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# Denying a Class of Adopted Children Equal Protection

Katherine A. West

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# DENYING A CLASS OF ADOPTED CHILDREN EQUAL PROTECTION

Katherine A. West\*

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## INTRODUCTION

In 2005, Infant J (hereinafter J) was born in Shreveport, Louisiana.<sup>1</sup> Shortly thereafter, Oren Adar and Mickey Ray Smith, an unmarried same-sex couple residing in Connecticut, traveled to Louisiana, where the child's mother agreed to give him up for adoption.<sup>2</sup> In April 2006, the Ulster County Family Court in Kingston, New York approved the adoption and issued an adoption decree declaring Adar and Smith J's legal parents.<sup>3</sup> The couple forwarded the adoption decree to the Louisiana Registrar of Vital Records and Statistics, requesting that the Registrar issue an amended birth certificate for J.<sup>4</sup> This new birth certificate would identify Adar and Smith as J's legal parents.<sup>5</sup> The Registrar, however, denied their request.<sup>6</sup>

In a letter, Darlene W. Smith, the Louisiana State Registrar (the Registrar), stated that since Louisiana law does not authorize adoptions by unmarried couples, the Registrar is unable to create a new birth certificate listing both men's names.<sup>7</sup> In 2007, Adar and Smith challenged the Registrar's refusal in a lawsuit against the Registrar in her official capacity.<sup>8</sup> The couple alleged that the Registrar's refusal violated the Full Faith and Credit Clause and the Equal Protection Clause of the United States Constitution.<sup>9</sup> Despite their legal attempts, Adar and Smith were unsuccessful in receiving a court order requiring the Registrar to issue an accurate birth certificate.<sup>10</sup> The couple's legal battle ended in October 2011 when the Supreme Court of the United States denied Adar and Smith's petition for writ of certiorari.<sup>11</sup> To date, J does not have a birth certificate

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1. Adar v. Smith, 597 F.3d 697, 701 (5th Cir. 2010), *rev'd en banc*, 639 F.3d 146 (5th Cir. 2011).

2. Brief of Appellant State Registrar Darlene W. Smith at 4–5, *Adar*, 597 F.3d 697 (No. 09-30036), 2009 WL 6027991 at \*4–5 [hereinafter Brief of Appellant].

3. *Id.* at 5.

4. *Id.* at 6–7.

5. *Id.* at 7.

6. *Id.*

7. *See id.*; Adar v. Smith, 591 F. Supp. 2d 857, 859 (E.D. La. 2008).

8. Brief of Appellant, *supra* note 2, at 8; *Adar*, 591 F. Supp. 2d at 859.

9. *Id.*

10. Adar v. Smith, 639 F.3d 146, 162 (5th Cir. 2011) (en banc).

11. Adar v. Smith, 132 S. Ct. 400 (2011).

listing both his parents' names.<sup>12</sup>

According to Lambda Legal, "An accurate birth certificate is universally recognized, readily accepted, and often required in many legal contexts," including enrolling the child in school, obtaining a social security card and passport for the child, and claiming the child as a dependent for taxes.<sup>13</sup> Failing to have an accurate birth certificate denies a child access to these rights and benefits, and compromises his or her well-being.<sup>14</sup> In J's case, having an inaccurate birth certificate has hindered Adar and Smith's ability to enroll J in school and has "complicat[ed] Smith's ability to enroll his son on his company health plan."<sup>15</sup> J is not the only child a state registrar has denied an accurate birth certificate based on the state's disapproval of the parents' marital status.<sup>16</sup> Oklahoma, Mississippi, and Virginia have also denied birth certificates to children adopted out-of-state, i.e. outside the state where the child was born, by unmarried same-sex couples.<sup>17</sup>

While these instances raise several questions under the United States Constitution,<sup>18</sup> this Comment focuses solely on the equal protection question.<sup>19</sup> Through the lens of Adar and Smith's case, this Comment addresses the unconstitutionally unequal treatment of a subset of children adopted by unmarried and/or same-sex couples.<sup>20</sup> Specifically, it discusses the proper level of judicial scrutiny that courts should apply in such cases and proposes necessary action towards eliminating this unequal treatment.

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12. See *Adar*, 591 F. Supp. 2d at 859.

13. *Adar v. Smith Case Background*, LAMBDA LEGAL (2011), [http://data.lambdalegal.org/publications/downloads/fs\\_adar-v-smith-case-background.pdf](http://data.lambdalegal.org/publications/downloads/fs_adar-v-smith-case-background.pdf).

14. See Brief of Amici Curiae Joan Heifetz Hollinger et al. in Support of Plaintiffs-Appellees Oren Adar and Mickey Ray Smith and in Support of Affirmance at 8–9, *Adar v. Smith*, 597 F.3d 697 (5th Cir. 2010) (No. 09-30036), 2010 WL 5778048 at \*8–9, [hereinafter Brief of Amici Curiae Hollinger].

15. *Adar v. Smith Case Background*, *supra* note 13.

16. See *infra* Part I.C.

17. See *infra* Part I.C.

18. See *Adar v. Smith*, 591 F. Supp. 2d 857, 859 (E.D. La. 2008); see also *Finstuen v. Crutcher*, 496 F.3d 1139, 1143 (10th Cir. 2007); *Davenport v. Little-Bowser*, 611 S.E.2d 366, 368 (2005).

19. See *infra* Part III.

20. See *infra* Part III.

Part I of this Comment addresses the current landscape of adoption and the adoption process in the United States.<sup>21</sup> It discusses in detail the *Adar v. Smith* case and summarizes the necessary background information for evaluating equal protection questions.<sup>22</sup> Part II identifies the equal protection problem arising from a state registrar's failure to issue an accurate birth certificate to a particular group of adopted children.<sup>23</sup> Part III analyzes the equal protection claim in *Adar v. Smith*—specifically, it discusses the application of intermediate scrutiny and the United States Supreme Court's rationale in illegitimacy cases.<sup>24</sup> Part IV proposes the level of review courts should apply in evaluating state registrars' refusal to issue accurate birth certificates to children adopted by unmarried and/or same-sex couples.<sup>25</sup> In addition, Part IV proposes attacking the discrimination against adopted children of unmarried and/or same-sex couples by making changes at the legislative level.<sup>26</sup>

Joint adoption by unmarried couples, especially same-sex couples, is becoming more prevalent.<sup>27</sup> Without proper action, state registrars will continue to deny children adopted by these couples the same rights and benefits of having an accurate birth certificate that states grant to children adopted by married couples, as well as all other children.

## I. BACKGROUND

### A. *Adoption in the United States*

#### 1. *Adoption Generally*

For many children, especially those in foster care, adoption is the “path to a safe, loving, permanent family.”<sup>28</sup>

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21. *See infra* Part I.A.

22. *See infra* Part I.B.-E.

23. *See infra* Part II.

24. *See infra* Part III.A.-B.

25. *See infra* Part IV.

26. *See infra* Part IV.B.

