No. 1080440

IN THE SUPREME COURT OF ALABAMA

Ex parte N. B.

(In re: N. B., Petitioner,

v.

A. K., Respondent.)

On Writ of Certiorari to the
Court of Civil Appeals
No. 2070086

On appeal from the
Juvenile Court of Houston County, Alabama
Juvenile Court No. JU-06-455

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

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STATEMENT REGARDING ORAL ARGUMENT

Amicus curiae does not request oral argument in this case.

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STATEMENT OF THE ISSUES ADDRESSED BY AMICUS CURIAE

Whether Full Faith and Credit Clause requires the Alabama court to defer to the California Court's visitation order for A.K.

Whether a visitation order in one state based upon a relationship in violation of the law of nature may be disregarded in other states.

Whether the Defense of Marriage Act, 28 U.S.C. § 1738C, permits Alabama to give no effect to the California Court's visitation order.

SUMMARY OF THE ARGUMENT

The Court of Civil Appeals below justified its decision below, in part, upon an erroneous interpretation of the Full Faith and Credit Clause of the United States Constitution and with complete disregard for Alabama and federal laws protecting the traditional view of marriage and families. The U.S. Constitution requires states to give acts and judgments of other states "full faith and credit," but the Founders did not intend the clause to mean that the policies and judgments of California would be automatically enforced in Alabama and around the country. Particularly when faced with a choice between two states' contradicting statutes, the public policy of the one does not need to be abandoned to the other under the guise of full faith and credit.

Alabama has a distinct legal and public policy forbidding same-sex "marriage" and homosexual conduct, while protecting the traditional definitions of family and parents. There is no "de facto" parent status recognized in this state, and there are no rights to parentage or visitation that arise from a same-sex relationship. Moreover, the former relationship underlying the visitation

order violates the law of nature and of nature's God, as recognized in English and Alabama common law. Alabama does not need to recognize a visitation order affecting an Alabama family that runs contrary to its own law and policy and the law of nature.

Finally, the federal Defense of Marriage Act (DOMA) removes any doubt that Alabama may protect N.B. and her child. DOMA provides that an unwilling state need not grant full faith and credit—-or any recognition whatsoever—-to a same-sex relationship "treated as a marriage" in another state or "a right or claim arising from such relationship." A.K.'s visitation claim arose from her former relationship with N.B. and the California court's willingness to treat it as a marriage. DOMA recognizes that Alabama may tell California to keep such inventive orders in California.

ARGUMENT

The Court of Civil Appeals held below that, regardless of the underlying personal jurisdiction issue over A.K., the trial court in this case was "bound, under federal constitutional and statutory law, to give full faith and credit to the judgment of the California court rendered on September 11, 2006, that A.K. *is a parent* of the child." *A.K. v. N.B.*, ___ So. 2d ___, 2008 WL 2154098 (Ala. Civ. App. 2008). *Amicus* hereby addresses the errors in the appeals court's brief but significant treatment of the "full faith and credit" issue, particularly in light of this Court's March 11, 2009 Order granting certiorari review and expressing interest in the impact of the Alabama Sanctity of Marriage Amendment, the Full Faith and Credit Clause of the U.S. Constitution, and the federal Defense of Marriage Act on this case of first impression.

I. THE FULL FAITH AND CREDIT CLAUSE OF THE U.S. CONSTITUTION DOES NOT REQUIRE ALABAMA COURTS TO RECOGNIZE A.K.'S "DE FACTO" PARENT STATUS WHERE ALABAMA PUBLIC POLICY AND LAW STAND OPPOSED TO IT AND THE UNDERLYING HOMOSEXUAL RELATIONSHIP.

The Full Faith and Credit Clause of the United States Constitution provides:

> Full faith and credit shall be given in each State to the public acts, records, and judicial

> proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

U.S. Const. art. IV, § 1. This Clause was a stronger version of a similar provision in the Articles of Confederation, one that had been "certainly quite too loose and general in its texture." 3 Joseph Story, *Commentaries on the Constitution* § 1298 (1833).

The Framers of the Full Faith and Credit Clause crafted the clause "'to form a more perfect Union,' and to give to each state a higher security and confidence in the others, by attributing a superior sanctity and conclusiveness to the public acts and judicial proceedings of all." *Id.* at § 1303; *see also Hampton v. M'Connel*, 16 U.S. 234 (1818); *Mills v. Duryee*, 7 Cranch 481 (1813). Wasting little time after ratification of the Constitution, Congress approved a law in 1790 describing the mode of authentication for state acts, records, and judicial proceedings, and providing that, so proved, they "shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken." 1 Stat. 12 (1790).

