No. 06-1110

In The
Supreme Court of the United States

LISA MILLER-JENKINS,

Petitioner,

v.

JANET MILLER-JENKINS,

Respondent.

On Petition For Writ Of Certiorari To The Vermont Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Respondent supplements the Petitioner's description of the opinions below (Petition, p. 1) as follows: The decision of the Vermont Supreme Court has been reported. *See Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, 912 A.2d 951 (2006).

JURISDICTION

There is no "[f]inal judgment[ ] or decree[ ]" for review by this Court within the meaning of 28 U.S.C. §1257(a) where the Vermont Supreme Court below simply affirmed three interlocutory Family Court orders and remanded for further proceedings in the Vermont Family Court on the merits of the issues of parental rights, property, child support and dissolution of the parties' Vermont civil union.

In addition, with respect to Petitioner's Question No. 3, there are independent and adequate state grounds for the Vermont Supreme Court's ruling.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent accepts the Petitioner's statement of constitutional and statutory provisions involved with the following exceptions. Neither the Vermont statutory provisions cited (Vt. Stat. Ann. tit. 15 §§5, 6) nor the Virginia constitutional and statutory provisions cited (Va. Const., art. I, §15-A and Va. Code Ann. §20-45.3) have any relevance to the present case.

STATEMENT OF THE CASE

Petitioner, Lisa Miller ("Lisa"), attempts to cast this case as one involving "the statutory and constitutional rights of . . . the fit, biological mother . . . to decide whether to allow her child to spend time with [Respondent] Janet Jenkins ('Janet'), a woman who has no biological or adoptive relationship to IMJ," their child, whose last name is "Miller-Jenkins." (Petition, p. 2). The Petitioner's abstract characterization misrepresents the facts of this case particularly given that Janet has been adjudged by the Vermont courts to be a legal parent of IMJ along with Lisa.

Lisa and Janet established a romantic relationship in December 1997 in Virginia and subsequently traveled to Vermont and entered into a Vermont civil union on December 19, 2000. (*See* Petition, p. 2a). The couple jointly decided to have a child; decided that Lisa would carry the child; decided that they would use artificial insemination with an anonymous donor; and worked together in the selection of the donor. (Petition, p. 2a; Tr. 3/15, pp. 90-102; Tr. 5/26, pp. 64-65).[1]

IMJ was born in April 2002. (Petition, p. 2a). Janet attended every prenatal visit and was present at the delivery and cut the umbilical cord. (Tr. 5/26, pp. 68-69). Following IMJ's birth, Janet and Lisa shared parental caretaking. (Tr. 3/15, pp. 42-45, 117; Tr. 5/26, pp. 69-70; Tr. 8/17, pp. 55-58).

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[1] In this Opposition, references to the transcript of hearings in the Vermont Family Court are indicated as follows: (Tr. [month/day of hearing], pp. ___-___).

Having previously planned to move to Vermont to raise their child, Lisa and Janet found a house in Vermont in July 2002 and moved to Vermont in early August 2002. (Tr. 3/15, pp. 24-25, 107-109).

Nearly 14 months later, in mid-September 2003, the couple separated; and Lisa moved to Virginia with IMJ. At first, the separation was amicable; and Janet and Lisa worked out a notarized agreement in October 2003 that included custody, visitation for Janet and support to Lisa from Janet. (Tr. 3/15, pp. 33, 36-37, 48-49, 52-53, 61). Lisa intended that there would be "liberal parent/child contact" for Janet. (*Id*., pp. 52-53, 61).[2]

On November 24, 2003, Lisa filed pro se to dissolve the parties' civil union in Rutland County Family Court in Vermont. (Petition, pp. 2a-3a).[3] Among other things, Lisa requested an award of parent-child contact, i.e., visitation, to Janet. (Petition, p. 3a). Indeed, at the first day of

[2] Although Lisa asserts "no regular contact" between IMJ and Janet after Lisa moved to Virginia through October 2004 (Petition, p. 2 and n.1), the record from the March 15, 2004 Vermont Family Court hearing shows that the parties worked out regular monthly visits in Virginia for Janet, had plans for an April visit for IMJ's birthday and were still planning a week's vacation together for July 2004. (Tr. 3/15, pp. 48-51, 54-63). Lisa, however, denied all contact after the first weekend in June 2004. (Petition, p. 3a).

