IN THE SUPREME COURT
OF VIRGINIA

No. 070933

LISA MILLER-JENKINS,

Appellant,

v.

JANET MILLER-JENKINS,

Appellee.

FROM THE COURT OF APPEALS OF VIRGINIA
Record No. 0688-06-04

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION
IN SUPPORT OF APPELLANT
Urging reversal

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae The National Legal Foundation (NLF) is a 501(c)(3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has filed numerous briefs in important cases pertaining to the sanctity of marriage. The NLF has an interest, on behalf of its constituents and supporters, particularly those in Virginia, in arguing to protect the sanctity of marriage and prevent the evisceration of the recently ratified Virginia Marriage Amendment and the Virginia Marriage Affirmation Act.

ASSIGNMENTS OF ERROR

Amicus Curiae adopts the Assignments of Error as presented by the Appellant.

QUESTIONS PRESENTED

1. Whether the Parental Kidnapping Prevention Act, which affords custody and visitation orders full faith and credit, or the Defense of Marriage Act, which does not require full faith and credit be afforded to rights arising from same-sex unions treated as marriage, controls when Virginia is asked to give full faith and credit to Vermont parentage and custody rights arising from a Vermont civil union

insofar as Virginia's laws expressly declare the civil union "void in all respects."

STATEMENT OF THE CASE

Amicus Curiae adopts the Statement of the Case as presented by the Appellant.

SUMMARY OF THE ARGUMENT

While this case involves multiple issues, this Brief expands upon and brings new insight into the argument that the Defense of Marriage Act (DOMA) prevents the application of the Parental Kidnapping Prevention Act (PKPA) to the recognition of Vermont's child custody and visitation order because Vermont's order relies on a presumption of parenthood under its civil union law. The Court of Appeals held that it would not construe DOMA to be in conflict with PKPA because repeals by implication are not favored. However, a proper statutory construction of DOMA would reveal that it is more likely an amendatory statute. The only way to reconcile the conflicting sections of PKPA and DOMA is to recognize that since DOMA was enacted subsequent to PKPA it would control, and would prevent the application of PKPA in this case. Furthermore, DOMA would apply to this case, because even though Vermont's law does not recognize same-sex marriage, its civil union is a relationship that is "treated as a marriage" under the statute.

ARGUMENT

The Court of Appeals erred when it held that the child custody and visitation order from Vermont should be afforded full faith and credit under the Parental Kidnap Protection Act (PKPA). 28 U.S.C. § 1738A (2006). The Court stated that "[i]n light of our decision in Record No. 2654-04-4, it is clear that the trial court likewise erred in this case." *Miller-Jenkins v. Miller-Jenkins*, 2007 Va. App. LEXIS 158 (Va. Ct. App. Apr. 17, 2007). The decision in Record No. 2654-04-4 was reported as *Miller-Jenkins v. Miller Jenkins*, 49 Va. App. 88, 637 S.E.2d 330 (Ct. App. 2006). In that case, Appellant Lisa Miller-Jenkins argued that the Defense of Marriage Act, 28 U.S.C. § 1738C (2006) (herein after "DOMA") and the Virginia Marriage Affirmation Act, Virginia Code Annotated § 20-45.3 (2004) (hereinafter "MAA") prevented PKPA from requiring Virginia to give the Vermont court's order full faith and credit. *Miller-Jenkins*, 49 Va. App. at 100, 637 S.E.2d at 336. The court rejected her argument, however, because it did not believe that DOMA had any impact on PKPA. *Id.* at 101-02, 637 S.E.2d at 337.

Below, *Amicus* argues that DOMA should apply this case, preventing PKPA from forcing Virginia to recognize Vermont's presumption of parentage. The statutory construction of DOMA reveals that it was meant as an amendment to the Full Faith and Credit Act, 28

U.S.C. § 1738 (2006), and its constituent part, PKPA, and therefore would control in any conflicts with PKPA. DOMA controls this situation because Vermont's civil union is a relationship that is "treated as a marriage" under the statute. 28 U.S.C. § 1738C.

I. THE COURT OF APPEALS SHOULD BE REVERSED BECAUSE DOMA MODIFIES PKPA ON THE ISSUE AT BAR.

The Court of Appeals erred when it held that DOMA did not apply to this case because the canons of statutory construction that it cited in its opinion are less applicable to this case than other canons. The Court quoted the canon that "'[r]epeal[s] by implication [are] not favored.'" *Id.* at 101, 637 S.E.2d at 336 (quoting *Scott v. Lichford*, 164 Va. 419, 422, 180 S.E. 393, 394 (1935)). However, the application of this canon overly simplifies the issue. Both PKPA and DOMA are amendments to the Full Faith and Credit Act, 28 U.S.C. § 1738. As has been noted "[t]he distinction between repeal and amendment, as these terms are used by courts, is arbitrary . . . ." 1A J. G. Sutherland, Statutes and Statutory Construction, § 23:2, at 436-37 (6th ed. Norman J. Singer 2002). Furthermore, Sutherland notes that

> [t]he courts have recognized also that acts which the legislature has treated as original frequently have the same effect in substance as amendments and repeals and that an independent act in effect adds a provision to a prior act pertaining to the same subject matter or in effect adds a

> provision to a prior act and abrogates a part of it by being in conflict with it.