A. Public Policy Exception

Supreme Court Justice and constitutional scholar Joseph Story recognized, however, that states were not bound by the Constitution or Congressional acts to blindly give full faith and credit to sister states' judgments:

> [The Full Faith and Credit Clause] . . . does not prevent an inquiry into the jurisdiction of the court in which the original judgment was rendered, to pronounce the judgment, nor an inquiry into the right of the state to exercise authority over the parties, *or the subject-matter*, nor an inquiry whether the judgment is founded in, and impeachable for a manifest fraud.

J. Story, *Commentaries on the Conflict of Laws* § 609 (Boston: Little, Brown & Co. 1865) (emphasis added). State courts did not, by this Clause, become servants of one another's judgments or actors beyond their borders.

> It did not make the judgments of other states *domestic* judgments to all intents and purposes; but only gave a general validity, faith, and credit to them, *as evidence.* No execution can issue upon such judgments without a new suit in the tribunals of other states.

Id. (emphasis added); *see also Thompson v. Whitman*, 18 Wall. 457, 462-63 (1873) (quoting the same from the 7th edition).

Likewise, the U.S. Supreme Court "'has often recognized . . . that there are some limitations upon the extent to

which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy.'" *Nevada v. Hall*, 440 U.S. 410, 422 (1979) (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 502 (1939)). *Accord Loudonville Milling Co. v. Davis*, 27 So. 2d 6 (Ala. 1946) (refusing to recognize as against public policy a warrant of attorney for confession of judgment executed in Alabama but transacted in Ohio under Ohio law). More recent decisions have considered the full faith and credit obligation more "exacting" *as to judgments*, but have still allowed for a court to be "guided by the forum State's 'public policy' in determining the *law* applicable to a controversy," *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998) (citing *Hall*, 440 U.S. at 421-424), and "the time, manner, and mechanisms for enforcing judgments." *Id.* at 235. *But see id.* at 233 ("But our decisions support no roving 'public policy exception' to the full faith and credit due *judgments*.")

As for conflicting public policy in state *statutes*, however, the High Court has found it

> "unavoidable that the full faith and credit clause does not require one state to substitute for its

> own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events."

Hall, 440 U.S. at 422-23 (quoting *Pacific Ins.*, 306 U.S. at 502-503). *Accord Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 496 (2003) (states need not substitute statutes for other states' in "a subject matter concerning which it is competent to legislate") (quoting *Pacific Ins.*, 306 U.S. at 501). Full faith and credit will not support one state's attempt to "accomplish an official act within the exclusive province of that other State," *Baker*, 522 U.S. at 235, or "project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Hall*, 440 U.S. at 423-24 (quoting *Pacific Ins.*, *supra*, at 504-505). If the ruling of the Court of Civil Appeals stands, the effect will be that even though N.B. and her child reside in Alabama they will be governed by California law rather than Alabama law.

B. Alabama Public Policy and Law

Alabama has a well-established public policy protecting the traditional definition of marriage and families. As to marriage, like many other states (including, as of November

2008, California) Alabama has a constitutional amendment that defines marriage as "a sacred covenant, solemnized between a man and a woman." Ala. Const. 1901, § 36.03(c) (Amend. 744). Alabama's marriage amendment, passed in 2006, also requires that any "*union replicating marriage* of or between persons of the same sex . . . shall be considered and treated in all respects as having *no legal force or effect in this state*." *Id.* at (g) (emphasis added). Since as early as 1998, a similar Marriage Protection Act was enacted to define marriage as "between a man and a woman." Ala. Code 1975, § 30-1-19(a). Both the Act and Amendment state Alabama's policy:

> "As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting this [or *the*] unique relationship in order to promote, among other goals, the stability and welfare of society and its children."

Ala. Const. amend. 744(b); Ala. Code, § 30-1-19(b).

Unlike California, Alabama does not recognize a so-called *de facto* parent status; rather, Alabama's Uniform Parentage Act in effect at the time of the court rulings in this case defines "parent and child relationship" as "existing between a child and his natural or adoptive parents." Ala. Code 1975, § 26-17-2 (repealed Jan. 1,

2009). Additionally, Ala. Code 1975, § 26-17-4 permits a parent and child relationship to be established between a child and (1) the "natural mother," (2) the "natural father," or (3) an "adoptive parent." Contrary to the California precedent and statutory interpretations that gave rise to A.K. attaining "de facto parent" status, Alabama adheres to traditional, father-or-mother roles in establishing parentage.

