IN THE SUPREME COURT
OF ALABAMA

No. 1080440

N.B.,

Petitioner,

v.

A.K.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CIVIL APPEALS
Case No. 2070086

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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 Alabama, in arguing to protect the sanctity of marriage and prevent the evisceration of the Alabama Sanctity of Marriage Amendment and the Alabama Marriage Protection Act.

STATEMENT OF THE CASE

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

STATEMENT OF THE ISSUES

I. 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 relationships treated as marriage, controls when Alabama is asked to give full faith and credit to California parentage and custody rights arising from a California court order insofar as Alabama's laws expressly declare that any "union replicating marriage of or between persons of the same sex . . . in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect" in Alabama.

STATEMENT OF THE FACTS

Amicus Curiae adopts the Statement of the Facts as presented by the Petitioner.

SUMMARY OF THE ARGUMENT

This Brief argues that the Defense of Marriage Act (DOMA) prevents the application of the Parental Kidnapping Prevention Act (PKPA) to the recognition of California's child custody and visitation order because California's order relies on a presumption of parenthood arising out

of a same-sex relationship that approximates marriage. Because DOMA was enacted subsequent to PKPA it would prevent the application of PKPA in this case.

ARGUMENT

The Court of Civil Appeals erred when it held that the child custody and visitation order from California should be afforded full faith and credit under the Parental Kidnap Protection Act (PKPA). 28 U.S.C. § 1738A (2006). The court stated that

> [c]onfronted with the priority of the California court's jurisdiction in this case, which stems from A.K.'s initiation of parentage and visitation proceedings in that court before Alabama became the child's home state, we . . . hold that the PKPA preempted the Alabama court's jurisdiction to enter a judgment touching and concerning A.K.'s visitation rights with respect to the child.

A.K. v. N.B., No. 20070086, 2008 Ala. Civ. App. LEXIS 316, at *17 (Civ. App. May 23, 2008). The court below failed to consider (1) that the case law permitting A.K. a presumption of parentage is grounded in a relationship approximating marriage when applied to same-sex couples, (2) that DOMA has amended PKPA insofar as PKPA restricts states from enforcing its marriage laws and rights arising therefrom, and, therefore, (3) that Alabama's Sanctity of Marriage Amendment and Marriage Protection Act permit this Court to ignore California's presumption of parentage in favor of A.K. in the instant case.

I. THE COURT OF CIVIL APPEALS SHOULD BE REVERSED BECAUSE THE FEDERAL DEFENSE OF MARRIAGE ACT HAS AMENDED THE PARENTAL KIDNAP PROTECTION ACT TO PERMIT ALABAMA JURISDICTION OVER CLAIMS ARISING OUT OF MARRIAGE-LIKE SAME-SEX RELATIONSHIPS.

A. A.K. was awarded parental rights because her relationship with N.B. was one approximating a marriage under California law.

As the court below noted, A.K. sought a determination of parentage under a California statute that states in pertinent part:

> A man is presumed to be the natural father of a child if . . .
> (d) He receives the child into his home and openly holds out the child as his natural child.

Cal. Fam. Code § 7611 (LEXIS through Feb. 20, 2009 Sess.). Although A.K. is not a man, California courts have interpreted § 7611(d) to permit a woman to establish a presumption of paternity under this subsection. *See Elisa B. v. Superior Court*, 117 P.3d 660, 670 (Cal. 2005). The court below, without further explanation, restated the *Elisa B.* ruling as controlling in the instant matter:

> Although Alabama appellate courts have yet to consider the question, in August 2005, the Supreme Court of California, construing that state's version of the UPA [Uniform Parentage Act], held that a woman with whom the biological mother of a child has lived in a committed romantic relationship can, in law, also be deemed a "mother" of that child by analogy to provisions permitting a presumed father of a child to be adjudicated a parent of that child.