27. *See* EVAN B. DONALDSON ADOPTION INST., EXPANDING RESOURCES FOR WAITING CHILDREN II: ELIMINATING LEGAL AND PRACTICE BARRIERS TO GAY AND LESBIAN ADOPTION FROM FOSTER CARE 13 (2008), *available at* [http://www.adoptioninstitute.org/publications/2008\\_09\\_Expanding\\_Resources\\_Legal.pdf](http://www.adoptioninstitute.org/publications/2008_09_Expanding_Resources_Legal.pdf).

28. *Id.* at 4.

Adoption is the “[l]egal transfer of parenthood from one to another parent or couple.”<sup>29</sup> This “legal transfer of parenthood” completely terminates the “parental rights and relations between the parent and child,”<sup>30</sup> and bestows on the adoptive parent(s) all the rights of a legal parent.<sup>31</sup> For the child, adoption confers certain benefits flowing from the parent-child relationship.<sup>32</sup>

Estimates show that roughly 120,000 children are adopted each year in the United States.<sup>33</sup> Many of these adoptions occur outside the foster care system, via private domestic<sup>34</sup> or international adoptions.<sup>35</sup> Others take place following a determination by a child welfare agency, such as foster care, that a child will not be returning home to his or her parent(s).<sup>36</sup> In 2009, an estimated 421,000 children were in foster care.<sup>37</sup> Of those 421,000 children, about 114,000 were awaiting adoption, meaning their goal was adoption

29. Annette R. Appell, *Legal Issues in Lesbian and Gay Adoption, in ADOPTIONS BY LESBIANS AND GAY MEN: A NEW DIMENSION IN FAMILY DIVERSITY* 36, 37 (David M. Brodzinsky & Adam Pertman eds., 2012).

30. *Id.* An adoption also terminates the relations between the child and the terminated parent’s family, including the “child’s siblings, grandparents, aunts, uncles, and cousins.” *Id.*

31. *See id.*

32. *See id.* These benefits include the rights to inherit and to receive survivor benefits and parental support. *Id.*

33. *How Many People Choose Adoption*, ADOPTION.COM, <http://adopting.adoption.com/child/how-many-people-choose-adoption.html> (last visited Apr. 26, 2013).

34. Private domestic adoptions are adoptions in which the birthparents select from several potential adoptive families the family in which they would like their child to be placed. HARVEY J. MAKADON ET AL., *THE FENWAY GUIDE TO LESBIAN, GAY, BISEXUAL, AND TRANSGENDER HEALTH* 454 (2008).

35. GARY G. GATES ET AL., *ADOPTION AND FOSTER CARE BY LESBIAN AND GAY PARENTS IN THE UNITED STATES 1* (2007), available at <http://www.urban.org/publications/411437.html>.

36. *Id.*

37. U.S. CHILDREN’S BUREAU, ADMIN. FOR CHILDREN, YOUTH & FAMILIES, *TRENDS IN FOSTER CARE AND ADOPTION—FY 2002—FY 2011* at 1 (2012) [hereinafter *AFCARS TRENDS*], available at <http://www.acf.hhs.gov/programs/cb/resource/trends-in-foster-care-and-adoption>. According to the Code of Federal Regulations, foster care is defined as “24 hour substitute care for children outside their own home.” 45 C.F.R. app. A § 1355 (2012). Children in foster care may live in “nonrelative foster family homes, relative foster homes (whether payments are being made or not), group homes, emergency shelters, residential facilities, and preadoptive homes.” CHILD WELFARE INFORMATION GATEWAY, *FOSTER CARE STATISTICS 2011*, at 2 (2013), available at <https://www.childwelfare.gov/pubs/factsheets/foster.pdf>.

and/or their parents had their parental rights terminated.<sup>38</sup> While quite a few children are awaiting adoption, this number shows a substantial decline from the estimated 131,000 children that were awaiting adoption in 2000.<sup>39</sup>

Researchers at the Urban Institute and the Williams Institute of the UCLA School of Law speculate that the decline is the result of the enactment of the Adoption and Safe Families Act (ASFA) of 1997.<sup>40</sup> ASFA pressured states to locate permanent homes for children in the foster care system.<sup>41</sup> In addition, it “placed stricter timelines on agencies to terminate parental rights.”<sup>42</sup> Following the enactment of ASFA, the number of adoptions significantly increased.<sup>43</sup> Since 2000, the number of children in foster care that are adopted has remained at roughly 50,000 per year.<sup>44</sup>

In general, state law determines who may adopt.<sup>45</sup> Because there is no uniform adoption law, adoption practices vary from state to state.<sup>46</sup> Historically, states preferred to place children with married couples.<sup>47</sup> While adoption laws have become more flexible, many states solely permit adoptions by married couples or single unmarried adults.<sup>48</sup> Some states, however, do not permit unmarried couples to adopt jointly.<sup>49</sup>

Joint adoption allows parents not biologically related to a child to simultaneously adopt a child.<sup>50</sup> Such adoptions allow unmarried couples to adopt a child together.<sup>51</sup> In some states,

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38. AFCARS TRENDS, *supra* note 37, at 1; *see also* GATES ET AL., *supra* note 35, at 1. In defining waiting children, the Adoption and Foster Care Analysis and Reporting System (AFCARS) excluded children “whose parents’ rights have been terminated, who are 16 years old and older, and who have a goal of emancipation.” AFCARS TRENDS, *supra* note 37, at 2.

39. GATES ET AL., *supra* note 35, at 1.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Joan Heifetz Hollinger, *State and Federal Adoption Laws*, in FAMILIES BY LAW: AN ADOPTION READER 37, 37 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004).

46. *See id.*

47. Appell, *supra* note 29, at 38.

48. *Id.* at 38, 39.

49. *See id.* at 39.

50. SEAN CAHILL & SARAH TOBIAS, POLICY ISSUES AFFECTING LESBIAN, GAY, BISEXUAL, AND TRANSGENDER FAMILIES 24 (2010).

51. *See id.* In the 1980s, “lower courts in the San Francisco Bay Area began

laws prohibiting unmarried couples from jointly adopting affect opposite- and same-sex couples alike.<sup>52</sup> Currently, Illinois, Indiana, Massachusetts, Maine, New York, New Jersey, Pennsylvania, Colorado, and the District of Columbia allow unmarried couples, including same-sex couples, to adopt jointly.<sup>53</sup> In addition, California allows married same-sex couples to adopt jointly, while Connecticut, New Hampshire, Oregon, and Vermont allow unmarried partners who have civil unions to adopt jointly.<sup>54</sup> On the contrary, Mississippi and Utah statutorily prohibit same-sex couples from adopting.<sup>55</sup> Nebraska, Ohio, and Wisconsin prohibit, via case law, joint adoptions by same-sex couples.<sup>56</sup> The twenty-eight unlisted states, however, fall somewhere between explicitly permitting and prohibiting joint adoption by same-sex couples.<sup>57</sup>

## 2. *Adoptions by Gay Men and Lesbians*

Researchers at the Urban Institute and the Williams Institute of the UCLA School of Law estimate that gay and lesbian parents are raising “at least four percent of all adopted children” in the United States; this equates to roughly 65,000 children.<sup>58</sup> In addition, estimates show that “over two million lesbian, gay or bisexual persons have an interest in adopting.”<sup>59</sup> Reports show that gay men and lesbians may be more willing than heterosexual adults may be to adopt children with special needs.<sup>60</sup>

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granting same-sex couples the right to adopt children jointly and simultaneously. Since then, courts have been allowing such adoptions more frequently.” *Id.*

52. Appell, *supra* note 29, at 42.

53. EVAN B. DONALDSON ADOPTION INST., *supra* note 27, at 20. In 2007, Colorado signed HB 1330 into law; this law statutorily recognizes joint adoption by unmarried couples, including same-sex couples. *Id.*

54. *Id.*

55. Appell, *supra* note 29, at 56.

56. *Id.* at 56–57.

