No. 26-164

IN THE
Supreme Court of the United States

A.A. AND F.A.,
Petitioners,

v.

JOSHUA MAST AND STEPHANIE MAST,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF THE YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ARJUN R. RAMAMURTI
Counsel of Record
ANDREW C. DEGUGLIELMO
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aramamurti@jenner.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. NOTICE TO A CHILD'S CARETAKERS IS ESSENTIAL TO THE BEST INTERESTS DETERMINATIONS THAT STATE, FEDERAL, AND INTERNATIONAL LAW REQUIRE. 5

A. The Best Interests Standard Requires Complete Information. 5

B. The Best Interests Standard Therefore Requires Notice to a Child's Physical Custodians. 7

C. Notice Protections Do Not Depend on a Biological Relationship. 11

II. THIS CASE ILLUSTRATES THE CONSEQUENCES OF ADJUDICATING ADOPTION WITHOUT NOTICE TO A CHILD'S CARETAKERS 15

A. The Absence of Notice Deprived the Circuit Court of Accurate Information on Many Issues Relevant to Baby Doe's Best Interests. 15

B. The Resulting Adoption Order Inflicted the Very Harms that Child Welfare Law Seeks to Prevent. 17

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT FOR MILLIONS OF NON-PARENT CAREGIVERS. 21

CONCLUSION 24

TABLE OF AUTHORITIES

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Carvin v. Britain (In re Parentage of L.B.), 155 Wash. 2d 679 (2005) 13

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INTEREST OF *AMICUS CURIAE*[1]

The Young Center for Immigrant Children's Rights (the "Young Center") is a national nonprofit organization. Its 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 nine offices around the country, in Chicago; Grand Rapids; Harlingen; Houston; Los Angeles; New York City; Phoenix; San Antonio; and Washington, D.C.

Since 2004, the Young Center has been appointed by the U.S. Department of Health and Human Services Office of Refugee Resettlement ("ORR") to serve as the independent Child Advocate for unaccompanied and separated immigrant children in federal immigration custody. *See* 8 U.S.C. § 1232(c)(6)(A) (authorizing ORR to appoint Child Advocates for victims of child trafficking and other vulnerable children). 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 (where appropriate) repatriation. The Child Advocate submits best interests determinations to various federal agencies, including the Executive Office for Immigration Review ("EOIR") within the Department of Justice; Immigration and Customs Enforcement ("ICE") within the Department of Homeland Security, and ORR. As

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of *amicus*' intent to file this brief. *See* S. Ct. R. 37.2.

relevant here, the Young Center has served as Child Advocate for thousands of unaccompanied and separated immigrant children, including for over 130 Afghan children who arrived in the United States after the evacuation of Kabul.

The Young Center also maintains a Technical Assistance Program ("TAP") that supports children caught between the federal immigration system and state child welfare systems. In particular, the Young Center offers multidisciplinary case consultations and trainings to children's state court advocates and direct service providers. TAP engages on a variety of situations involving immigrant children involved in multiple legal systems, such as children and youth who are involved in child welfare and custody proceedings in state court systems, and those navigating complex family reunification in the United States or abroad after separation.

Given its unique perspective—developed over two decades through working directly with thousands of immigrant children—*amicus* submits this brief to explain why this Court should grant certiorari to ensure that basic procedural due process protections are afforded to kin and non-kin caregivers alike before a child's best interests are adjudicated.

SUMMARY OF ARGUMENT

The Virginia Supreme Court's decision upholding a state adoption order that Respondents procured by fraud and without notice to Petitioners is profoundly wrong and undermines the mandate of the child welfare

system to protect the best interests of children. The United States Government, the Afghan Government, and the International Committee of the Red Cross all identified Petitioners as Baby Doe's kin, and Petitioners were Baby Doe's physical custodians, caretakers, and parent figures for eighteen months. Nonetheless, the court below concluded that Petitioners were not entitled even to notice of ongoing adoption proceedings to remove Baby Doe because they were not Baby Doe's actual parents and therefore lacked a constitutionally protected interest in their relationship with her. In *amicus*' view, that holding cannot be squared with the child welfare system's foundational principle requiring a determination of the "best interests of the child." A child's best interests cannot be accurately ascertained where individuals who have physical custody of the child are not permitted to offer their perspective. And a court hearing only half the story significantly risks making the wrong decision—as the circuit court judge in this very case came to recognize.