Sutherland, § 23:2, at 437-38. The terms "implied amendment" and "implied repeal" arose in this context. Sutherland, § 23:2, at 438. Thus, even based merely upon proper canons of construction, DOMA is more appropriately categorized as an amendatory act because it is a statute "complete within itself [, that is] it is not necessary to refer to any other statute to understand its scope and meaning." Sutherland, § 22:21, at 319-20.

In trying to determine how a subsequent amendment interacted with a previous act of Congress the Second Circuit stated that

> [t]he rule of statutory construction to which we turn in this instance has been enunciated as follows:
>
> > The provisions introduced by the amendatory act should be read together with the provisions of the original section that were . . . left unchanged, as if they had been originally enacted as one section. Effect is to be given to each part, and they are to be interpreted so they do not conflict. If the new provisions and the . . . unchanged portions of the original section cannot be harmonized, the new provisions should prevail as the latest declaration of the legislative will.

American Airlines, Inc. v. Remis Industries, Inc., 494 F.2d 196, 200 (2d Cir. 1974) (quoting J. G. Sutherland, Statutes and Statutory Construction, § 22:34, at 196 (4th ed. C. Sands 1972)) (alterations in original).

The Court of Appeals held, in an attempt to prevent a "repeal by implication," that it would not read any conflict between the statutes. However, in order for it to reach that conclusion, the court had to ignore the last phrase of DOMA: "or a right or claim arising from such relationship." This mistake resulted in the Court ignoring an important part of DOMA. A better reading of PKPA and DOMA—which, as noted, are both part of 28 U.S.C. § 1738—would have shown that the concluding phrase of DOMA was in conflict with PKPA, as illustrated by this case. Appellee Janet Miller-Jenkins's only claim for parental rights arises solely from her civil union with Lisa at the time of IM's birth. Since DOMA prevents a state from being forced to recognize rights arising from "a relationship between persons of the same sex that is treated as a marriage under the laws of" Vermont, and since, as will be demonstrated below, Vermont treats its civil unions identically to marriages, a conflict exists between PKPA and DOMA. As noted by the Court of Appeals, PKPA was enacted in 1980 and DOMA was enacted in 1996. *Miller-Jenkins*, Va. App. 88 at 101, 637 S.E.2d at 336. Because these two laws conflict,

the latter one must control and DOMA prevents PKPA from forcing Virginia to recognize Vermont's order granting Janet visitation rights.

To reiterate a point made above, it is not particularly important whether this conflict be seen as due to a partial repeal or an amendment—the distinction is often arbitrary. Sutherland, *supra*, § 23:2, at 438. However, in the instant case, DOMA was clearly an amendment, and it is hard to understand how the Court of Appeals missed that fact. The court stated that "Lisa cites no authority holding that either the plain wording of DOMA or its legislative history was intended to affect or partially repeal PKPA. Therefore, any Congressional intent to repeal must be by implication." *Id*. at 100-01, 637 S.E.2d at 336. However, DOMA originated as Public Law 104-199. Section 2 (a) of the Public Law states "Chapter 115 of title 28, United States Code, is amended by adding after section 1738B the following: [here follows the text of what became section 1738C, i.e., the portion of DOMA pertinent to this case]." On its face, DOMA amended § 1738, including § 1738C.

Furthermore, the Court of Appeals was also incorrect in saying that the legislative history of DOMA did not indicate that it was designed to interact with PKPA. As Lisa mentioned in her Petition for Appeal to this Court, the House of Representatives Committee on the Judiciary's report

on DOMA reveals that it "was concerned that a state might be required to give legal recognition to: 'benefits relating to . . . *child custody* . . . .'" (Petition for Appeal 18 (quoting 104 H. Rpt. 664 n.21, 1996 U.S.C.C.A.N. at 2929).) More specifically, Congress was concerned about the disputes that would occur if one state started granting rights to same-sex couples that had traditionally been limited to opposite-sex couples and those couples tried to enforce those expanded rights in sister states. Professor Lynn Wardle noted that "Congress enacted DOMA in response to claims by advocates of same-sex marriage that, if any state legalizes same-sex marriage, all states and federal agencies will have to recognize as valid same-sex marriages performed in that same-sex-marriage-permitting state." Lynn D. Wardle, *Revisiting DOMA: Protecting Federalism In Family Law*, 58 Or. State Bar Bulletin 21, 22 (1998). Wardle continued:

> [w]hen any state legalizes same-sex marriage, it is likely that immediately many same-sex couples will fly there to be united in marriage. They will then return to the states they came from, and to other states, and demand recognition of their marriages (for purposes of marriage and divorce benefits, adoption, *custody*, guardianship, visitation, health and welfare benefits, education, alimony, property division, state taxes, probate, wills, trusts and estate law, public entitlements, etc.).