A.K., 2008 Ala. Civ. App. LEXIS 316, at *2-3. The court's summary of the holding, however, fails to explicate the fuller basis for California's rule—namely, that paternity for a same-sex non-biological "mother" will only be found when the relationship is one approximating marriage.

Both the facts of *Elisa B.* and the grounding of the court's holding demonstrate that the court's analysis of the applicability of § 7611(d) for a presumptive "mother's" paternity rested upon a detailed analysis of the parties' relationship, demonstrating that short of a marriage-like relationship, a same-sex claimant would fail to meet the burden of § 7611(d). The facts of *Elisa B.* illustrate the point. The parties began to live together approximately six months after their relationship began, eventually introducing one another as partner, exchanging rings, and opening a joint bank account. *Elisa B.*, 117 P.3d at 663. Approximately three or four years after they began living together, they decided to attempt to have children, and within that context began discussions over household finance. *Id.* The parties decided that one would be the "stay-at-home mother" and the other would be the "primary breadwinner for the family." *Id.* The parties

then chose the same donor from the sperm bank, and each was present at the other's successful insemination (even perhaps performing the act of insemination). *Id.* Each party was present for the labor and delivery of the other and cut the umbilical cord upon the children's births. *Id.* The parties gave the children hyphenated last names which included the names of both parties, and each party breast-fed all the children. *Id.* Finally, one party obtained a life insurance plan, naming the other as beneficiary, and, consistent with their earlier stated plan, the one party "supported the household financially," while the other remained primarily in the home. *Id.*

As the facts above amply demonstrate, numerous incidences of a marriage-like relationship existed. In particular, the parties "exchanged rings," "opened a joint bank account," and made joint economic decisions naming one as the "stay-at-home mother." *Id.* They assisted one another with the artificial insemination (apparently an attempt to replicate natural conception between a man and woman) and, upon the birth of the children, cut the "children's umbilical cords." *Id.* Finally, the parties operated in a manner of many husbands and wives, with one partner "support[ing] the household financially" and the other not working outside the home. *Id.*

Significantly, *Elisa B.* was decided at the same time as *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005), a case construing § 7611(d) in the context of an estoppel claim. The *Kristine H.* parties "jointly filed . . . a 'Complaint to Declare Existence of Parental Rights' that alleged that Kristine was seven months pregnant and Lisa was her 'partner.'" 117 P.3d at 692. When Kristine later attempted to have the judgment set aside, the court considered whether she was "estopped from challenging the validity of that judgment." *Id.* at 693. The court based its holding on a long line of estoppel cases *nearly all* involving rights, duties, or impediments incident to marriage. *See id.* at 693-95. The *Kristine H.* court first considered *Watson v. Watson*, 246 P.2d 19, 20 (Cal. 1952), noting that "'the validity of a divorce decree cannot be contested by

a party who has procured the decree or a party who has remarried in reliance thereon or by one who has aided another to procure the decree so that the latter will be free to marry.'" *Id.* at 693 (citation omitted).

The *Kristine H.* court went on to analyze several other estoppel cases of a similar strain. The court explained that *Harlan v. Harlan*, 161 P.2d 490 (Cal. App. 1945), had invalidated a "mail order" divorce, because the plaintiff was "not in a position to take advantage of the invalidity of the Mexican divorce," having helped the defendant to obtain it and having enjoyed its benefits. *Id.* at 693-94. Then *Kristine H.* court cited *In re Marriage of Recknor*, 187 Cal. Rptr. 887 (Cal. App. 1982), for the proposition that a wife was estopped from invalidating a fifteen year marriage on the basis that her divorce from a previous marriage had not been finalized prior to her solemnizing a second marriage. *Id.* at 694. Next, the court found a surrogacy case helpful, *Adoption of Matthew B.*, 284 Cal. Rptr. 18 (Cal. App. 1991), wherein a surrogate mother was prevented from contesting her consent to the adoption of the child she carried on behalf of a husband and wife. *Id.* at 694-95. Finally, the *Kristine H.* court noted in *In re Marriage of Hinman*, 8 Cal. Rptr. 2d 245 (1992), that a mother was prevented from rescinding a stipulation granting her ex-husband joint custody of her children to a previous marriage. *Id.* at 695.