Amicus submits this brief to make three points:

First, Virginia law, federal law, and international law governing the adoption and placement of children all recognize a best interests standard that relies on access to a complete factual picture regarding a child's well-being, kinship relationships, existing attachments, and more. Assembling that complete picture ordinarily will require gathering underlying facts that reside in the first instance with the caregivers who are raising the child. As a result, notice to a child's caretakers is not merely incidental to the best interests standard, but

necessary for that standard to be properly assessed. And while the child welfare system places a high value on kinship relations, states generally require such notice whether or not a child's established caretakers are her kin: either way, the system relies on accurate information from a child's physical custodians to arrive at the correct outcome.

Second, the facts of this case show how the best interests standard can be wrongly applied when procedural due process protections are not respected. Petitioners were identified as having a biological relationship with Baby Doe and cared for her for eighteen months. Yet they received no notice of the proceedings in Virginia, and the circuit court adjudicated Baby Doe's adoption on a record devoid of Petitioners' perspective. The consequence was that the court badly misunderstood numerous facts integral to the best interests inquiry—including facts regarding Baby Doe's statelessness, her family, her medical needs, and her existing custodial placement. Thus, instead of entering an adoption order that served Baby Doe's best interests, the circuit court did the opposite. The adoption order had the consequence of removing Baby Doe from her identified kin who had been caring for her for most of her life and placing her with strangers. And it inflicted many of the harms that the child welfare system seeks to avoid, including traumatic separation and disrupted attachments; severed kinship bonds; lost cultural and linguistic identity; and the resulting, often long-term harms to the child's health and well-being.

Third, the question presented is exceptionally

important. While the facts of this case are extraordinary, millions of children in the United States are being raised by non-parents. Confining procedural due process to "biological" and "legally adoptive parents," App.45a, creates uncertainty as to whether such caregivers have any constitutional entitlement to notice before a child is removed from their care. And the decision below's narrow understanding of what relationships trigger procedural due process protections fails to respect guardianship relationships in other cultures and traditions. The Court should grant the petition for certiorari to correct the Virginia Supreme Court's egregious error and avert these broader consequences.

ARGUMENT

I. NOTICE TO A CHILD'S CARETAKERS IS ESSENTIAL TO THE BEST INTERESTS DETERMINATIONS THAT STATE, FEDERAL, AND INTERNATIONAL LAW REQUIRE.

A. The Best Interests Standard Requires Complete Information.

The "best interests of the child" is a foundational principle of child protection in both U.S. child welfare law and international law. The federal Children's Bureau has explained that while the "best interests of the child" principle has no single definition, widely accepted considerations 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 right

to identity.[2]

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.[3] Indeed, this Court long ago recognized in the custody context that "Virginia law, like that of probably every State in the Union, requires the court to put the child's interest first"; it is "'the primary, paramount, and controlling consideration of the court.'" *Ford v. Ford*, 371 U.S. 187, 193 (1962) (quoting *Mullen v. Mullen*, 188 Va. 259, 269 (1948)).

International law recognizes the same principles. The Hague Adoption Convention provides that an intercountry adoption "shall take place only if the competent authorities of the State of origin" have "established that the child is adoptable" and have "determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests." Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, art. 4(a)-(b), May 29, 1993, 1870 U.N.T.S. 167

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[2] Children's Bureau, Admin. for Child. & Fams., U.S. Dep't of Health & Human Servs., *Determining the Best Interests of the Child*, at 2-4 (2024), https://artifacts.childwelfare.gov/public/documents/determining-best-interests-child_1.pdf.

