QUESTIONS PRESENTED

1) Is the Court of Appeals of Virginia's decision in *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 98, 637 S.E.2d 330, 335 (2006) ("*Miller-Jenkins One*"), determining that the Parental Kidnapping Prevention Act controlled the resolution of this custody dispute, "law of the case" after this Court rejected Lisa Miller-Jenkins' appeal from that decision?

2) Did the Court of Appeals of Virginia correctly hold that the lower court must register a Vermont custody and visitation order, where the Court of Appeals of Virginia's decision in *Miller-Jenkins One* already established that the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, governs this custody dispute?

STATEMENT OF THE CASE

This is an interstate child custody dispute which has resulted in two separate decisions from the Court of Appeals of Virginia, the second of which is the subject of the instant appeal before this Court, but both of which involved the same legal question.

This case began in November 2003, when Appellant Lisa Miller-Jenkins ("Lisa"), filed a complaint in the Rutland County Family Court in Vermont ("Vermont Court"), to dissolve her Vermont civil union with Appellee Janet Miller-Jenkins ("Janet"), and to adjudicate the parental rights and responsibilities over the "child of the civil union," IMJ. In June 2004, the Vermont Court issued a Temporary Custody Order granting Lisa primary physical custody over IMJ and granting Janet visitation rights. The Vermont Court continued to exercise its jurisdiction over the

same issues and ultimately determined that both Janet and Lisa were legal parents of IMJ, and that Lisa was in contempt of court for refusing to allow Janet visitation. On August 4, 2006, a unanimous Vermont Supreme Court affirmed the Vermont Court's orders. From that decision, Lisa sought a writ of *certiorari* from the United States Supreme Court which was denied on April 30, 2007.

First Appeal in Virginia. Rather than comply with the June 2004 order of the Vermont Court awarding Janet visitation rights, Lisa filed a new action in the Frederick County Circuit Court in Virginia ("Circuit Court"), asking that court to rule that she was the sole parent and the only person with custodial and other parental rights over IMJ. On October 15, 2004, the Circuit Court, after dismissing out of hand Janet's jurisdictional objections under the Parental Kidnapping and Prevention Act ("PKPA"), 28 U.S.C. § 1738A, and under Virginia law, ruled that Lisa was the only parent of IMJ and that neither Janet "nor any other person has any claims of parentage or visitation rights over [IMJ]."

Janet appealed that decision, and on November 28, 2006, the Court of Appeals of Virginia ("Court of Appeals") unanimously reversed the Circuit Court's assumption of jurisdiction in the case, holding that Vermont had sole jurisdiction over the case pursuant to controlling federal law. In a comprehensive, published opinion, the Court of Appeals applied the jurisdictional criteria in the PKPA to find that Vermont had been IMJ's "home state" within six months of Lisa's filing the Vermont petition and that Vermont continued to exercise jurisdiction over the case. Accordingly, "the [Virginia] trial court lacked authority to exercise jurisdiction based upon Lisa's custody and visitation action in Virginia or to modify the custody and visitation orders of the Vermont court." *Miller-Jenkins v. Miller-Jenkins*, 49 Va.

App. 88, 98, 637 S.E.2d 330, 335 (2006) ("*Miller-Jenkins One*"). The Court of Appeals also directed the Circuit Court "to extend full faith and credit to the custody and visitation orders of the Vermont court." *Id*. at 103, 637 S.E.2d at 338. On January 19, 2007, the Court of Appeals denied Lisa's petition for rehearing *en banc.* Lisa attempted to appeal to this Court, but her appeal was dismissed on May 7, 2007.

Second Appeal in Virginia. While the Court of Appeals was considering the first appeal, Janet sought to register the Vermont custody order in the Frederick County Juvenile and Domestic Relations Court ("J&DR Court"). The J&DR Court registered the order, but on March 1, 2006, the Circuit Court reversed. Janet appealed, and on April 17, 2007, in a two-page, unpublished opinion, a unanimous panel of the Court of Appeals reversed the Circuit Court's refusal to register the Vermont custody order, finding that this result was mandated by the result in the first appeal:

> [i]n light of our decision in Record No. 2654-04-4, it is clear that the trial court likewise erred in this case, Record No. 0688-06-4. Accordingly, we likewise vacate the trial court's March 1, 2006 order and remand the case to the trial court with instruction to enter an order allowing Janet Miller-Jenkins to register the Vermont order in Virginia.

Ct. App. Mem. Op. 2, Apr. 17, 2007.

The present appeal is from the second Court of Appeals' decision, a summary ruling that determined only that the registration issue was controlled by the Court of Appeal's prior ruling that the PKPA applied to this dispute. Nonetheless, in her opening brief Lisa seeks to reargue all the issues she raised in her faulty first appeal. In accord with the long established doctrine of law of the case, the questions decided by the Court of Appeals in the first appeal, including that the PKPA applies and

requires the Circuit Court to give full faith and credit to the Vermont Court's custody and visitation orders, have already been decided permanently by virtue of the dismissal of Lisa's petition. Thus, the Court of Appeals' summary disposition of the second appeal was correct: after the question of the applicability of the PKPA was answered, there can be no dispute that enrollment and enforcement of the Vermont Court's orders are mandated.

STATEMENT OF FACTS

From February 1998 to July 2002 Janet Miller-Jenkins ("Janet") and Lisa Miller-Jenkins ("Lisa") lived in Virginia in an openly lesbian relationship. Janet Aff. ¶ 1, Aug. 18, 2004 ("Janet Aff."), JA 373;[1] On December 19, 2000, while still residing in Virginia, Lisa and Janet traveled to Vermont, entered into a civil union, and returned to Virginia. *Id.* ¶ 2; *see also* Complaint for Civil Union Dissolution (hereinafter "Compl. for Dissolution"), JA 116. After returning to Virginia, they decided to have a child through artificial insemination using sperm obtained from a sperm bank. Janet Aff. ¶ 3, JA 373. The couple selected a donor with physical characteristics similar to Janet so that their child would physically resemble them both. *Id*. Lisa conceived and carried the couple's daughter, "IMJ." *Id.* ¶ 4. On April 16, 2002, IMJ was born in Hamilton, Virginia. *Id*. Janet was present in the delivery room and cut IMJ's umbilical cord. *Id*.

In July 2002, concerned that Virginia was not a welcoming place for a gay family, Lisa and Janet decided to relocate permanently with IMJ to Fair Haven,

[1] Citations are made to the document by: title; page, paragraph and/or line number; and date, e.g., Hr'g Tr. 20:14, Aug. 24, 2004, and then to the page numbers(s) of the document as it is numbered in the Joint Appendix ("JA").

Vermont. *Id*. ¶ 6. A little over a year later, in the fall of 2003, Lisa and Janet decided to separate. *Id*. ¶ 7. Janet urged Lisa to remain in Vermont, but Lisa insisted on taking IMJ and moving with her to Virginia, which Lisa did in September 2003. *Id*.

On November 24, 2003, Lisa initiated a proceeding in Vermont to dissolve her and Janet's civil union by filing a Complaint for Civil Union Dissolution in the Rutland Family Court of Vermont ("Vermont Court"). Compl. for Dissolution, JA 116-19. In her Complaint, Lisa listed IMJ as a biological or adoptive child of the civil union. *Id*. at 1, JA 116; *see also Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 92, 637 S.E.2d 330, 332 (2006) ("*Miller-Jenkins One*"). Lisa requested that the court dissolve the civil union, award her legal and physical rights and responsibilities for IMJ, award Janet suitable parent/child contact, and require Janet to pay child support. Compl. for Dissolution at 2, JA 117; *Miller-Jenkins One*, 49 Va. App. at 92, 637 S.E.2d at 332.

On June 17, 2004, the Vermont Court issued a Temporary Custody Order allocating parental rights and responsibilities between Janet and Lisa. VT Ct. Order of 6/17/04, JA 1 ("Vermont Order"). Pursuant to the Vermont Order, Janet was to have "parent-child" contact and visitation with IMJ in June and July in Virginia and in August and thereafter in Vermont. *Id*. Lisa refused to comply with the Vermont Order and did not allow Janet visitation, communication, or contact with IMJ. VT Ct. Order 4, Sept. 2, 2004, JA 478.

On July 1, 2004—the same day that Virginia's "Marriage Affirmation Act" (Va. Code Ann. § 20-45.3) became law—Lisa asked Virginia's Frederick County Circuit Court ("Circuit Court") to help her end-run the decision she sought from the Vermont Court, by redetermining custody and visitation, and denying Janet any and

all rights on the basis of Virginia's newly enacted Marriage Affirmation Act. In Count I of her Petition, Lisa asked the Circuit Court to make a determination of parentage pursuant to Virginia's paternity statute, Va. Code Ann. § 20-49.1. Petition at 1, JA 4-6. In Count II, she asked the Circuit Court to make a custody and visitation determination by "[a]djudicating Petitioner, Lisa Miller-Jenkins, to be the sole parent of and to have sole parental rights over [IMJ]" and by "[a]djudicating any parental rights claimed by Respondent, Janet Miller-Jenkins, to be nugatory, void, illegal and/or unenforceable." Petition at 2, JA 5. On July 1, 2004, IMJ and Lisa resided in Frederick County, Virginia, as they do at present, while Janet continues to reside in Rutland County, Vermont. Janet Aff. ¶¶ 10, 11, JA 374.

On July 19, 2004, after it learned of Lisa's filing in the Circuit Court, the Vermont Court issued an order, affirming that "[t]his Vermont Court has and will continue to have jurisdiction over this case including all parent-child contact issues. . . . The Temporary Order for parent-child contact [is] to be followed." VT Ct. Order 1, July 19, 2004, JA 9.

