

**In The  
Supreme Court of the United States**

—◆—  
LISA MILLER-JENKINS,

*Petitioner,*

v.

JANET MILLER-JENKINS,

*Respondent.*

—◆—  
**On Petition For A Writ Of Certiorari  
To The Supreme Court Of Vermont**

—◆—  
**BRIEF OF THE COMMONWEALTH OF  
VIRGINIA AS AMICUS CURIAE  
IN SUPPORT OF THE PETITIONER**

—◆—  
ROBERT F. McDONNELL  
Attorney General of Virginia

WILLIAM C. MIMS  
Chief Deputy Attorney General

WILLIAM E. THRO  
State Solicitor General  
*Counsel of Record*

DAVID E. JOHNSON  
Deputy Attorney General

STEPHEN R. MCCULLOUGH  
Deputy State  
Solicitor General

MATTHEW M. COBB  
Assistant Attorney General

OFFICE OF THE  
ATTORNEY GENERAL  
900 East Main Street  
Richmond, Virginia 23219  
Telephone: (804) 786-2436  
Facsimile: (804) 786-1991

March 26, 2007

*Counsel for the  
Commonwealth of Virginia*

**QUESTION PRESENTED**

The People of Virginia, in the exercise of their sovereignty, have amended their State Constitution to prohibit the explicit or implicit recognition of same-sex marriage or same-sex unions. *See Virginia Const.* art. I, § 15-A. The Supreme Court of Vermont ruled that Virginia is required to disregard this strong public policy and recognize a child custody proceeding that is based on a same-sex union. The question presented is:

Whether a State must recognize a child custody proceeding based on a same-sex union in violation of the State's legitimate public policy?

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
TABLE OF AUTHORITIES.....	iii
INTERESTS OF VIRGINIA.....	1
REASONS FOR GRANTING THE PETITION .....	6
I. REVIEW SHOULD BE GRANTED TO REAFFIRM THE STATES' SOVEREIGNTY OVER DOMESTIC RELATIONS .....	7
II. REVIEW SHOULD BE GRANTED TO REAFFIRM THE PUBLIC POLICY EXCEPTION TO THE FULL FAITH AND CREDIT CLAUSE .....	10
III. REVIEW SHOULD BE GRANTED TO REAFFIRM THE LIMITS ON CONGRESS' POWER TO ENFORCE THE CONSTITUTION.....	12
A. Congress Cannot Abrogate the Public Policy Exception to the Full Faith and Credit Clause .....	12
B. The Text of PKPA Did Not Abrogate the Public Policy Exception .....	14
C. The Legislative History Confirms that Congress Did Not Intend for the PKPA to Abrogate the Public Policy Exception .....	16
IV. REVIEW SHOULD BE GRANTED TO DETERMINE THE APPLICATION OF THE PKPA TO CUSTODY PROCEEDINGS BASED ON SAME-SEX UNIONS.....	19
CONCLUSION .....	20

## TABLE OF AUTHORITIES

## Page

## CASES

<i>Alden v. Maine</i> , 527 U.S. 706 (1999) .....	7, 13
<i>Arlington Cent. Sch. Dist. v. Murphy</i> , 126 S. Ct. 2455 (2006) .....	15
<i>Ashwander v. TVA</i> , 297 U.S. 288 (1936) .....	14
<i>Atascadero State Hosp. v. Scanlon</i> , 473 U.S. 234 (1985) .....	15
<i>Baker v. Vermont</i> , 744 A.2d 864 (1999) .....	8
<i>Board of Trs. of Univ. of Alabama v. Garrett</i> , 531 U.S. 356 (2001) .....	13
<i>In re Burrus</i> , 136 U.S. 586 (1890) .....	4
<i>California Democratic Party v. Jones</i> , 530 U.S. 567 (2000) .....	6
<i>Central Virginia Cmty. Coll. v. Katz</i> , 126 S. Ct. 990 (2006) .....	10
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997) .....	5, 9, 13
<i>In re Civil Rights Cases</i> , 109 U.S. 3 (1883) .....	13
<i>Coyle v. Smith</i> , 221 U.S. 559 (1911) .....	9
<i>Elk Grove Unified Sch. Dist. v. Newdow</i> , 542 U.S. 1 (2004) .....	8

## TABLE OF AUTHORITIES – Continued

	Page
<i>Federal Election Comm’n v. Akins</i> , 524 U.S. 11 (1998) .....	14
<i>Federal Mar. Comm’n v. South Carolina State Ports Auth.</i> , 535 U.S. 743 (2002) .....	7, 8
<i>Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank</i> , 527 U.S. 627 (1999) .....	13
<i>Franchise Tax Bd. of California v. Hyatt</i> , 538 U.S. 488 (2003) .....	5, 10, 11
<i>Gonzales v. Oregon</i> , 126 S. Ct. 904 (2006) .....	9
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991) .....	8, 15
<i>INS v. St. Cyr</i> , 533 U.S. 289 (2001) .....	14
<i>Kimel v. Florida Bd. of Regents</i> , 528 U.S. 62 (2000) .....	13
<i>Mansell v. Mansell</i> , 490 U.S. 581 (1989) .....	8
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803).....	5
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819).....	5
<i>Moore v. Sims</i> , 442 U.S. 415 (1979) .....	8
<i>Nevada v. Hall</i> , 440 U.S. 410 (1979) .....	4, 10, 11