[3] *See* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & Fam. Stud. 337, 370 (2008) ("Today, every state has a statute requiring that the child's best interests be considered whenever decisions regarding a child's placement are made.").

("Hague Convention").

The best interests standard is a demanding one that requires full consideration of a child's circumstances. Thus, while states have statutorily identified the factors that courts must weigh, several courts have recognized that they must broadly consider "all circumstances, on everything that actually has occurred, on everything that is relevant to the child's best interests." *Kinsella v. Kinsella*, 150 N.J. 276, 317 (1997) (quotation marks omitted); *accord, e.g.*, *Int. of A.S.K.*, 152 Haw. 123, 127 (2022); *Taylor v. Taylor*, 306 Md. 290, 311 (1986). That is achieved through "a full and plenary … inquiry" that includes a "careful and comprehensive evaluation of the material facts and circumstances." *S.L. v. J.R.*, 27 N.Y.3d 558, 563 (2016) (internal quotation marks omitted). Indeed, a determination that "excludes important and available testimony relevant to its determination of the best interests of the child[] … cannot be considered rational." *S. v. S. (In re Brandon S.S.)*, 179 Wis. 2d 114, 150 (1993).

B. The Best Interests Standard Therefore Requires Notice to a Child's Physical Custodians.

Many of the facts that are important to the best interests inquiry originate with the people who have physical custody of the child. State, federal, and international law accordingly ensure enforcement of their substantive best interests standards by imposing notice-based procedural protections that extend beyond legal parentage before changes to a child's placement or

custody occur.

Start with Virginia, which squarely provides in the custody context that anyone "having physical custody of the child" must receive "notice and an opportunity to be heard." Va. Code § 20-146.16(A); *see also id.* § 63.2-1202(L); Pet. 23. That requirement reflects that a caregiver has a valuable perspective on a child's lived reality and existing needs, and that perspective should be brought to bear on any assessment of a child's best interests in connection with a custody determination. And Virginia attaches further procedural consequences to sustained physical caregiving. After six months of care, kinship foster parents must consent before a child is removed from their physical custody. Va. Code § 63.2-900.1(G). Virginia has thus repeatedly recognized that sustained physical caregiving creates notice rights before a child is removed.

At the federal level, Congress has made the same judgment. That is most clear in the context of the Indian Child Welfare Act, "[t]he touchstone of [which] is notice." *Haaland v. Brackeen*, 599 U.S. 255, 306 (2023) (Gorsuch, J., concurring). In any involuntary proceeding to determine foster-care placement or termination of parental rights involving an Indian child, including adoption proceedings that would sever the parent-child relationship, the "party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe." 25 U.S.C. § 1912(a). And ICWA builds in timing as a buffer—"[n]o foster care placement or termination of parental rights proceeding

shall be held until at least ten days after receipt of notice," and the parent, Indian custodian, or tribe "shall, upon request, be granted up to twenty additional days to prepare for such proceeding." *Id.*

Even consent under ICWA bears the hallmarks of notice. A voluntary consent to foster-care placement or termination is valid only if "executed in writing and recorded before a judge" with a certification that the "terms and consequences of the consent were fully explained in detail and were fully understood." *Id.* § 1913(a). And consent to foster-care placement "may [be] withdrawn … at any time." *Id.* § 1913(b). These notice-based procedural protections are part of the reason why "the leading child welfare organizations in America have opined" that ICWA is "the 'gold standard' for adoption and child welfare cases."[4]

Finally, international adoption law recognizes the same principles. The Convention on the Rights of the Child requires governments implementing systems of adoption to "[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."

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[4] Bethany R. Berger, *Savage Equalities*, 94 Wash. L. Rev. 583, 630 (2019) (citation omitted).