Id. (emphasis added). Professor Wardle's hypothetical is essentially what has transpired in this case. Janet and Lisa were residents of Virginia,

traveled to Vermont over the weekend for a civil union and returned to Virginia. *Miller-Jenkins*, 49 Va. App. at 91-92, 637 S.E.2d at 332. It was not until after IM was born that the couple moved to Vermont. *Id.* at 92, 637 S.E.2d at 332. Now Janet is trying to use Vermont's civil union law to establish parental rights over IM that are incongruent with Virginia law. Therefore, this case presents exactly the conflict between sovereign states that Congress passed DOMA to prevent.

For all the reasons stated above, the Court of Appeals erred in opining that, if applicable to the present case, Virginia's Marriage Affirmation Act was preempted by PKPA under the Supremacy Clause. 49 Va. App. at 102, 637 S.E.2d at 337. As discussed above, DOMA amended PKPA. This allows the states to individually decide what effect to provide to same-sex marriages from other states, as well as the rights arising therefrom, including presumptions of parenthood. Since PKPA does not force Virginia to recognize Vermont's law in this case, Virginia is free to decide the issue for itself. Additionally, the Legislature and people of Virginia have already established Virginia law and public policy, through the MAA and the Virginia Marriage Amendment, Va. Const. art. I, § 15-A, which was ratified three weeks before the Court of Appeals opinion issued, that other states' civil union and same-sex

marriage laws are not to be given effect under Virginia law or any rights arising from such a relationship.

An objection to the argument offered above is that DOMA does not cover civil unions. However, two lines of reasoning suggest that DOMA should be construed to cover civil unions.

The first is provided by portions of DOMA's legislative history actually quoted by the Court of Appeals:

> DOMA
>
> > has two primary purposes. The first is to defend the institution of traditional heterosexual marriage. The second is to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.
>
> H.R. Rep. No. 104-664, at 2 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2906. *See also id*. at 18, reprinted in 1996 U.S.C.C.A.N. at 2922 ("It is surely a legitimate purpose of government to take steps to protect the right of the people, acting through their state legislatures, to retain democratic control over the manner in which the States will define the institution of marriage. [DOMA] advances this most important government interest.").

Miller-Jenkins, 49 Va. App. at 101, 637 S.E.2d at 330.

Everything that Congress noted about the need for states to be allowed to protect their right to define marriage applies with equal force to

other states' civil unions as it does to other states' same-sex marriages. Civil unions were not mentioned in these quotations for the simple reason that they did not exist in 1996; Vermont created them in 1999. 15 V.S.A. § 1201 (2002). However, Congress did provide for the possibility that some states might give alternative names, such as civil unions, rather than calling it marriage by using the phrase "relationship between persons of the same sex that is *treated as a marriage*" in the text of DOMA. 28 U.S.C. § 1738C (emphasis added).

Second and relatedly, Vermont's civil unions are—and were explicitly intended to be—the complete functional equivalent of civil marriage. For example, the legislative findings appended to the civil union bill states that "[w]hile a system of civil unions does not bestow the status of civil marriage, it does . . . [e]xtend[ ] the benefits and protections of marriage to same-sex couples . . . . *Id.* (H.847, 1999-2000 Session, § 10 & 11 (Vt. 1999). A complete understanding of Vermont's civil unions can be gather by examining sections 1201-1207 of title 15 of Vermont's Code. However, for present purposes, two small quotations will suffice. First, section 1204 states in part as follows:

> (a) Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.

> (b) A party to a civil union shall be included in any definition or use of the terms “spouse,” “family,” “immediate family,” “dependent,” “next of kin,” and other terms that denote the spousal relationship, as those terms are used throughout the law.
>
> (c) Parties to a civil union shall be responsible for the support of one another to the same degree and in the same manner as prescribed under law for married persons.
>
> (d) The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union

Second, section 1206 emphasizes that “[t]he dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage . . . .”

Thus, because DOMA should be construed to cover a system that gives *all* the same benefits, protections and responsibilities of marriage to same-sex couples; and because DOMA amended the Full Faith and Credit Act and thus its constituent part, PKPA, the trial court was correct to refuse to register the Vermont order.

CONCLUSION

For the foregoing reasons and for other reasons contained in the Appellant’s Brief, *Amicus* respectfully requests that this Court find that the

Court of Appeals erred in vacating the trial court's order, and that it reverse the judgment of the Court of Appeals.

Respectfully submitted
this 22nd day of October 2007.

____

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of The National Legal Foundation in the case of *Miller-Jenkins v. Miller-Jenkins*, No. 070933, on all required parties by depositing three paper copies in the United States mail, first class postage, prepaid on October 22, 2007 addressed as follows:

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