Read together, *Elisa B.* and *Kristine H.* stand for the proposition that for a same-sex partner to assert parentage under § 7611(d), she must first demonstrate that the relationship consisted of significant incidences of a marriage relationship. In particular, *Elisa B.* reinforces this reading by assuring potential defendants that the mere existence of a romantic relationship or the fact of gratuitous support of a partner's children is insufficient to arise to a presumption of parentage under § 7611. As the court stated,

> [w]e were careful in *[In re] Nicholas H.*[, 46 P.3d 932 (Cal. 2002)], therefore, not to suggest that every man who begins living with a woman when she is pregnant and continues to do so after the child is born necessarily becomes a presumed father of the child, even against his wishes. The Legislature surely did not intend to punish a man like the one in *Nicholas H.* who voluntarily provides support for a child who was conceived before he met the mother, by transforming that act of kindness into a legal obligation.
>
> But our observation in *Nicholas H.* loses its force in a case like the one at bar in which the presumed mother under section 7611, subdivision (d), acted together with the birth mother to cause the child to be conceived. In such circumstances, unlike the situation before us in *Nicholas H.*, we believe the Legislature would have intended to impose upon the presumed father or mother the legal obligation to support the child whom she caused to be born.

117 P.3d at 670. In other words, the *Elisa B.* court grounded its holding in the significant intimacy of the parties' relationship, a relationship closely analogous to a marriage relationship.

B. DOMA permits Alabama to ignore California's adjudication of A.K.'s parentage because to do otherwise would recognize rights arising out of a relationship that is "treated like marriage" in California, but that is contrary to Alabama law.

Alabama is free to ignore California's adjudication of A.K.'s parentage because to do otherwise would recognize rights arising out of a relationship that is "treated like marriage" in California, but that is contrary to Alabama's Sanctity of Marriage Amendment, Ala. Const. art. I, § 36.03 (LEXIS through 2008 Sess.), and Marriage Protection Act, Ala. Code § 30-1-19 (LEXIS through 2009 Sess.).[1]

The Court of Civil Appeals erred when it yielded its jurisdiction to the California courts, because it failed to consider that DOMA applied to the instant case, working an amendment to the Full Faith and Credit Act, 28 U.S.C. § 1738 that amended in part PKPA.[2] Although both PKPA and DOMA are amendments to the Full Faith and Credit Act,

[1] Although not necessary for a finding that DOMA and Alabama's laws permit this Court to ignore California's order of parentage on behalf of A.K., as N.B.'s brief more fully sets out, A.K. and N.B. lived in a manner approximating marriage. (*See* Petitioner's Br. at 1.)

[2] PKPA was first enacted in 1980, and DOMA was first enacted in 1996. *See* History, 28 U.S.C. § 1738A; History, 28 U.S.C. 1738C.

> courts have recognized . . . 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.

1A J. G. Sutherland, Statutes and Statutory Construction, § 23:2, at 437-38 (6th ed. Norman J. Singer 2002). Thus, based upon proper canons of construction, DOMA is appropriately categorized as an amendatory act, resulting in an "implied amendment" or "implied repeal" of part of PKPA, and because DOMA is a statute "complete within itself [,] it is not necessary to refer to any other statute to understand its scope and meaning." Sutherland, § 22:21, at 319-20; § 23:2, at 438.

In determining how a subsequent amendment interacted with a previous act of Congress, the Second Circuit has 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)) (omissions in original).

