COMMONWEALTH OF VIRGINIA

IN THE CIRCUIT COURT FOR THE COUNTY OF FLUVANNA

IN RE:

AMIN et al., Petitioners,

Case No. CL22000186-00

v.

Mast et al., Respondents.

MOTION OF YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

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COMES NOW undersigned counsel and submits in accordance with rule 5A:23 of the Rules of Virginia Supreme Court the following Motion for Leave to File a brief as *amicus curiae*.

1. Counsel to the Petitioners invited the Young Center for Immigrant Children's Rights (Young Center) to submit an *amicus curiae* brief in support of Petitioners and consented to this filing.
2. The Young Center for Immigrant Children's Rights is a registered 501(c)(3) with eight offices around the country in Washington, D.C., New York City, Harlingen, Houston, San Antonio, Chicago, Phoenix, and Los Angeles. The mission of the Young Center is to protect and advance the rights and best interests of immigrant children in accordance with state, federal, and international law. The Young Center has been appointed by the federal government to serve as the best interests guardian ad litem, or Child Advocate, pursuant to the Trafficking Victims Protection Reauthorization Act, 8 U.S.C. § 1232, for thousands of unaccompanied and separated immigrant children.
3. The Young Center seeks leave to file an amicus brief in the manner of Rule 5A:23 of the Rules of Virginia Supreme Court.
4. The Young Center has requested the consent of counsel to the Respondents to the filing of an *amicus curiae* brief, and Respondents' counsel did not respond to our request.

The Young Center respectfully requests that the Court grant leave to file the brief of *amicus curiae.*

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Young Center for Immigrant Children's Rights is a national non-profit organization and a registered 501(c)(3). The Young Center's mission is to protect and advance the rights and best interests of immigrant children in accordance with state, federal, and international law. The Young Center has eight offices around the country in Washington, D.C., New York City, Harlingen, Houston, San Antonio, Chicago, Phoenix, and Los Angeles. Since 2004, the Young Center has been the only organization appointed by the U.S. Department of Health and Human Services Office of Refugee Resettlement (ORR) to serve as the independent Child Advocate (or best interests guardian ad litem) for unaccompanied and separated immigrant children in federal immigration custody. The Young Center is appointed as Child Advocate pursuant to the Trafficking Victims Protection Reauthorization Act which authorizes ORR to appoint Child Advocates to victims of child trafficking and other vulnerable children. 8 U.S.C. § 1232(c)(6)(A).

The Young Center has served as Child Advocate for thousands of unaccompanied and separated immigrant children, including over 100 Afghan children who arrived in the United States after the evacuation of Kabul. The role of the Child Advocate is to represent the best interests of children on matters related to a child's custody, placement, immigration case, access to services, and repatriation, where appropriate. Child Advocates submit best interests

determinations to various federal agencies including the Executive Office for Immigration Review within the Department of Justice, Immigration and Customs Enforcement within the Department of Homeland Security, and ORR. The Young Center also maintains a policy program that advances changes in immigration policy and practice that center immigrant children's rights and best interests in all decisions. The Young Center's unique perspective, cultivated over nearly two decades of working with thousands of immigrant children from dozens of countries around the world, may assist the Court in deciding the issues before it.

INTRODUCTION

The "best interests of the child" is a foundational principle of child protection in both U.S. child welfare law and international law. In the United States, every state, including Virginia, has laws requiring courts to consider the best interests of children when making decisions about a child who is separated from their parents or legal guardian. Children's Bureau, Admin. for Children for Families, U.S. Dep't of Health & Human Servs., *Determining the Best Interests of the Child,* (Mar. 2016).[1] While the "best interests of the child" principle has no single definition, widely-accepted elements include: a child's safety and well-being; a child's expressed interests; a child's health; a child's right to family integrity; a child's right to liberty; a child's right to development; and a child's

[1] Available at https://www.childwelfare.gov/pubpdfs/best_interest.pdf.

right to identity. *Id.*; *see also* Comm. on the Rights of the Child, *General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1)*, ¶¶ 52-78, U.N. Doc. CRC/C/GC/14 (May 29, 2013) [hereinafter General Comment No. 14].[2]

In this brief, amicus curiae highlights the particular importance of maintaining a child's familial bonds and their ties to their ethnic heritage, language, and culture as well as the necessity of considering these factors when making decisions about custody of a child. State, federal, and international law recognize a child's right to family, culture, and identity as critical components of a best interests analysis. Moreover, countless voices from the medical and mental health fields have documented the trauma and lasting harm children experience when they are abruptly separated from family and caregivers and raised without deep, meaningful connection to their heritage.