On July 29, 2004, Janet demurred to Lisa's Petition in the Circuit Court, arguing that both the federal Parental Kidnapping Prevention Act ("PKPA") 28 U.S.C. § 1738A, and Virginia's Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Va. Code Ann. § 20-146.1, preclude the Circuit Court from exercising jurisdiction over this matter and instead require the Circuit Court to enforce the Vermont Order.

On August 18, 2004, the Circuit Court requested that the parties brief the issue of whether the Circuit Court could properly exercise jurisdiction. VA Ct. Order 1-2, Aug. 18, 2004, JA 67-69. Over the objection of Janet, the Court also modified the

Vermont Court's June 17 Temporary Custody and Visitation Order.[2] The Circuit Court stayed all visitation except supervised visitation in the Commonwealth of Virginia, in direct contradiction of the Vermont Order which grants Janet unsupervised visitation in both Virginia and Vermont. *See* VA Ct. Order 1-2, Aug. 18, 20004, JA 67-69; VT Ct. Order 1-3, June 17 2004, JA 99-101.

On August 24, 2004, the Circuit Court held a hearing on the issue of jurisdiction. Ruling from the bench, the Circuit Court disregarded the Vermont Court's orders and proceedings, as well as federal law requiring the Circuit Court to enforce the Vermont Court's orders. The Circuit Court did not even mention the PKPA during its ruling from the bench, and its two-page September 9, 2004 order (memorializing its August 24 ruling) does not even attempt to reconcile jurisdiction in Virginia with the plain language of the PKPA. *See* Hr'g Tr. 23-28, Aug. 24 2004, JA 441-46; VA Ct. Order 1-3, Sept. 9, 2004, JA 463-65. The Circuit Court also disregarded the plain meaning of Virginia's UCCJEA, holding that it could exercise jurisdiction despite the pendency of the Vermont proceedings. *See* Hr'g Tr. 24-25, Aug. 24, 2004, JA 442-43; VA Ct. Order 2, Sept. 9, 2004, JA 464. On September 17, 2004, Janet timely appealed this Order. Appellant's Notice of Appeal, JA 466-73.

Throughout this period Lisa refused to allow Janet any contact whatsoever with IMJ. VT Ct. Order ¶ 25, Sept. 2, 2004, JA 481. Accordingly, on September 2, 2004, the Vermont Court found Lisa in contempt, holding that:

---

[2] The Vermont Court recognized and took exception to this impermissible modification of its order, finding that "Unfortunately, and without contacting this Court before it did so, the Circuit Court modified the Vermont order to preclude parent-child contact between the child and Janet outside Virginia." VT Ct. Order ¶ 21, Sept. 2, 2004, JA 480.

> [h]ere, Lisa has willfully refused to comply with this court's order regarding visitation since mid-June, solely because she does not like it. . . . Lisa's contemptuous conduct goes beyond that, however. Lisa initiated this dissolution action in Vermont and asked for a temporary order regarding parental rights and responsibilities. Then, when she received a temporary order she did not like, she not only refused to comply with it, but she actually initiated a separate action in a Circuit Court, asking that court to disregard the fact that she had already initiated an action involving the same issues (i.e. the parental status of Lisa and Janet and their relative rights and responsibilities) in Vermont.

VT Ct. Order 4-5, Sept. 2, 2004, JA 481-82. Despite this contempt ruling, Lisa continues to ignore the Vermont Court's orders and has continued to refuse to allow Janet to have visitation with IMJ.

On October 15, 2004, the Circuit Court, again disregarding the Vermont Court's orders, granted Lisa's petition in its entirety, ruling that Lisa "solely has the legal rights, privileges, duties and obligations as a parent hereby established for the health, safety, and welfare of the minor child, [IMJ]. Neither [Janet] nor any other person has any claims of parentage or visitation rights over [IMJ]." VA Ct. Order 1-2, Oct. 15, 2004, JA 487. On November 9, 2004, Janet timely noticed her appeal of the Circuit Court's October 15, 2004 order, and moved to consolidate her appeals. Appellant's Notice of Appeal, JA 489-91.

On November 17, 2004, the Vermont Court, ruling on Lisa's "Motion to Withdraw Waiver to Challenge Presumption of Parentage," held that Janet is IMJ's legal parent and that she has all the rights and responsibilities of a parent. VT Ct. Order 13, JA 866. The Vermont Court also took issue with the Circuit Court's duplicative exercise of jurisdiction, holding that "this court already had jurisdiction over the parentage issue and continues to have jurisdiction over this matter. The exercise of jurisdiction by the Circuit Court is not in accordance with the Uniform

Child Custody Jurisdiction Act, see 15 V.S.A. §§ 1031 *et seq*., Va. Code Ann. §§ 20-146.1 *et seq*., and the federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A(f)." *Id.* at 13 n.6. On August 4, 2006, the Vermont Supreme Court affirmed the Vermont Court's rulings that Vermont has jurisdiction over the dispute that Janet is IMJ's parent, and that Lisa was in contempt of court for refusing to allow Janet visitation. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006), *cert. denied*, 127 S. Ct. 2130 (2007).

On November 28, 2006, a panel of the Court of Appeals of Virginia ("Court of Appeals") unanimously agreed that the PKPA applied fully to this custody dispute, irrespective of Lisa's arguments under the so-called Defense of Marriage Act ("DOMA"), 28 U.S.C. § 1738C. Therefore, the Court of Appeals ruled that Vermont had exclusive jurisdiction under the PKPA, and ordered the Circuit Court to give full faith and credit to Vermont's custody orders. *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 637 S.E.2d 330 (2006) ("*Miller-Jenkins One*"). On January 19, 2007, the Court of Appeals denied Lisa's petition for rehearing *en banc*. Lisa attempted to appeal to this Court, but her appeal was dismissed on May 7, 2007, after she failed to file a timely, correct notice of appeal. VA Sup. Ct. Order, May 7, 2007, JA 1090. Lisa's Petition for Rehearing was subsequently denied by this Court on June 22, 2007. VA Sup. Ct. Order, June 22, 2007, JA 1107.

The same Circuit Court that improperly exercised jurisdiction also refused to allow Janet to enroll the Vermont Order. VA Ct. Order, Mar. 1, 2006, JA 708. Janet appealed that decision to the Court of Appeals, which summarily and unanimously found on April 17, 2007, that its prior decision in *Miller-Jenkins One* holding the PKPA applicable to this custody dispute, also decided the enrollment issue. Ct. App.

Mem. Op. 1-2, Apr. 17, 2007; Ct. App. Order, Apr. 17, 2007, JA 1089. Lisa appealed that decision to this Court.

SUMMARY OF ARGUMENT

The issues raised in this appeal were decided by the Court of Appeals of Virginia ("Court of Appeals") in *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 637 S.E.2d 330 (2006) ("*Miller-Jenkins One*"), and are, therefore, law of the case and the Court of Appeals' decision should be affirmed on that basis. The Court of Appeals, like the Vermont Supreme Court, has properly decided—twice—that the express and extraordinarily clear jurisdictional provisions of the federal Parental Kidnapping and Prevention Act ("PKPA") 28 U.S.C. § 1738A precluded the Circuit Court from modifying the Vermont Court's custody and visitation order, and require that the Circuit Court enforce that order.

Substantively, the Court of Appeals was correct. This case presents a classic example of just what Congress sought to preclude by enacting the PKPA. Lisa started this child-custody case in Vermont, did not like the result and proceeded to seek a second (and now third) bite at the apple in Virginia. Federal law—as well as Virginia's own Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Va. Code Ann. § 20-146.1—expressly and wisely precludes such conduct. With one exception, every judge and justice, in both Virginia and Vermont, who has considered this case, has reached that same obvious conclusion.

This four-year odyssey of litigation highlights the importance of affording finality and universality to the custody and visitation decisions made by a child's home state under that state's UCCJEA law. The Full Faith and Credit Clause of the

United States Constitution ensures full faith and credit to final judgments without any public policy exceptions. The statutory provisions of the PKPA and state UCCJEAs likewise ensure that custody and parentage determinations that follow from a child's legal parentage are also subject to full faith and credit in all states without public policy exceptions. The fact that IMJ has two legal parents who are both of the same sex should not distract this Court from affirming the Court of Appeals' straightforward and standard analysis of the jurisdictional issues and the importance of having Virginia defer to the parentage, custody and visitation orders of the child's home state of Vermont.

Lisa's appeal should be rejected not only because of the threat that it poses to the safety of children of same-sex couples, but also because of the damage it would do to jurisprudential concerns that this Court has expressed frequently. Lisa seeks to relitigate issues previously and finally determined against her. She also asks this Court to void the judgment of a sister state and invites the court to pronounce its own view of the law of another state when that state's high court has spoken already. Indeed, it is odd that Lisa invokes the rights of individual states to make their own determinations when the model she proposes would invite other states not to respect the judgments of the courts of our Commonwealth.

ARGUMENT

I. THE DISPOSITIVE ISSUE THAT APPELLANT RAISES WAS FINALLY ADJUDICATED WHEN THIS COURT DISMISSED HER FIRST APPEAL; THAT RULING IS LAW OF THE CASE.

This appeal must be dismissed under this Court's exacting rule that issues decided in a prior appeal cannot be relitigated in subsequent appeals between the

same parties. In *Miller-Jenkins One*, the parties vigorously contested whether the PKPA applies to this dispute.[3] What the parties did **not** dispute is the effect of the PKPA when it does apply: Lisa readily conceded that, under the PKPA, the second state to begin custody proceedings cannot modify, and must enforce, a custody or visitation order from the first state to begin custody proceedings. "The PKPA requires a state to enforce according to its terms, and not modify, a *valid* custody or visitation determination of another state, except under certain exceptions provided for in the statute." Appellee Lisa's Ct. App. Br. in *Miller-Jenkins One* 12, JA 513; *see also id.* at 23, JA 524 ("[T]he PKPA clarifies that a custody or visitation order is encompassed within those judgments or acts that must be afforded full faith and credit, and that a state cannot refuse to enforce the order, regardless of that state's public policy, if the first state properly exercised jurisdiction.").