57. *Id.* at 55–57.

58. EVAN B. DONALDSON ADOPTION INST., *supra* note 27, at 5.

59. *Id.* at 13.

60. *Id.* at 5.

### 3. Adoption Process and the Birth Certificate

Individuals who choose to adopt may do so domestically or internationally.<sup>61</sup> In general, domestic adoptions are broken down into two classifications, private or public adoptions.<sup>62</sup> Private domestic adoptions are adoptions in which the child's birth parent(s) select the adoptive parents with whom their child will be placed.<sup>63</sup> Such adoptions may be done with the help of an intermediary, such as a lawyer.<sup>64</sup> Public domestic adoptions, on the other hand, are adoptions completed through a state child welfare agency and "involve the adoption of children who have been placed in the custody of the agency."<sup>65</sup> Private or public agencies that have custody over a child usually do so through "a voluntary relinquishment or an involuntary termination of the birth parents' rights."<sup>66</sup>

Individuals interested in adopting are not required to adopt a child who resides in the same state in which they reside.<sup>67</sup> Interstate adoption allows for the adoption of a child who lives in a state other than the state in which his or her adoptive parent(s) reside.<sup>68</sup> The Interstate Compact on the Placement of Children (ICPC) governs such adoptions.<sup>69</sup> Every state in the United States is a member of this compact.<sup>70</sup> The compact's purpose is to "ensure protection and services to children who are placed across state lines for foster care or adoption."<sup>71</sup>

While the adoption process varies depending on the type of adoption and the state in which the adoption takes place, all adoptions must be certified and finalized by the court.<sup>72</sup> The court finalizes the adoption through a court order or

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61. MAKADON ET AL., *supra* note 34, at 454.

62. *See id.* at 454–55.

63. *Id.*; *see also* Hollinger, *supra* note 45, at 37.

64. Hollinger, *supra* note 45, at 37.

65. MAKADON ET AL., *supra* note 34, at 454–55.

66. Hollinger, *supra* note 45, at 37.

67. *See Interstate Adoption*, ADOPTION.COM, <http://encyclopedia.adoption.com/entry/interstate-adoption/197/1.html> (last visited Apr. 26, 2013).

68. *Id.*

69. *Id.*

70. *Id.*

71. AM. PUB. HUMAN SERVS. ASS'N, GUIDE TO THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN 3 (2002), *available at* [http://icpc.aphsa.org/Home/Doc/Guidebook\\_2002.pdf](http://icpc.aphsa.org/Home/Doc/Guidebook_2002.pdf).

72. *See* Hollinger, *supra* note 45, at 37–39.

adoption decree.<sup>73</sup> A judge will usually sign and issue an adoption decree as long as the necessary prerequisites for adoption are satisfied and the adoption is in the best interest of the child.<sup>74</sup> The decree establishes the legal relationship between the child and his or her adoptive parent(s)<sup>75</sup> and severs the legal relationship between the child and his or her biological parents.<sup>76</sup> The decree also guarantees that the adoptive parent(s) “will be treated as parents for all legal purposes including custody, the authority to enroll the child in school, participate in health-care decision-making, travel with the child, and receive benefits for and through the child, and impart benefits to the child.”<sup>77</sup> After the court has entered the decree and “the time for challenging it passed, the adoption cannot be challenged, ignored, or revoked.”<sup>78</sup> In general, “governmental agencies, courts, and other states ought to recognize these [adoption] decrees as establishing for all legal purposes the parenthood of the adults named in the decree.”<sup>79</sup>

Once the court finalizes an adoption, the state or county office responsible for issuing birth certificates usually seals the child’s original birth certificate and issues an amended birth certificate reflective of the legal parent-child relationship created by the adoption decree.<sup>80</sup> Prior to 1930, a state did not amend a child’s birth certificate upon completion of an adoption.<sup>81</sup> In 1930, however, states began issuing new birth certificates upon a child’s adoption; these new birth certificates replaced the birth parents’ names with the adoptive parents’ names.<sup>82</sup>

Today, every state requires by law that the state issue, upon receipt of a certified copy of an adoption decree, new birth certificates to adopted children who were born in that state.<sup>83</sup> The new birth certificate keeps the information

73. *See id.* at 38.

74. *See id.*

75. Appell, *supra* note 29, at 50.

76. 2 AM. JUR. 2D *Adoption* § 163 (2004).

77. Appell, *supra* note 29, at 50.

78. *Id.*

79. *Id.*

80. *Id.* at 51.

81. Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367, 376 (2001).

82. *Id.*

83. Brief of Amici Curiae Hollinger, *supra* note 14, at 6–7. All fifty states

regarding the child's birth date and place of birth, and replaces the names of the child's birth parent(s) with the names of the child's adoptive parent(s).<sup>84</sup> This new birth certificate carries the "same legal effect and serves the same functions" as all other valid birth certificates.<sup>85</sup>

Each individual state is responsible for registering a child's birth via a birth certificate.<sup>86</sup> The registration of a child's birth serves as a "permanent and official record of the existence of a person before the law."<sup>87</sup> The birth certificate is a document the state issues to an individual as proof of the state's registration of the individual's birth.<sup>88</sup> The certificate includes the child's name and date of birth, as well as the child's "parents' names, dates and places of birth, [and] nationality."<sup>89</sup> The state government vital records office for the state in which the individual is born is responsible for issuing the birth certificate.<sup>90</sup> While this certificate serves as proof of the child's birth, it also serves as the child's legal and personal identification.<sup>91</sup>

The birth certificate is "universally recognized as reliable proof of a child's identity and parentage."<sup>92</sup> Both "public and private entities require the submission of a birth certificate to verify a child's legal parentage in virtually every circumstance in which parentage must be shown."<sup>93</sup> For example, a birth certificate is required to enroll a child in school and to establish the child's emergency contacts.<sup>94</sup>

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have adopted some form of Article 3, Part 8 of the proposed Uniform Adoption Act of 1994. *Id.* at 7. The Act provides that "upon receipt of a certified decree of adoption from another jurisdiction, the state registrar shall issue a new birth certificate for an adoptee born in that state." *Id.*

84. *Id.*

85. *Id.*

86. See *How Do I Order a Birth, Death, or Marriage Certificate?*, HHS.GOV, <http://answers.hhs.gov/questions/3245> (last updated Aug. 31, 2009).