## TABLE OF AUTHORITIES – Continued

	Page
<i>Nevada Dep’t of Human Res. v. Hibbs</i> , 538 U.S. 721 (2003) .....	13
<i>New York State Bd. of Elections v. Torres</i> , <i>cert. granted</i> , 127 S. Ct. ___ (2007).....	6
<i>New York v. United States</i> , 505 U.S. 144 (1992) .....	7, 9
<i>Pacific Employers Ins. Co. v. Industrial Accident Comm’n of California</i> , 306 U.S. 493 (U.S. 1939) .....	3
<i>Pennhurst State Sch. &amp; Hosp. v. Halderman</i> , 451 U.S. 1 (1981) .....	15
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797 (1985) .....	10
<i>Printz v. United States</i> , 521 U.S. 898 (1997) .....	7, 9
<i>Romer v. Evans</i> , 517 U.S. 620 (1996) .....	6
<i>Rose v. Rose</i> , 481 U.S. 619 (1987) .....	8
<i>Seminole Tribe v. Florida</i> , 517 U.S. 44 (1996) .....	9, 13
<i>Sherrer v. Sherrer</i> , 334 U.S. 343 (1948) .....	10
<i>South Carolina v. Baker</i> , 485 U.S. 505 (1988) .....	9
<i>Tennessee v. Lane</i> , 541 U.S. 509 (2004) .....	12

## TABLE OF AUTHORITIES – Continued

	Page
<i>Texas v. White</i> , 74 U.S. (7 Wall.) 700 (1868) .....	7
<i>Thompson v. Thompson</i> , 484 U.S. 174 (1988) .....	5, 14, 15
<i>United States v. Georgia</i> , 126 S. Ct. 877 (2006) .....	12
<i>United States v. Lopez</i> , 514 U.S. 549 (1995) .....	9
<i>United States v. Morrison</i> , 529 U.S. 598 (2000) .....	9, 13
<i>United States ex rel. Attorney General v. Delaware &amp; Hudson Co.</i> , 213 U.S. 366 (1909) .....	14
<i>U.S. Term Limits, Inc. v. Thornton</i> , 514 U.S. 779 (1995) .....	1, 6
<i>Washington v. Washington State Republican Party</i> , <i>cert. granted</i> , 127 S. Ct. ___ (2007) .....	6
<i>Will v. Michigan State Police</i> , 491 U.S. 58 (1989) .....	15
<i>Williams v. North Carolina</i> , 317 U.S. 287 (1942) .....	4
<i>Wilson v. Ake</i> , 354 F. Supp. 2d 1298 (M.D. Fla. 2005) .....	4, 10, 11

## CONSTITUTIONAL PROVISIONS

U.S. Const. art. IV, § 1 (Full Faith and Credit Clause) .....	1, 3, 4, 5, 6, 10-18, 20
---	--------------------------

## TABLE OF AUTHORITIES – Continued

	Page
U.S. Const. amend. X .....	8
<i>Alabama Const.</i> amend. 774 .....	1
<i>Alaska Const.</i> art. I, § 1.25 .....	1
<i>Arkansas Const.</i> amend. 83 .....	1
<i>Colorado Const.</i> art. II, § 31 .....	1
<i>Georgia Const.</i> art. I, § IV .....	1
<i>Hawaii Const.</i> art. I, § 23 .....	2
<i>Idaho Const.</i> art. III, § 28 .....	1
<i>Kansas Const.</i> art. XV, § 16 .....	1
<i>Kentucky Const.</i> § 233A .....	1
<i>Louisiana Const.</i> art. XII, § 15 .....	1
<i>Michigan Const.</i> art. I, § 25 .....	1
<i>Mississippi Const.</i> art. XIV, § 263A .....	1
<i>Missouri Const.</i> art. I, § 33 .....	1
<i>Montana Const.</i> art. XIII, § 7 .....	1
<i>Nebraska Const.</i> art. I, § 29 .....	1
<i>Nevada Const.</i> art. I, § 21 .....	1
<i>North Dakota Const.</i> art. XI, § 28 .....	1
<i>Ohio Const.</i> art. XV, § 11 .....	1
<i>Oklahoma Const.</i> art. 2, § 35 .....	1
<i>Oregon Const.</i> art. XV, § 5a .....	1
<i>South Carolina Const.</i> art. XVI, § 1 .....	2
<i>South Carolina Const.</i> art. XVII, § 15 (Proposed) .....	2
<i>South Dakota Const.</i> art. XXI, § 9 .....	1

## TABLE OF AUTHORITIES – Continued

	Page
<i>Tennessee Const.</i> art. XI, § 18 .....	2
<i>Texas Const.</i> art. I, § 32.....	2
<i>Utah Const.</i> art. I, § 29.....	2
<i>Virginia Const.</i> art. I, § 15-A.....	1, 2, 8, 11
<i>Wisconsin Const.</i> art. XIII, § 13 .....	2