Convention on the Rights of the Child ("CRC"), art. 21(a), Nov. 20, 1989, 1577 U.N.T.S. 3 (emphasis added). The United Nations Committee on the Rights of the Child has similarly explained that the "consent of parents and the consent of other persons, institutions and authorities that are necessary for adoption must be free and informed." Comm. on the Rights of the Child, General Comment No. 6, ¶ 91, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005), https://www.refworld.org/docid/42dd174b4.html ("General Comment").

Likewise, the United Nations Special Rapporteur on the sale of children, child prostitution, and child pornography conducted a study of the issue of illegal adoptions and published a report in 2016 recommending similar safeguards. The report concluded that "[i]llegal adoptions violate multiple child rights norms and principles, including the best interests of the child."[5] The Special Rapporteur found that "[o]f the different stages involved in an adoption process, those leading to a determination of the adoptability of the child are the most vulnerable to illegal acts and illicit practices," Hum. Rts. Council, *Report* ¶ 31, as the "designation of children as having been abandoned or the relinquishment of parental rights on the child can be irregularly or illegally obtained." *Id.* ¶ 33. The Special Rapporteur accordingly advised governments to "[a]dopt adequate regulation on procedures and

[5] Hum. Rts. Council, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, ¶ 26, U.N. Doc. A/HRC/34/55 (Dec. 2016), https://digitallibrary.un.org/record/861191/files/A_HRC_34_55-EN.pdf ("Hum. Rts. Council, *Report*").

safeguards in relation to domestic and intercountry adoptions, including in relation to the determination of adoptability, and establish effective and well-resourced mechanisms for overseeing adoption processes, especially with respect to strictly verifying the background of any child who is declared an orphan and his or her documents." *Id.* ¶ 95(f).

The Hague Adoption Convention imposes consent and notice requirements as well. Under that agreement, the competent authorities of the state of origin must ensure that the persons "whose consent is necessary for the adoption" have "been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin," and have "given their consent freely, in the required legal form." Hague Convention, art. 4(c)(1)-(2).

In short, across state, federal, and international law, notice to physical custodians is an essential safeguard. The Virginia Supreme Court's conclusion that non-parent caretakers lack procedural protections is fundamentally at odds with this established body of law.

C. Notice Protections Do Not Depend on a Biological Relationship.

Crucially, while the child welfare system places great value on kinship relationships, adequate notice of adoption proceedings is essential for both kin and non-kin caregivers alike. In the case of parents, their biological relationship with the child confers a liberty

interest that entitles them to be informed of potential removal proceedings. *Cf. Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion). But non-parents, too, who are sustained physical custodians of a child have a procedural due process right to notice and an opportunity to be heard. For example, a plurality of this Court has observed the "tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children," and has recognized that this tradition "has roots equally venerable and equally deserving of constitutional recognition." *Moore v. City of E. Cleveland*, 431 U.S. 494, 504-05 (1977) (plurality opinion).

And it has taken that recognition a step further, emphasizing that family "stems from the emotional attachments that derive from the intimacy of daily association" such that "[n]o one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship." *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 844 (1977). Thus, this Court has concluded that it is "the relationship of love and duty in a recognized family unit" itself that creates "an interest in liberty entitled to constitutional protection." *Lehr v. Robertson*, 463 U.S. 248, 258 (1983).[6]

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[6] *See also* Linda van den Dries et al., *Fostering Security? A Meta-Analysis of Attachment in Adopted Children*, 31 Child. & Youth Servs. Rev. 410, 410 (2009) (finding that children placed with nonfamilial caregivers develop the same sense of attachment as