87. CLAIRE CODY, PLAN LIMITED, COUNT EVERY CHILD: THE RIGHT TO BIRTH REGISTRATION 10 (2009), available at <http://plan-international.org/about-plan/resources/publications/campaigns/count-every-child/>.

88. *Id.*

89. CLAIRE CODY, PLAN LIMITED, *supra* note 87, at 10; see also Brief of Amici Curiae Hollinger, *supra* note 14, at 7.

90. *How Do I Order a Birth, Death, or Marriage Certificate*, *supra* note 86.

91. See generally Brief of Amici Curiae Hollinger, *supra* note 14, at 6–9.

92. *Id.* at 7.

93. *Id.* at 8. These entities include schools, welfare departments, financial institutions, the Social Security Administration, and the Veterans Administration. See *id.* 8–9.

94. *Id.* at 8.

Furthermore, a birth certificate is “required to establish who is authorized to sign for medications distributed by the school nurse or to make emergency medical decisions for a child.”<sup>95</sup>

An individual is also generally required to show a copy of a child’s birth certificate where he or she is conducting legal and financial transactions on behalf of a minor, for example opening up a bank account for a child.<sup>96</sup> In addition, a birth certificate is required in instances where a child inherits from extended family.<sup>97</sup> Furthermore, the U.S. Social Security Administration requires a child’s birth certificate when applying for survivor benefits for a child.<sup>98</sup> Moreover, companies usually require a birth certificate in order to collect the proceeds from insurance policies in which a child is a named beneficiary, as well as “to verify a child’s entitlement to a parent’s pension or other retirement benefits.”<sup>99</sup>

Generally, a birth certificate is also required to acquire a passport for a minor child.<sup>100</sup> Beginning April 1, 2011, the U.S. Department of State requires certified birth certificates offered by passport applicants as primary evidence of citizenship to include, among other things, the full names of applicants’ parent(s).<sup>101</sup> The Department of State, however, will not accept as evidence of citizenship certified birth certificates lacking this information.<sup>102</sup>

### *B. Adar v. Smith*

According to Adar and Smith, under Louisiana law,<sup>103</sup> “when a child born in the state is adopted in another state, the child’s adoptive parents are entitled to obtain a new Louisiana birth certificate for their child listing them as the child’s parents.”<sup>104</sup> In 2006, pursuant to this statute, Adar

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95. *Id.*

96. *Id.* at 9.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. 22 C.F.R. § 51.42(a) (2011); *New Requirement for U.S. Birth Certificates*, TRAVEL.STATE.GOV, [http://travel.state.gov/passport/passport\\_5401.html](http://travel.state.gov/passport/passport_5401.html) (last updated Apr. 28, 2011).

102. *See New Requirement for U.S. Birth Certificates*, *supra* note 101. An individual, however, may submit secondary evidence in the event that he or she cannot satisfy subsection (a). 22 C.F.R. § 51.42(b).

103. LA. REV. STAT. ANN. § 40:76 (2011).

104. Petition for Writ of Certiorari at 2, *Adar v. Smith*, 132 S. Ct. 400 (2011)

and Smith, an unmarried same-sex couple, requested a new birth certificate for their adopted child J.<sup>105</sup> The Louisiana State Registrar, however, denied the couple's request.<sup>106</sup>

In 2007, Adar and Smith filed suit against the Registrar in her official capacity in the Eastern District of Louisiana for her refusal to issue an accurate birth certificate identifying both Adar and Smith as J's legal parents.<sup>107</sup> The couple requested that the court enter an injunction requiring the Registrar to issue a birth certificate identifying both Adar and Smith as J's parents.<sup>108</sup> The couple's complaint alleged that the Registrar's refusal to issue an accurate birth certificate violated both the Full Faith and Credit Clause<sup>109</sup> and the Equal Protection Clause<sup>110</sup> of the U.S. Constitution.<sup>111</sup>

Adar and Smith's equal protection claim alleged that the Registrar, in refusing to issue accurate birth certificates to children adopted by unmarried couples, denies a class of adopted children the same rights available to children adopted by married couples.<sup>112</sup> Furthermore, Adar and Smith contended that the Registrar's refusal penalizes children adopted by unmarried parents based on their parents' marital status.<sup>113</sup> According to Adar and Smith, the Registrar's policy called for the court to apply heightened scrutiny, the same level of review applied by the United States Supreme Court in illegitimacy cases.<sup>114</sup> Under this level of review, Adar and Smith argued that the Registrar's policy violated the Equal

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(No. 11-46), 2011 WL 2689011 at \*2.

105. See *Adar v. Smith*, 591 F. Supp. 2d 857, 859 (E.D. La. 2008).

106. *Id.*

107. See *id.*

108. *Id.*

109. The Full Faith and Credit Clause of the United States Constitution provides, in relevant part, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1. Adar and Smith's full faith and credit claim specifically argued that the Constitution requires the Registrar to enforce the New York adoption decree and issue an amended birth certificate "without regard to Louisiana's public policy." *Adar*, 591 F. Supp. 2d at 859.

110. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall deny any person equal protection of the laws. U.S. CONST. amend. XIV, § 1.

111. *Adar*, 591 F. Supp. 2d at 859.

112. *Adar v. Smith*, 639 F.3d 146, 161 (5th Cir. 2011) (en banc).

113. Brief of Appellees Oren Adar and Mickey Ray Smith at 54, *Adar*, 597 F.3d 697 (No. 09-30036), 2009 WL 6027996 at \*54 [hereinafter Brief of Appellees].

114. *Id.*

Protection Clause.<sup>115</sup>

In response, the Registrar argued that its actions did not violate the Equal Protection Clause because it was simply upholding and enforcing Louisiana law.<sup>116</sup> Under Louisiana adoption law, only married couples may jointly adopt.<sup>117</sup> Louisiana's policy is based on its preference for providing adopted children the stability of having married parents.<sup>118</sup> According to the State, Louisiana birth certificate law flows from its policy favoring adoption by married couples.<sup>119</sup> As a result, the Registrar could not issue a birth certificate listing both parents' names.<sup>120</sup> The Registrar further maintained that her enforcement of Louisiana laws did not deprive Adar and Smith of their rights and did not violate the Equal Protection Clause.<sup>121</sup>

In 2008, U.S. District Court Judge Jay Zainey ruled against the Registrar, finding that her actions violated the Full Faith and Credit Clause.<sup>122</sup> In his decision, Judge Zainey did not address the equal protection claim because Adar and Smith were entitled to summary judgment on their full faith and credit claim.<sup>123</sup> The court subsequently entered judgment ordering the Registrar to issue an accurate birth certificate identifying both Adar and Smith as J's parents.<sup>124</sup>

The state appealed the district court ruling, and in 2010, a three-judge panel of the Fifth Circuit Court of Appeals unanimously affirmed the district court's decision.<sup>125</sup> Again, the court did not address the equal protection claim.<sup>126</sup> The

115. *See id.* at 54–55.

116. *See* Brief in Opposition at 23–24, *Adar v. Smith*, 132 S. Ct. 400 (2011) (No. 11-46), 2011 WL 4048833 at \*23–24.

117. *Id.* at 23.

118. *Id.*

119. *Id.*

120. *See id.*

121. *See id.* at 23–24.