## STATUTES

28 U.S.C. § 1738 .....	15
28 U.S.C. § 1738A (PKPA).....	3, 5, 6, 8, 9, 12-20
28 U.S.C. § 1738c (Defense of Marriage Act) .....	11
<i>California Fam. Code</i> §§ 297 through 299.6.....	1
<i>Connecticut Gen. Stat.</i> §§ 46b-38aa through 46b-38pp.....	1
<i>D.C. Code</i> §§ 32-701 through 710 .....	1
<i>Florida Stat.</i> § 63.042.....	3
<i>Hawaii Revised Stat.</i> §§ 572C-1 through 572C-7 .....	1
<i>22 Maine Rev. Stat.</i> § 2710.....	1
<i>Massachusetts ALM GL ch. 207</i> , §§ 1 through 58.....	1
<i>Mississippi Code</i> § 93-17-3.....	3
<i>New Jersey Stat.</i> §§ 26:8A-1 through 26:8A-13.....	1
<i>10 Oklahoma Stat.</i> § 7503-1.1 .....	3
<i>Utah Code</i> § 78-30-1.....	3
<i>15 Vermont Stat.</i> §§ 1201 through 1207 .....	1, 2
<i>Virginia Code</i> § 63.2-1201.....	3

## TABLE OF AUTHORITIES – Continued

	Page
LEGISLATIVE HISTORY	
124 Cong. Rec. 786 (1978).....	17
124 Cong. Rec. 787 (1978).....	17
125 Cong. Rec. 758 (1979).....	17
126 Cong. Rec. 22817 (1980).....	17
126 Cong. Rec. 5727 (1978).....	17
<i>Parental Kidnapping Prevention Act of 1979:</i>	
<i>Joint Hearing on S. 105 Before the Subcomm. on Criminal Justice of the Sen. Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Sen. Comm. on Labor and Human Resources, 96<sup>th</sup> Cong. 2d Sess. 48 (1980), Serial No. 96-54-A .....</i>	
	17
<i>Parental Kidnapping Prevention Act of 1979:</i>	
<i>Addendum to Joint Hearing on S. 105 Before the Subcomm. on Criminal Justice of the Sen. Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Sen. Comm. on Labor and Human Resources, 96<sup>th</sup> Cong. 2d Sess. 101, 105-06, 117-18 (1980), Serial No. 96-54 (PKPA Addendum).....</i>	
	16, 17, 18
FEDERALIST PAPERS	
<i>The Federalist No. 28 (Alexander Hamilton).....</i>	7
<i>The Federalist No. 51 (James Madison).....</i>	7

TABLE OF AUTHORITIES – Continued

Page

BOOKS

Erin O’Hara, *The Full Faith and Credit Clause*,  
THE HERITAGE GUIDE TO THE CONSTITUTION 267,  
(Edwin Meese, III, Matthew Spalding,  
& David Forte, eds. 2005) .....10, 11

## INTERESTS OF VIRGINIA

Although this matter arises out of a child custody dispute, it actually involves the division of the “atom of sovereignty” between “two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). In particular, it concerns the sovereign power of each State to define its own domestic relations law, the meaning of the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, and the power of Congress to enforce the Constitution.

The States have conflicting public policies regarding same-sex unions and same-sex couples becoming parents. Vermont, like a few States, recognizes same-sex unions.<sup>1</sup> See 15 *Vermont Stat.* §§ 1201 through 1207. Conversely, Virginia, like many other States, has a state constitutional provision prohibiting the recognition of same-sex marriage and/or same-sex unions.<sup>2</sup> See *Virginia*

---

<sup>1</sup> In addition to Vermont, the States of California, Connecticut, Hawaii, Maine, Massachusetts, and New Jersey recognize same-sex unions or same-sex marriage. See *California Fam. Code* §§ 297 through 299.6; *Connecticut Gen. Stat.* §§ 46b-38aa through 46b-38pp; *Hawaii Revised Stat.* §§ 572C-1 through 572C-7; 22 *Maine Rev. Stat.* § 2710; *Massachusetts ALM GL ch. 207*, §§ 1 through 58; *New Jersey Stat.* §§ 26:8A-1 through 26:8A-13. See also *D.C. Code* §§ 32-701 through 710.

<sup>2</sup> At present, twenty-five States have such provisions. See *Alabama Const.* amend. 774; *Alaska Const.* art. I, § 1.25; *Arkansas Const.* amend. 83; *Colorado Const.* art. II, § 31; *Georgia Const.* art. I, § IV; *Idaho Const.* art. III, § 28; *Kansas Const.* art. XV, § 16; *Kentucky Const.* § 233A; *Louisiana Const.* art. XII, § 15; *Michigan Const.* art. I, § 25; *Mississippi Const.* art. XIV, § 263A; *Missouri Const.* art. I, § 33; *Montana Const.* art. XIII, § 7; *Nebraska Const.* art. I, § 29; *Nevada Const.* art. I, § 21; *North Dakota Const.* art. XI, § 28; *Ohio Const.* art. XV, § 11; *Oklahoma Const.* art. 2, § 35; *Oregon Const.* art. XV, § 5a; *South Dakota Const.* art. XXI,

(Continued on following page)

*Const.* art. I, § 15-A.<sup>3</sup> In Vermont, if one person in a same-sex union becomes a biological parent, the other person in the same-sex union is, by operation of law, also considered a parent of the child. *See Vermont Stat.* § 1204(F). This is so even though the other person in the same-sex union has not contributed any genetic material or adopted the child. *See Pet. App.* at 62a (Family Court’s ruling on Motion to Withdraw).<sup>4</sup> In contrast, the public policy of Virginia does

---

§ 9; *Tennessee Const.* art. XI, § 18; *Texas Const.* art. I, § 32; *Utah Const.* art. I, § 29; *Virginia Const.* art. I, § 15-A; *Wisconsin Const.* art. XIII, § 13. In South Carolina, both the legislature and the people have overwhelmingly approved a constitutional amendment prohibiting recognition of same-sex unions, but it is still necessary for the legislature to vote again in 2007. *See South Carolina Const.* art. XVI, § 1. If a majority of the legislature again votes for the measure, then *South Carolina Const.* art. XVII, § 15 will become part of the State Constitution and a majority of States will have prohibitions on the recognition of same-sex unions. In addition, *Hawaii Const.* art. I, § 23 empowers the legislature to limit marriage to opposite-sex couples.

