In her opening brief, Appellant Janet Miller-Jenkins explained the simple proposition that the pendency of a Vermont child custody proceeding precluded Virginia from hearing an action regarding the same parental rights questions pending in Vermont. This result is mandated both by the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C.A. § 1738A, and Virginia's Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Va. Code Ann. § 20-146.1 *et seq.*

Appellee Lisa Miller-Jenkins does not dispute the general principle that the PKPA and UCCJEA preclude a second state from considering custody/visitation issues when another state is already doing so. Instead, she attempts an end run around those laws. First, Lisa wrongly argues that the Frederick County Circuit Court ("Virginia Court") acted properly in assuming jurisdiction because the Rutland County Family Court in Vermont ("Vermont Court") incorrectly applied the law *of Vermont*. A Virginia court has no power to substitute its view of Vermont law for the Vermont Court's, or to examine the underlying merits of the Vermont court decision.

Second, Lisa argues that the Vermont custody action does not preclude a Virginia court from hearing a *parentage* action that declares Lisa a parent. Janet has never disputed that Lisa also is a parent of IMJ.[1] However, no matter how the Virginia action is characterized, whether as an action to determine parentage, visitation, custody, or something else, the Virginia Court lacks jurisdiction and authority to declare that *no other person* has parental or custodial rights with respect to IMJ, because that issue is reserved exclusively to the Vermont court by the PKPA and the UCCJEA.

Third, Lisa argues that the UCCJEA does not apply because the Vermont proceeding is not a "child custody proceeding" and Janet is not even a "person acting as a parent," much less a parent, under the UCCJEA. It is pursuant to Lisa's explicit request that the Vermont Court is determining the custody and visitation of IMJ. Additionally, Janet not only is a parent who has cared for IMJ since birth, she is plainly a "person with a legitimate interest" that Virginia permits

to seek custody under its own law.[2]

Fourth, Lisa incorrectly argues that the Virginia Court's assertion of jurisdiction is validated by both 28 U.S.C. § 1738, the federal "Defense of Marriage Act" ("DOMA"), which she claims overrides the PKPA, and by Va. Code § 20-45.3, Virginia's "Affirmation of Marriage Act" ("AMA"), because Janet and Lisa had a civil union that Virginia may ignore. Appellee is wrong on both counts. DOMA neither applies to civil unions nor authorizes exceptions to the PKPA. The PKPA speaks directly to the jurisdictional issue, as does a post-DOMA amendment to the PKPA, to stress its applicability to visitation disputes.

The AMA is likewise inapplicable to this case. By its plain terms, it applies only to the "exclusive benefits of marriage." It thus does not alter the pre-existing rights of unmarried persons. In Virginia, unmarried non-biological parents have standing to seek custody or visitation. Moreover, even if the AMA otherwise could be interpreted to permit the exercise of jurisdiction by the Virginia Court, it would be preempted by the PKPA, which expressly preempts state laws that purport to permit the exercise of jurisdiction where the PKPA precludes it.

Finally, Lisa argues that the Vermont Court's grant to Janet of parental rights violates her federal due process rights. This argument was never raised below and cannot be raised now. Further, this is a substantive issue for Vermont to consider in determining the custody and visitation rights of the parties; it is emphatically not a basis for Virginia to assume jurisdiction. Moreover, a court does not infringe a biological parent's due process rights when the parent chooses to create a family with and cede exclusive parental rights in favor of shared rights with a non-biological parent, as Lisa did here by raising IMJ with Janet and entering into a civil union with Janet prior to IMJ's birth.

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[1] The parties are referred to by their first names and their minor child only by initials.

[2] Lisa attempts to belittle Janet's relationship with IMJ by noting Janet is not on IMJ's birth certificate. Virginia's refusal to list same-sex parents on a birth certificate is under review by the Virginia Supreme Court.

I. TO AVOID THE PKPA AND UCCJEA, LISA IMPROPERLY ASKS THIS COURT TO REVISIT ISSUES OF VERMONT LAW.

Lisa asserts that Virginia validly has jurisdiction because the Vermont Court's orders are improper under Vermont law. If this were true, Lisa has a remedy in the Vermont appellate system, not here. Indeed, Lisa already has filed an appeal in Vermont.[3] Lisa fails to cite a single case suggesting that Virginia can take jurisdiction to examine whether another state applied its law correctly. Lisa's argument is flatly contrary to the PKPA, the UCCJEA, and Virginia law.

