credit for lack of subject-matter jurisdiction, but refuses to acknowledge that the decision below reached far beyond this principle. As E.L. apparently concedes, aside from a small number of inapposite "wrong forum" challenges,[4] the decision below is the first successful collateral attack *ever* on an out-of-state judgment for lack of subject-matter jurisdiction. Pet. 28-30. 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.[5] Pet. 30-31. The

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[4] As the Petition explained, this Court and lower courts have sustained collateral attacks on out-of-state judgments for lack of subject-matter jurisdiction when a party alleged that a suit was brought in the wrong forum. Pet. 28-30 (citing, *inter alia*, *Williams v. North Carolina*, 325 U.S. 226 (1945), and *Kalb v. Feuerstein*, 308 U.S. 433 (1940)).

[5] E.L. argues that *Russell v. Bridgens*, 647 N.W.2d 56 (Neb. 2002),

Alabama Supreme Court's decision is a blow to interstate comity that lacks any precedent in the case law of this or any other Court.

Finally, E.L. advocates a view of the Full Faith and Credit Clause that is even *more* radical than the view adopted by the Alabama Supreme Court. E.L. suggests that adoptions might not be entitled to full faith and credit *at all*, and suggests that "percolation" on this novel theory is warranted. Resp. 14-16.

This argument lacks merit. As E.L. herself observes, it has been 100 years since this Court last applied the Full Faith and Credit Clause in an adoption case; and E.L. does not cite a single case, or even secondary source, from that 100-year interval supporting her theory that the Full Faith and Credit Clause discriminates against adoption judgments. This is hardly surprising: not only does such a rule have no basis in the text or history of the Full Faith and Credit Clause, but it would have devastating effects on families who rely on the finality of adoption judgments. *See, e.g.*, Amicus Brief of Donaldson Adoption Institute

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supports the Alabama Supreme Court's decision. Resp. 11. 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 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).

et al., at 8-19; Amicus Brief of Gay & Lesbian Advocates & Defenders *et al.*, at 7-28. Even E.L. herself never suggested in the lower-court proceedings that the Full Faith and Credit Clause might not apply to adoptions. E.L.'s unsupported musings about adoption law are no basis to deny certiorari.

II. The Decision Below Violated The Full Faith And Credit Clause.

The decision below is irreconcilable with a century of Full Faith and Credit jurisprudence.

E.L. asserts that V.L.'s adoption is not entitled to full faith and credit because it supposedly "defies" a "plain statutory requirement" that the parental rights of the existing parent be terminated. Resp. 13. As an initial matter, E.L. does not grapple with the wealth of cases which have interpreted indistinguishable statutory language to *authorize* adoptions like V.L.'s, on the theory that like most statutory requirements, the parental-termination requirement can be waived. *See e.g.*, *Sharon S.*, 73 P.3d at 561 (holding that because similar provisions of California adoption statute "are for the benefit of the parties to an adoption petition and the section contains no language prohibiting a waiver, we conclude that [the statute] declares a legal consequence of the usual adoption, waivable by the parties thereto, rather than a mandatory prerequisite to every valid adoption" (citations omitted)); *In re Jacob*, 660 N.E.2d 397, 405 (N.Y. 1995) ("[I]t is clear that [the termination provision of the New York adoption statute], designed as a shield to protect new adoptive families, was never intended as a sword to prohibit otherwise beneficial intrafamily adoptions by

second parents."). Thus, the Georgia Superior Court judge interpreted the Georgia Adoption Code in a manner consonant with most state courts to have considered the issue.

But even if V.L.'s adoption violated state law, that would be irrelevant for full faith and credit purposes unless the Georgia Superior Court's error was *jurisdictional*. And E.L. offers no argument, beyond *ipse dixit*, that the Georgia Superior Court's purported error was a jurisdictional error, rather than an error on the merits. 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. Pet. 16-18.