Lisa's first appeal raised numerous arguments why the PKPA does not apply to this case. Those are precisely the arguments that the Court of Appeals already rejected in *Miller-Jenkins One*. *Miller-Jenkins*, 49 Va. App. at 103, 637 S.E.2d at 338 ("The PKPA forbids her prosecution of this action in the courts of this Commonwealth Accordingly, we vacate the orders of the trial court and remand this matter to the trial court with instruction to extend full faith and credit to the custody and visitation orders of the Vermont court."). The Court of Appeals order is final and not subject to further appeal. As a result, under law of the case doctrine applied consistently by this Court for over a century, Lisa cannot now contest the

[3] The parties also contested the applicability of the UCCJEA, but the Court of Appeals held that the applicability of the PKPA rendered that issue moot. *Miller-Jenkins One*, 49 Va. App. at 103, 637 S.E.2d at 337.

applicability of the PKPA to this custody dispute. Thus, the courts of Virginia must respect and enforce orders from Vermont regarding the parental rights of Lisa and Janet.

"[W]here there have been two appeals in the case, between the same parties, and the facts are the same, nothing decided on the first appeal can be re-examined on a second appeal." *Chappell v. White*, 184 Va. 810, 816, 36 S.E.2d 524, 526-27 (1946) (citation omitted); *accord Fox v. Fox*, 41 Va. App. 88, 95, 581 S.E.2d 904 (2003); *Am. Filtrona Co. v. Hanford*, 16 Va. App. 159, 164, 428 S.E.2d 511, 514 (1993); *Kemp v. Miller*, 160 Va. 280, 285, 168 S.E. 430, 431 (1933). This Court repeatedly has stressed how established this rule is in Virginia appellate procedure. *Chappell*, 184 Va. at 816, 36 S.E.2d at 527 ("The doctrine has been applied in many cases by this court . . . . The principle here laid down is everywhere applied.") (citation omitted); *Commonwealth v. Luzik*, 259 Va. 198, 206, 524 S.E.2d 871, 876 (2000) (it is "the established rule of appellate procedure in this Commonwealth that if a matter is appealed and a party fails to preserve a challenge to an alleged error" it becomes law of the case); *Searles' Adm'r v. Gordon's Adm'r*, 156 Va. 289, 295, 157 S.E. 759, 761 (1931) ("The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it, and [sic] end could never be put to litigation.'").

As explained in Sections II and III below, the Court of Appeals correctly decided that the PKPA applies to this dispute. However, it is not legally relevant whether this Court agrees with the Court of Appeals; the final ruling in a first appeal is "law of the case" irrespective of whether it is legally correct. *Fox*, 41 Va. App. at 95-96, 581 S.E.2d at 908 ("Right or wrong, it is binding on both the trial court and the

appellate court, and is not subject to reexamination by either."), *quoting Am. Filtrona*, 16 Va. App. at 164, 428 S.E.2d at 514 (quoting *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 620, 93 S.E. 684, 687 (1917)); *accord Chappell*, 184 Va. at 816, 35 S.E.2d at 527; *Kemp v. Miller*, 160 Va. at 285, 168 S.E. at 431.[4]

Finally, for law of the case's purposes, the finality of the first appeal is the only relevant consideration.[5] In the first appeal, Lisa failed to file a Notice of Appeal, and this Court rejected her appeal as procedurally defective. Regardless of whether one views the termination of the first appeal as Lisa's procedural default, or this Court's rejection of a petition for appeal, law of the case doctrine applies. Law of the case applies when this Court rejects a petition for appeal in the first appeal. *Peterson v. Haynes*, 145 Va. 653, 659, 134 S.E. 675, 676 (1926) ("[I]t is well settled that the refusal of this court to grant an appeal from the decree complained of determined 'the law of the case.'"). Law of the case also applies in the absence of an appeal from a prior ruling. *Kondaurov v. Kerdasha*, 271 Va. 646, 658, 629 S.E.2d 181, 187 (2006) ("Under law of the case doctrine, a legal decision made at one [stage] of the litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation ....") (citation omitted); *see*

---

[4] Moreover, while Lisa raises no new argument as to why the Circuit Court of Appeals erred, law of the case prevents her from any attack on the applicability of the PKPA, even by introducing new arguments. *See Robbins v. Robbins*, 48 Va. App. 466, 473 632 S.E.2d 615, 619 (2006) (the doctrine "precludes parties from relitigating, after an appeal, matters that were either (i) not raised on appeal, but should have been, or (ii) raised on appeal, but expressly rejected by the appellate court.").

[5] It is irrelevant that the Court of Appeals is an inferior court to this Court. Even a ruling from a trial court that is not appealed properly becomes law of the case. *E.g.*, *Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc.*, 259 Va. 92, 108, 524 S.E.2d 420, 429 (2000).

also Fox, 41 Va. App. at 95-96, 581 S.E.2d at 908. A procedural default by a prior appealing party also precludes its relitigation of issues decided against it. *Lockheed* 259 Va. at, 108, 524 S.E.2d 429 (failure to assign error to portion of judgment in first appeal prevented appellant from relitigating that issue in subsequent appeal). That a party may have failed to appeal through inadvertence or negligence is irrelevant. Law of the case doctrine applies to any issue "which might have been brought forward as a part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case." *Searles' Adm'r*, 156 Va. at 295, 157 S.E. at 761 (citation omitted).

Having little to say in her defense, Lisa relegates to a footnote her argument that the two appeals are separate and purportedly involve separate issues: jurisdiction as opposed to enforcement. Appellant's Br. at 6 n.2. That this appeal arises from a separately captioned matter is irrelevant; Lisa herself concedes that the proceedings are "related," and law of the case doctrine applies when the losing party in the appeal of the first action files an appeal covering a similar issue in a "separate, but related action." *Fox*, 41 Va. App. at 93, 581 S.E.2d at 907. Even if the two proceedings were deemed completely separate, Lisa's arguments would be barred by *res judicata*, which "is similar but not identical to" law of the case doctrine and applies when proceedings are separate. *Am. Filtrona*, 16 Va. App. at 164, 428 S.E.2d at 514; *Kaufman v. Kaufman*, 12 Va. App. 1200, 1208, 409 S.E.2d 1, 6 (1991). Res judicata principles would bar Lisa from relitigating the issue the Court of Appeals determined, that the PKPA, and not DOMA, governs this dispute. *See Storm v. Nationwide Mut. Ins. Co.*, 199 Va. 130, 133, 97 S.E.2d 759, 761 (1957) ("'A judgment on the merits, fairly rendered, by a court of competent jurisdiction, having cognizance both of the

parties and the subject matter, however erroneous it may be, is conclusive on the parties and their privies until reversed or set aside in a direct proceeding for that purpose and is not amenable to collateral attack.'") (citation omitted).

Lisa's argument that the "core issues" are "different", Appellant's Br. at 6 n.2, is not only incorrect but also contradicts her prior pleadings and misunderstands the breadth of law of the case doctrine. As Lisa has argued, the identical legal issue in the two appeals is whether the PKPA or DOMA controls this dispute. Lisa presented the following question to the Court of Appeals in the First Appeal: "Whether the PKPA, which is codified at 28 U.S.C. § 1738A was expressly limited in its application so that it does not apply to same-sex unions by virtue of the later passage of the federal Defense of Marriage Act, which is codified in the same statute at 28 U.S.C. § 1738C." The Court of Appeals answered this question with a resounding "No." In issuing its ruling that the PKPA, not DOMA, controls the dispute, the Court of Appeals succinctly stated that the PKPA both "forbids her prosecution of this action in the courts of this Commonwealth" and requires the Circuit Courts "to extend full faith and credit to the custody and visitation orders of the Vermont court." 49 Va. App. at 103, 637 S.E.2d at 338.

Lisa recognized this straightforward proposition in her first appeal to this Court, characterizing the question in the case as whether the PKPA or DOMA "controls" the dispute. Pet. for Appeal 3 in *Miller-Jenkins One*, Question Presented No. 1, Feb. 20, 2007, JA 1024 ("Whether the Parental Prevention Kidnaping Act [sic], . . . , or the Defense of Marriage Act . . . controls . . ."; *see also id.* at 3-4, Question Presented No. 4, JA 1024-25 ("Whether the [purportedly] later-enacted federal Defense of Marriage Act . . . controls full faith and credit decisions involving

parentage and custody rights arising from a same-sex civil union rather than the Parental Prevention Kidnaping Act [sic] . . . .”). Moreover, Lisa also recognized in her first appeal that the question of giving full faith and credit to Vermont orders was necessarily decided by the Court of Appeals in its ruling that the PKPA applies. *See id.* at 3-4, Questions Presented 2, 6, 7, JA 1024-25 (“Whether Virginia’s laws prohibiting recognition of same-sex relationships or rights arising from those relationships prohibits [sic] Virginia *from giving full faith and credit to Vermont orders* granting visitation and parental rights . . .”; “Whether Virginia can give *full faith and credit to Vermont orders* granting visitation and parental rights to a woman with no biological or adoptive relationship to a child . . .”; “Whether Virginia *can give full faith and credit to a Vermont order* declaring a third party a *de facto* parent . . . .”) (emphasis added).