<sup>3</sup> That provision states:

That only a union between one man and one woman may be a marriage valid in *or recognized* by this Commonwealth and its political subdivisions. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that *intends to approximate* the design, qualities, significance, or *effects of marriage*. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the *rights, benefits, obligations, qualities, or effects of marriage*.

*Virginia Const.* art. I, § 15-A (emphasis added).

<sup>4</sup> As the Family Court observed:

[T]he law will presume that the parties to a civil union are the parents of that child, just as the court would so presume the parental status of a married couple initiating a divorce and custody action and acknowledging the child as being born during the marriage. To not recognize the presumption would violate the mandate of the civil union law.

not allow unmarried couples, regardless of sexual orientation, to adopt children. *See Virginia Code* § 63.2-1201. *See also* 10 *Oklahoma Stat.* § 7503-1.1 (Permits married couples or single individuals to adopt.); *Utah Code* § 78-30-1 (Only married couples or single individuals who are not “cohabiting” are allowed to adopt.). Some States prohibit individuals in a same-sex relationship from adopting. *See Florida Stat.* § 63.042. *Cf. Mississippi Code* § 93-17-3 (specifically prohibits adoptions by “couples of the same gender”). When the same-sex parties decide to dissolve their relationship and children have been born to one of the persons during the time of the same-sex union, the Vermont courts render custody decisions just as they would when a married couple with children divorce. The lower court held that pursuant to the Parental Kidnapping Prevention Act (“PKPA”), 28 U.S.C. § 1738A, those custody decisions must be respected by other States. *See Pet. App.* at 12a-13a (appellate court decision).

Such a result is constitutionally problematic. The lower courts held that a person attains the status of parent simply by virtue of being in a same-sex union with a child’s biological parent. *See Pet. App.* at 25a (appellate court decision); *Pet. App.* at 73a (Family Court decision). In other words, the existence of the same-sex union was essential to the judgment. Without the same-sex union, there would be no basis for regarding the person as a parent. If the existence of a same-sex union is essential to the judgment, the recognition of that judgment by another State necessarily entails recognition of the same-sex union. Thus, if a State has a legitimate public policy against recognizing same-sex unions, recognition of the custody decision based on a same-sex union requires the State to violate its own public policy. *Cf. Pacific Employers Ins. Co. v. Industrial Accident Comm’n of California*, 306 U.S. 493, 502 (1939) (“[T]he 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.”). In effect, those States that have chosen to recognize same-sex unions could “create national policy.” *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303 (M.D. Fla. 2005).

Virginia’s interests are threefold.<sup>5</sup> First, Virginia has an interest in preserving its sovereign power over domestic relations. *See In re Burrus*, 136 U.S. 586, 593-94 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”). If the Constitution empowers Virginia to decide whether to recognize same-sex unions, then surely neither the Constitution nor the National Government can compel Virginia to recognize a child custody proceeding based on a same-sex union. *See Williams v. North Carolina*, 317 U.S. 287, 296 (1942) (“Nor is there any authority which lends support to the view that the full faith and credit clause compels the courts of one state to subordinate the local policy of that state, as respects its domiciliaries, to the statutes of any other state.”).

Second, Virginia has an interest in preserving the public policy exception to the Full Faith and Credit Clause. *See Nevada v. Hall*, 440 U.S. 410, 422 (1979) (“the Full Faith and Credit Clause does not require a State to

---

<sup>5</sup> Although other States share Virginia’s interests, only Virginia is directly impacted by the lower court decision. Only the Virginia courts are being forced to give implicit recognition to a same-sex union in direct contravention of the State Constitution. Consequently, while Virginia normally invites other States to join its amicus briefs in this Court, Virginia has not done so here.

apply another State's law in violation of its own legitimate public policy.”). If the public policy exception allows a State to refuse to recognize the sovereign immunity of another State, *see Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 496-98 (2003), then surely a State may refuse to recognize a judgment that is based upon something contrary to the State's fundamental law.

Third, Virginia has an interest in ensuring that the powers of the National Government remain enumerated, and hence limited. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). Indeed, “that those limits may not be mistaken, or forgotten, the constitution is written.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). Although the Constitution explicitly empowers Congress to enforce the Full Faith and Credit Clause, Congress may not, through the PKPA, change the substantive meaning of that Clause. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (“Legislation which alters the Free Exercise Clause's meaning cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. . . . It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”). If the public policy exception to the Full Faith and Credit Clause allows Virginia to refuse to recognize child custody proceedings based on same-sex unions, then surely Congress cannot abrogate the public policy exception. The PKPA merely extends the requirements of the Full Faith and Credit Clause to child custody proceedings; it does not abrogate the public policy exception. *See Thompson v. Thompson*, 484 U.S. 174, 183 (1988) (“Congress' chief aim in enacting the PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations. . . .”).