The liberty interest that arises from these relationships runs both ways. *See, e.g.*, *Hardwick v. Cnty. of Orange*, 980 F.3d 733, 741 (9th Cir. 2020) ("The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal." (quotation marks omitted)); *Blixt v. Blixt*, 437 Mass. 649, 658 (2002) ("[T]he best interests of children and fundamental parental autonomy rights … are cognate and connected." (internal quotation marks omitted)). Because "the rights of the parents are a counterpart of the responsibilities they have assumed," *Lehr*, 463 U.S. at 257, non-parent guardians and caretakers have a "substantial" interest in their relationships with their children. *Z. v. San Bernardino Cnty. Welfare Dep't (In re B.G.)*, 11 Cal. 3d 679, 692 (1974); *see Carvin v. Britain (In re Parentage of L.B.)*, 155 Wash. 2d 679, 710 (2005). And children raised by non-parents "have a strong interest in maintaining the ties that connect them to adults who love and provide for them." *Rubano v. DiCenzo*, 759 A.2d 959, 975 (R.I. 2000) (quoting *V.C. v. M.J.B.*, 163 N.J. 200, 221 (2000)); *see also Youmans v. Ramos*, 429 Mass. 774, 784 (1999) ("Here, [the child's] interest in continuing to have access to the only adult who has acted as a parent to her is powerful.").

And, as relevant here, the same intimacy of daily association that creates the liberty interest for parents

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children raised by biological parents because the caregiving itself is what builds bonds); Dawn O. Braithwaite et al., *Constructing Family: A Typology of Voluntary Kin*, 27 J. Soc. & Pers. Relationships 388, 389 (2010) ("Scholars across disciplines … recognize the existence of families outside of blood and legal kin relationships.").

and non-parents alike is also what makes the caretaker's knowledge about the child's circumstances indispensable to the court. That is precisely why courts across the nation have recognized that "[t]he participation of interested *de facto* parents in custodial litigation promotes correct disposition"—"because such persons who have experienced close day-to-day contact with the child are among the custodial alternatives the court must appraise, and their views deserve consideration." *San Diego Cnty. Dep't of Soc. Servs. v. Williams (In re Kieshia E.)*, 6 Cal. 4th 68, 75 (1993) (internal quotation marks omitted); *see, e.g.*, *In re K.N.L.*, 675 Pa. 17, 57-58 (2022) ("[A] bond exists with a nonbiological caregiver just as with the natural parent …, the primacy of the resulting bond warrants a … right … to be heard regarding the substance of the child's best interests."); *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1, 24 (2016) ("[N]arrowly defin[ing] the term 'parent[]' … foreclos[es] all inquiry into the child's best interest in custody and visitation cases involving parental figures who lacked biological or adoptive ties to the child." (internal quotation marks omitted)).

In short, the procedural safeguards described above protect the liberty interests of those who raise children and make substantively sound best interests determinations possible—without regard to biology. The Virginia Supreme Court's contrary constitutional holding conflicts with the premises of the best interests framework and should be reviewed by this Court.

II. THIS CASE ILLUSTRATES THE CONSEQUENCES OF ADJUDICATING ADOPTION WITHOUT NOTICE TO A CHILD'S CARETAKERS.

This Court has warned that "[f]ailure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy." *In re Gault*, 387 U.S. 1, 19-20 (1967). This case proves that point. The adoption order rested on incorrect facts and prescribed a remedy that inflicted the very harms that the best interests standard is meant to prevent.

A. The Absence of Notice Deprived the Circuit Court of Accurate Information on Many Issues Relevant to Baby Doe's Best Interests.

The facts of this case make clear how important adequate notice is to the proper functioning of the child welfare system. Petitioners received no notice. App.115a. The United States, too, received no notice. App.142a-43a. That lack of notice fundamentally distorted the proceeding, as the court ultimately issued an adoption order "based on [Respondents'] false representations." App.159a; *see also* App.166a.

For example, Respondents portrayed Baby Doe as a "stateless child of non-Afghan fighters." App.141a-42a; *see* App.182a-86a. In fact, she was determined by her own government and U.S. forces to be "an Afghan national," App.113a, whose next of kin had been identified by the United States Government, the Afghan

Government, and the Red Cross; had been "vetted consistent with Afghan law," *id.*; and had received custody under Afghan law, App.113a-14a; *see* App.139a-40a, 199a-200a.