Additionally, Lisa’s contention is legally irrelevant, as law of the case doctrine precludes the relitigation of any issue inconsistent with the ruling in the initial appeal. In *Norfolk & W. Ry. Co. v. Duke & Rudacille*, 107 Va. 764, 60 S.E. 96 (1908), this Court held that the appellant could not challenge the jurisdiction of the trial court in a subsequent appeal, because the affirmance of the trial court in the first appeal necessarily assumed the trial court’s jurisdiction, even though the issue of jurisdiction “was not expressly presented and decided” in the first appeal. *Id.*, 107 Va. at 766, 60 S.E. at 97. It is impossible to reconcile Lisa’s position in this appeal with the Court of Appeals’ ruling that the PKPA controls this dispute unaffected by DOMA. This court’s ruling in *Norfolk* barring consideration of issues “necessarily involved on the former appeal or writ of error, whether actually adjudicated or not” has been reaffirmed repeatedly over the last hundred years. *Norfolk*, 107 Va. at 766,

60 S.E. at 97; *Kemp*, 160 Va. at 285, 168 S.E. at 431; *Chappell*, 184 Va. at 816, 36 S.E.2d at 527; *Am. Filtrona*, 16 Va. App. at 165, 428 S.E.2d at 514. The Court of Appeals' specific mandate in *Miller-Jenkins One* to give effect to Vermont orders under the PKPA cannot be disturbed. *See Kemp*, 160 Va. at 286-87, 168 S.E. at 432 (mandate of the Court of Appeals in the initial appeal to enter a decree to effect specific performance must be respected).

II. THE COURT OF APPEALS CORRECTLY RULED THAT THE PKPA CONTROLS THIS CHILD CUSTODY PROCEEDING, NOT DOMA.

Because the law of the case doctrine requires affirmance of the Court of Appeals decision, this Court need not reach the issue of whether the PKPA controls the case. However, should the Court choose to do so, it should find that the Court of Appeals correctly ruled that the PKPA, not DOMA, applies to this dispute.

The Court of Appeals correctly understood that the PKPA was Congress's careful response to the problem of tens of thousands of children being transported across state lines by parents seeking a more favorable judicial forum. Lisa nowhere disputes the bedrock principle that Congress enacted the PKPA specifically to provide that, once a child custody proceeding begins in one state, a second state cannot entertain its own proceeding and must enforce the first state's orders. The Court of Appeals also understood that the federal Defense of Marriage Act ("DOMA"), 28 U.S.C. § 1738C, concerns something else: whether other states would be required to respect as married same-sex couples who got married in other states. Thus, DOMA was not intended to allow the children of same-sex couples to be placed in the same vulnerable state that all children were in prior to the PKPA. The PKPA was necessary to protect children from interstate transportation by forum-

shopping parents, and the Court of Appeals realized that DOMA did not change the rules to leave children of same-sex couples vulnerable to what, in essence, is interstate kidnapping by one parent to gain advantage over another.

The result reached by the Court of Appeals should be affirmed for the additional and independent reason that DOMA simply has no applicability to this dispute. Lisa's argument that Virginia can refuse to respect Vermont's orders depends on her establishing two propositions: (1) that Janet's parental rights derive completely from the civil union, and (2) that DOMA provides an exception to Virginia's PKPA responsibility to honor other orders when parental rights are granted based on a civil union. Both of these arguments are incorrect.

The Vermont Supreme Court held that Janet was a parent to IMJ ***not only*** because of the civil union, but also because Lisa intended to create and did create a parent child relationship between IMJ and Janet. Vermont is in accord with many states, including Virginia, that afford rights to someone who has acted as a parent to a child, even if that person has no legally recognized relationship with the biological parent. Because Janet's parental rights spring from an additional source other than the civil union, DOMA cannot be invoked to challenge the PKPA's applicability here.

Finally, DOMA—the Defense of ***Marriage*** Act—has no applicability to this controversy, because this case does not involve a same-sex ***marriage***. Courts around the country have recognized that Vermont civil unions are not marriages and are not treated as marriages. Specifically, the only courts to consider the applicability of DOMA to nonmarital unions have held that DOMA applies only to marriages and not to other legal relationships.

A. The Court of Appeals Properly Recognized that DOMA Does Not Eviscerate the Careful Jurisdictional Rules Established by the PKPA.

Lisa's argument depends both on the applicability of DOMA to this case and her theory that DOMA eviscerates the PKPA's jurisdictional scheme to allow forum-shopping when same-sex couples have disputes over parental rights. The Court of Appeals assumed without elaboration that the PKPA applied and held that DOMA did not enact the partial repeal of the PKPA that Lisa advocates. While DOMA should be seen as irrelevant to this dispute (*see* Section III(B) and (C), below), the Court of Appeals should be affirmed because it correctly rejected the theory of "repeal by implication" argued by Lisa.

1. DOMA Was Not Intended to Affect the PKPA.

The Court of Appeals recognized that the PKPA is a careful jurisdictional scheme to prevent the very forum-shopping that Lisa has attempted, by requiring all states to enforce the proper custody and visitation orders of other states. *Miller-Jenkins One*, 49 Va. App. at 95, 637 S.E.2d at 334, *quoting Scott v. Rutherfoord*, 30 Va. App. 176, 187, 516 S.E.2d 225, 231 (1999) ("[T]he purpose of the PKPA was to provide for nationwide enforcement of custody orders . . . ."). In the PKPA, Congress mandated a "first in time" rule that precludes other states from revisiting decisions made elsewhere because of substantive law differences. *Henderson v. Justice*, 514 S.E.2d 713, 719 (Ga. Ct. App. 1999); *In re C.A.D.*, 839 P.2d 165, 172 (Okla. 1992); *see also D'Agnese v. D'Agnese*, 22 Va. App. 147, 154-55, 468 S.E.2d 140, 144 (1996) (noting that Virginia law establishes a general jurisdictional principle of "first in time" for custody proceedings).

The Court of Appeals recognized that DOMA does not eviscerate the specific jurisdictional rules established by the PKPA. The court found "no authority holding that either the plain wording of DOMA or its legislative history was intended to affect or partially repeal the PKPA." 49 Va. App. at 100-01, 637 S.E.2d at 336. The court properly recognized that "[t]herefore, any Congressional intent to repeal must be by implication", which is disfavored, especially when the statutes can be reconciled. *Id*. at 101, 637 S.E.2d at 336 (citing *Scott v. Lichford*, 164 Va. 419, 422, 180 S.E. 393, 394 (1935)).

Because the purposes of the PKPA and DOMA do not conflict, the Court of Appeals properly held that the statutes readily can be reconciled. The PKPA was enacted specifically "to extend the requirements of the Full Faith and Credit Clause to custody determinations." *Miller-Jenkins One*, 49 Va. App. at 101, 637 S.E.2d at 337 (citations omitted). By contrast, in passing DOMA, Congress was concerned about "heterosexual marriage" and the ability of "homosexual couples to acquire marriage licenses." *Id.*; *see also* H.R. Rep. No. 104-664, at 18, 44,(1996), *as reprinted in* 1996 U.S.C.C.A.N. 2905, 2922, 2947 (the stated purpose of DOMA, not implicated here, is to allow states to "define the institution of marriage" and not honor "same-sex 'marriage' licenses."). "Nothing in the wording or the legislative history of DOMA indicates that it was designed to affect the PKPA and related custody and visitation determinations." *Miller-Jenkins*, 49 Va. App. at 102, 637 S.E. 2d at 337.

As the Court of Appeals held, DOMA and the PKPA can be reconciled because DOMA did not purport to interfere with the PKPA's careful jurisdictional scheme. Even if there were a conflict, it is notable that the PKPA is the more recent word on Congress's intent, as the PKPA was amended two years ***after*** DOMA to

address visitation orders specifically – the exact type of order at issue here. *See Alexandria Nat'l Bank v. Thomas*, 213 Va. 620, 625, 194 S.E.2d 723, 726 (1973) (the "later expression of the legislative will" controls); *Seaton v. Commonwealth*, 42 Va. App. 739, 759, 595 S.E.2d 9, 19 (2004) (if two statutes conflict, "the more specific statute takes precedence over the more general one"). *See* Pub. Law No. 104-199 (DOMA) (1996) and Public Law No. 105-374 (1998) (explicitly providing that the PKPA covers visitation); *Bruner v. Tadlock*, 991 S.W.2d 600, 603 (Ark. 1999) (Public Law 105-374 sought to "eliminate the hassles, obstacles, and delays that too often confront those who have valid visitation orders and are asking only that federal law be followed." (citing 144 Cong. Rec.151, S12941 (daily ed. Oct. 21, 1998)).

2. Interpreting DOMA to Eviscerate the PKPA Would Lead to Absurd Results.

Lisa's interpretation of DOMA also should be rejected because it violates the canon that "a statute should never be construed in a way that leads to absurd results[.]" *Meeks v. Commonwealth*, No. 062452, 2007 WL 3226201, at *2 (Va. Nov. 2, 2007). Her interpretation would result in a chaotic situation that would encourage any biological parent in a same-sex marriage or civil union to take children to jurisdictions that oppose such unions. Lisa plays up her ties to Virginia (despite the fact that Lisa voluntarily chose to enter into a Vermont civil union, to move with her partner and daughter to Vermont, and to file a dissolution action in Vermont). However, her argument is in no way limited to parents with some tie to the forum they shopped for: if DOMA eviscerates the PKPA, any biological parent in a same-sex marriage or civil union could transport a child to any state hostile to same-sex unions and defeat the purposes of the PKPA. The PKPA was passed precisely to

respond to parents who were successful in taking tens of thousands of children to more favorable forums.[6] Congress's concern for this problem is unaffected by DOMA, the purpose of which, according to the Court of Appeals is to "allow[] a state to deny recognition to same-sex marriage entered into in another state." 49 Va. App. at 102, 637 S.E.2d at 337. Lisa here is attributing to Congress a desire to encourage forum shopping and child snatching when the parents are in a same-sex marriage; nothing whatsoever supports such an interpretation of Congressional intent.