## REASONS FOR GRANTING THE PETITION

To be sure, there is at present no conflict among the lower courts as to whether a State is required to recognize a child custody proceeding based on a same-sex union. Notwithstanding the absence of a conflict, this Court frequently grants review if there are important questions concerning the States' sovereign choices. *See California Democratic Party v. Jones*, 530 U.S. 567, 571 (2000) (participation in party primary); *U.S. Term Limits, Inc.*, 514 U.S. at 786 (term limits for members of Congress); *Romer v. Evans*, 517 U.S. 620, 625-26 (1996) (ability of state and local governments to enact non-discrimination provisions). *See also Washington v. Washington State Republican Party*, cert. granted, 127 S. Ct. \_\_\_ (2007) (ability of political parties to repudiate candidates claiming to represent the party); *New York State Bd. of Elections v. Torres*, cert. granted, 127 S. Ct. \_\_\_ (2007) (requirement that candidates be selected by convention rather than by primary). Like cases concerning the regulation of the party nomination process, term limits, or the authority of state and local governments to enact anti-discrimination laws, the Petition concerns the States' choices at the very core of the States' sovereignty.

Certiorari should be granted for four reasons. First, there is a need to reaffirm the States' sovereign power over domestic relations. Second, there is a need to reaffirm the public policy exception to the Full Faith and Credit Clause. Third, there is a need to reaffirm the limits on Congress' power to enforce the Constitution. Fourth, there is a need for guidance from this Court as to the application of the PKPA to child custody proceedings based on same-sex unions.

**I. REVIEW SHOULD BE GRANTED TO REAFFIRM THE STATES' SOVEREIGNTY OVER DOMESTIC RELATIONS.**

The Constitution “protects us from our own best intentions” by preventing the concentration of “power in one location as an expedient solution to the crisis of the day.” *New York v. United States*, 505 U.S. 144, 187 (1992). By dividing sovereignty between the National Government and the States, “a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.” *The Federalist No. 51* at 291 (James Madison) (Clinton Rossiter, ed. 1961, Mentor Books Edition 1999). *See also The Federalist No. 28* at 149 (Alexander Hamilton) (Clinton Rossiter, ed. 1961, Mentor Books Edition 1999) (“Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.”). Thus, “the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.” *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868). This division of sovereignty between the States and the National Government “is a defining feature of our Nation’s constitutional blueprint.” *Federal Mar. Comm’n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002). The division of power between *dual sovereigns*, the States and the National Government, is reflected throughout the Constitution’s text, *see Printz v. United States*, 521 U.S. 898, 919 (1997), as well as its structure. *See Alden v. Maine*, 527 U.S. 706, 714-15 (1999). *See also*

U.S. Const. amend. X. (If a sovereign power is not explicitly given to the National Government, it is reserved to the States to the People.) “Just as the separation and independence of the coordinate Branches of the Federal Government serve to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

“An integral component of that ‘residuary and inviolable sovereignty’ retained by the States,” *Federal Mar. Comm’n*, 535 U.S. at 751-52, is control over domestic relations. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12-13 (2004). See also *Mansell v. Mansell*, 490 U.S. 581, 587 (1989) (“[D]omestic relations are preeminently matters of state law”); *Moore v. Sims*, 442 U.S. 415, 435 (1979) (“Family relations are a traditional area of state concern.”). Indeed, this Court has “consistently recognized that ‘[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.’” *Rose v. Rose*, 481 U.S. 619, 625 (1987). Thus, Vermont’s judges may mandate recognition of same-sex union as a matter of state constitutional law. See *Baker v. Vermont*, 744 A.2d 864 (1999). Conversely, Virginians may amend their State Constitution to prohibit recognition of same-sex unions. See *Virginia Const.* art. I, § 15-A.

Yet, the court below ignored the States’ sovereignty over domestic relations. It rendered a decision, based on the PKPA, that forces Virginia to recognize a custody proceeding that arises exclusively from a same-sex civil union. If this is correct, Virginia’s judges are thus required to ignore the Virginia Constitution that they swore to uphold. While such a result certainly vindicates Vermont’s sovereign choice to recognize same-sex unions, it

fundamentally disrespects Virginia's sovereign choice to reject same-sex unions. The sovereign choices of both Vermont and Virginia must be respected. Virginia cannot force Vermont to repudiate same-sex unions and Vermont cannot force Virginia to recognize them. A mere act of Congress, such as the PKPA, does not and cannot alter this constitutional equipoise.

Because "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom," *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., joined by O'Connor, J., concurring), this Court has consistently enforced the sovereign prerogatives of the States. Recognizing that "the erosion of state sovereignty is likely to occur a step at a time," *South Carolina v. Baker*, 485 U.S. 505, 533 (1988) (O'Connor, J., dissenting), this Court has declared that the National Government may not compel the States to pass particular legislation, *New York*, 505 U.S. at 162, require state officials to enforce federal law, *Printz*, 521 U.S. at 935, dictate the location of the State Capitol, *Coyle v. Smith*, 221 U.S. 559, 579 (1911), or regulate purely local matters. *United States v. Morrison*, 529 U.S. 598, 617-19 (2000); *Lopez*, 514 U.S. at 561 n.3. *Cf. Gonzales v. Oregon*, 126 S. Ct. 904, 925 (2006) (National Attorney General may not shift "authority from the States to the Federal Government to define general standards of medical practice in every locality.") Similarly, this Court has restricted Congress' power to enforce the Fourteenth Amendment, *Flores*, 521 U.S. at 536, and its ability to abrogate the States' sovereign immunity. *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996). Having intervened to protect the States' sovereignty in these areas, this Court should intervene to protect the States' sovereignty over domestic relations. Certiorari should be granted.