122. *Adar v. Smith*, 591 F. Supp. 2d 857, 864 (E.D. La. 2008). The court held that Louisiana's out-of-state adoption statute authorizes the state registrar to issue a birth certificate upon receipt of a valid adoption decree, even if Louisiana adoption law would not permit the adoption. *Id.* at 863. The court further found that the Registrar's arguments that her discretion to issue a new birth certificate is limited lacked merit. *Id.*

123. *Id.* at 862 n.8.

124. *Id.* at 864.

125. *Adar v. Smith*, 597 F.3d 697, 701 (5th Cir. 2010), *rev'd en banc*, 639 F.3d 146 (5th Cir. 2011).

126. *See id.* at 720 n.76.

Registrar petitioned the Fifth Circuit for a rehearing en banc.<sup>127</sup> The court granted the petition and vacated the panel decision.<sup>128</sup> After reviewing the case, the en banc court reversed and remanded the case to the district court for “entry of a judgment of dismissal” of Adar and Smith’s claims.<sup>129</sup> In its decision, the court held that the Registrar did not violate the Full Faith and Credit Clause.<sup>130</sup> In addition, the court held that Louisiana’s birth certificate law did not deny equal protection to adopted children of unmarried couples.<sup>131</sup>

The court based its denial of the equal protection claim on two grounds. First, the court disagreed that “the law discriminates on the basis of illegitimacy—and that it therefore triggers heightened scrutiny—because Infant[] J’s birth status is irrelevant to the Registrar’s decision.”<sup>132</sup> Second, the court found that “Louisiana’s distinction between married and unmarried adoptive couples furthered its legitimate interest in encouraging a stable and nurturing environment for the education and socialization of its adopted children.”<sup>133</sup> This interest, the court held, provides a rational basis for Louisiana’s adoption law and its corresponding birth certificate policy.<sup>134</sup>

### C. *Similar Cases*

Several other courts have addressed contests regarding the issuance of accurate birth certificates to children adopted in states other than the one in which they were born. In *Davenport v. Little-Bowser*, three same-sex couples filed suits asking the court to compel the Virginia Registrar of Vital Records and Health Statistics to issue accurate birth certificates to their adopted children.<sup>135</sup> While the children were born in Virginia, the couples adopted them in

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127. See *Adar v. Smith*, 639 F.3d 146, 150 (5th Cir. 2011) (en banc).

128. *Id.*

129. *Id.*

130. *Id.* at 161.

131. See *id.* at 162.

132. Brief in Opposition, *supra* note 116, at 7 (internal quotation marks omitted).

133. *Id.* at 7, 23 (internal quotation marks omitted).

134. See *id.*

135. Appell, *supra* note 29, at 51.

Washington, D.C.<sup>136</sup> The Virginia Registrar denied the couples' requests because, under Virginia law, "birth certificates can only list the name of a mother and a father"—i.e., Virginia does not permit same-sex couples to jointly adopt in Virginia.<sup>137</sup>

Similarly, in *Perdue v. Mississippi State Board of Health*, a Mississippi trial court addressed a case in which Mississippi refused to issue a new birth certificate to a four-year-old boy adopted by a lesbian couple.<sup>138</sup> The child was born in Mississippi but adopted by Cheri Goldstein and Holly Perdue in Vermont.<sup>139</sup> The state denied the couple's request because same-sex couples may not jointly adopt children in Mississippi.<sup>140</sup>

Lastly, in *Finstuen v. Crutcher*, Oklahoma government officials refused to issue accurate birth certificates reflecting "the adoptions for three same-sex parent adoptive families."<sup>141</sup> The couples filed suit in response to an Oklahoma statute prohibiting the state from recognizing adoptions "by more than one individual of the same sex from any other state or foreign jurisdiction."<sup>142</sup> As a result, Oklahoma categorically rejected a class of out-of-state adoption decrees.<sup>143</sup>

#### *D. The Equal Protection Clause and Equal Protection Analysis*

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>144</sup> In essence, the clause requires the government to treat each individual equally,<sup>145</sup> but "does not require every law to be

136. *Id.*

137. *Id.* at 51–52 (internal quotation marks omitted).

138. Goldstein Perdue v. Mississippi State Board of Health: *Mississippi Punishes Four Year Old Because He Has Lesbian Moms*, LAMBDA LEGAL (Oct. 25, 2001), [http://www.lambdalegal.org/news/ga\\_20011025\\_goldstein-perdue-v-ms-state-board-of-health](http://www.lambdalegal.org/news/ga_20011025_goldstein-perdue-v-ms-state-board-of-health).

139. *Id.*

140. *See id.*

141. Appell, *supra* note 29, at 52.

142. *Id.* (internal quotation marks omitted).

143. *See id.*

144. U.S. CONST. amend. XIV, § 1.

145. Debra Carrasquillo Hedges, Note, *The Forgotten Children: Same-Sex Partners, Their Children and Unequal Treatment*, 41 B.C. L. REV. 883, 897 (2000).

equally applicable to all individuals.”<sup>146</sup> Equal protection issues arise when a law discriminates against or disadvantages a class of individuals, or “impinge[s] upon the exercise of a fundamental right.”<sup>147</sup>

In evaluating equal protection cases, courts apply one of three levels of review or scrutiny.<sup>148</sup> The level of review applied differs depending on the type of classification.<sup>149</sup> The rational basis test is the lowest level of review.<sup>150</sup> At a minimum, all laws challenged under the equal protection clause must survive rational basis review.<sup>151</sup> Under this test, a court will uphold a law so long as it is “rationally related to a legitimate government purpose.”<sup>152</sup>

The middle level of review is intermediate scrutiny.<sup>153</sup> In general, courts apply intermediate scrutiny in cases dealing with discrimination based on gender or illegitimacy.<sup>154</sup> Under intermediate scrutiny, a court will uphold a law so long as it is “substantially related to an important government purpose.”<sup>155</sup> In essence, the means used by the government “must have a ‘substantial relationship’ to the end being sought.”<sup>156</sup>

The highest level of review is strict scrutiny.<sup>157</sup> Under strict scrutiny, a court will uphold a law so long as it is “proved necessary to achieve a compelling government purpose.”<sup>158</sup> In general, courts apply strict scrutiny in cases where the government discriminates based on “race or national origin,” or where the government impinges upon a fundamental right.<sup>159</sup>

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146. HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 59–60 (1971).

147. *See Plyer v. Doe*, 457 U.S. 202, 216–17 (1982) (internal quotation marks omitted).

148. Hedges, *supra* note 145, at 897.

149. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

150. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 672 (3d ed. 2006).

151. *Id.*

152. *Id.*

153. *Clark*, 486 U.S. at 461.

154. *Id.*

155. CHEMERINSKY, *supra* note 150, at 671; *see also Clark*, 486 U.S. at 461.

156. CHEMERINSKY, *supra* note 150, at 671.

157. *See Clark*, 486 U.S. at 461.

158. CHEMERINSKY, *supra* note 150, at 671.

159. *Clark*, 486 U.S. at 461; CHEMERINSKY, *supra* note 150, at 671.