The Virginia Supreme Court repeatedly has held that a foreign court's decision interpreting its own law is "controlling authority in the courts of all other States as well as in the federal courts. This principle applies even where the construction given by the foreign court to its law is directly opposite to the construction the domestic court gives to its own law." *Mathy v. Com. Dept. of Taxation*, 253 Va. 356, 360, 483 S.E.2d 802, 804 (1997), quoting *King v. Forst*, 239 Va. 557, 561, 391 S.E.2d 60, 62 (1990).

This general rule is even more settled as to custody matters. The PKPA flatly prohibits a second state from revisiting the merits of the first state's determinations of custody and visitation as a basis to assume jurisdiction. 28 U.S.C. § 1738A(g), (h); *In re Clausen*, 442 Mich. 648, 669, 502 N.W.2d 649, 657 (1993). As the Supreme Court of Michigan held, a different rule would "permit the forum state's view of the merits of the case to govern the assumption of jurisdiction . . . ." *Id.* at 670, 502 N.W.2d at 658.

Lisa's claim that Virginia has jurisdiction because the Vermont Court's decisions are inconsistent with *Virginia* law, is also foreclosed by the PKPA. The law of Vermont is applicable to the dispute, irrespective of whether it differs from Virginia law. *Clausen*, 442 Mich. 648, 670,

[3] Lisa also tries to blame her affirmative requests for child support and to establish rights of Janet's visitation on her use of Vermont "pro se forms". Appellee's Br. at 5. Notably, Lisa wrote the word "supervised" next to visitation and declined to check all the boxes, evidencing deliberate choices. JA 17. This court cannot write into the PKPA an exception for pro se litigants who do not get the result they desired. Moreover, Lisa has been represented by counsel in Vermont and Virginia throughout the vast majority of these proceedings.

502 N.W.2d at 658; *Perez v. Tanner*, 332 Ark. 356, 368, 965 S.W.2d 90, 95 (1998) (holding that "the law of the foreign state, not Arkansas law" governed the custody dispute).

II. THE PKPA AND UCCJEA BAR THE VIRGINIA COURT FROM DETERMINING JANET'S PARENTAL AND CUSTODIAL RIGHTS IN A "PARENTAGE ACTION."

Lisa next seeks to escape the PKPA and UCCJEA by arguing that the Virginia proceeding was simply a "parentage action" and neither a proceeding for a "custody or visitation determination" under the PKPA, nor a "child custody proceeding" under the UCCJEA. The record clearly refutes Lisa's position. Lisa did not merely seek a declaration of her (uncontested) parentage; she also sought and received an order cutting off Janet's parental and custodial rights to IMJ. See VA Ct. Order of 10/15/04 at 1-2, JA 468-69 (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]*.") (emphasis added). Such proceedings are expressly subject to the PKPA and UCCJEA.

Lisa mistakenly relies upon *Sheila L. on Behalf of Ronald M.M. v. Ronald P.M.*, 195 W.Va. 210, 465 S.E.2d 210 (1995), in which the West Virginia Supreme Court held that a prior Ohio parentage action was not also a "custody determination" under the PKPA. This was because Ohio law mandated that a decision on custody or visitation be "separate from the parentage action." *Id*. at 221, 465 S.E.2d at 221. *Sheila L.* makes clear that the action below *is* subject to the PKPA and UCCJEA, because the action below includes a decision on *another per*son's parental or custodial rights.[4]

Lisa's attempt to distinguish *Paternity of M.R.*, 778 N.E.2d 861, 864 (Ind. Ct. App. 2002)

[4] Lisa's other cited cases are simply inapposite. Those cases recognize that the PKPA has been held not to apply to neglect and dependency proceedings because they do not implicate Congress's interest in preventing a parent from seeking a more favorable forum. *L.G. v. People*, 890 P.2d 647, 661-62 (Colo. 1995); *see also State ex rel. Dept. of Human Serv. v. Avinger*, 104 N.M. 255, 257, 720 P.2d 290, 292 (1986).

is unpersuasive. See Appellee Br. at 15 n.3. As Lisa concedes, the *M.R.* court ruled that the underlying paternity action there involved a "custody determination" under the PKPA because it would "also have resulted in a custody decree." *Id*. The same occurred here. A proceeding that determines who will *not* have custody falls under the PKPA. *Guernsey v. Guernsey*, 794 So.2d 1108, 1110 (Ala. Civ. App. 1998); *In Interest of L.C.*, 857 P.2d 1375, 1377 (Kan. App. 1993).