[3] Lisa asserts that "Vermont was the only place she could dissolve the civil union because no other state recognized a Vermont civil union as valid." (Petition, p. 3). There is no support for this large, general proposition. Whether any state, including Virginia, would have entertained an action in 2003 to dissolve a Vermont civil union is a largely unanswered question. Other states have since dissolved Vermont civil unions. *See*, *e.g*., *Alons v. Iowa Dist. Court for Woodbury County*, 698 N.W.2d 858 (Iowa 2005) (holding that third parties lacked standing to challenge Iowa trial court's dissolution of Vermont civil union).

hearings on temporary orders, March 15, 2004, Lisa testified that contact with Janet was in IMJ's best interest, stating, "the bottom line is I would like to see [Janet] see Isabella as much as possible because I do think that's in her best interests." (Tr. 3/15, p. 76).

Although the proceedings turned more adversarial at the second hearing on temporary orders on May 26, 2004, Lisa's attorney still made an offer of visitation every other weekend in Virginia. (Tr. 5/26, p. 36). Lisa objected to any visitation in Vermont. (Tr. 5/26, p. 86).

At the conclusion of the May 26, 2004 hearing, the Vermont trial court issued temporary orders for visitation that were memorialized in an Order dated June 17, 2004. (Petition, pp. 3a, 42a-44a).

Faced with this Vermont temporary order – still in effect today and never subject to a request for leave to appeal in Vermont – Lisa simply defied it. (Petition, p. 3a).[4]

On September 2, 2004, the Vermont Family Court found Lisa in contempt for willful refusal to comply with the temporary visitation order. (Petition, p. 4a). That interlocutory order was appealed by Lisa to the Vermont Supreme Court which granted discretionary review on November 4, 2004 and affirmed the Order of Contempt in the decision below with a remand for the imposition of sanctions. (Petition, pp. 36a-39a). The Vermont Family Court imposed sanctions on Lisa by Order dated December

[4] Lisa allowed the first court-ordered visitation on the weekend of June 4-6, 2004 but nothing thereafter. (Petition, p. 3a).

8, 2006. The contempt order and subsequent sanctions are not challenged in this Petition.

Rather than honor the Vermont court's visitation order – even admitting in the Vermont court that she had no intention of complying (Petition, p. 37a) – Lisa turned to Virginia for a second bite at the apple and initially obtained an order (dated October 15, 2004) of sole parentage to herself and a denial to Janet of any parental or visitation rights. (Petition, pp. 85a-87a). That Virginia order was reversed by unanimous decision on November 28, 2006 by the Court of Appeals of Virginia with instructions to give full faith and credit to the Vermont court's visitation order. (Petition, pp. 92a-108a). The Court of Appeals of Virginia subsequently denied rehearing en banc without dissent on January 19, 2007 (Petition, pp. 109a-110a). Lisa has sought discretionary review from the Virginia Supreme Court.

REASONS FOR DENYING THE WRIT

SUMMARY

This Court should deny the writ for the following reasons:

The Vermont Supreme Court's affirmance of temporary visitation orders and remand for trial lacks the requisite finality to allow this Court's review under 28 U.S.C. §1257(a).

Questions No. 1 and No. 2 ultimately relate to whether Vermont, as the first court to exercise jurisdiction and issue a visitation order, must give full faith and credit to a subsequent, inconsistent order from a Virginia court.