In family law contexts, moreover, Alabama courts have repeatedly held that a parent's homosexual conduct—-still listed in the criminal code as illegal deviate sexual conduct, Ala. Code 1975, § 13A-6-65(a)(3)—-is grounds for loss or restriction of custody and visitation rights. *See Ex parte J.M.F.*, 730 So. 2d 1190 (Ala. 1998) (upholding change in custody to father from lesbian mother exposing child to her homosexual lifestyle); *Ex parte D.W.W.*, 717 So. 2d 793 (Ala. 1998) (restricting visitation by lesbian mother "[e]xposing her children to such a lifestyle, one that is illegal under the laws of this state and immoral in the eyes of most of its citizens"); *Ex parte H.H.*, 830 So 2d 21, 31-34 (2002) (Moore, C.J., concurring) (detailing numerous legal and policy examples opposing homosexual

conduct). In 1998, the Alabama legislature clarified the language of the state adoption code and passed a joint resolution stating, "we hereby express our intent to prohibit child adoption by homosexual couples." Ala. Act 98-439, HJR35 (1998).

Alabama's law and public policy affirming traditional marriage and parentage and disapproving of homosexual conduct and lifestyles runs entirely opposite to the legal maneuvers exploited by A.K. in the California courts and affirmed by the Court of Civil Appeals. A.K.'s creative status as a "*de facto* parent" with no adoptive or biological relation to N.B.'s child has no analogous, recognized status in Alabama. Indeed, even stepparents in Alabama are not legal parents until they have affirmatively adopted their spouse's child. *See* Ala. Code § 26-10A-27. Additionally, because the "*de facto*" and "co-parent" stati given to (or taken by) A.K. arose out of a former homosexual union, perhaps one even "replicating marriage," with N.B., any recognition thereof by an Alabama court would fly in the face of the expressed, multi-faceted, moral and legal policy in the Alabama Constitution, Code, and cases.

This Court's adoption of the Court of Civil Appeals' "interpretation of the Full Faith and Credit [Clause] would create a license for a single State to create national policy." *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303 (M.D. Fla. 2005) (denying in Florida full faith and credit to a Massachusetts same-sex "marriage" because it "clearly conflicts with Florida's legitimate public policy of opposing same-sex marriage"). A judgment for one would become a judgment for all. California or any other state "could mandate that all the States recognize bigamy, polygamy, marriages between blood relatives or marriages involving minor children." *Id.* at 1304 n.6.

If anything, the public policy "exception" to the Full Faith and Credit Clause means that the courts should not be in the position of picking state favorites and "elevat[ing] California's sovereignty interests above those of [Alabama's]." *Hyatt*, 538 U.S. at 498. Rather, "[p]reserving the authority of law-makers to decide novel policy issues including whether or not to allow or recognize new forms of domestic relations flows from that emphasis on forum sovereignty." Lynn D. Wardle, *From*

Slavery to Same-Sex Marriage, 2008 B.Y.U. L. Rev. 1855, 1919-20 (2008).

Here, Alabama is making no assertion that California's parentage act should be subservient to Alabama's. Rather, it is California that is attempting to "project its laws across state lines," *Hall*, *supra*, at 423-24, so as to preclude Alabama from following its own established acts and policy. *See*, e.g., *Hood v. McGehee*, 237 U.S. 611, 615 (1915) (denying Louisiana adoption record full faith and credit because "Alabama is sole mistress of the devolution of Alabama land by descent"). Even faced with a hostile foreign judgment from many states away, judges in Alabama ought to be "guided by the forum State's 'public policy' in determining the *law* applicable to a controversy," *Baker*, 522 U.S. at 233. In this context, Alabama judges should be free to apply Alabama law to a mother and child in Alabama.

II. A UNION THAT VIOLATES THE LAW OF NATURE IS NOT ENTITLED TO FULL FAITH AND CREDIT IN A STATE THAT DOES NOT SANCTION SUCH RELATIONSHIPS.

The Full Faith and Credit Clause was designed to protect on an interstate level such transactions as marriage and divorce that occur in one state: "if they are valid where entered into, they are valid everywhere."

Thomas Cooley, *The General Principles of Constitutional Law* 180, 181 (1880) (Reprint: American Found. Pub. 2001). Cooley explains further this interstate protection for the marriage arrangement:

> "The importance of this relation [marriage] is so great, and the mischiefs that would flow from its being held invalid where the parties have intended that it should exist, are so serious, that marriages are sustained even where parties, who are not allowed to marry by the laws of the State of their domicile, have gone abroad and been married, subsequently returning to reside."

Id. at 181.

Despite this general transportability of a marriage from one state to another, however, Cooley notes one notable type of exception to the valid-where-entered, valid-everywhere rule:

> "[B]ut this is subject to exceptions in the case of polygamous marriages, and marriages which would be incestuous *according to the laws of nature* as commonly understood, by which we must perhaps understand only marriages between brothers and sisters, and marriages in the direct lineal line of consanguinity."

Id. at 180-81 (emphasis added). Those polygamous or incestuous marriages or would-be marriages that violate the law of nature do not enjoy full faith and credit and are, in fact, against the law of nature and "void as against

public policy." *Johnson v. Johnson*, 16 So. 2d 401, 404 (Ala. 1944) (citation omitted).