Respondents also told the court that Baby Doe was "turned over to [an] anonymous person" and was "being looked after by a young Afghan girl and that [they] had no specific information as to her identity." App.114a. In reality, Baby Doe was under the care of Petitioners—determined by the United States to be Baby Doe's relatives, and characterized by the Virginia courts as Baby Doe's "physical custodians," her "caretakers" and her "parent figures." App.23a. A court cannot adjudicate a child's best interests if it does not have accurate information to determine the impact of adoption on a child's attachment, well-being, and health. Indeed, this consideration is fundamental to the best interests determination because it goes directly to the child's sense of security, safety, and permanency.

Similarly, Respondents portrayed Baby Doe as requiring urgent medical attention. App.143a, 183a. In fact, the U.S. military had determined that she was stable and "not in need of continuous medical care." App.286a. That incorrect portrayal again distorted the best interests determination, which must consider who is equipped to meet a child's needs, including the caregivers who have raised the child for most of her life and are intimately familiar with her day-to-day needs and routines.

And Respondents further suggested that the Afghan

Government would imminently waive jurisdiction. App.141a-42a. The Afghan Government, however, refused to waive jurisdiction and made a formal demand for Baby Doe's transfer. App.113a-14a, 140a, 144a.

For all of these reasons, the United States correctly concluded in its (now-withdrawn) brief below that Respondents "obtained the final adoption order by committing a fraud on the court." App.166a-67a. And in rubber-stamping that fraud, the Virginia Supreme Court's decision "legitimiz[ed] the manipulation and artifice employed by [Respondents]." App.60a (Mann, J., dissenting).

Indeed, the adjudicating judge's own first-hand account about how he had been misled confirms how the lack of notice poisons the adoption process. Judge Moore explained that he entered the adoption order "with apprehension" and without being "aware of any opposition or objection." App.225a. But he may have decided to "stand down," App.211a, had he known these withheld facts, all of which "addressed the very foundation of th[e] court taking any action, at all," App.207a. As he put it, with "nobody on the other side," the proceedings were "one-sided," App. 211a-12a, and therefore inaccurate.

B. The Resulting Adoption Order Inflicted the Very Harms that Child Welfare Law Seeks to Prevent.

Due to Petitioners' lack of notice, the adoption order severed Baby Doe from her family, rupturing her kinship bonds and established attachments not only with

Petitioners but also other extended family. For nearly two decades, *amicus* has served as Child Advocate to similarly situated immigrant children of all ages who have experienced separation from a family member or primary caregiver. For many children, separation from their families, particularly from primary caregivers, is a deeply traumatic event. The Young Center's experience thus confirms what this Court has long considered "undisputed"—"that children require secure, stable, long-term, continuous relationships." *Lehman v. Lycoming Cnty. Child.'s Servs. Agency*, 458 U.S. 502, 513 (1982).

Start with kinship. The system's first preference—placement with kin—was fully available here. As noted, the United States Government, the Afghan Government, and the Red Cross each had identified Petitioners as Baby Doe's kin, App.113a, 139a-40a, 199a-200a, and Baby Doe was already in Petitioners' care. The adoption order did not merely fail to honor that preference; it negated it. The circuit court removed a child from a stable kinship placement that every relevant body of law, as well as extensive research on child health and development, favors, and transferred her to strangers who shared no kin relationship with her. That inversion was possible only because the people from whom she was taken never received notice that any proceeding was underway.

In addition, the adoption disrupted Baby Doe's attachment to Petitioners, who raised her as their daughter for eighteen months before she was abruptly taken from their care when she was two years old. Pet.