*E. United States Supreme Court Decisions Addressing Classifications of Nonmarital Children*

Historically, children born out of wedlock or conceived prior to marriage<sup>160</sup>—i.e., nonmarital or illegitimate children—“suffered significant legal and societal discrimination.”<sup>161</sup> At common law, nonmarital children were denied many of the same rights available to marital children, including the “right to inherit from or through a parent” and to receive parental support and government benefits.<sup>162</sup> Since 1968,<sup>163</sup> the United States Supreme Court has held laws denying nonmarital children rights and benefits based on the state’s disapproval of their parents’ actions to be unconstitutional.<sup>164</sup>

In one such case, *Clark v. Jeter*,<sup>165</sup> the Supreme Court held unconstitutional a Pennsylvania state law that “required a nonmarital child to establish paternity within six years of birth” before the child could seek support from his or her father.<sup>166</sup> The state law permitted marital children to seek support from their parents at any time, but limited the time during which a nonmarital child could do the same.<sup>167</sup> The Court reasoned that “the six-year limitations period was impermissible because financial needs may not emerge until later and because it did not offer the child a sufficient opportunity to present his or her own claims.”<sup>168</sup>

The Court’s decision in *Clark* articulated intermediate scrutiny as the level of review applied to discriminatory classifications based on nonmarital status.<sup>169</sup> In such cases, the court will uphold “statutory distinctions between marital

160. KRAUSE, *supra* note 146, at 10–11.

161. Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 346 (2011).

162. *Id.* at 346–47.

163. In 1968, the United States Supreme Court held unconstitutional in *Levy v. Louisiana* a law that denied illegitimate or nonmarital children the right to file a wrongful death suit and recover losses resulting from a mother’s death. Hedges, *supra* note 145, at 898; *see also* CHEMERINSKY, *supra* note 150, at 678. The law permitted marital children to sue but did not permit nonmarital children to do so. *Id.*

164. *See* Maldonado, *supra* note 161, at 351.

165. *Clark v. Jeter*, 486 U.S. 456 (1988).

166. CHEMERINSKY, *supra* note 150, at 777; *see also Clark*, 486 U.S. at 457.

167. *Clark*, 486 U.S. at 457.

168. CHEMERINSKY, *supra* note 150, at 777.

169. *Id.*; *see also Clark*, 486 U.S. at 461.

and nonmarital children so long as they [are] ‘substantially related to permissible state interests.’”<sup>170</sup> For the Supreme Court, penalizing children because of the marital status of their parents is not substantially related to a permissible state interest.<sup>171</sup>

The Supreme Court’s decisions regarding nonmarital children’s rights share several common themes:

children are not responsible for the circumstances of their birth or for the legal status or conduct of their parents; . . . children of unmarried parents deserve as much legal and economic protection as other children; and . . . states may not seek to influence the behavior of adults by penalizing their children.<sup>172</sup>

While the Supreme Court has utilized these common themes to invalidate laws discriminating against nonmarital children, it has also utilized them to invalidate a Texas law that discriminated against undocumented aliens.<sup>173</sup> In *Plyler v. Doe*,<sup>174</sup> the Court held unconstitutional “a Texas law that provided a free public education for children of citizens and of documented aliens, but required that undocumented aliens pay for their schooling.”<sup>175</sup> According to the Court, “[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”<sup>176</sup>

## II. IDENTIFICATION OF THE PROBLEM

In *Adar v. Smith*, the Fifth Circuit, sitting en banc, addressed whether denying an accurate birth certificate to children adopted by unmarried couples violates the Equal Protection Clause.<sup>177</sup> The issue arose in the context of the Louisiana Registrar’s refusal to provide an accurate birth

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170. Maldonado, *supra* note 161, at 352 (quoting *Lalli v. Lalli*, 439 U.S. 259, 265 (1978)).

171. See Brief of Amici Curiae Hollinger, *supra* note 14, at 11–12; see also CHEMERINSKY, *supra* note 150, at 777.

172. Brief of Amici Curiae Hollinger, *supra* note 14, at 12.

173. See CHEMERINSKY, *supra* note 150, at 775–76.

174. *Plyler v. Doe*, 457 U.S. 202 (1982).

175. CHEMERINSKY, *supra* note 150, at 775 (citing *Plyler*, 457 U.S. at 206).

176. *Plyler*, 457 U.S. at 220; see also Brief of Amici Curiae Hollinger, *supra* note 14, at 18.

177. *Adar v. Smith*, 639 F.3d 146, 161–62 (5th Cir. 2011) (en banc).

certificate to J, a child born in Louisiana but adopted out-of-state by an unmarried couple.<sup>178</sup> The Louisiana Registrar denied the couple's request based solely on the couple's unmarried status.<sup>179</sup>

This particular issue is not unique to Adar and Smith, or to Louisiana.<sup>180</sup> In several other states, state registrars have denied accurate birth certificates to children adopted by unmarried and/or same-sex couples through interstate adoption.<sup>181</sup> As a result, these states have denied these children the same rights and benefits of having an accurate birth certificate enjoyed by children adopted by married couples.<sup>182</sup> This unequal treatment raises the question as to whether the failure to extend equal rights to a class of children adopted by unmarried couples violates the Equal Protection Clause. In addition, it poses the question as to what level of review courts should apply in analyzing these questions.

### III. EQUAL PROTECTION ANALYSIS OF *ADAR V. SMITH* AND PROPOSED APPLICATION OF INTERMEDIATE SCRUTINY

#### A. *Birth Certificate*

A birth certificate plays a crucial role in a child's life.<sup>183</sup> It serves not only as the child's primary form of personal identification, but entitles him or her to various benefits.<sup>184</sup> Failing to provide a child with an accurate birth certificate denies the child access to these benefits, and compromises his or her "safety and well being."<sup>185</sup> In the instance of an emergency, any problem or delay in verifying a parent's legal status may place the child's health or life at risk.<sup>186</sup> The risk is especially present where "parental consent for medical treatment of a child is required."<sup>187</sup> Health care personnel, such as doctors and nurses, both "expect and accept birth

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178. *Id.* at 149.

179. *See* Brief of Amici Curiae Hollinger, *supra* note 14, at 4–5.

180. *See supra* Part I.C.

181. *See supra* Part I.C.

182. *See* Brief of Amici Curiae Hollinger, *supra* note 14, at 14.

183. *See id.* at 7–8.

184. *See id.* at 7–9.

185. *Id.* at 9.

186. *Id.* at 8.

187. *Id.*

certificates as proof of legal parentage.”<sup>188</sup> Not having an accurate birth certificate could delay treatment.<sup>189</sup>

Although other means of proving parentage exist, such as the adoption decree, requiring a child to produce his or her adoption records prevents the child from keeping his or her adoption confidential.<sup>190</sup> Furthermore, a child may become upset or embarrassed if he or she has to explain who his or her parentage, as well as his or her adoption.<sup>191</sup> Having an accurate birth certificate prevents such occurrences from happening and protects the child’s privacy.<sup>192</sup>

The Louisiana Registrar’s policy against issuing birth certificates with both parents’ names to children adopted by unmarried couples has already presented various obstacles for Adar and Smith.<sup>193</sup> In particular, not having a birth certificate with both parents’ names has complicated “Smith’s ability to enroll his son on his company health plan, imped[ed] the couple’s ability to enroll their son [in] school, and result[ed] in the couple being stopped at an airport when airport personnel wanted proof of their relationship with the child.”<sup>194</sup> Unfortunately, the family will continue to face such obstacles so long as the Registrar denies their request for an accurate birth certificate.