There is currently no conflicting Virginia order and, therefore, no Virginia proceeding to credit and no federal question. The Petitioner raises the federal Defense of Marriage Act (DOMA) and the Parental Kidnapping Prevention Act (PKPA) solely to attempt to eviscerate the PKPA as applied to her competing Virginia claim and to argue for a situation where Vermont's alleged obligation to credit the subsequent Virginia proceeding presents solely a question of the application of the Full Faith & Credit Clause. The Petitioner fails even to attempt an argument that the Full Faith & Credit Clause issue presents a substantial federal question.

Question No. 3 raises the issue of Petitioner's federal constitutional rights as a parent. Any such question was decided by the Vermont Supreme Court on an independent and adequate state ground. The Petition cannot create a "conflict" simply because different states under their own domestic relations law have different ways of determining parentage. Such differences do not reflect the type of "conflict" relevant for this Court's review under Supreme Court Rule 10. Further, the ultimate question of whether a state's acknowledgement of a non-birth or non-adoptive parent infringes on a biological parent's federal constitutional rights has previously been answered by this Court. Finally, this Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), addressing third-party visitation, has no bearing on the present case involving visitation ordered for a parent.

I. NO FINAL DECISION EXISTS WHERE THE VISITATION ORDER AT ISSUE IS INTERLOCUTORY AND TEMPORARY.

This Court may not review the judgment below from the highest court of the State of Vermont where it is not a

final judgment or decree. 28 U.S.C. §1257(a). Here, the rights of the parties have not been fully adjudicated; and the Vermont courts have not concluded with the matter. *Market St. Ry. Co. v. R.R. Comm'n*, 324 U.S. 548, 551 (1945); *Dep't of Banking v. Pink*, 317 U.S. 264, 268 (1942). Although the Vermont Supreme Court affirmed the Family Court's jurisdiction to issue a temporary order providing Janet visitation with IMJ for one week per month beginning in August 2004, it remanded the case in acknowledgement of critical proceedings yet to take place specifically on the final determination of custody and visitation.[5]

Facts remain to be developed about the rights of both Lisa and Janet to visitation and custody with the child IMJ which could clarify and even eliminate any constitutional issues. *Minnick v. Cal. Dep't Corrs.*, 452 U.S. 105, 127 (1981). The finality rule bars this Court's piecemeal review of the case and should deter this Court from revisiting the Vermont Supreme Court's determination of the issues on an interim order. *N. D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973). In short, this Court has no role to play until at least such time as the Vermont courts finally resolve the underlying matter. *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) (state-court judgment must be final "as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein" (internal citations omitted)).

[5] The temporary order, issued on June 17, 2004, "awarded Janet parent-child contact for two weekends in June, one weekend in July, and the third full week of each month, beginning in August 2004." (Petition, p. 3a).

II. QUESTIONS NO. 1 AND NO. 2 PRESENT NO FEDERAL QUESTION OR NO SUBSTANTIAL FEDERAL QUESTION.

The first two questions, as set out by Petitioner, address two statutes: the federal Defense of Marriage Act ("DOMA"), 28 U.S.C. §1738C, and the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. §1738A. Both statutes have relevance, if at all, to a question of full faith and credit, i.e., whether the Vermont courts were obligated to give credit to a later-entered, conflicting Virginia court order. Nothing about these federal statutes nor any issues of full faith and credit properly before the Vermont Supreme Court present a federal question, substantial or otherwise, worthy of this Court's review.