Nor does E.L. reconcile the decision below with this Court's case law holding that under the Full Faith and Credit Clause, a court must *presume* that an out-of-state court of general jurisdiction possessed jurisdiction to enter a judgment. No binding Georgia precedent defeats this presumption. Pet. 18-20. E.L. argues that "the undisputed record" establishes that "E.L. did not surrender her parental rights," Resp. 22-23, but this argument misses the point. E.L.'s burden is not to prove that she retained her parental rights; it is to show that her retention of parental rights stripped the Superior Court of jurisdiction. She has failed to meet this burden.

Even if the parental-termination requirement was jurisdictional, the Alabama Supreme Court would still have been barred from overturning the Georgia Superior Court's judgment. The Georgia Superior Court made an explicit "Conclusion of Law" that V.L.

had "complied" with all "formalities … in accordance with the laws of the State of Georgia," and expressly considered the applicability of the termination provision, concluding that V.L. could adopt the children without terminating E.L.'s parental rights, App. 50a. That determination was itself entitled to *res judicata*. Pet. 24-26. E.L.'s effort to twist this language in order to show that the Superior Court did not address the legal basis for the adoption (Resp. 23-25) is both unpersuasive on its own terms, and inconsistent with a basic principle of the Full Faith and Credit Clause: the presumption of regularity attending out-of-state judgments. The Georgia Superior Court was legally obligated to independently determine its own jurisdiction. *Turner v. Flournoy*, 594 S.E.2d 359, 361 n.1 (Ga. 2004). Because the Georgia Superior Court fulfilled that legal obligation and determined that it possessed subject-matter jurisdiction, the Alabama court was required to recognize that determination as *res judicata*.[6]

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[6] Moreover, the Georgia adoption would not have been susceptible to collateral attack in the courts of Georgia. Although E.L. relies on *Bates v. Bates*, 730 S.E.2d 482 (Ga. Ct. App. 2012), she ignores the statement 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. Pet. 25-26.

III. E.L.'s Argument Based On The Parties' Residency Is Irrelevant And Incorrect.

E.L. asserts that the Alabama Supreme Court's decision "could be upheld on the alternative ground" that V.L. was not a resident of Georgia at the time of the adoption.[7] Resp. 25. As E.L. acknowledges, *id.*, the Alabama Supreme Court did not decide that issue and instead resolved the case on a ground that had nothing to do with residency. Consistent with this Court's admonition that it is "a Court of review, not of first view," *Wellness International Network, Inc. v. Sharif*, 135 S. Ct. 1932, 1949 (2015) (quotation marks omitted), the Court should deny E.L.'s request to add the residency issue as a second question presented.

In any event, E.L.'s argument is meritless. The Alabama Court of Civil Appeals expressly rejected E.L.'s residency argument on two grounds. First, "[a]rguably, because the Georgia court has already decided that the residency requirements were satisfied, the family court was bound by that determination and could not find otherwise." App. 45a. Second, Georgia law prohibits residency-based collateral attacks on

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[7] E.L. repeatedly asserts that the "undisputed record" shows that V.L. was not a Georgia resident. *E.g.*, Resp. 25. Not so. E.L.'s arguments are based on her self-serving, litigation-driven affidavit that was never subject to cross-examination, and V.L. disputes E.L.'s factual assertions. As the Alabama Court of Civil Appeals held, however, the veracity of those factual assertions is irrelevant because even if they were accurate, the adoption would still be entitled to full faith and credit.

adoptions filed over six months after entry of the adoption decree. App. 46a. E.L. ignores the second point altogether; on the first point, she argues that *res judicata* does not apply because the residency issue was not expressly litigated. Resp. 27. Yet this Court has squarely rejected this argument, holding that *res judicata* applies to any litigant who had the *opportunity* to contest an issue—even if she did not actually do so. Pet. 15-16. E.L. had every opportunity to contest the parties' residency in the Georgia Superior Court, but instead supported the adoption; she is precluded from contesting residency now. And even setting these points aside, E.L. cites no authority holding that residency is a jurisdictional, as opposed to merits-based, requirement in an adoption case.

If V.L. prevails in this Court, it is highly doubtful that anything will be left of E.L.'s residency argument for the reasons already stated by the Alabama Court of Civil Appeals. But, consistent with the Court's usual practice, the Court should grant certiorari on the question presented; if the Court reverses, E.L. may present any preserved, alternative arguments on remand.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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