Lisa's interpretation of DOMA also should be rejected because it would create the absurd result of protecting some children of same-sex couples while endangering others. Through various mechanisms, dozens of states respect the parental rights of nonbiological parents, including when that parent is in a same-sex relationship that has no formal legal status under that state's law. Lisa herself points out that many states recognize that visitation can be awarded to one who has served as a psychological parent to the child, and this doctrine frequently has been applied to award parental rights to the same-sex partner of a biological parent when both have raised the child in states that otherwise do not grant formal recognition to the couple's status. *See* Appellant's Br. 30 n. 21, 36-37 n.25. DOMA would not apply to any such nonmarital situation, and any visitation decree from such a state would have to be respected under the PKPA. Additionally, many states that have no formal recognition for same-sex couples still allow the nonbiological parent to adopt the biological parent's child without terminating the biological parent's rights – the same

[6] *Thompson v. Thompson*, 484 U.S. 174, 180-81 (1988) (citing PKPA of 1979: *Joint Hearing on S. 105 before the Subcommittee on Criminal Justice of the Judiciary Committee and the Subcommittee on Child and Human Development of the Committee on Labor and Human Resources*, 96th Cong., 2d Sess., 10 (1980) (statement of Sen. Malcolm Wallop)).

result as a step parent adoption.[7] Still other states will enforce a co-parenting agreement between partners while not giving any formal recognition to that couple's status. Any award of visitation to a nonbiological parent in these examples would be unaffected by DOMA.

The absurdity of Lisa's interpretation perhaps is best illustrated when one considers the fact that Massachusetts, which allows same-sex couples to marry, also recognizes the rights of a psychological parent who is not married to his or her same-sex partner who is the biological parent. Thus, Massachusetts could afford parental rights to a nonbiological mother whether or not she married her partner. According to Lisa, an order granting visitation to the nonbiological mother who did not formalize her relationship would be on stronger legal footing than a visitation award to a nonbiological mother who did formalize the relationship.[8] Nothing in the law supports such an illogical result.

---

[7] In her brief before the Circuit Court, Lisa chastised Janet for not having adopted IMJ, asserting that her failure to do so deprived Janet of standing to claim parental rights. Appellant's Ct. App. Br. 15, JA 997. However, she and an amicus now argue that such adoptions are invalid when the adoptive parent is in a marriage or civil union. Appellant's Br. 27-28 & n.19; Mich. AG Amicus Br. 18-19. While Lisa's previous argument tacitly acknowledged a state's obligation to recognize judgments under the Full Faith and Credit Clause, Lisa now argues that DOMA would allow Virginia to invalidate an adoption decree if the parents were of the same-sex and were married or in a civil union in a state that allows that, while DOMA would not affect Virginia's obligation to respect a second-parent adoption that occurred in a state that has no formal recognition of same-sex couples. Appellant's Br. 36-37.

[8] The same result would also occur in California and New Jersey, which recognize the rights of nonbiological parents who have not formalized their relationship with partners, *see Elisa B. v. Superior Cour*t, 117 P.3d 660 (Cal. 2005); *V.C. v. M.J.B.*, 748 A.2d 539, 552 (2000); but also provide comprehensive recognition of relationships through, respectively, domestic partnerships and civil unions. Cal. Fam. Code §§ 297 *et seq.*; N.J. P.L. 2006, c. 103.

In short, DOMA did not withdraw the PKPA protections from children of a Massachusetts same-sex marriage, leaving them more vulnerable than children of a Maryland different-sex marriage or the children of a Pennsylvania same-sex couple where the nonbiological mother is given parental rights based on her acting as a parent to the child. In this case, the Court of Appeals merely respected Congress's intent to protect children in custody proceedings. The Court of Appeals succinctly disposed of Lisa's fanciful contentions about the demise of Virginia's marriage laws by recognizing that

> [t]his case does not place before us the question whether Virginia recognizes the civil union entered into by the parties in Vermont. Rather, the only question before us is whether, considering the PKPA, Virginia can deny full faith and credit to the orders of the Vermont court regarding IMJ's custody and visitation. It cannot.

Miller-Jenkins One, 49 Va. App. at 102, 637 S.E. 2d at 337.

B. Vermont Civil Unions, and Other Marriage Substitutes, Simply Are Not Covered by DOMA.

Although the Court of Appeals did not need to reach the issue, Lisa's entire DOMA argument fails because of the basic fact that DOMA targets marriages, not civil unions. Lisa fails to cite a single case in which DOMA was applied to a Vermont civil union and neglects to cite authority specifically holding that civil unions and other nonmarital forms of recognition of same-sex couples simply are not covered by DOMA.

In *Bishop v. Oklahoma ex. Rel. Edmondsom*, 447 F. Supp. 2d 1239 (N.D. Okla. 2006), a couple who had a Vermont civil union brought a challenge to DOMA. The court held that the couple lacked standing to challenge DOMA "because their Vermont civil union is not 'treated as a marriage' under Vermont law, as that term

was meant to be understood when Congress passed DOMA." *Id*. at 1247-48. [9] "DOMA did not anticipate the scenario of an alternate form of legally-cognizable relationship." *Id*. at 1248.

The *Bishop* court relied on *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir., *cert. denied*, 127 S. Ct. 396 (2006)). *Smelt* rejected a DOMA challenge brought by a couple who had entered into a California registered domestic partnership. *Smelt* held that the couple lacked standing because they were "not even married under any state law" and that even a valid California domestic partnership was "not by any means a marriage." *Id*. at 683 & n.26. The court so ruled even though the California Supreme Court previously held that, through domestic partnerships, "the Legislature has granted legal recognition *comparable to marriage* both procedurally and in terms of the substantive rights and obligations granted to and imposed upon the partners, which are supported by policy considerations similar to those that favor marriage." *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212, 1223 (Cal. 2005) (citation omitted, emphasis added). *Bishop* and *Smelt* recognize that a relationship status that merely approximates marriage is not covered by DOMA.

Courts in many other states also reject the notion that a Vermont civil union is equivalent to marriage. "The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status." *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 570 (Mass. 2004). The Georgia Court of Appeals likewise held that the Vermont statute

[9] The *Bishop* court did find that two other plaintiffs had standing to challenge Section 3 of DOMA, because in addition to a Vermont civil union, they had been married in Canada. *Id*. at 1249-50.

"expressly distinguishes between 'marriage,' which is defined as 'the legally recognized union of one man and one woman,' and 'civil union,' which is defined as a relationship established between two eligible persons pursuant to that chapter. *Burns v. Burns*, 560 S.E.2d 47, 48-49 (Ga. Ct. App. 2002) (citing 15 Vt. Stat. Ann. § 1201(2), (4)). The court also relied on the "legislative findings accompanying the enactment of the Vermont civil union" which specifically provided that "a system of civil unions does not bestow the status of civil marriage . . . ." *Burns*, 560 S.E.2d at 49 (quoting 2000 Vt. Act 91, § 1(10)). Similarly, in *Langan v. St. Vincent's Hosp.*, 802 N.Y.S.2d 476, 479 (N.Y. Sup. Ct. 2005), appeal dismissed, 850 N.E.2d 672 (N.Y. 2006), a New York court refused to treat a Vermont civil union as a marriage for purposes of wrongful death recovery, noting that "the Vermont Legislature went to great pains to expressly decline to place civil unions and marriage on an identical basis." *Id.*

Another case relied on by Lisa further demonstrates that a civil union is not a marriage under Vermont law. *Rosengarten v. Downes*, 802 A.2d 170, 175 (Conn. App. Ct. 2002) ("Nor is [a civil union] a marriage under our sister state of Vermont's definition of marriage found in § 1201(4) of title 15 of the Vermont Statutes Annotated because it too limits the definition of marriage to those entered between 'one man and one woman.'"). Lisa herself has argued that "civil unions are not the equivalent of marriage, as the term 'marriage' is reserved only for a union between a man and a woman," and that "a Vermont Civil Union is not marriage even in Vermont." Appellee's Ct. App. Br. 7, 9, JA at 989, 991. As Lisa herself points out, Appellant's Br. 28 n.18, Vermont does not treat civil unions in the same manner as marriages. Among other differences, whereas Vermont law does not allow

nonresidents to marry in Vermont if said marriage would be void in the couple's state of residence, Vermont does allow nonresidents to enter civil unions regardless of how the couple's home state treats civil unions. 912 A.2d at 963-65.

The cited cases recognize that Vermont's legislature created a separate and largely "parallel" but discriminatory structure when it created civil unions. It could do so because the controlling Vermont Supreme Court case had held that "the denial of a marriage license . . . is not the claim we address today." *Baker v. State of Vermont*, 744 A.2d 864, 886 (Vt. 1999). "When Vermont passed its bill granting legal recognition to civil unions, it was precise in stating that civil unions were not to be treated as marriages under the law," and in fact the very intent of the Vermont legislature was to create a different status "to circumvent [the] impact" of DOMA." Anita Y. Woudenberg, *Giving DOMA Some Credit: The Validity of Applying Defense of Marriage Acts to Civil Unions Under the Full Faith and Credit Clause*, 38 Val. U. L. Rev. 1509, 1539 (2004).

In short, the basic premise of Lisa's argument – that DOMA has any applicability to a Vermont civil union – is incorrect.

C. DOMA Does Not Apply Because the Vermont Supreme Court Found That Janet Has Parental Rights For Reasons Other Than the Civil Union.

As set forth above, Lisa cannot prevail on her argument that Circuit Courts are free to assume jurisdiction to eviscerate parental rights that Janet has based on her civil union. But Lisa's argument fails for the additional reason that Janet has parental rights under Vermont law completely independent of her civil union with Lisa, thus

rendering DOMA inapplicable. Lisa nowhere addresses this gaping hole in her argument.