12. The research is clear that the attachment relationship between a child and caregiver "begins in infancy and is critical to the child's inherent sense of safety and protection," because "[n]eurologically, attachment relationships drive the brain development foundational for subsequent physical, emotional, social and cognitive maturation."[7] The developmental window of six to thirty-six months—which encompasses the period in which Petitioners raised Baby Doe—is especially critical; it is when primary attachments form and are solidified, as "children develop strong preferences for care by their primary attachment figures."[8] The developmental research is unequivocal that losses like these are "profound."[9] Separating young children from their caregivers "disrupt[s] a child's brain architecture," inducing prolonged stress that carries

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[7] Laura C.N. Wood, *Impact of Punitive Immigration Policies, Parent-Child Separation and Child Detention on the Mental Health and Development of Children*, 2 BMJ Paediatrics Open 1, 3 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6173255/.

[8] Wendy L. Haight et al., *Understanding and Supporting Parent-Child Relationships During Foster Care Visits: Attachment Theory and Research*, 48 Soc. Work 195, 199 (2003), https://pubmed.ncbi.nlm.nih.gov/12718415/; *see also* Charles H. Zeanah et al., *Practitioner Review: Clinical Applications of Attachment Theory and Research for Infants and Young Children*, 52 J. Child Psych. & Psychiatry 819, 820 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3670111/.

[9] Vivek Sankaran, Christopher Church & Monique Mitchell, *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 Marq. L. Rev. 1161, 1191 (2019).

"lifelong consequences."[10] Indeed, separation is so extreme that children "often experience[]" it "as a threat to survival."[11] The lifelong consequences of this instability manifest in myriad ways, including through the development of behavioral problems, depression, and anxiety.[12]

The harms of wrongful separation, moreover, can extend to the loss of a child's ethnic heritage, language, and culture. Strong cultural identity is a protective factor associated with lower rates of depression, anxiety, and isolation, and children who remain connected to their family and community of origin experience healthier development.[13] For example, Native American

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[10] Colleen Kraft, *AAP Statement Opposing Separation of Children and Parents at the Border*, Am. Academy of Pediatrics (May 8, 2018), https://docs.house.gov/meetings/IF/IF14/20180719/108572/HHRG-115-IF14-20180719-SD004.pdf.

[11] Deborah Cromer, *Through No Fault of Their Own: Reasserting a Child's Right to Family Connectedness in the Child Welfare System*, 41 Fam. L.Q. 181, 185 (2007).

[12] David M. Rubin et al., *The Impact of Placement Stability on Behavioral Well-Being for Children in Foster Care*, 119 Pediatrics 336, 336-44 (2007); Anouk Spruit et al., *The Relation Between Attachment and Depression in Children and Adolescents: A Multilevel Meta-Analysis*, 23 Clinical Child & Fam. Psych. Rev. 54, 54-57, 60-62 (2020); Cristina Colonnesi et al., *The Relation Between Insecure Attachment and Child Anxiety: A Meta-Analytic Review*, 40 J. Clin. Child & Adolescent Psych. 630, 631-33 (2011).

[13] Lisa Kiang et al., *Ethnic Identity and the Daily Psychological Well-Being of Adolescents from Mexican and Chinese Backgrounds*, 77 Child Dev. 1338, 1348 (2006); Femke Vanschoonlandt et al., *Kinship and Non-Kinship Foster Care:*

adults removed from their families and raised in non-Native homes experience higher rates of mental-health problems and substance abuse than other adults who were adopted or fostered as children.[14] International law likewise recognizes that "[a]ll unaccompanied and separated children have the right to maintain their cultural identity and values, including the maintenance and development of their native language." *General Comment No. 6*, ¶ 42. Here, an Afghan child whose kin had been identified by the United States Government, the Afghan Government, and the Red Cross was removed from those kin and transferred to a family that does not share her heritage, religion, or language.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT FOR MILLIONS OF NON-PARENT CAREGIVERS.