### *B. Equal Protection Analysis of the Louisiana Registrar’s Policy*

The Louisiana Registrar’s policy denies children adopted by unmarried couples the same rights available to children adopted by married couples.<sup>195</sup> Under the Louisiana “Record of Foreign Adoptions” statute, “the State Registrar shall provide a new birth certificate showing the names of the adoptive parents to a Louisiana-born child who is adopted out-of-state upon presentation of a properly certified copy of the other state’s final decree of adoption.”<sup>196</sup> The statute, however, does not address whether the couple adopting must

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188. *Id.* at 8–9.

189. *See id.* at 8.

190. *Id.* at 10.

191. *Id.* at 11.

192. *Id.*

193. *Adar v. Smith Case Background, supra* note 13.

194. *Id.*

195. *See* Brief of Amici Curiae Hollinger, *supra* note 14, at 4.

196. *Id.* at 5.

be married.<sup>197</sup> Despite this, the Registrar issues accurate birth certificates to children adopted by married couples, but does not for children adopted by unmarried couples.<sup>198</sup> The Registrar contends that it cannot issue an accurate birth certificate to a child adopted by unmarried parents because Louisiana does not permit unmarried couples to jointly adopt and its birth certificate laws flow from this policy.<sup>199</sup> The Registrar's policy, however, violates the Equal Protection Clause by denying a class of adopted children the same rights available to other adopted children.<sup>200</sup>

The Registrar's policy against issuing accurate birth certificates to a class of adopted children is constitutionally indistinguishable from the laws the Supreme Court invalidated in illegitimacy cases.<sup>201</sup> The Supreme Court has traditionally held that unequal treatment of nonmarital children "based on the conduct or status of their parents violates the Equal Protection Clause."<sup>202</sup> According to the Court, "no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent . . . ."<sup>203</sup> Similarly, a child has no control over his or her adoption, including whether his or her adopted parents are unmarried.<sup>204</sup> Therefore, penalizing the adopted child is also an ineffectual and unjust way of deterring unmarried parents from adopting or of expressing disapproval of such conduct.<sup>205</sup> By singling out and penalizing a class of adopted children, the Registrar violates the Equal Protection Clause in the same way as those statutes that denied benefits to illegitimate children.<sup>206</sup> The Registrar's policy, like the laws challenged in illegitimacy cases, should be analyzed using intermediate scrutiny.<sup>207</sup>

197. See LA. REV. STAT. ANN. § 40:76 (2011).

198. See Brief of Amici Curiae Hollinger, *supra* note 14, at 7.

199. *Id.* at 16; see also *Adar v. Smith*, 639 F.3d 146, 161 (5th Cir. 2011) (en banc).

200. Brief of Amici Curiae Hollinger, *supra* note 14, at 14.

201. *Id.*

202. Brief of Appellees, *supra* note 113, at 53; see also Brief of Amici Curiae Hollinger, *supra* note 14, at 11–12.

203. Brief of Appellees, *supra* note 113, at 54 (quoting *Pickett v. Brown*, 462 U.S. 1, 7 (1983)).

204. Brief of Amici Curiae Hollinger, *supra* note 14, at 15.

205. *Id.*

206. See Brief of Appellees, *supra* note 113, at 54.

207. *Id.*

The Fifth Circuit wrongly concluded that intermediate scrutiny does not apply to cases involving discrimination against children adopted by unmarried couples. According to the Fifth Circuit, the Supreme Court's decisions in illegitimacy cases focus on the child's illegitimate birth status.<sup>208</sup> Because "J's birth status [was] irrelevant to the Registrar's decision,"<sup>209</sup> the Fifth Circuit concluded that the Supreme Court's illegitimacy cases could not "support the conclusion that Infant J belong[ed] to a suspect classification protected by heightened scrutiny."<sup>210</sup> The Fifth Circuit, however, ignored the Supreme Court's rationale for applying intermediate scrutiny in cases discriminating against nonmarital children—a state cannot penalize children for their parents' status or conduct because children are not responsible for their parents' status or conduct.<sup>211</sup> Statutes that penalize children on these grounds do not bear a substantial relationship to a permissible state interest.<sup>212</sup> In addition, the Fifth Circuit ignored the Supreme Court's extension of this rationale, as well as intermediate scrutiny, to a case not addressing discrimination based on a child's illegitimate birth status.<sup>213</sup> In *Plyer v. Doe*,<sup>214</sup> the Supreme Court invalidated a Texas law that denied free public education to children of undocumented immigrants.<sup>215</sup> The Court held that a state could not impose disabilities on children of undocumented immigrants because of their parents' status.<sup>216</sup>

Under Supreme Court precedent, the Registrar's policy cannot survive intermediate scrutiny. To survive intermediate scrutiny, a law must be "substantially related to an important government purpose."<sup>217</sup> The Registrar's policy serves no such purpose.<sup>218</sup> The Registrar's policy penalizes a class of children for circumstances they cannot control—their

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208. *Adar v. Smith*, 639 F.3d 146, 162 (5th Cir. 2011).

209. *Id.*

210. *Id.*

211. *See id.*; Brief of Amici Curiae Hollinger, *supra* note 14, at 13.

212. Brief of Amici Curiae Hollinger, *supra* note 14, at 14.

213. Petition for Writ of Certiorari, *supra* note 104, at 34.

214. *Plyer v. Doe*, 457 U.S. 202 (1982).

215. *Plyler*, 457 U.S. at 230; *see also* CHEMERINSKY, *supra* note 150, at 775.

216. *Plyler*, 457 U.S. at 230; *see also* CHEMERINSKY, *supra* note 150, at 776.

217. CHEMERINSKY, *supra* note 150, at 671.

218. Brief of Amici Curiae Hollinger, *supra* note 14, at 14–15.

parent's marital status.<sup>219</sup> The Registrar contends that its policy does not penalize adopted children of unmarried parents, but rather "simply expresses a preference that children be adopted by married parents."<sup>220</sup> According to the Registrar, "a marriage provides a more stable basis for raising children together than relationships founded on something other than marriage."<sup>221</sup> However, the Supreme Court has held that "encouraging marriage [is] not a permissible justification" for denying nonmarital children specific rights.<sup>222</sup>

Furthermore, the Registrar's policy against issuing birth certificates to children adopted by unmarried couples serves no legitimate purpose because it operates only after the adoption has taken place.<sup>223</sup> "The Registrar's policy has no effect on who may adopt a child born in Louisiana, nor can it affect the validity of adoption laws or decrees from other states."<sup>224</sup> Rather, the Registrar's policy denies an accurate birth certificate to a class of children already adopted.<sup>225</sup>

In addressing the equal protection question in *Adar v. Smith*, the Fifth Circuit sitting en banc wrongly held that the Registrar's policy does not violate the Equal Protection Clause. Had the court applied intermediate scrutiny, it could not have rationally concluded that the Registrar's policy is substantially related to a legitimate government purpose.<sup>226</sup> The Registrar's policy has no relationship to its birth certificate law.<sup>227</sup> Rather, it penalizes a subset of adopted children for their parents' status.<sup>228</sup> Such discrimination serves no legitimate purpose, and therefore violates the Equal Protection Clause.<sup>229</sup>

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219. *Id.* at 15.