Under the Vermont Supreme Court's decision, Janet is a legal parent—***not only*** because IMJ was born of Janet and Lisa's civil union—but for separate and fully independent reasons. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d at 970. The court explained that among the

> [***m]any factors*** [that] are present here that support a conclusion that Janet is a parent [are that] . . . [i]t was the expectation and intent of both Lisa and Janet that Janet would be IMJ's parent. Janet participated in the decision that Lisa would be artificially inseminated to bear a child and participated actively in the prenatal care and birth. Both Lisa and Janet treated Janet as IMJ's parent during the time they resided together, and Lisa identified Janet as a parent of IMJ in the dissolution petition.

Id. (emphasis added). While noting that the civil union is very strong evidence of Janet's parental status, the Vermont Supreme Court explicitly renounced reliance on any sole factor in ruling that Janet is IMJ's parent. 912 A.2d at 971 ("Because so many factors are present in this case that allow us to hold that the nonbiologically-related partner is the child's parent, we need not address which factors may be dispositive on the issue in a closer case.").

Vermont is in keeping with many states, including Virginia, affording parental rights to a person with no biological ties to a child but who has acted as a parent to a child.[10] Many other states also respect the parental bonds between children and their psychological parents. *See T.B. v. L.R.M.*, 786 A.2d 913, 919-20 (Pa. 2002); *Rubano v. DiCenzo*, 759 A.2d 959, 967 (R.I. 2000); *Gestl v. Frederick*, 133 Md. App. 216,

[10] In Virginia, an unmarried non-biological parent of a child can seek custody or visitation if he or she is a "person with a legitimate interest" in the child. Va. Code § 20-124.2(B); *Thrift v. Baldwin*, 23 Va. App. 18, 19, 473 S.E.2d 715, 716 (1996) (reversing trial court that had denied standing to grandparents and sibling).

243, 754 A.2d 1087, 1101 (2000); *Kinnard v. Kinnard*, 43 P.3d 150, 155 (Alaska 2002); *In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005); *Riepe v. Riepe*, 91 P.3d 312, 318 (Ariz. Ct. App. 2004); *V.C. v. M.J.B.*, 748 A.2d at 552; *In re Custody of H.5.H. – K. (Holtzman v. Knott)*, 533 N.W.2d 419, 435-36 (Wis. 1995); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 892-93 (Mass. 1999); *In re E.L.M.C.*, 100 P.3d 546, 561-62 (Colo. Ct. App. 2004); *Middleton v. Johnson*, 633 S.E.2d 162, 167-70 (S.C. Ct. App. 2006); *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1151-52 (Me. 2004). The Vermont Supreme Court cited many of these cases with approval for its holding that Janet is a parent for reasons independent of the civil union, noting that "[i]n these cases, there was *no marriage or civil union* between the partners." 912 A.2d at 972 (emphasis added) (citing *T.B.*, 786 A.2d at 920; *E.L.M.C.*, 100 P.3d at 562; *C.E.W.*, 845 A.2d at 1151-52; *Rubano*, 759 A.2d at 976 ; *E.N.O.*, 711 N.E.2d at 892-93; *In re L.B.*, 122 P.3d at 176; *V.C.*, 748 A.2d at 552).

Thus, Lisa ignores the fact that is fatal to her DOMA argument: Vermont afforded Janet rights based not only on the civil union, but also on her strong parental bond with IMJ. Indeed, in Lisa's first Petition for Appeal to this Court, she specifically argued that Vermont had declared Janet "a *de facto* parent", which she claimed Virginia should not recognize. Pet. for Appeal 4, Question Presented No. 7, JA 1025.

In short, there are many states that might award visitation to a person who has served as a parent to a child, even if that person's biological ties to the child are distant or non-existent. Lisa does not even contend that DOMA authorizes another state to assume jurisdiction over such a situation and reverse the first state's decree. Vermont recognizes Janet as a parent based on many factors, including the fact that

Lisa intended to foster a parental relationship between Janet and IMJ, and succeeded in doing so. *Miller-Jenkins*, 912 A.2d at 970. This result clarifies that DOMA is inapplicable to this dispute.

III. THERE IS NO "PUBLIC POLICY EXCEPTION" TO THE FULL FAITH AND CREDIT REQUIREMENT OF THE PKPA.

Lisa admits that the PKPA was intended to extend to custody and visitation orders the same respect due final judgments under the Full Faith and Credit Clause. Appellant's Br. at 17. She also contends, however, that this extension renders such orders subject to a "public policy exception" that purportedly applies to all judgments under the Full Faith and Credit Clause. *Id.* The first proposition is undeniably correct; the second is completely wrong with no support whatsoever in constitutional law.[11] Indeed, the Court of Appeals' ruling in *Miller-Jenkins One* necessarily decided that the PKPA applies irrespective of any public policy conflict. *See Norfolk*, 107 Va. at 766, 60 S.E. at 97.

Without any authority, Lisa resorts to claiming that the PKPA codified a longstanding public policy exception found in the Full Faith and Credit Clause. *Id.* But there is no public policy exception with regards to *judgments*. The PKPA's purpose was to elevate custody orders—which by definition are not final due to the possibility of changed circumstances—to the status of final judgments under the Full Faith and Credit Clause. *Thompson v. Thompson*, 484 U.S. 174, 180 (1988); *see also* Appellant's Br. at 10 n.7. This was necessary because parents had been able to

[11] Nothing in the Senate Report Lisa cites, regarding a different law than the PKPA (regarding child support obligations), even mentions a "public policy exception." See Petitioner's Opening Br. at 17-18; S. Rep. No. 103-361, *as reprinted in* 1994 U.S.C.C.A.N. 3259.

forum-shop successfully, urging a second state that it could modify the prior state's order, because the order could be modified in the first state, and the second state need only give the order as much respect as the initial state would. *Id.* The PKPA changed this, and now custody orders from the first state must be treated the same as final judgment. *Thompson*, 484 U.S. at 181-82.

The U.S. Supreme Court has made clear that whatever discretion a state court has to apply its own law to a controversy disappears in the face of an order from another state court: "Regarding judgments, however, the full faith and credit obligation is exacting." *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 233 (1998). There is absolutely no public policy exception to a state's duty to honor another state's judgments. *Id.*; *Jaffe v. Accredited Sur. & Cas. Co.*, 294 F.3d 584, 592 (4thCir. 2002) ("But neither a state nor a federal court can refuse to give full faith and credit to the judgment of a state court because of disagreement with the public policy basis for that decision."); *Finstuen v. Crutcher*, 496 F.3d 1139, 1153 (10th Cir. 2007) ("However, with respect to final judgments entered in a sister state, it is clear there is no 'public policy' exception to the Full Faith and Credit Clause: Regarding judgments ... the full faith and credit obligation is exacting.").[12]

This Court has recognized what Lisa does not. In *Coghill v. Boardwalk Regency Corp.*, 240 Va. 230, 396 S.E.2d 838 (1990), this Court held that the Full Faith and Credit Clause mandated respect for a judgment enforcing a gambling debt.

[12] *Nevada v. Hall*, cited by Lisa, did not involve the full faith and credit due a state's orders, as the U.S. Supreme Court explicitly pointed out: "A court may be guided by the forum State's 'public policy' in determining the law applicable to a controversy. *See Nevada v. Hall*, 440 U.S. 410, 421-424, . . . But [this Court's] decisions support no roving 'public policy exception' to the full faith and credit due judgments." *Baker*, 522 U.S. at 233.

This Court did so despite acknowledging that the Commonwealth's public policy against enforcing gambling debts "could scarcely be more forcefully expressed." *Id.* at 232. But far from allowing public policy arguments to vitiate respect for the judgments of another state, this Court wisely observed that "most controversies involving the Full Faith and Credit Clause arise where state policies differ, and if the Clause were not applied in those situations, it would fail where the need for it was the greatest." *Id*. at 234, *citing Morris v. Jones*, 329 U.S. 545, 553 (1947). Thus, this Court held that the Full Faith and Credit Clause "render[s] the foreign judgment immune from reexamination for error." 240 Va. at 233.

Lisa fails to cite any case suggesting there is a "public policy exception" in the PKPA, because there is none. By contrast, other state supreme courts have recognized that the PKPA mandates respect for the orders of other states, even if they violate the forum state's laws or public policy. In *Perez v. Tanner*, 965 S.W.2d 90 (Ark. 1998), the Arkansas Supreme Court reversed a trial court's ruling that a parent had no visitation rights under Arkansas law. *Perez* held that Arkansas could not assume jurisdiction and enforce its own policy choices but instead would have to respect an existing Mississippi court order because "Mrs. Tanner was merely shopping for a forum that would completely deny Mr. Perez's visitation rights," and "[s]uch forum shopping directly contravenes the express purposes of the UCCJA and PKPA." 965 S.W.2d at 94-95. Similarly, the Michigan Supreme Court rejected the contention that Michigan could assume jurisdiction over a custody dispute because "the Iowa proceeding was repugnant to Michigan public policy." *In re Clausen*, 502 N.W.2d 649, 660 (Mich. 1993). Instead, Michigan was obligated under the PKPA to respect the pre-existing Iowa court orders. 502 N.W.2d at 660-662. Lisa's argument

also flies in the face of the unanimous position of dozens of courts recognizing that the PKPA preempts any contrary state law. [13]

Moreover, the "public policy exception" argument is irrelevant because, in awarding Janet visitation rights based on her acting as a parent to IMJ, Vermont was in accord with Virginia public policy. Virginia affords parental rights to persons who are not biological parents, but who have "a cognizable and reasonable interest in maintaining a close relationship with the child." *Thrift*, 23 Va. App. at 20, 473 S.E.2d at 716. Therefore, there is no conflict in the first place, because the Vermont Supreme Court held Janet to be just such a person. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d at 970. Va. Const. art. I, § 15-A, regarding same-sex marriage, is irrelevant to this dispute, because the Attorney General explained that any rights in Virginia that derive not from marriage laws, but "in other statutes or common law" remain intact