## II. REVIEW SHOULD BE GRANTED TO REAFFIRM THE PUBLIC POLICY EXCEPTION TO THE FULL FAITH AND CREDIT CLAUSE.

Although the States retain aspects of sovereignty, some provisions of the Constitution diminish the States' sovereignty. *See Central Virginia Cmty. Coll. v. Katz*, 126 S. Ct. 990, 1004-1005 (2006) (Bankruptcy Clause diminishes the States' sovereign immunity with respect to proceedings necessary to effectuate the in rem jurisdiction of bankruptcy courts.). One such provision is the Full Faith and Credit Clause, which "was an essential mechanism for creating a 'union' out of multiple sovereigns." Erin O'Hara, *The Full Faith and Credit Clause*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 267, 267 (Edwin Meese, III, Matthew Spalding, & David Forte, eds. 2005). "The full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation." *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948). However, this diminishment of sovereignty by the Full Faith and Credit Clause is not total. The "Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Hall*, 440 U.S. at 422. *See also Hyatt*, 538 U.S. at 493-94 (A State is not compelled to "[s]ubstitute the statutes of other States for its own statutes dealing with the subject matter concerning which it is competent to legislate."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822-23 (1985) ("Neither the Due Process Clause nor Full Faith and Credit Clause requires a State 'to substitute for its own [laws], applicable to persons and events within it, the conflicting statute of another state.'"). Thus, if a State has a public policy against recognizing same-sex unions, it need not recognize another State's same-sex unions. *Wilson*, 354 F. Supp. 2d

at 1303-04 (“Florida is not required to recognize or apply Massachusetts’ same-sex marriage law because it clearly conflicts with Florida’s legitimate public policy of opposing same-sex marriage.”). Indeed, in passing the Defense of Marriage Act, 28 U.S.C. § 1738c as a means of enforcing the Full Faith and Credit Clause, Congress made it clear that a State was not required to recognize another State’s same-sex unions. *See O’Hara, supra*, at 268-69. If a State is not required to recognize another State’s same-sex unions, then logically it is not required to recognize child custody proceedings based exclusively on another State’s same-sex unions.

Yet, the Supreme Court of Vermont’s decision ignores the public policy exception to the Full Faith and Credit Clause. Although Virginia’s constitution prohibits the recognition of same-sex unions, the lower court’s decision mandates that Virginia recognize a child custody proceeding based on a same-sex union. The distinction between recognizing the same-sex union and recognizing a custody proceeding that is based on a same-sex union is not constitutionally significant. Either direct or indirect recognition is contrary to the Virginia Constitution. *See Virginia Const.* art. I, § 15-A. Thus, under the public policy exception to the Full Faith and Credit Clause, Virginia does not have to recognize the same-sex union between the Petitioner and the Respondent or the child custody proceeding arising out of the dissolution of that same-sex union.

Just as this Court has enforced the sovereignty of the States, it also has enforced the public policy exception to the Full Faith and Credit Clause. *See Hyatt*, 538 U.S. at 493-94; *Hall*, 440 U.S. at 422-24. It should do so here as well. Certiorari should be granted.

### **III. REVIEW SHOULD BE GRANTED TO REAFFIRM THE LIMITS ON CONGRESS' POWER TO ENFORCE THE CONSTITUTION.**

Despite the States' sovereignty over domestic relations and despite the public policy exception to the Full Faith and Credit Clause, the lower court held that Virginia must recognize a child custody proceeding based on a same-sex union. In other words, it held that PKPA requires Virginia to ignore its legitimate public policy against recognition of same-sex unions. If this interpretation is correct, then Congress, in its efforts to enforce the Constitution, may with impunity abrogate the public policy exception to the Full Faith and Credit Clause.

The Supreme Court of Vermont's interpretation of the PKPA is fundamentally flawed. Quite simply, Congress cannot abrogate the public policy exception to the Full Faith and Credit Clause. There are limitations on Congress' power to enforce the Constitution. Any interpretation that ignores those limitations raises grave constitutional questions and must be rejected. Moreover, as this Court's decisions indicate, the PKPA did not and could not abrogate the public policy exception. Furthermore, Congress did not intend to abrogate the public policy exception. Congress was clear that the PKPA simply extended the requirements of the Full Faith and Credit Clause to child custody proceedings.

#### **A. Congress Cannot Abrogate the Public Policy Exception to the Full Faith and Credit Clause.**

In its efforts to enforce the Constitution, Congress may abrogate some aspects of the States' sovereignty. *See United States v. Georgia*, 126 S. Ct. 877, 881 (2006); *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (both holding

that Congress could abrogate sovereign immunity for federal statutory claims that also involve a constitutional violation). However, “Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.” *Flores*, 521 U.S. at 519. Thus, Congress may not abrogate sovereign immunity for a federal statutory claim that does not involve a constitutional violation. *See generally Board of Trs. of Univ. of Alabama v. Garrett*, 531 U.S. 356, 364 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 78 (2000); *Alden*, 527 U.S. at 748; *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 636 (1999); *Seminole Tribe*, 517 U.S. at 72-73 (all holding that the States were immune from statutory claims that did not involve constitutional violations). *But see Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (finding abrogation for a federal statutory claim that did not involve a constitutional violation, but did involve gender discrimination). Similarly, because the Constitution generally does not apply to the conduct of private actors, *In re Civil Rights Cases*, 109 U.S. 3, 11 (1883), Congress may not enforce the Constitution by regulating the conduct of private actors. *Morrison*, 529 U.S. at 620-27.