Finally, the Court should grant certiorari in light of the broader potential consequences of the decision below. The Supreme Court of Virginia held that Petitioners were not Baby Doe's "actual parents,"

Differences in Contact with Parents and Foster Child's Mental Health Problems, 34 Child. & Youth Servs. Rev. 1533 (2012); Paul R. Smokowski et al., *Ethnic Identity and Mental Health in American Indian Youth: Examining Mediation Pathways Through Self-Esteem, and Future Optimism*, 43 J. Youth & Adolescence 343, 347 (2014).

[14] *See, e.g.*, Ashley L. Landers et al., *American Indian and White Adoptees: Are There Mental Health Differences?*, 24 Am. Indian & Alaska Native Mental Health Rsch. 54, 56, 69 (2017); *see also, e.g.*, Irving N. Berlin, *Anglo Adoptions of Native Americans: Repercussions in Adolescence*, 17 J. Am. Acad. Child Psychiatry 387, 387-88 (1978).

App.45a, as measured by "American (not Afghan) law," App.40a, because they were not Baby Doe's "biological" or "adoptive parents," nor had they been granted "court-ordered custody or guardianship" over Baby Doe. App.41a. Petitioners, therefore, were not "entitled … to the Fourteenth Amendment's due-process protections afforded to actual parents." App.48a.

In so holding, the Virginia Supreme Court threatens to subordinate the interests of all children raised by non-parents. But as the relevant frameworks of state, federal, and international law recognize, the lived reality of a caregiver-child relationship is what counts. *See supra* Part I. The Young Center has worked with a number of children and families involved in state-court custody, adoption, and guardianship proceedings where the child is being raised by kin caregivers or has kin who is willing and able to serve as a caregiver. Indeed, millions of children in the United States are presently being raised by a non-parent, often one to whom they are unrelated by blood,[15] and often informally.[16] Their relationships are no less worthy of due process

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[15] *See* U.S. Census Bureau, *America's Families and Living Arrangements: 2023*, at tbl. C3 (Nov. 2023), https://www.census.gov/data/tables/2023/demo/families/cps-2023.html (2.7 million children in the care of unrelated adults); Generations United, *State of Grandfamilies & Kinship Care in America*, at 1 (2025), https://www.gu.org/app/uploads/2025/10/SOGFK-2025-Update-Final.pdf (2.5 million children in the care of kin).

[16] Tyreasa Washington & Brittany P. Mihalec-Adkins, *Kinship Care Supports the Academic Performance of Children*, Child Trends (Sept. 27, 2023), https://www.childtrends.org/publications/kinship-care-supports-the-academic-performance-of-children.

protections.

In addition, the decision below could weigh heavily on immigrant and refugee children, whose caregivers often hold legal statuses that the majority's formal, American-law test categorically excludes. Many legal traditions do not recognize adoption as such; guardianship is the "closest analog." App.194a. The Virginia Supreme Court nonetheless dismissed Petitioners' status under Afghan law as that of a "self-identifying 'guardian,' not legally appointed by any court," App.48a n.27, reasoning that due process turns on status under "American (not Afghan) law." App.40a. But in *amicus*' experience serving children who arrived after the evacuation of Kabul, and in its technical-assistance work nationwide, such children are routinely cared for by kin and community members whose relationships to the child are rarely formally documented. Nor is the problem confined to children from abroad: As the petition observes, the decision below "would have applied equally if [P]etitioners had been raising Baby Doe in Alabama, rather than in Afghanistan." Pet. 36-37.

In *amicus*' experience, the harm to children's health and well-being in cases where the best interests of the child analysis is compromised is profound and often devastating, with long-term impacts on both the child and their caregiver(s), as well as on their extended families and communities. The decision below multiplies the risk of such harms by withdrawing, for an entire class of caregivers, the basic procedural safeguards designed to prevent them.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

ARJUN R. RAMAMURTI
Counsel of Record
ANDREW C. DEGUGLIELMO
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aramamurti@jenner.com

Counsel for Amicus Curiae

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