---

[13] *See, e.g., Meade v. Meade*, 812 F.2d 1473, 1476 (4th Cir. 1987), *overruled on other grounds, Thompson v. Thompson*, 484 U.S. 174 (1988); *Martinez v. Reed*, 623 F. Supp. 1050, 1054 (E.D. La. 1985), *aff'd without op.*, 783 F.2d 1061 (5th Cir.1986); *Esser v. Roach*, 829 F. Supp. 171, 176 (E.D. Va. 1993); *Ex parte Blanton*, 463 So. 2d 162, 164 (Ala.1985); *Rogers v. Rogers*, 907 P.2d 469, 471 (Alaska 1995); *Atkins v. Atkins*, 823 S.W.2d 816, 819 (Ark. 1992); *In re Marriage of Pedowitz*, 225 Cal. Rptr. 186, 189 (Ct. App. 1986); *In re B.B.R.*, 566 A.2d 1032, 1036 n.10 (D.C. 1989); *Yurgel v. Yurgel*, 572 So. 2d 1327, 1329 (Fla.1990); *In re Marriage of Leyda*, 398 N.W.2d 815, 819 (Iowa 1987); *Wachter v. Wachter*, 439 So. 2d 1260, 1265 (La. App. 1983); *Guardianship of Gabriel W.*, 666 A.2d 505, 508 (Me. 1995); *Delk v. Gonzalez*, 658 N.E.2d 681, 684 (Mass. 1995); *In re Clausen*, 502 N.W.2d 649, 657 n.23 (Mich. 1993); *Glanzner v. State of Missouri*, 835 S.W.2d 386, 392 (Mo. Ct. App. 1992); *Ganz v. Rust*, 690 A.2d 1113, 1118 n.5 (N.J. Super. Ct. App. Div. 1997); *Tufares v. Wright*, 644 P.2d 522, 524 (N.M. 1982); *Leslie L. F. v. Constance F.*, 441 N.Y.S.2d 911, 913 (N.Y. Fam. Ct.1981); *Dahlen v. Dahlen*, 393 N.W.2d 765, 767 (N.D. 1986); *Holm v. Smilowitz*, 615 N.E.2d 1047, 1053-54 (Ohio Ct. App. 1992); *In re Henry*, 951 P.2d 135, 138 (Or. 1997); *Barndt v. Barndt*, 580 A.2d 320, 326 (Pa. Super. Ct. 1990); *Marks v. Marks*, 315 S.E.2d 158, 160 (S.C. Ct. App. 1984); *Brown v. Brown*, 847 S.W.2d 496, 499 (Tenn. 1993); *In Interest of S.A.V.*, 837 S.W.2d 80, 87-88 (Tex. 1992); *State of Utah ex rel. D.S.K.*, 792 P.2d 118, 128 (Utah Ct. App. 1990); *State of Washington v. Carver*, 781 P.2d 1308, 1316 (Wash. 1990); *Arbogast v. Arbogast*, 327 S.E.2d 675, 679 (W. Va. 1984); *Michalik v. Michalik*, 494 N.W.2d 391, 394 (Wis. 1993); *State ex rel. Griffin v. District Court*, 831 P.2d 233, 237 n.6 (Wyo.1992).

after the passage of the amendment. Op. Va. Atty. Gen. 06-003 (2006). Thus, the parental rights available under Va. Code Ann. § 20-124.2(B) and *Thrift*, which are not tied to marriage, are unaffected by the recent constitutional amendment.

IV. THE VERMONT ORDER IS CONSTITUTIONAL.

Having failed to provide any basis for this Court to disturb the Court of Appeals decision in *Miller-Jenkins One*—and the impact of that decision on the instant appeal—Lisa resorts to claiming that the Vermont Order is unconstitutional and therefore should not be enforced in Virginia. As with her arguments regarding the PKPA, her position is without merit. As a threshold matter, the constitutionality of the Vermont Order is not subject to review by this Court. That aside, even were it subject to review by this Court, the Vermont Order clearly does not violate Lisa's constitutional rights.

A. Lisa May Not Collaterally Attack the Constitutionality of the Vermont Order.

The PKPA does not authorize Virginia courts to second-guess the Vermont courts by reviewing the constitutionality of the Vermont court's order. In registering a foreign order under the PKPA, a court is to look no further than the four corners of the order. By the plain terms of the PKPA, a state court "*shall*" enforce the custody or visitation order of another state as long as the order was "made consistently with the provisions of [the PKPA] . . . ." 28 U.S.C. § 1738A(a). An order is consistent with the provisions of the PKPA if (1) the court that made the order had jurisdiction under the laws of its own state, and (2) one of the conditions of 28 U.S.C. § 1738A(c)(2) is met (here, that the state "had been the child's home State within six months before the date of the commencement of the proceeding and the child is

absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State." 28 U.S.C. § 1738A(c)(2)(A)). Both of the conditions are met; accordingly, the courts of Virginia must enforce the order.

Indeed, this is a general principle of full faith and credit. "When considering questions of full faith and credit, the Virginia court is not concerned with whether the foreign judgment is legally correct. The Virginia court's inquiry focuses on whether the foreign court had jurisdiction to enter the judgment." *Wright v. Eckhardt,* 267 Va. 24, 27, 591 S.E.2d 668, 670 (2004). A party may not avoid the operation of full faith and credit by collaterally attacking the constitutionality of the foreign order, unless the alleged unconstitutionality goes to jurisdiction. *See, e.g., Stewart v. Stewart*, 289 S.E.2d 652, 653-55 (W. Va. 1980) (Granting full faith and credit to Virginia custody and visitation order in a pre-PKPA case, notwithstanding biological father's contention that the Virginia order violated his constitutional rights.)

Despite Lisa's dangerous argument to the contrary, the Vermont courts properly determined that Vermont had jurisdiction over this custody dispute, and it would not suit the Commonwealth well for this Court to second-guess that decision. The PKPA confers jurisdiction on a state that was the child's home state within the six months prior to the filing (undisputed here), and when that state's own law confers jurisdiction. 28 U.S.C. § 1738A(c)(1), (2). Lisa challenges the latter point—despite the fact that she herself filed the custody action in Vermont—arguing that Vermont law should be interpreted to deny civil unions to nonresidents from states

that forbid civil unions. *See* Appellant's Br. 38-42.[14] Lisa presented this argument to the Vermont Supreme Court, which rejected it based on a thorough analysis of the statute's plain language, legislative history, and subsequent interpretation. *Miller-Jenkins*, 912 A.2d at 962-65. Janet respectfully submits that this Court should reject, as did the Court of Appeals, Lisa's invitation to have Virginia question the Vermont Supreme Court's determination of Vermont law. *See* 49 Va. App. at 98, 637 S.E.2d at 335 ("Lisa cites no authority, and we know of none, that permits us to rule that the supreme court of another state incorrectly interpreted its own law. The contrary is well established . . . .") (citing *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159 (1825).

While the courts of this state are foreclosed under the PKPA from considering Lisa's constitutional arguments irrespective of Vermont's rationale, it is noteworthy that Lisa **waived** these arguments in Vermont, thus making her protestation that the Vermont Supreme Court "refused to address" this point ring quite hollow. *See* Appellant's Br. 14 n.11. Because the Vermont court has jurisdiction over this custody and visitation dispute, any constitutional questions had to be raised in that forum. In holding that the constitutional "argument was not adequately raised below and has been waived," *Miller-Jenkins*, 912 A.2d at 971, the Vermont Court was following basic appellate procedural rules that apply in Virginia and probably every other jurisdiction. It is untenable to suggest that a litigant can waive issues in one jurisdiction and then ask a court in another jurisdiction to consider the same

[14] Lisa attempts to downplay the fact that she invoked the jurisdiction of the Vermont courts in filing for the dissolution of the civil union by arguing that she could not file anywhere else. This contention is not only legally irrelevant to the question of whether Vermont had jurisdiction over the custody dispute but is also factually questionable. *See Alons v. Iowa Dist. Ct.*, 698 N.W.2d 858 (Iowa 2005).

arguments by impugning the first court's willingness to consider the argument. Neither the PKPA nor sound judicial policy allows her to do so.

B. The Vermont Order Does Not Violate Lisa's Constitutional Rights.

Lisa's contention that the Vermont visitation order violates her constitutional rights is based on the faulty premise that Lisa is IMJ's sole parent and Janet is a legal stranger. This is simply not the case. The Vermont Supreme Court – which has sole jurisdiction over this dispute – determined that Janet is in fact IMJ's legal parent, and such a determination does not violate Lisa's constitutional rights.

The Vermont Supreme Court held that Janet is IMJ's parent based on "many factors." In addition to the fact that IMJ was born during a legal union between Lisa and Janet, the court noted that:

> It was the expectation and intent of both Lisa and Janet that Janet would be IMJ's parent. Janet participated in the decision that Lisa would be artificially inseminated to bear a child and participated actively in the prenatal care and birth. Both Lisa and Janet treated Janet as IMJ's parent during the time they resided together, and Lisa identified Janet as a parent of IMJ in the dissolution petition. Finally, there is no other claimant to the status of parent, and, as a result, a negative decision would leave IMJ with only one parent.

Miller-Jenkins, 912 A.2d at 970.