Alabama's common-law roots, *see* Ala. Code 1975, § 1-3-1, run back to the moral foundation in the law of nature and of nature's God. *See Ex parte H.H.*, 830 So. 2d at 31-34 (Moore, C.J., concurring). Sir William Blackstone would not describe homosexual conduct but merely labeled it "*the* infamous crime against nature . . . the very mention of which is a disgrace to human nature." 4 W. Blackstone, *Commentaries on the Laws of England* 215 (1769) (Univ. Chi. Press 1979). If incestuous and bigamous marriages were considered to be against the law of nature and therefore not enforceable from state-to-state, how much less would anything resembling a homosexual "union" be legal in states like Alabama that still maintain a common law foundation?

Moreover, incestuous and bigamous marriages are, by comparison to homosexual relationships, at least unions between a man and a woman and thereby more closely resemble traditional marriage in its historical, opposite-sex form. Those same-sex unions fail to even meet that standard, even if bestowed by a state with the name "marriage," and would all the more fail to earn approval under the law of nature.

Unions and relationships that violate the law of nature deserve no faith and credit in a state that still recognizes a moral foundation in its law.

III. THE FEDERAL DEFENSE OF MARRIAGE ACT BOLSTERS ALABAMA'S SOVEREIGN RIGHT TO REJECT CALIFORNIA'S RECOGNITION OF A SAME-SEX RELATIONSHIP "TREATED AS A MARRIAGE" OR ANY "RIGHT OR CLAIM ARISING FROM SUCH RELATIONSHIP."

Exercising its authority in the Full Faith and Credit Clause to "prescribe the manner in which such acts, records, and proceedings shall be proved, *and the effect thereof*" (emphasis added), Congress passed the Defense of Marriage Act in 1996 (DOMA). DOMA provides, in pertinent part:

> 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 (emphasis added). Thus, DOMA asserts that those states whose public policy and law oppose treating same-sex relationships "as a marriage" or recognizing "a right or claim arising" therefrom are not

required to give any effect to any other State's acts, records, or judicial proceedings doing just that.

In the present case, a California court granted A.K.'s petition to alter the birth certificate of N.B.'s biological daughter in order to add A.K. as a "parent" and to award A.K. the right to visitation of N.B.'s daughter. 2008 WL 2154098, *3. According to the Court of Civil Appeals, A.K. supported her petition by asserting that she lived in an arrangement with N.B. that was a "committed romantic relationship" that "rendered the two of them 'co-parents' with respect to the child." *Id.* A.K. never adopted the child and has no biological connection to her. Her claim to visitation rights arises solely from the homosexual, cohabiting relationship between she and N.B. during the five (5) years from the child's birth in 1999 until N.B. and the child moved out in 2004.

A.K.'s award of visitation, therefore, falls directly within the language of DOMA that prevents the granting of full faith and credit to "a right or claim arising from" a relationship between persons of the same sex "that is treated as a marriage." A.K. and N.B.'s former relationship was treated by the judge like a marriage with

all the benefits and presumptions that flow therefrom: namely, the right to be considered a parent of a child you have neither adopted, conceived, nor birthed. The same-sex relationship is the causal link. Thus, neither Alabama nor any other state need to give effect to a judicial proceeding, such as a visitation award, based on a former same-sex relationship like we have in this case.

CONCLUSION

N.B. and her child left California and, with it, the homosexual lifestyle N.B. had lived with A.K. N.B. is now married to a man in Alabama. She has done all she can do to put her past life behind her and move forward with her new family. Instead, her former lesbian lover is suddenly insisting on a post hoc parentage and cross-country visitation rights that will only be a constant reminder to N.B. of her past life—-and not only her, but her husband and young child, too.

Alabama has stood firm in its definition of the traditional family and the sanctity of marriage, reflecting its strong public policy against the advancement of the homosexual agenda. N.B. is not asking this Court to tell California what to do with its children, families, and

marriage laws. The question is whether Alabama will enforce its own Constitution, Code, and court decisions to protect Alabama residents N.B. and her child living here in Alabama.

Under the Full Faith and Credit Clause and the Defense of Marriage Act, the Alabama trial court properly exercised its judicial power to protect N.B.'s child from the interstate visitation attempts by A.K. The Court of Appeals erred in reversing and should therefore be reversed.

Respectfully submitted this 1st day of April, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 31(b), Ala. R. App. P., I have this date served a copy of the above and foregoing *Brief of* Amicus Curiae on the office of counsel for each party separately represented by placing a copy of same in the United States Mail, postage prepaid and addressed to the following mail addresses on this 1st day of April, 2009:

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