It also bears noting that when Congress enacted DOMA, conflicts arising out of custody disputes were clearly part of the motivation for its passage. 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* . . . ." 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 has 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). Those same-sex couples being "married" would then "demand recognition of their marriages," including seeking enforcement of rights incident to marriage like "divorce benefits, adoption, *custody*, guardianship, *visitation*, health and welfare benefits, education, alimony, property division, state taxes, probate, wills, trusts and estate law, [and] public entitlements." *Id.* (emphasis added). This case presents one of the conflicts between sovereign states that Professor Wardle predicted and Congress passed DOMA to prevent, but in an even more invasive form. In particular, here a former same-sex partner seeks in an Alabama court vindication of a "right" of parentage based on a mere *marriage-like* relationship recognized in California.

Thus, the import of DOMA's amendatory force cannot be overstated. Desiring to protect individual states from being forced to recognize same-sex "marriages" *and legal rights incident to them*, Congress enacted the following:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a *relationship between persons of the same sex that is treated as a marriage* under the laws of such other State, territory, possession, or tribe, *or a right or claim arising from such relationship*.

28 U.S.C. § 1738C (LEXIS through Mar. 20, 2009 Sess.) (emphases added). Thus, read together, PKPA and DOMA—which, as noted, are both part of 28 U.S.C. § 1738—demonstrate that the concluding phrase of DOMA is in conflict with PKPA. A.K.'s claim for parental rights arises from her admittedly marriage-like relationship with N.B. prior to and after the birth of A.R.B.K. (*See* Petitioner's Br. at 1.) As set out more fully above, California will find a presumption of parentage in a same-sex situation when the parties have demonstrated a relationship approximating marriage. And A.K.'s California judgment affording her a presumption of parentage for the purposes of PKPA is exactly the type of "right or claim arising from such relationship" that DOMA was enacted to prevent.

C. Alabama has definitively acted to permit its rejection of the California order, because Alabama shall give "no legal force or effect"to any "union replicating marriage."

All of the above discussion has significance because the Legislature and people of Alabama have emphatically established Alabama law and public policy in support of traditional marriage and in opposition to same-sex relationships approximating marriage, including a rejection of purported rights arising therefrom. Alabama has codified the following:

> **§ 30-1-19. Alabama Marriage Protection Act; marriage defined; marriage between individuals of same sex invalid.**
>
> **(a)** This section shall be known and may be cited as the "Alabama Marriage Protection Act."
> **(b)** Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting the unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.
> . . . .
>
> **(e)** The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction *regardless of whether a marriage license was issued*.

Ala. Code § 30-1-19 (LEXIS through 2009 Sess.) (emphasis added). And similarly,

> **Sec. 36.03. Sanctity of marriage.**
>
> **(a)** This amendment shall be known and may be cited as the Sanctity of Marriage Amendment.
> **(b)** Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting this unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.
> . . . .
>
> **(f)** The State of Alabama shall not recognize as valid any common law marriage of parties of the same sex.
> **(g)** *A union replicating marriage of or between persons of the same sex in the State of Alabama or in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state as a marriage or other union replicating marriage.*

Ala. Const. art. I, § 36.03 (LEXIS through 2008 Sess.) (emphasis added).

As has been addressed more fully above, A.K.'s right to a presumption of parentage in California rests upon her demonstrating a marriage-like relationship, a type of relationship having "no legal force or effect" in Alabama. Ala. Const. art. I, § 36.03 (LEXIS through 2008 Sess.). Furthermore, DOMA explicitly protects states from being forced into recognizing "right[s] or claim[s] arising from such relationship." 28 U.S.C. § 1738C (LEXIS through Mar. 20, 2009 Sess.). Therefore, Alabama law ultimately controls, and Alabama law has vested no legal right arising out of A.K.'s relationship with N.B.

CONCLUSION

For the foregoing reasons and for other reasons contained in the Petitioner's Brief, *Amicus* respectfully requests that this Court find that the Court of Civil Appeals erred in vacating the trial court's order, and that it reverse the judgment of the Court of Civil Appeals.

Respectfully submitted
this 1st day of April 2009.

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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 *N.B. v. A.K.*, No. 1080440, on all required parties via electronic mail or by depositing one paper copy in the United States mail, first class postage, prepaid on April 1, 2009, addressed as follows:

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