A. THERE IS NO CONFLICTING VIRGINIA ORDER THAT VERMONT MUST CREDIT.

Critically, as the Petitioner acknowledges, there is currently no outstanding order in Virginia that conflicts with the temporary order of visitation from the Vermont courts. (Petition, pp. 9 n.5, 18, 92a-108a). Therefore, no federal full faith and credit question is even arguably presented given that the only full faith and credit issue before the Vermont courts involved an order that Virginia, as the issuing forum, has since decided it was without jurisdiction to enter in the first place. (Petition, pp. 106a-107a).[6]

[6] Neither should the mere possibility of Virginia Supreme Court review of the Virginia Court of Appeals decision cause this Court to hold this case as Petitioner requests. (*See* Petition, p. 5 n.3 and p. 10 n.5). The Vermont case is not final and can and should proceed on remand. At the heart of the remand is the Vermont Family Court's adjudication

(Continued on following page)

B. QUESTIONS RELATING TO THE FEDERAL PKPA AND/OR THE FEDERAL DOMA ARE IRRELEVANT AND/OR INSUBSTANTIAL.

Given the obscurity of the Petitioner's presentation of Questions No. 1 and No. 2, it is important to focus on what question was actually raised below, i.e., whether the Vermont courts, having issued a visitation order, were required to give full faith and credit to a subsequent, conflicting, and now non-existent Virginia order that totally eliminated that visitation.

Although that is the question on which the Petitioner seeks review in this Court, she devotes her Petition discussion to a long digression on the proper interpretation of the PKPA, the federal DOMA and, surprisingly, the errors of the Virginia appellate court. (Petition, pp. 11-21). The one thing she never discusses is why and how the Vermont courts were in error in refusing to give full faith and credit to a now non-existent Virginia order. *See* Section II.B., *supra*.

Although the Petitioner wishes this Court to pronounce on the PKPA and the federal DOMA, she cannot show their relevance to *this* case.

First, with regard to federal DOMA, that statute provides,

> *No State . . . shall be required to give effect* to any . . . judicial proceeding of any State respecting a

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of the best interests of the child, IMJ. Every passing day that delays an ultimate adjudication of IMJ's best interests has great significance to her young life. To the extent this Court finds it has any discretion pertaining to holding this case, Respondent maintains that discretion should be exercised in allowing this case to go forward.

> relationship between persons of the same sex that is treated as a marriage under the laws of such other State. . . .

28 U.S.C. §1738C (emphasis added).

At best, DOMA acts as a permission slip to the states to allow them to *deny* credit. Notably, however, DOMA expressly does not *require* any full faith and credit action by any state and, therefore, most assuredly could impose no *obligation* on Vermont to give any credit to any Virginia judicial proceeding. Simply put, federal DOMA presents no federal question for this Court in this case.

Second, with regard to the PKPA, as this Court has explained, that statute was designed to create "uniform national standards for allocating and enforcing custody determinations" so that "a parent who lost a custody battle in one State" did not have "an incentive to . . . move to another State to relitigate the issue." *Thompson v. Thompson*, 484 U.S. 174, 180-181 (1988). Thus, the PKPA "imposes a duty on the States to enforce a child custody determination entered by a court of a sister State if the determination is consistent with the provisions of the Act." *Id*. at 175-176.

To be consistent with the PKPA, the State "must have jurisdiction under its own local law, and one of the five conditions set out in [28 U.S.C.] §1738A(c)(2) must be met." *Id*. at 176-177.

In the instant case, Vermont had jurisdiction under its local law (Petition, p. 7a); and §1738A(c)(2)(A)(ii) was satisfied in that Vermont had been the child, IMJ's, home state within six months of the commencement of the proceedings and a contestant, Janet, continued to live in

Vermont (Petition, pp. 6a-7a). In short, Vermont properly took jurisdiction as a matter of Vermont law and also satisfied the requirements of federal law under the PKPA.

This is where the PKPA really comes into play. As this Court further explained in *Thompson*, "[a]t the time Congress passed the PKPA, custody orders held a peculiar status under the full faith and credit doctrine" because of the doubt at the time by some courts about whether custody orders were ever "sufficiently 'final' to trigger full faith and credit requirements." *Id*. at 180. The PKPA was passed "to extend the requirements of the Full Faith and Credit Clause to custody determinations" and "to furnish a rule of decision for courts to use in adjudicating custody disputes." *Id*. at 183. As a result, Congress recognized continuing, exclusive jurisdiction in the first court to properly have and maintain jurisdiction to issue a custody or visitation order and required all other courts to credit and enforce such orders according to their terms. 28 U.S.C. §1738A(a).