III. NOTHING IN DOMA ALTERS THE COMMAND OF THE PKPA THAT VIRGINIA DECLINE JURISDICTION.

Lisa is incorrect in arguing that DOMA, 28 U.S.C. § 1738C, amends the PKPA *sub silentio* and authorizes Virginia to substitute its substantive law and public policies for Vermont's. DOMA has no impact on the PKPA and there is simply no basis for the argument that the marriage-based concerns of DOMA were meant to affect federal child welfare policies against kidnapping children and forum shopping in custody matters.

A. DOMA DID NOT REPEAL OR AMEND THE PKPA.

DOMA does not concern custody and does not trump the PKPA, which is Congress' first and last word on the issue of which state has jurisdiction over a custody/visitation dispute. The PKPA protects children by preventing jurisdictional gamesmanship and unilateral moves. The PKPA was enacted to "remedy the inapplicability of full faith and credit requirements to custody determinations," *Thompson v. Thompson*, 484 U.S. 174, 181 (1988), and to end jurisdictional disputes over custody. *In re Clausen*, 442 Mich. at 669, 502 N.W.2d at 657 ("The congressionally declared purpose of the PKPA is to deal with inconsistent and conflicting laws and practices by which courts determine their jurisdiction to decide disputes between persons claiming rights of custody"). 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." H.R. REP. 104-664, 18, 44, 1996 U.S.C.C.A.N. 2905, 2922, 2947. DOMA does not address custody or visitation.

Congress had no intent for DOMA to amend the PKPA. On its face, the language of DOMA does not apply to the PKPA, nor is there any indication whatsoever in the Congressional record that Congress meant to change or repeal the PKPA by passing DOMA. *See* H.R. Rep. No. 104-664 (1996); 142 Cong.Rec. S10100-02 (1996). Given this lack of evidence of Congressional intent to repeal or amend the PKPA, to find otherwise would be a violation of the "cardinal rule . . . that repeals by implication are not favored." *Morton v. Mancari*, 417 U.S. 535, 549-50 (1974) (citing *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *Wood v. United States*, 16 Pet. 342--343, 363, 10 L.Ed. 987 (1842); *Universal Interpretive Shuttle Corp. v. Washington Metro. Area Transit Comm'n*, 393 U.S. 186, 193 (1968)).

Moreover, contrary to Lisa's understanding of and reliance on the order of passage, Congress amended the PKPA more recently, with no indication that it sought to leave children like IMJ unprotected. To the contrary, Congress amended and strengthened the PKPA two years **after** DOMA was enacted to cut off arguments that it did not apply to visitation proceedings. *See* Pub. Law 104-199 (DOMA) (1996) and Public Law No. 105-374 (1998) (explicitly providing that the PKPA covers visitation); *Bruner v. Tadlock*, 338 Ark. 34, 39-40, 991 S.W.2d 600, 603 (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))). The PKPA, thus, is Congress's latest expression of its intent and therefore must be enforced as written. *See Alexandria Nat. 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"). Obviously, if Congress had intended that children's relationships with certain non-biological parents be made more vulnerable to jurisdictional differences in law and policy, it would not have further strengthened the PKPA's absolute control of forum choice regarding visitation, a right commonly enjoyed by such parents and children even without a

marriage or civil union. See note 8, and accompanying text, *infra.*

B. DOMA DOES NOT APPLY TO VERMONT CIVIL UNIONS.

Assuming, *arguendo*, that DOMA somehow amended the PKPA, DOMA is nevertheless inapplicable here because it does not apply to Vermont civil unions, which are not "treated as a marriage" under Vermont law. 28 U.S.C. § 1738C; Vt. Stat. Ann. tit. 15 sec. 1201(4) (2003). Lisa herself has stated "civil unions are not the equivalent of marriage, as the term 'marriage' is reserved only for a union between a man and a woman," Appellee's Br. at 16, and that "a Vermont Civil Union is not marriage even in Vermont." *Id*. at 17 citing *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002); *see also* Appellee's Br. at 4 n.1 (The Vermont Supreme Court allowed the legislature to devise "some other 'alternative legal status to marriage for same-sex couples,'" citing *Baker v. State*, 744 A.2d 864, 866 (Vt. 1999)).