The lower court’s interpretation of the PKPA ignores the limitations on Congress’ power to enforce the Constitution. The effect of Supreme Court of Vermont’s decision is that the PKPA not only extended the requirement of the Full Faith and Credit Clause to child custody proceedings, but also abrogated the public policy exception in the context of child custody proceedings. The consequence of this view is that the PKPA commands Virginia to ignore its public policy and recognize a child custody proceeding based on a same-sex union. In other

words, Congress, by enforcing the Full Faith and Credit Clause, substantively altered the meaning of Full Faith and Credit Clause. The public policy exception was abrogated in the context of child custody proceedings.

The interpretation of the PKPA advanced by the Supreme Court of Vermont, that the public policy exception is abrogated, is constitutionally incorrect, and, thus, must be rejected. “[T]he doctrine of constitutional doubt” requires this Court “to interpret statutes, if possible, in such fashion as to avoid grave constitutional questions.” *Federal Election Comm’n v. Akins*, 524 U.S. 11, 32 (1998). Therefore, “if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’” then this Court is “obligated to construe the statute to avoid such problems.” *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001). *See also Ashwander v. TVA*, 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). Because the interpretation advanced by Virginia, that the public policy exception survives and applies to the recognition of child custody proceedings, does not raise any constitutional issues, the Vermont lower court’s interpretation must be rejected and Virginia’s interpretation must be accepted.

#### **B. The Text of PKPA Did Not Abrogate the Public Policy Exception.**

As this Court’s decisions demonstrate, the PKPA did not abrogate the public policy exception. “Congress’ chief aim in enacting the PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations. . . .” *Thompson*, 484 U.S. at 183. “The

PKPA, 28 U.S.C. § 1738A, is an addendum to the full faith and credit statute, 28 U.S.C. § 1738. This fact alone is strong proof that the Act is *intended to have the same operative effect as the full faith and credit statute.*” *Id.* at 183 (emphasis added). “The context of the PKPA therefore suggests that the principal problem Congress was seeking to remedy was the inapplicability of full faith and credit requirements to custody determinations.” *Id.* at 181. “It seems highly unlikely Congress would follow the pattern of the Full Faith and Credit Clause and section 1738 by structuring section 1738A as a command to state courts to give full faith and credit to the child custody decrees of other states, and yet, without comment, depart from the enforcement practice followed under the Clause and section 1738.” *Id.* at 183. These statements, both individually and collectively, indicate that the purpose of the PKPA was limited to extending the requirements of the Full Faith and Credit Clause to child custody proceedings. This Court has never suggested that the PKPA supercedes the public policy exception.

Moreover, “if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.” *Will v. Michigan State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks omitted). *See also Gregory*, 501 U.S. at 460-61 (clear statement required to dictate qualifications for state officials); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (no abrogation of sovereign immunity without clear statement); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981) (clear statement required to impose conditions on the States receipt of federal funds). *Cf. Arlington Cent. Sch. Dist. v. Murphy*, 126 S. Ct. 2455, 2459 (2006) (Legislature is presumed to say what it means and mean what it says.). Thus, if the

PKPA superceded the public policy exception to the Full Faith and Credit Clause, the statutory text would contain words to that effect. In the absence of such words, the public policy exception must still apply.

**C. The Legislative History Confirms that Congress Did Not Intend for the PKPA to Abrogate the Public Policy Exception.**

Congress did not intend for the PKPA to abrogate the public policy exception. The legislative history indicates that the PKPA was intended only to extend the requirements of the Full Faith and Credit Clause to child custody proceedings. It was not intended to eliminate the public policy exception to the Full Faith and Credit Clause.<sup>6</sup> Senator Thurmond, a co-sponsor of the PKPA,

---

<sup>6</sup> Congress considered and ultimately rejected a proposal to include an explicit exception for those situations when the State's strong public policy precluded giving full faith and credit. *Parental Kidnapping Prevention Act of 1979: Addendum to Joint Hearing on S. 105 Before the Subcomm. on Criminal Justice of the Sen. Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources*, 96<sup>th</sup> Cong. 2d Sess. 101, 105-06, 117-18 (1980), Serial No. 96-54 ("PKPA Addendum"). Some might argue that Congress' rejection of such a proposal is evidence that it intended to abrogate the public policy exception. Yet, such an argument must fail. As explained in more detail above, Congress cannot alter the meaning of the Constitution as a means of enforcing the Constitution. Moreover, there are other policy reasons for Congress not to explicitly include a public policy exception. These include concern with how courts would interpret a specific public policy exemption in the PKPA and that a broad public policy exemption in the statute would be inconsistent with the Full Faith and Credit Clause. *PKPA Addendum* at 117. Congress may also have been concerned that such an exemption would be inconsistent with the Uniform Child Custody Jurisdiction Act and would require states to re-examine and evaluate the judicial proceedings of other states. *Id.* Congress also may have been concerned with creating a federal question regarding whether a state's public policy was strong enough to overcome a custody order. *Id.* at 117-18.