In this case, Vermont was indisputably the first court to take jurisdiction; and, indeed, it was the Petitioner who initiated the Vermont action. The express role of the PKPA is then to prevent a person in the Petitioner's position from doing what she did, i.e., run to a Virginia court to relitigate custody and visitation to attempt to obtain a result more to her liking. That was the essence of the Vermont court's ruling below – that with Vermont having proper and continuing jurisdiction, Virginia was denied jurisdiction under the PKPA and, therefore, the

then-extant Virginia order was not entitled to full faith and credit. (Petition, pp. 7a-9a).[7]

For all of these reasons, Petitioner cannot make – and, indeed, never attempts to make – the argument that the PKPA required *Vermont* (the court first having jurisdiction to issue the visitation order) to give full faith and credit to the (now non-existent) Virginia order. Surely, such an argument would stand the PKPA on its head since what the PKPA does is to require Virginia to credit the Vermont visitation order.

In sum, the issue of any PKPA-imposed obligation on Vermont to credit the Virginia proceedings presents no federal question for this Court.

In fact, the Petitioner's position in the Vermont court depended upon demonstrating that the PKPA is wholly irrelevant and inapplicable to the question of Vermont's obligation vis a vis the now non-existent Virginia order. (*See* Petition, pp. 9a-15a). Before the Vermont Supreme Court, her case turned on her argument that the PKPA explicitly did *not* apply to the Virginia proceeding, an argument rejected by the Vermont Supreme Court. (Petition, pp. 9a-15a). Only in this way could the Petitioner get to her essential claim, i.e., that the Full Faith & Credit

[7] Petitioner repeatedly asserts that Vermont reads the PKPA to "impose a per se full faith and credit obligation" on sister states. (Petition, pp. 11, 15, 16). However, Vermont did no such thing (*see* Petition, p. 14a) and obviously so since the question before the Vermont court was *its* full faith and credit obligation (regarding a now-vacated Virginia trial court order), not the full faith and credit obligations of Virginia. Petitioner's unhappiness with the decision of the Virginia Court of Appeals (which the Petitioner has asked the Virginia Supreme Court to review) provides no basis for this Court to issue a writ of certiorari to the Vermont Supreme Court.

Clause, U.S. Const. art. IV, §1 – not the federal DOMA and not the PKPA – created the obligation on the part of the Vermont courts to credit the Virginia proceeding.[8]

Put another way, Petitioner's claim is not that the Vermont Supreme Court misapplied the PKPA in this case. Her claim is that the PKPA should not have applied at all, freeing the Virginia court to undertake its own proceedings and creating the basis for Petitioner's assertion that Vermont was required to credit the Virginia proceedings as a matter of the Full Faith & Credit Clause simpliciter.

The gist of the Petitioner's argument seems to be that Vermont failed to read the federal DOMA and the PKPA together to allow Virginia to ignore the credit otherwise mandated by the PKPA, 28 U.S.C. §1738A(a), to the Vermont visitation order. In such a regime, the Petitioner would then presumably maintain that the Full Faith & Credit Clause requires Vermont to credit the subsequent (and now non-existent) Virginia order.

However, even assuming the Petitioner has properly raised all these subsidiary questions, she never demonstrates the existence of an ultimate substantial federal question.

[8] For this reason, any questions about whether the Virginia proceedings come within a proper construction of the PKPA and the federal DOMA are not worthy of review in this case. Although they are certainly questions of federal law, they are neither reflective of any conflict among the courts nor pertinent to the resolution of the Petitioner's claims as they relate to the Vermont proceedings since these questions are only a predicate step to the ultimate and non-substantial federal question under the Full Faith & Credit Clause discussed in the text below.