I. Placing children with family and maintaining kinship bonds serves the best interests of children.

The principle that when a parent is unable to care for a child, the child is best served by placement with family is deeply embedded in child welfare law—and with good reason. Children learn about the world in the context of their families. A family helps a child learn and come to understand love, belonging, community, and

[2] Available at: http://www.refworld.org/docid/51a84b5e4.html

safety. Indeed, there is growing recognition among the child welfare agencies and advocates that placement with kin is preferable to placement with strangers as it strengthens family bonds, lowers risk of abuse, improves mental health, and promotes permanency. *See, e.g.* Casey Family Programs, *Why Should Child Protection Agencies Adopt a Kin-First Approach*, 1 (Sept. 2019).[3]

Virginia child welfare law recognizes that placing children with family and maintaining a child's bonds with relatives serves the best interests of children. In determining a child's best interests in custody or visitation decisions, Virginia courts are required to "giv[e] due consideration to other important relationships of the child, including but not limited to siblings, peers, and extended family members." Va. Code Ann. § 20-124.3. Similarly, in court proceedings to decide whether to terminate parental rights for a child deemed to have been abandoned on account of abuse or neglect, Virginia law requires the party seeking termination to establish by clear and convincing evidence that "[d]iligent efforts have been made to locate the child's parent or parents, guardian, or relatives without avail." Va. Code Ann. § 16.1-283(D)(3). In *Logan v. Fairfax Cnty. Dep't of Hum. Dev.*, 13 Va. App. 123, 131, 409 S.E.2d 460, 465 (1991), the Virginia Court of Appeals held that this statute imposes a duty on parties seeking termination "to produce

[3] Available at https://caseyfamilypro-wpengine.netdna-ssl.com/media/SF_Kin-First-Approach.pdf.

sufficient evidence so that the court may properly determine whether there are relatives willing and suitable to take custody of the child, and to consider such relatives in comparison to other placement options."

Virginia's commitment to placing children with relatives and maintaining family bonds is further evidenced by its own Kinship Guardianship Assistance programs, which were established to "facilitate placements with relatives and ensure permanency for children in foster care." Va. Code Ann. §§ 63.2-1305, 63.2-1306. Indeed, documentation promoting these programs notes that "[k]inship care can reduce trauma, promote stability, and maintain family and cultural connections." Va. Dept. Of Social Servs., Div. Of Family Servs, *Kinship Care: Exploring Options for Relatives of Children in Foster Care.*[4]

Virginia's preference for kinship care aligns with the growing body of federal child welfare law that preferences a child's placement with family members. Under Title IV-E of the Social Security Act, if a state seeks federal funding for its adoption and foster care programming, it must "consider giving preference to an adult relative over a nonrelated caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant state child protection standards." 42 U.S.C. § 671(a)(19). Likewise, the Family First

[4] Available at https://www.dss.virginia.gov/nam/downloads/kinship_care_brochure_web.pdf

Prevention Services Act, signed into law under the last administration, further "reinforces long-standing federal and state law prioritizing family-based care, preferably within a child's own family network." Children's Defense Fund *et al.*, *Implementing the Family First Prevention Services Act: A Technical Guide for Agencies, Policymakers and Other Stakeholder*, 4 (Feb. 2020).[5] Similarly, the Indian Child Welfare Act explicitly establishes that for foster and adoptive placement of a Native American child, the child's extended family is the preferred placement. 25 U.S.C. § 1915(a). In the absence of a tribal law definition, the ICWA defines extended family member as a person who has reached the age of eighteen and who is the child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent. 25 U.S.C. § 1903(2).

The federal government further promotes the value of kinship placement through the public pronouncements of the Children's Bureau, a sub-agency which advises the federal government's Administration for Children and Families on matters related to child welfare, including adoption. Kinship placement is "the full-time care, nurturing, and protection of a child by relatives, members of their Tribe or clan, godparents, stepparents, or other adults who have a family relationship to a