Vermont is well within its sovereign authority to define parenthood in this manner. Lisa's contention that biology and adoption are the only valid determinants of parenthood has been rejected by the U.S. Supreme Court. In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the Court considered the rights of the biological father of a child who was born during the mother's marriage to another man. The biological parent had established a relationship with the child and had not been shown to be unfit. Nonetheless, the Court held that California could impose an irrebuttable

presumption that the husband was the father of the child. In so doing, the Court recognized that legal parenthood is a construct of state law that need not equate with biological relationship. "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." 491 U.S. at 129-130. In other words, Vermont's defining who constitutes a parent does not infringe any constitutional rights.

Vermont's decision to treat Janet as a parent is neither arbitrary nor unusual. Courts across the country have adopted the concept of *de facto* parenthood, which recognizes that a person who, with the encouragement of the biological parent, assumes parental responsibilities and maintains a parental relationship with the child may be considered that child's parent. *See, e.g.*, Appellant's Br. 36-37 n.25; *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999); *Clifford K. v. Paul S.*, 619 S.E.2d 138 (W. Va. 2005); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000); *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001); *In re E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004); *In re Parentage of L.B.*, 89 P.3d 271 (Wash. Ct. App. 2004), *aff'd in part, rev'd in part*, 122 P.3d 161 (Wash. 2005), *cert. denied*, 126 S. Ct. 20221 (2006); *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004); *Janice M. v. Margaret K.*, 910 A.2d 1145 (Md. Ct. Spec. App. 2006).[15]

[15] Contrary to Lisa's suggestion, a decision to register the Vermont order does not "put Virginia on the wrong side"—or on any side—in the question of whether to recognize *de facto* parenthood. In registering the Vermont order, the *only* thing Virginia recognizes is that Vermont issued a visitation order, and that it had jurisdiction to do so. This case does not implicate Virginia's ability to develop its own substantive law on this issue.

Neither the case law of this Court nor the United States Supreme Court addressing third-party visitation supports Lisa's constitutional claim. The leading U.S. Supreme Court case, *Troxel v. Granville*, 530 U.S. 57 (2000), invalidated an award of visitation to paternal grandparents over the objection of the mother, under a Washington statute that allowed "any person" to petition for visitation of a child at "any time." The plurality ruled on very narrow grounds. First, it noted that the Washington statue was "breathtakingly broad," in that it allowed anyone to seek visitation, with "no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever." 530 U.S. at 67. Second, the award of visitation was based on the judge's "mere disagreement" with the mother's assessment of the children's best interest, with no "special factors that might justify the State's interference with [the mother]'s fundamental right to make decisions concerning the rearing of her two daughters." *Id.* at 68. Finally, the Court noted that the mother had never sought to deny the grandparent's visitation altogether; she simply disagreed about how much visitation they should get. "Significantly, many other States expressly provide by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party." *Id.* at 71.

Notably, both the plurality and the concurring opinion of Justice Souter expressly declined to create a requirement that harm to the child must be shown before a third party could be granted visitation over the objections of the parent. 530 U.S. at 73, 76-77. Instead of adopting such a *per se* rule, they recognized, along with Justice Kennedy, that the constitutional issues involved in third party visitation must

be "elaborated with care," based on the facts of each particular case. *Id.* at 73, 101-02.

In contrast to the "breathtakingly sweeping" statute at issue in *Troxel*, courts that have recognized the *de facto* parenthood doctrine have done so in narrowly defined situations, while carefully considering the rights of biological parents. Indeed, *Troxel* supports the recognition of *de facto* parents where the legal parent has encouraged and fostered the relationship, as legal recognition reflects the legal parent's wishes. Thus, many courts have stressed the fact that the parent-like relationship between the child and the *de facto* parent was actively fostered and encouraged by the biological parent. *See Middleton v. Johnson*, 633 S.E.2d 162, 168-69, (S.C. Ct. App. 2006); *E.N.O.*, 711 N.E.2d at 891; *V.C v. M.J.B.*, 748 A.2d at 551; *Clifford K.*, 619 S.E. 2d at 156-57; *Janice M.*, 910 A.2d at 1152. In such circumstances, the biological parent has already made the decision to treat the other party as a parent. The court's role is simply to protect the child from the severance of that critical relationship:

> [W]hen a legal parent invites a third party into a child's life, and that invitation alters a child's life by essentially providing him with another parent, the legal parent's rights to unilaterally sever that relationship are necessarily reduced. The legal parent's active fostering of the psychological parent-child relationship is significant because the legal parent has control over whether or not to invite anyone into the private sphere between parent and child. Where a legal parent encourages a parent-like relationship between a child and a third party, "the right of the legal parent [does] not extend to erasing a relationship between [the third party] and her child which [the legal parent] voluntarily created and actively fostered."

Middleton, 633 S.E.2d at 169 (quoting *V.C.*, 748 A.2d at 552). Additionally, many courts have held specifically that the recognition of *de facto* parents is fully consistent with *Troxel*. *In re E.L.M.C.*, 100 P.3d at 551-52; *In re Parentage of L.B.*, 89 P.3d at

285; *T.B. v. L.R.M.*, 786 A.2d at 919-20; *Rubano*, 759 A.2d at 967; *Gestl v. Frederick*, 754 A.2d 1087, 1101 (Md. Ct. Spec. App. 2000).

In this case, as the Vermont Supreme Court explained, Lisa and Janet made the decision to bear a child jointly. They jointly chose a sperm donor. Janet was present at the child's birth. The child was given both Lisa's and Janet's last name. Janet shared the parenting responsibilities with Lisa. In other words, Lisa consented to and participated in the creation of the parent-child relationship between Janet and the child. Under these circumstances, there is no constitutional infirmity in a court order that allows that relationship to continue.

This Court's decision in *Williams v. Williams*, 256 Va. 19, 501 S.E.2d 417 (1998), is not to the contrary. In that pre-*Troxel* case, the Court interpreted Virginia's third-party visitation statute, Va. Code § 20-124.2(B), to require a finding of potential harm to the child before visitation is awarded to a non-parent. Like *Troxel*, *Williams* dealt with a grandparents' request for visitation over the objections of the parents. The Court did not consider a situation in which a parent-child relationship is actively fostered by the biological parent. Nor did the *Williams* case purport to address the question of who might be considered a "parent."[16]

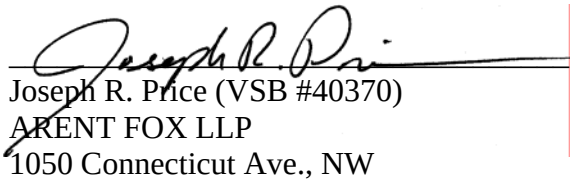
[16] The other Virginia case relied upon by Lisa, *Griffin v. Griffin*, 41 Va. App. 77, 581 S.E.2d 899 (2003), is a Court of Appeals decision with no binding authority over this Court. In any event, *Griffin*, like *Williams* and *Troxel*, did not consider the question of whether the Constitution limits who may be considered a "parent." And, as the Court of Appeals subsequently recognized, neither *Griffin* nor *Williams* implies that "rights analogous to the constitutional rights enjoyed by a parent may not be established by other means, the most salient of which are court-adjudicated findings that a non-parental actor, such as a grandparent, is acting and will continue to act in accordance with the best interests of the child and that the non-parental party is a proper custodian." *Denise v. Tencer*, 46 Va. App. 372, 388, 617 S.E.2d 413, 421 (2005).

In sum, both Lisa and IMJ treated Janet as IMJ's parent, and Janet has always acted as such. The Vermont courts' recognition of her parental status does not violate anyone's constitutional rights.

V. CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,



Joseph R. Price (VSB #40370)
ARENT FOX LLP
1050 Connecticut Ave., NW
Washington, DC 20036-5339
202-775-5769 office
202-857-6395 facsimile

Gregory R. Nevins, Esq.
Lambda Legal Defense & Education Fund, Inc.
730 Peachtree Street NE #1070
Atlanta, GA 30308
404-897-1880 ext. 230 office
404-897-1884 facsimile

Rebecca Glenberg (VSB# 44099)
American Civil Liberties Union of Virginia
Foundation, Inc.
530 E. Main Street, Suite 310
Richmond, VA 23219
(804) 644-8080 office
(804) 649-2733 facsimile

CERTIFICATE PURSUANT TO RULE 5:18(a)

The undersigned counsel hereby certifies that:

1. Counsel for Appellee, Janet Miller-Jenkins, are:

Joseph R. Price (VSB #40370)
ARENT FOX LLP
1050 Connecticut Ave., NW
Washington, DC 20036-5339
202-775-5769 office
202-857-6395 facsimile

Rebecca Glenberg (VSB# 44099)
American Civil Liberties Union of Virginia Foundation, Inc.
530 E. Main Street, Suite 310
Richmond, VA 23219
(804) 644-8080 office
(804) 649-2733 facsimile

Gregory R. Nevins (not admitted in Virginia)
Lambda Legal Defense & Education Fund, Inc.
730 Peachtree Street NE #1070
Atlanta, GA 30308
404-897-1880 ext. 230 office
404-897-1884 facsimile

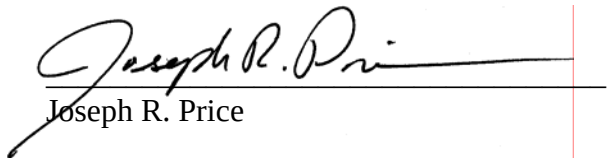
2. Counsel for Appellant, Lisa Miller-Jenkins, are:

Mathew D. Staver
Liberty Counsel
1055 Maitland Center Commons, Second Floor
Maitland, FL 32751
(800) 671-1776

Rena M. Lindevalsen
Liberty Counsel
P.O. Box 11108
Lynchburg, VA 24506
(800) 671-1776

3. A copy of Appellee's Brief has been mailed on this ___ day of November, 2007 to the above-listed counsel for Petitioner.

4. Seven copies have been hand filed with the Clerk of the Supreme Court of Virginia on this ___day of November, 2007.



Joseph R. Price