As the Vermont Supreme Court analyzed the issue, if the Petitioner were successful in bringing her claim outside the PKPA, the credit question reverts to the pre-PKPA law where custody and visitation orders were not credited under Vermont law – the state of the law that, as noted above, prompted the passage of the PKPA. (Petition, pp. 9a-10a, 14a-15a).[9] Any pre-PKPA Full Faith & Credit Clause question raised by the Vermont Supreme Court decision presents no substantial federal question, and the Petitioner certainly makes no attempt whatsoever to set forth such an argument.

The Petition should be denied as to Questions No. 1 and No. 2.

III. THE PARENTAL RIGHTS ISSUE SET FORTH IN QUESTION NO. 3 RAISES NO ISSUES FOR THIS COURT TO PROPERLY REVIEW.

This Court should deny certiorari as to any constitutional question about the Vermont Supreme Court's parentage determination because (1) it was decided on independent and adequate state grounds; (2) there is no certworthy "conflict"; and (3) any question about state law

[9] Even assuming for the sake of argument alone that custody and visitation orders were fully amenable to credit under pre-PKPA Full Faith & Credit jurisprudence, the question then presented reverts to what credit forum 1 (VT), issuing a judgment, needs to give to a competing judgment from forum 2 (VA) where the issue of the credit owed by forum 2 (VA) to forum 1's judgment (VT) was litigated in forum 2 (VA). The Vermont court indicated its assessment of this question, *see* Petition, pp. 14a-15a; and it is consistent with what has been the settled state of the law for many years. *See* Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 Harv. L. Rev. 798 (1969).

granting parental rights to a non-birth, non-adoptive parent have been asked and answered.

A. ANY QUESTION OF THE PETITIONER'S CONSTITUTIONAL RIGHT TO PARENT HER CHILD WAS DECIDED ON AN INDEPENDENT AND ADEQUATE STATE GROUND.

It is axiomatic that "[i]f in fact the [state court] judgment rests on a state ground, the Supreme Court has no jurisdiction to review the case." Stern, Gressman, Shapiro and Geller, *Supreme Court Practice*, §3.22, p. 195 (8th ed. 2002). Moreover, this Court has "recognized that the failure to comply with a state procedural rule may constitute an independent and adequate state ground barring our review of a federal question." *Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982); *see also Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 334-336 (Harlan, J., dissenting on other grounds) (a question is not within 28 U.S.C. §1257(a) if the petitioner has not "satisfied the state rules governing presentation of issues").

In this case, the Vermont Supreme Court expressly held that the Petitioner's claim of interference "with her exclusive constitutional right to parent her child . . . was not adequately raised below and has been waived." (Petition, pp. 32a-33a). That should suffice to preclude review by this Court.

In apparent anticipation of this jurisdictional problem, the Petitioner asserts that she did raise the issue in the Vermont trial court and that the Vermont Supreme Court "wrongly claim[ed] that Petitioner had not raised the issue in the trial court." (Petition, pp. 5-6).

First, the Vermont Supreme Court did not hold that the issue was *not* raised below but that it was *inadequately* raised below. The Petition thus does not respond to the Court's actual rationale.

Second, the Petitioner says only that the Vermont Supreme Court was wrong in its state law waiver determination. However, this Court has been clear that it "accepts the [state law] decision whether right or wrong." *Nickel v. Cole*, 256 U.S. 222, 225 (1921). This rule will not be followed only if either: (1) the state rule is not "strictly or regularly followed" and thus not "appl[ied] evenhandedly to all similar claims," *Hathorn*, *supra* at 263 quoting *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964); or (2) the state court "adopted its view in order to evade a constitutional issue," *Nickel*, *supra* at 225. The Petitioner does not – and, indeed, could not – make any showing to bring herself within either of these exceptions.

For this reason alone, the Court does not have jurisdiction to hear Petitioner's Question No. 3.