Vermont's legislature created a separate and parallel but discriminatory structure when it created civil unions. It could do so because the Vermont Supreme Court held that "the denial of a marriage license . . . is not the claim we address today." *Baker*, 744 A.2d at 887.[5] "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." 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). "Although the Vermont legislature had the option of legalizing same-sex marriages, it chose to create the civil union, a separate entity with separate treatment, rights, and responsibilities under the law, because the Vermont legislature knew of both federal and state DOMAs addressing the recognition of same-sex marriages and hoped to circumvent their impact." Woudenberg at 1539 (citation omitted).[6]

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[5] In contrast, the Massachusetts Supreme Court rejected civil unions as equal to marriage. *In re Opinions of the Justices to the Senate*, 440 Mass. 1201, 1206, 802 N.E.2d 565, 569 (2004). "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." *Id.* at 1207, 802 N.E.2d at 570.

[6] None of the law review articles cited by Lisa is to the contrary. Those articles do not address

Accordingly, because DOMA does not concern custody or apply to Vermont civil unions, it has no application here.

IV. THE DEFINITIONAL PREREQUISITES OF THE UCCJEA ARE MET.

Lisa seeks to avoid the UCCJEA by ignoring its plain definition of "child custody proceeding" as "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue." Va. Code § 20-146.1. Lisa's own complaint put legal custody, physical custody, and visitation at issue in the Vermont Court; therefore, the Vermont action is a "child custody proceeding." Compl. for Dissolution at VT Rec. 32, JA 98; VT Ct. Order of 11/17/04 at 1.[7] Section 20-146.1 goes on to state that "child custody proceeding" "includes" certain types of proceedings, but the list is not exhaustive. Notably, the list does not list a change of custody proceeding or actions for custody by a parent who has moved but is not seeking a legal separation or divorce. If it were a complete list, there would have been no need to separately list matters that can affect custody, like juvenile delinquency, that are *excluded* from the definition of child custody proceeding—a list that does not exclude the current action. *See* Va. Code § 20-146.1.

Lisa is also incorrect in asserting that Janet is not a "person acting as a parent" under the UCCJEA because she does not "claim[] a right to legal custody under the laws of this Commonwealth." Va. Code Ann. § 20-146.1. Lisa does not dispute that Virginia broadly defines who is a "person with a legitimate interest" and allowed to seek custody. Va. Code § 124.2(B); *Thrift*, 23 Va. App. at 18. Instead, she erroneously argues that the AMA precludes a same-sex partner from seeking custody. The AMA purports to void certain unions, contracts, and other arrangements only to the extent that they bestow an *exclusive* benefit of marriage. However, in Virginia, an unmarried non-biological parent of a child may seek custody or visitation if he or she

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whether a second state's court can assume jurisdiction in a custody/visitation dispute, when the first court began issuing rulings before any action was filed in the second state. This case does not present the issue of how a "first in time" Virginia court should resolve these custody issues.

[7] Lisa seizes on the Vermont Court's use of the term "parent-child contact" in its June 2004 order; but that term is expressly defined to mean "visitation." Vt. Stat. Ann. tit. 15, § 664(2).

is a "party with a legitimate interest" in the child. Va. Code § 20-124.2(B); *Thrift v. Baldwin*, 23 Va. App. 18, 473 S.E.2d 715 (1996) (reversing trial court that had denied standing to grandparents and sibling). The AMA does not affect "rights or privileges not exclusive to the institution of marriage" and does "not depriv[e] any individual rights currently available to all citizens." *See* Letter from Virginia Attorney General Jerry W. Kilgore to Delegate Robert G. Marshall of 4/21/04. Indeed, many states specifically recognize the parental rights of non-biological parents who are same-sex partners such as Janet, even though those states have statutes prohibiting same-sex marriage and do not grant civil unions. *See, e.g.*, *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1151 (Me. 2004); 19-A Maine Rev. Stat. Ann. § 701; *See also T.B. v. L.R.M.*, 567 Pa. 222, 298, 786 A.2d 913, 917 (2001); 23 Pa.C.S.A § 1704; *In re A.B.*, 818 N.E.2d 126 (Ind. Ct. App. 2004); Ind. Code § 31-11-1-1; *In re E.L.M.C.*, 100 P.3d 546, 562 (Colo. Ct. App. 2004); Colo. Rev. St. § 14-2-104. Accordingly, because that act does not affect pre-existing rights afforded unmarried persons and does not apply unless one is seeking a benefit exclusive to marriage, it has no bearing here.

Moreover, as fully set forth in Appellant's opening brief (Opening Br. at 21-23)—and unrefuted by Lisa—the PKPA preempts the AMA even if there were a viable argument that the AMA permits the exercise of jurisdiction in this matter in contravention of the PKPA's clear bar.