[5] Available at https://www.childrensdefense.org/wp-content/uploads/2020/07/FFPSA-Guide.pdf

child." Children's Bureau, Admin. for Children and Families, U.S. Dep't of Health & Human Servs., *About Kinship Care*.[6] According to educational materials published by the Bureau, "kinship care is the preferred option because it can reduce trauma and help children maintain family bonds, a sense of belonging, and their identity." Children's Bureau, Admin. for Children and Families, U.S. Dep't of Health & Human Servs., *Working with Kinship Caregivers*, 1 (Jun. 2018).[7] Research has shown that placing children with kin can benefit children by minimizing trauma, preserving cultural identity, offering greater placement stability, and improving behavioral outcomes. *Id.* at 3-4. "Placing children with relatives helps to maintain family connections and cultural traditions that can minimize the trauma of family separation and relieve the anxieties that come with traditional foster placements." Children's Bureau, Admin. for Children and Families, U.S. Dep't of Health & Human Servs., *Partnering with Relatives to Promote Reunification*, 2 (Jan. 2020).[8]

International law, like Virginia and federal law, also establishes the centrality of familial bonds in evaluating the best interests of children. As stated in the Preamble to the Convention on the Rights of the Child ("Convention"): "[T]he

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[6] Available at https://www.childwelfare.gov/topics/outofhome/kinship/about/
[7] Available at https://www.childwelfare.gov/pubPDFs/f_kinshi.pdf.
[8] Available at https://www.childwelfare.gov/pubPDFs/factsheets_families_partner_relatives.pdf

family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community."[9] Convention on the Rights of the Child, art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; s*ee also* International Covenant on Civil and Political Rights, Art. 23, Dec. 19, 1966, 61 I.L.M. 368, 999 U.N.T.S. 171 ("[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State"). Article 8 of the Convention demands that parties "respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference." *Id.* at art. 8. The United Nations Committee on the Rights of the Child has explained further that "[p]reservation of the family environment encompasses the preservation of the ties of the child in a wider sense. These ties apply to the extended family, such as grandparents, uncles/aunts as well friends, school and the wider environment." General Comment No. 14 ¶ 70; *see also id.* at ¶ 59 ("[t]he term "family" must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom (art. 5)").

[9] Though the United States is a signatory to the Convention on the Rights of Child, and therefore precluded from taking any action in contravention of it, it remains the only country that has not yet ratified the Convention.

In the context of adoption, international law also establishes a preference for placement of children with relatives where possible. Under the Convention, governments implementing systems of adoption must "[e]nsure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary." CRC at art. 21(a). Furthermore, the government should "[e]nsure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption." Id. at art. 21(c). The United Nations Committee on the Rights of the Child has explained:

> Adoption of unaccompanied or separated children should only be considered once it has been established that the child is in a position to be adopted. In practice, this means, inter alia, that efforts with regard to tracing and family reunification have failed, or that the parents have consented to the adoption. The consent of parents and the consent of other persons, institutions and authorities that are necessary for adoption must be free and informed.

General Comment No. 6 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 91, U.N. Doc. CRC/GC/2005/6

(Sept. 1, 2005) [hereinafter General Comment No. 6].[10] The Committee further states: "Priority must be given to adoption by relatives in their country of residence" and that "[a]doption should not be considered...[u]nless a reasonable time has passed during which all feasible steps to trace the parents or other surviving family members has been carried out." *Id.*

II. Maintaining ties to ethnic heritage, language, and culture further a child's best interests by helping them understand their identity, feel a sense of belonging, and connect with community.

Placement with family and connection to culture are inextricably linked. "[T]he first and best way to preserve cultural connections is to preserve the child's connections with the child's biological family, including extended family, whenever possible ... ." Corinne Wolf Center for Child and Family Justice, Univ. of New Mexico, *Preserving Cultural Connections*, 2 (2011).[11] A child's placement with family members serves not only to nurture foundational, familial bonds, but also to connect the child to a sense of identity and to a broader community through ethnic heritage, language, and culture. Indeed, a handful of states explicitly recognize a foster child's right to connect with their culture or impose a duty on foster families to facilitate a foster child's connection to culture. Ariella Hope Stafanson, *Supporting Cultural Identity for Children in Foster Care*, Ctr. on

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[10] Available at https://www.refworld.org/docid/42dd174b4.html

[11] Available at https://childlaw.unm.edu/assets/docs/best-practices/Cultural-Connections-2011.pdf

Children and the Law, Am. Bar Assoc. (Nov. 20, 2019).[12] The Virginia Department of Social Services itself demonstrates an understanding of the value of cultural identity when it observes that"[f]amily members are the experts about their own families" and that it is the "responsibility [of the Department] to understand children, youth, and families within the context of their own family rules, traditions, history, and culture." Va. Dep't of Soc. Servs., *Child and Family Servs. Manual: Section 17- Managing Foster Care Services*, 2 (July 2021).[13]

Federal law also imposes obligations on decision-makers to preserve a child's cultural identity when they are at risk of placement outside their parents' care. The Indian Child Welfare Act (ICWA) has been called the "gold standard" in child welfare law in large part because of the law's intent not only to keep children with their families, but to keep them in their communities and connected with their ethnic heritage, language, and culture. The law is explicitly designed to preserve the cultural identity of Native America children, and "[t]he best way to achieve this is for the child to remain with their respective tribe, family or extended family to ensure a healthy sense of cultural identity is experienced and nurtured." Kathy D.