B. PROPERLY UNDERSTOOD, PETITIONER'S QUESTION NO. 3 EITHER RAISES NO CERTWORTHY "CONFLICT" OR HAS ALREADY BEEN ASKED AND ANSWERED BY THIS COURT.

1. Understanding Petitioner's Question No. 3.

Conflating different issues, Petitioner's Question No. 3 arguably incorporates two separate ideas neither of which should trigger this Court's review. This becomes even clearer when those two ideas are separately articulated. First, Petitioner's Question No. 3 focuses on a

concern about the state's role in defining who qualifies as a legal parent. Second, Question No. 3 asks whether the determination made in answering the first part of that question – that is, in deciding who is a parent – violates the federal constitution when a particular state, here Vermont, decides that, in certain circumstances, a person who neither gave birth to a child nor adopted that child is determined to have parental rights.

2. Different States May Have Different Laws To Determine Parentage.

Separating out those two issues it becomes clear that as to the first, differences among state courts in defining who is a parent makes any "conflict" irrelevant for purposes of this Court's review. It is commonplace among the states to have different ways of determining parentage based upon statutory and common law developments. Resolutions of the legal question of parentage will inevitably be decided differently based on each state's laws. The fact of different outcomes hardly reflects a "conflict" and certainly not one that comports with the Supreme Court Rule 10 guidance. Petitioner adverts to a "pervasive conflict" but does not, because she cannot, argue that Question No. 3 meets the guidance offered by the relevant Supreme Court Rule.

3. This Court Should Not Revisit Established Law About Persons That States May Properly Regard As Legal Parents.

As to the second issue incorporated in Question No. 3, any federal question concerning whether a state's acknowledgement of parental rights in a non-birth,

non-adoptive parent infringes on a biological parent's rights has already been asked and answered by *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). In *Michael H.*, this Court affirmed the constitutionality of a California evidence rule that created an irrebuttable presumption of parentage in the husband of a woman who gives birth to a child during their marriage even where the presumption operates to the exclusion of a biological father of that child. *Id*. at 117-130 (plurality opinion); *id*. at 132-133 (Stevens, J., concurring). The evidence rule provided that a child born to a married woman living with her husband, who is neither impotent nor sterile, is presumed to be a child of the marriage, and the presumption could be rebutted only in very limited circumstances by either the husband or the mother. *Id*. at 115. Absent those circumstances, the presumption was irrebuttable regardless of the actual identity of the biological father; and he had no ability to challenge the presumption.

Unable to satisfy the conditions of the California statute which would trigger the right to rebut the presumption of the husband's paternity, the biological father claimed a deprivation of liberty. This Court rejected his claim and deferred to California's overriding social policy concerns about support for the child and maintaining the integrity of the family unit. *Id*. at 119-20. The fact that the evidence rule preferred the husband and precluded the biological father from rebutting the presumption of the husband's paternity raised no constitutional concern. *Id*. at 130. "It is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted." *Id*. at 129-30. Stated differently, in *Michael H.*, this Court

answered that it would defer to state laws crafting an acknowledgement of parental rights, even if those parents may not be biologically related to their children. *See also Lehr v. Robertson*, 463 U.S. 248, 262-63 (1983).

Just as this Court recognized California's power to define a husband with no genetic relationship to a child as a parent, the same must hold true for Vermont and its conclusion that Janet Miller-Jenkins is parent. As the Vermont Supreme Court explained, "Many factors are present here that support a conclusion that Janet is a parent." *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78 ¶56. (Petition, p. 30a). The Court referred to a host of factors to support the Family Court's legal determination that Janet is a parent including: the legal relationship between the two women, the "expectation and intent" that both Lisa and Janet parent the child, their joint participation in the decision to have the child and in "prenatal care and birth," their joint regard of Janet as a parent including while they were together and upon the relationship's dissolution, and the absence of any other person in IMJ's life who could make a claim of parentage. *Id*.