220. *Id.* at 16.

221. *Id.* (internal quotation marks omitted).

222. *See id.* at 17.

223. *See id.* at 16.

224. *Id.*

225. *Id.*

226. *See id.* at 14.

227. *See id.* at 16.

228. *See id.* at 15.

229. *See id.* at 14.

## IV. PROPOSAL

A. *Courts Should Apply Intermediate Scrutiny Analysis*

Courts addressing the denial of accurate birth certificates to children adopted by unmarried and/or same-sex couples should apply intermediate scrutiny. Cases such as *Adar* deny children adopted by unmarried parents equal rights solely based on their parents' marital status.<sup>230</sup> Similarly, cases such as *Davenport*, *Finstuen*, and *Perdue* deny children adopted by same-sex couples equal rights solely based on their parents' sexual orientation.<sup>231</sup> The Supreme Court, however, has repeatedly held that penalizing a child for the status or conduct of his or her parents is wrong.<sup>232</sup> Children adopted by unmarried and/or same-sex parents cannot change, and are not responsible for, the status of their parents.<sup>233</sup> Despite this, state registrars continue to penalize this class of adopted children.<sup>234</sup> As a result, children adopted by unmarried parents continue to be disadvantaged and exposed to unnecessary risk. Applying intermediate scrutiny will ensure that a class of adopted children is no longer treated differently than all other adopted children.

B. *Additional Proposal: Remediating the Problem Outside the Courts*

While applying intermediate scrutiny attacks discrimination against children adopted by unmarried and/or same-sex couples at the judicial level, society should take steps outside the courtroom to remedy this problem. State registrars denying accurate birth certificates to children adopted by unmarried and/or same-sex couples are doing so based on disapproval of the parents' marital status and/or sexual orientation.<sup>235</sup> Enacting legislation at the state and federal level prohibiting discrimination against unmarried and/or same-sex couple adoption will attack the root of this problem.

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230. *See id.* at 4.

231. *See supra* Part I.C.

232. *See* Brief of Amici Curiae Hollinger, *supra* note 14, at 4, 13.

233. *See id.*

234. *See generally* Appell, *supra* note 29, at 51–52.

235. *See* Brief of Amici Curiae Hollinger, *supra* note 14, at 4; *see supra* Part I.C.

Current estimates show that 401,000 children in the United States are in foster care.<sup>236</sup> Of this 401,000, over 104,000 are awaiting adoption.<sup>237</sup> While there is no shortage of children waiting for adoption, “there is a shortage of qualified individuals willing to adopt or foster a child in the child welfare system.”<sup>238</sup> Estimates show that approximately two million gay men, lesbians, and bisexuals are interested in adopting a child.<sup>239</sup> State laws precluding unmarried and/or same-sex couples from adopting keep children in need of homes and individuals willing to adopt from becoming families.<sup>240</sup>

States should therefore enact legislation that allows unmarried and/or same-sex couples to adopt, or, alternatively, that “bars the exclusion of applicants for adoption solely on the basis of [marital status and/or] sexual orientation.”<sup>241</sup> Child welfare advocates at the state and national level should work together to add such language to state adoption laws.<sup>242</sup>

Legislators are taking steps to enact such legislative change at the federal level. Former United States Representative Pete Stark introduced before Congress the Every Child Deserves a Family Act in October 2009.<sup>243</sup> The bill withholds federal government funding from “states that discriminate against prospective adoptive or foster parents based on marital status, sexual orientation and gender identity.”<sup>244</sup> The goal of the bill is to “open more homes to foster children” by eliminating “sexual orientation, gender identity, and marital status discrimination and bias in adoption and foster care recruitment, selection, and placement procedures.”<sup>245</sup> On May 3, 2011, a committee held a hearing on the issues presented in the bill.<sup>246</sup> Passing legislation like the Every Child Deserves a Family Act will

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236. AFCARS TRENDS, *supra* note 37, at 1.

237. *Id.*

238. Every Child Deserves a Family Act, H.R. 1681, 112th Cong. § 2(a)(1) (2011).

239. EVAN B. DONALDSON ADOPTION INST., *supra* note 27, at 13.

240. *See* H.R. 1681 § 2(a)(10)(A).

241. EVAN B. DONALDSON ADOPTION INST., *supra* note 27, at 20.

242. *Id.*

243. *Adoption, UNMARRIED EQUALITY*, <http://www.unmarried.org/parents-children/adoption/> (last visited Apr. 26, 2013).

244. *Id.*

245. H.R. 1681 § 2(a)(2).

246. *Adoption, supra* note 243.

only help in taking the necessary steps to end discrimination against adopted children based solely on the status of their parents.

### CONCLUSION

The state registrars with policies against issuing accurate birth certificates to children adopted by unmarried and/or same-sex couples deny this group of adopted children the same rights available to children adopted by married parents.<sup>247</sup> The policies penalize the child for a status that the child cannot change.<sup>248</sup> Just as a child cannot control his or her birth, he or she has no control over the adoption.<sup>249</sup> This makes such cases indistinguishable from illegitimacy cases, in which the Supreme Court has already held that the state cannot penalize a child for the status or conduct of his or her parents.<sup>250</sup>

The only remedy for courts is to apply intermediate scrutiny. Had the Fifth Circuit applied intermediate scrutiny in *Adar v. Smith*, it would have concluded that the Registrar's policy violates the Equal Protection Clause.<sup>251</sup> Other courts applying the same level of review will find that similar policies fail under the same terms. Therefore, the necessary judicial course of action is to apply intermediate scrutiny so children in similar situations as J will not have to suffer the same burdens.

Furthermore, while courts can attack such discrimination by utilizing intermediate scrutiny, states and welfare agencies can attack the problem by enacting legislation directed at prohibiting discrimination in adoption based on marital status, sexual orientation, or gender identity.<sup>252</sup> Such legislation would serve to make unlawful the very basis for state registrars' discrimination against children adopted by unmarried and/or same-sex couples.<sup>253</sup> Removing the legislative barriers against unmarried and same-sex joint

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247. See Brief of Amici Curiae Hollinger, *supra* note 14, at 4.

248. See *id.* at 15.

249. *Id.*

250. *Id.* at 14.

251. See *id.*

252. See Every Child Deserves a Family Act, H.R. 1681, 112th Cong. (2011); see also EVAN B. DONALDSON ADOPTION INST., *supra* note 27, at 19–20.

253. See *id.*

adoption may encourage more couples to provide loving homes for children in need.<sup>254</sup>

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254. *See* H.R. 1681.