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[12] Available at https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/supporting-cultural-identity-for-children-in-foster-care/

[13] Available at https://www.dss.virginia.gov/files/division/dfs/fc/intro_page/guidance_manuals/fc/07_2021/section_17_managing_foster_care_services.pdf

LaPlante, *The Indian Child Welfare Act and Fostering Youth Cultural Identity*, Am. Psych. Assoc. (Dec. 2017).[14] ICWA further serves to protect a Native American child's cultural identity by requiring that, when the child cannot remain with their family, priority for placement goes first to the child's tribe and second to any other Native American family. 25 U.S.C. § 1915(a). In prioritizing other tribal placements before traditional foster care, Congress took protective measures to help ensure that Native American children do not grow up estranged from their families, ethnic heritage, language, and culture.

The importance of fostering a child's sense of self through development of a strong cultural identity is also enshrined in the Convention on the Rights of the Child, which demands that "due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background … and the decision-maker must take into consideration this specific context when assessing and determining the child's best interests." *General Comment No. 14* ¶ 56 (citing the CRC at art. 20). "A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and

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[14] Available at https://www.apa.org/pi/families/resources/newsletter/2017/12/indian-child-welfare#:~:text=The%20underlying%20intent%20of%20the,identity%20is%20experienced%20and%20nurtured. ,

linguistic background, particular vulnerabilities and protection needs." *General Comment No. 6* ¶ 20. "All unaccompanied and separated children have the right to maintain their cultural identity and values, including the maintenance and development of their native language." *Id.* ¶ 42.

III. When a child is separated from biological family that served as primary caregivers, and estranged from their ethnic heritage, language, and culture, they suffer immediate trauma and lasting harm.

Legal frameworks under domestic and international law dictate that it is in a child's best interests to be placed with family members in a home where they maintain connections with their cultural heritage. But looking beyond the law, countless social science studies and the lived experience of children denied such familial and culturally appropriate placements demonstrate that children benefit from placement with family and connection to culture. The absence of these foundational developmental pillars from children's lives often leads to mental health challenges, social isolation, a sense of loss, and behavioral eruptions.

For nearly two decades, the Young Center has served as Child Advocate to immigrant children of all ages who lived through a traumatic separation from a family member or caregiver before experiencing prolonged estrangement from trusted loved ones and core aspects of their cultural identity. For many children, separation from their family—particularly from primary caregivers—is a deeply traumatizing event. Children "often experience[] separation from a primary

caregiver as a threat to survival." Deborah Cromer, *Through No Fault of Their Own: Reasserting a Child's Right to Family Connectedness in the Child Welfare System*, 41 Family L. Quarterly 181 (2007). The American Psychological Association has highlighted the consistent conclusion of psychological studies that separating migrant families leads to adverse outcomes for children. Am. Psych. Assoc., *APA Immigration and Refugee Policy Statement*, 1 (2019) (citing Miller, A., Hess, J. M., Bybee, D., & Goodkind, J. R., *Understanding the mental health consequences of family separation for refugees: Implications for policy and practice*, Am. J. of Orthopsychiatry, 88(1), 26–37 (2018)).[15] The American Academy of Pediatrics testified before Congress that separating children from family and caregivers "can cause irreparable harm, disrupting a child's brain architecture and affecting his or her short- and long-term health" and that "[t]his type of prolonged exposure to serious stress—known as toxic stress—can carry lifelong consequences for children." Colleen Kraft, *Statement Opposing Separation of Children and Parents at the Border*, Am. Academy of Pediatrics (May 8, 2018).[16]

Moreover, the separation from one's cultural identity that often goes hand in hand with separation from family can lead to emotional and psychological