This Court has repeatedly refused to intervene to disrupt the ability of states to determine for themselves how to define parental relationships. In case after case in which a party has sought certiorari, including in matters in which state courts have had to sort through relationships with children resulting from the relationships of same-sex couples, this Court has refused to interrupt the federalist structure of state decision-making about who is a parent. *In re Custody of HSH-K*, 533 N.W.2d 419 (Wisc. 1995), *cert. denied*, 516 U.S. 975 (1995); *E.N.O. v. L.M.M.*, 429 Mass. 824, *cert. denied*, 528 U.S. 1005 (1999); *In re Guardianship of Z.C.W.*, 84 Cal.Rptr.2d 48 (Cal. App. 1

Dist. 1999), *cert. denied*, 528 U.S. 1056 (1999); *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn.Ct.App. 2000), *cert. denied*, 531 U.S. 1011 (2000); *V.C. v. M.J.B.*, 748 A.2d 539, 554 (N.J. 2000), *cert. denied*, 531 U.S. 926 (2000); *Carvin v. Britain*, (In re Parentage of L.B.), 122 P.3d 161 (Wash. 2005), *cert. denied*, ___ U.S. ___, 126 S.Ct. 2021 (2006). Rather than any disagreement among states about how to define family relationships reflecting any federal or constitutional question, the varying case law more accurately reflects the healthy experimentation of states. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs").

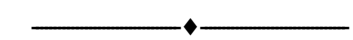
C. TROXEL DID NOT ALTER ANY LEGAL PRINCIPLES AND SPEAKS ONLY TO THIRD-PARTY VISITATION, NOT TO VISITATION ORDERED FOR A PARENT.

Petitioner acknowledges that this Court has long recognized parents' rights to make decisions concerning their children. (Petition, pp. 23-24). *Troxel v. Granville*, 530 U.S. 57 (2000), merely noted that long-established proposition while also noting the equally long-held principle that a parent's rights are not absolute. *Id.* at 88.

In *Troxel*, this Court reviewed a decision by Washington's Supreme Court invalidating, on federal constitutional grounds, a broadly-worded statute that allowed any third party to seek visitation with a child "at any time." *Id*. at 60. Disputes over visitation between parents, as is the case here, do not partake of the constitutional concerns raised in visitation cases involving third parties. The Washington

high court concluded that the statute violated the federal constitution because the statute permitted intervention in a parent's right to rear his or her children with no limitation and, in particular, no demonstration of harm, potential harm or even effect on the child of no visitation. The Court also concluded that the statute swept too broadly since it allowed visitation any time it might serve the best interests of the child. This Court affirmed the judgment of the Washington Court, on different grounds, explaining that the broadly-written statute, as applied to this specific case, failed to afford any deference to a parent's determination of a child's best interests. *Id*. at 67.

Troxel did not find any absolute right of a birth parent to custody or visitation over all other persons and particularly did not find any absolute right of a birth parent to custody or visitation over another legal parent. *Id*. at 87-88. *Troxel* involved a petition for visitation by the grandparents of the daughters of Tommie Granville and Brad Troxel. *Id*. at 60. After Brad Troxel died, his parents sought to maintain a higher level of visitation than Tommie Granville, the only surviving parent, wished them to have. The grandparents who sought visitation over Tommie Granville's objection made no claim of parentage, nor seemingly could they, based on the reported facts. None of this Court's opinions in *Troxel* address directly or otherwise the question of how a state might define parentage. *Troxel* states important principles regarding a parent's liberty interest against the unwelcome intrusion by a nonparent but not more. Lisa's protestations to the contrary do not transform Vermont's determination that Janet is a parent and cannot, without more than this case can support, raise a constitutional question.



CONCLUSION

For all of the foregoing reasons, the respondent, Janet Jenkins, respectfully requests that Lisa Miller's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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