V. LISA HAS WAIVED ANY CONSTITUTIONAL CLAIM AND HAS SUFFERED NO CONSTITUTIONAL INJURY.

For the first time, Lisa now argues that the Vermont orders violate her federal due process rights. This argument is clearly precluded by Virgina appellate rules. Va. Code § 8.01-384. As Lisa neither presented the argument to the trial court in her pleadings nor at oral argument, it is waived. *See Zipf v. Zipf*, 8 Va. App. 387, 392, 382 S.E.2d 263, 265 (1989).

Moreover, Lisa's argument is also improper because her complaint about the Vermont Court's order must be directed to the courts of that state and is not a basis for a jurisdictional change. Lisa fails to cite any case suggesting that a court in one state can take jurisdiction over a

custody/visitation dispute because it believes that the first state is misreading the Constitution.

Further, Lisa is incorrect in asserting that absolute and exclusive parental rights are guaranteed to her by *Troxel v. Granville*, 530 U.S. 57 (2000), as a biological parent. Even if Janet were not also a legal parent, many post-*Troxel* cases have found that a child's continuing contact with her second, non-biological parent is not subject to the legal parent's absolute veto. *See, e.g.*, *E.L.M.C.*, 100 P.3d at 562.[8] Indeed, last year this Court held that a parent waives rights under *Troxel* when she asks for a court to award visitation to another. *Merritt v. Gray*, 2004 WL 1959352, at *6 (Va. App. 2004). Parental autonomy is adequately safeguarded by the requirement of a showing that the legal parent consented to and fostered the second parent-child relationship. *T.B.*, 786 A.2d at 229; *A.B.*, 818 N.E.2d at 132. Once the parent makes the decision and permits an important parental bond to form over time, the child may be protected by the State from the "emotional harm . . . intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent under any definition of that term." *In re E.L.M.C.*, 100 P.3d at 561. In short, having created the parental bond, a legal parent cannot terminate that bond unilaterally. *T.B.*, 786 A.2d at 232 (a legal parent's rights "do not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered").

CONCLUSION

For these reasons the Virginia Court's exercise of jurisdiction must be reversed and this matter remanded with instructions for the Virginia Court to enforce the Vermont Court's orders.

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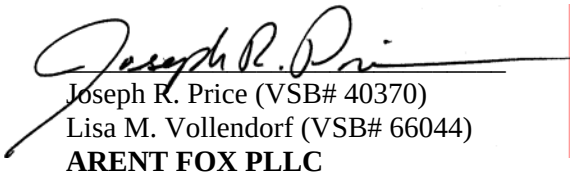
[8] *See also In re Bonfield*, 97 Ohio St.3d 387, 393-94, 780 N.E.2d 241, 247-48 (2002); *T.B. v. L.R.M.*, 567 Pa. 222, 233-34, 786 A.2d 913, 919-20 (Pa. 2002); *Rubano v. DiCenzo*, 759 A.2d 959, 967 (R.I. 2000); *Gestl v. Frederick*, 133 Md. App. 216, 243, 754 A.2d 1087, 1101 (2000); *A.B.*, 818 N.E.2d at 132 ("[w]hen Stephanie agreed to bear and raise a child with Dawn and, thereafter, consented to and actively fostered a parent-child relationship between Dawn and A.B., she presumptively made decisions in the best interest of her child and effectively waived the right to unilaterally sever that relationship when her romantic relationship with Dawn ended"). *See also Kinnard v. Kinnard*, 43 P.3d 150, 155 (Ak. 2002) ("*Troxel* involved neither a claim of psychological parenthood nor a determination that depriving the child of a psychological parent would negatively affect the welfare of the child"); *In re Custody of Shields*, 120 Wash. App. 108, 122-23, 126, 84 P.3d 905, 912, 913 (2004); *Riepe v. Riepe*, 91 P.3d 312, 318 (Ariz. App. 2004).

Respectfully submitted,



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CERTIFICATE PURSUANT TO RULE 5A:20(h)

(1) The under signed counsel hereby certifies that in compliance with Rule 5A:19(e), on this 23rd day of February, 2005, three copies of the foregoing brief and the appendix were sent to each counsel of record by United States mail, postage pre-paid and addressed as follows:

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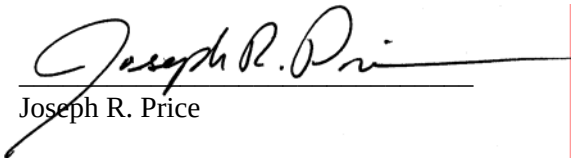

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