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[15] Available at https://www.apa.org/about/policy/immigration-refugee-policy.pdf
[16] Available at https://docs.house.gov/meetings/IF/IF14/20180719/108572/HHRG-115-IF14-20180719-SD004.pdf

difficulties later in life. In one study of Native American children raised in white families, as adults, participants experienced higher rates of mental health challenges, substance abuse, learning disabilities, and social isolation. Carol Locust, *Split Feathers: Adult American Indians Who Were Placed in Non-Indian Families as Children*, Ontario Assoc. of Children's Aid Soc. 44(3), 11-16 (2000).[17] "As a direct result of the loss of cultural experiences and the transmission of a cultural identity, their psychological and emotional wounding had lifetime consequences." Kathy D. LaPlante, *The Indian Child Welfare Act and Fostering Youth Cultural Identity*, Am. Psych. Assoc. (Dec. 2017).[18]

On the other hand, children who remain as part of their family unit, and therefore connected to their ethnic heritage, language, and culture, tend to experience healthier development and fewer mental health challenges. Social scientists have reported that adolescents who hold high regard for their ethnicity may draw upon that feeling to cope with stress and anxiety." Lisa Kiang *et al.*, *Ethnic Identity and the Daily Psychological Well-Being of Adolescents from Mexican and Chinese Backgrounds*, 77 Child Dev. 1338, 1348 (2007). Strong

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[17] Available at http://www.nativecanadian.ca/Native_Reflections/split_feather_syndrome.htm

[18] Available at https://www.apa.org/pi/families/resources/newsletter/2017/12/indian-child-welfare#:~:text=The%20underlying%20intent%20of%20the,identity%20is%20experienced%20and%20nurtured.

cultural identity is tied to lower rates of depression, anxiety, isolation, and other mental health challenges" as it "helps the child deal with adverse experiences and transitions and can reduce depression and anxiety." Ariella Hope Stafanson, *Supporting Cultural Identity for Children in Foster Care*, Ctr. on Children and the Law, Am. Bar Assoc., (Nov. 2019) (citing McMillen, C. *et al.*, *Psychiatric Symptoms and Substance Use Disorders in a Nationally Representative Sample of American Adolescents Involved with Foster Care*, J. of Adolescent Health 38(4), 351-358 (2007)).[19] Relatedly, "family connections are critical to healthy child development and a sense of belonging." Heidi Redlic Epstein, *Kinship Care Is Better for Children and Families*, Ctr. on Children and the Law, Am. Bar Assoc., (July 2017).[20] Indeed, the improved psychosocial functioning of children in kinship foster homes is usually explained by "the protective effect of cultural and family preservation" because "living with relatives *may reinforce the sense of identity and self-esteem that flows from knowing the family history and culture.*" Femke Vanschoonlandt *et al.*, *Kinship and Non-Kinship Foster Care: Differences in*

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[19] Available at https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/supporting-cultural-identity-for-children-in-foster-care/

[20] Available at https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/july-aug-2017/kinship-care-is-better-for-children-and-families/

Contact with Parents and Foster Child's Mental Health Problems, 34 Child. & Youth Servs. Rev. 1533 (2012) (emphasis in original) (quoting Holtan, A., Ronning, J. A., Handegard, B. H., & Sourander, A., *A comparison of mental health problems in kinship and nonkinship foster care*, European Journal of Child and Adolescent Psychiatry, 14, 200–207 (2005)).

CONCLUSION

A child's right to placement with family and to connection to culture are foundational aspects of a best interests analysis under both domestic and international child welfare law. But beyond the legal constructs, there simply is no replacing the sense of loss a child, and eventually a young person, will experience growing up knowing they were removed from family members who loved them and wanted to care for them and that they lost the chance to identify with their ethnic heritage, language, or culture. Connection to family and a strong cultural identity are protective factors that build resiliency in children, imbue a sense of belonging, and lead to better outcomes in mental health and development. Especially as immigrant children resettle in the United States and navigate the complexities of an inevitably bicultural childhood, placement with family and connection to culture is a grounding and stabilizing force that helps to support their overall health and well-being.

Respectfully submitted,

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Consistent with Rule 5A:20(h) and pursuant to Rule 1:12 of the Rules of Virginia Supreme Court, counsel for *amicus curiae* certifies as follows:

1. A copy of the Brief of *Amicus Curiae* in Support of Petitioners was filed with the Clerk of the Circuit Court of Virginia, Fluvanna County, by causing it to be deposited for next day delivery with Federal Express on the 18th day of August, 2022.

2. A copy of the *amicus curiae* brief was served on counsel for the Respondents by causing it to be deposited for next day delivery with Federal Express on the 18th day of August, 2022, addressed to:

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4. The Young Center does not request leave to participate in any oral argument.
5. This brief contains 3,681 words, excluding those portions that, by rule, do not count toward the word limit.

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