declared that the PKPA provisions “*could not, and do not, limit the force the full faith and credit clause has in its direct operation.*” 124 Cong. Rec. 787 (1978) (emphasis added). Similarly, Representative Moss, the sponsor of the PKPA in the House, indicated that the PKPA “simply would require that the initial State’s custody decree be granted full faith and credit by subsequent States. . . .” 126 Cong. Rec. 5727 (1978). Senator Wallop, the sponsor of the Senate version, intended that the PKPA “ . . . would require that full faith and credit be given to custody determinations which are made in compliance with the standards set forth in the succeeding subsections.” 124 Cong. Rec. 786 (1978). Other legislators emphasized that the PKPA merely extended the requirements of the Full Faith and Credit Clause to child custody proceedings. *See* 126 Cong. Rec. 22817 (1980) (statement of Sen. Cranston); *Id.* at 22818 (Statement of Sen. Durenberger); 125 Cong. Rec. 758 (1979) (statement of Sen. McGovern). *Cf. Parental Kidnapping Prevention Act of 1979: Joint Hearing on S. 105 Before the Subcomm. on Criminal Justice of the Sen. Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Sen. Comm. on Labor and Human Resources, 96<sup>th</sup> Cong. 2d Sess. 48 (1980), Serial No. 96-54-A, at 40 (statement of Sen. Durenberger); Id. at 18 (statement of Rep. Bennett); PKPA Addendum at 138 (submission of Sen. Wallop).* Moreover, the United States Justice Department viewed the PKPA as simply applying the standards of the Full Faith and Credit Clause to child custody proceedings, not

as abrogating the public policy exception.<sup>7</sup> In light of this extensive legislative history, the PKPA cannot be regarded as a mechanism for abolishing the public policy exception to the Full Faith and Credit Clause. Indeed, by extending the requirements of the Full Faith and Credit Clause, the PKPA logically also extended the exception.

In conclusion, the Supreme Court of Vermont interpreted the PKPA in a manner that contradicts the limitations on Congress' power to enforce the Constitution, this Court's decisions on the PKPA, and the legislative history of the PKPA. This Court should grant review to

---

<sup>7</sup> In a letter to the Chairman of House Judiciary Committee, the Justice Department observed:

The Full Faith and Credit Clause of the Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State" and authorizes Congress "to prescribe the Manner in which such Acts, Records and proceedings shall be proved, and the Effect thereof." A child custody order, however, is subject to modification where changed circumstances warrant a different custody arrangement. Consequently, since child custody orders are continually subject to modification, a court deciding a custody case is not, as a federal constitutional requirement under current judicial interpretation of the Full Faith and Credit Clause, bound by a decree entered by a court of another state in an action involving the same parties. As a result, individuals who are unsuccessful (or who expect to be unsuccessful) in an action in one state will attempt to evade that state's jurisdiction by taking the child to another state and relitigating the custody issue there . . . we have concluded that the soundest approach to this problem is that adopted by the civil provisions of proposed 28 U.S.C. 1738A. In essence, this provision would impose on states a federal duty, under enumerated standards derived from the UCCJA, to give full faith and credit to the custody decrees of other states.

*PKPA Addendum* at 101-02, 104 (citations omitted).

reaffirm the limits on Congress' power to enforce the Constitution.

**IV. REVIEW SHOULD BE GRANTED TO DETERMINE THE APPLICATION OF THE PKPA TO CUSTODY PROCEEDINGS BASED ON SAME-SEX UNIONS.**

Review should be granted to determine the application of the PKPA to custody proceedings based on same-sex unions. Although this Petition represents the first occasion that the issue has been presented to this Court, it undoubtedly will not be the last. The deep conflict between the States regarding the recognition of same-sex unions ensures that the issue of whether a State must recognize a child custody proceeding based on a same-sex union when such recognition is directly contrary to the State's public policy will recur frequently. There is little to be gained by allowing the issue to percolate further.

Further, there is much to be gained by immediate review. Many same-sex couples have traveled to States that recognize same-sex unions, have entered into such unions, and then have returned to live in States that do not recognize same-sex unions. If these same-sex couples later decide to dissolve their union, it is necessary for them to return to the State where they entered into the same-sex union. In such a situation, it is unclear whether their home State, which also may be the home State of any children, can even entertain a child custody proceeding. Conceivably, Virginia would be powerless to protect the interests of such children. Similarly, many same-sex couples have entered into such unions and currently live in States that do recognize same-sex unions. If these persons decide to relocate to a State that does not recognize same-sex unions, the rights of a person who is

neither a biological nor an adoptive parent are unclear. Review would provide guidance on that issue. Immediate review could provide much needed guidance.<sup>8</sup>

Certiorari should be granted.

### CONCLUSION

For the reasons stated above and in the Petition itself, the Petition for Certiorari should be **GRANTED**.

Respectfully submitted,

ROBERT F. MCDONNELL      WILLIAM C. MIMS  
Attorney General of Virginia      Chief Deputy Attorney General

WILLIAM E. THRO      DAVID E. JOHNSON  
State Solicitor General      Deputy Attorney General  
*Counsel of Record*

STEPHEN R. MCCULLOUGH      MATTHEW M. COBB  
Deputy State Solicitor      Assistant Attorney General

General      OFFICE OF THE  
   ATTORNEY GENERAL  
   900 East Main Street  
   Richmond, Virginia 23219  
   Telephone: (804) 786-2436  
   Facsimile: (804) 786-1991

*Counsel for the  
Commonwealth of Virginia*

March 26, 2007

---

<sup>8</sup> Although this matter has profound constitutional implications, it can be resolved as a question of statutory interpretation. If the PKPA does not abrogate the public policy exception to the Full Faith and Credit Clause, then there is no reason to reach the complex constitutional issues concerning whether such abrogation is permissible.