

No. _____

**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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In September 2019, an infant was orphaned during a U.S. military operation in Afghanistan. The Government of Afghanistan, the United States, and the International Committee of the Red Cross identified the child's Afghan next of kin, and she was placed in petitioners' care. Eighteen months later, after petitioners fled the Taliban and brought the child to the United States, she was taken from them by respondents. Petitioners have not seen her since.

Unbeknownst to petitioners, respondents had months earlier convinced a Virginia state court to grant them an *ex parte* adoption order, unauthorized under Virginia law, by committing what the United States later called "a fraud on the court." App.166a. Petitioners were given no notice or opportunity to be heard in those adoption proceedings, even though they had physical custody of the child and were lawfully raising her in Afghanistan at the time.

Virginia trial and appellate courts unanimously held that the adoption order was null, void, and unenforceable. Yet, in a sharply divided 4-3 decision, the Virginia Supreme Court reversed. According to the majority, petitioners were not entitled to the most basic procedural protections under the Due Process Clause because they were not the child's parents.

The question presented is:

Whether, or under what circumstances, a child's nonparent caretakers have a cognizable liberty interest under the Due Process Clause entitling them to procedural due process before a court enters an adoption order permanently removing the child from their care.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners A.A. and F.A. were Appellees below.

Respondents Joshua Mast and Stephanie Mast were Appellants below.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

A.A., et al. v. Mast, et al., No. 220674 (Va.)

J.M., et al. v. A.A., et al., No. 230197 (Va.)

A.A., et al. v. Mast, et al., No. 2177-23-2 (Va. App.)

A.A., et al. v. J.M., et al., No. 1162-26-2 (Va. App.)

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW.....	ii
RELATED PROCEEDINGS.....	ii
TABLE OF AUTHORITIES	viii
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1
INTRODUCTION	2
STATEMENT OF THE CASE.....	5
A. Factual Background.....	5
B. Procedural History	12
REASONS FOR GRANTING THE WRIT.....	20
I. The Virginia Supreme Court’s Decision Defies Bedrock Due Process Principles.....	21
A. Procedural Due Process Is Essential In Adoption Proceedings.....	21
B. Physical Custodians Raising A Child As Their Own Have Procedural Due Process Rights In Adoption Proceedings	24
C. The Masts’ Egregious Misconduct Shows Why Procedural Due Process Is Essential	27

TABLE OF CONTENTS—Continued

	Page
II. The Decision Below Deepens Acknowledged Division On When Nonparent Caretakers Enjoy Procedural Due Process Protection.....	30
III. This Court’s Review Of The Decision Below Is Exceptionally Important.....	34
CONCLUSION.....	37

APPENDIX

Opinion of the Supreme Court of Virginia, <i>Mast v. A.A.</i> , 925 S.E.2d 665 (Va. 2026)	1a
Opinion of the Court of Appeals of Virginia, <i>A.A. v. J.M.</i> , 903 S.E.2d 513 (Va. Ct. App. 2024).....	107a
Brief for the United States as <i>Amicus Curiae</i> Supporting A.A., et al., <i>J.M. v. A.A.</i> , No. 240707 (Va. Jan. 6, 2025)	136a
Fluvanna County Circuit Court, Virginia	
Order on Petition to Amend a Certificate of Birth, <i>In re “Baby [Redacted],”</i> No. 19CL719 (Va. Cir. Ct. Fluvanna Cnty. Nov. 8, 2019) [Redacted]	179a
Interlocutory Order, <i>In re “Baby [Redacted],”</i> No. 19CL719 (Va. Cir. Ct. Fluvanna Cnty. Nov. 10, 2019) [Redacted].....	182a
Adoption Order, <i>In re “Baby [Redacted],”</i> No. 19CA12 (Va. Cir. Ct. Fluvanna Cnty. Dec. 3, 2020) [Redacted]	187a

TABLE OF CONTENTS—Continued

	Page
Exhibit 1 to Brief in Support of Petition to Vacate Adoption: Declaration of Havva G. Guney-Ruebenacker, <i>In re “Baby [Redacted],”</i> No. 19CA12 (Va. Cir. Ct. Fluvanna Cnty. Jan. 14, 2021) [Redacted]	192a
Declaration of Donna Welton, <i>[Redacted] v. [Redacted]</i> , No. CL22000186-00 (Va. Cir. Ct. Fluvanna Cnty. Aug. 22, 2022) [Redacted]	196a
Transcript of Proceeding held Nov. 11, 2022, <i>[Redacted] v. [Redacted]</i> , No. CL22000186-00 (Va. Cir. Ct. Fluvanna Cnty.) [Redacted] (excerpts).....	203a
Findings and Rulings, <i>[Redacted] v. [Redacted]</i> , No. CL22000186-00 (Va. Cir. Ct. Fluvanna Cnty. Nov. 18, 2022) [Redacted]	214a
Order Denying Pleas in Bar and Certifying for Interlocutory Appeal Pursuant to Va. Code § 8.01-675.5(A), <i>[Redacted] v. [Redacted]</i> , No. CL22000186-00 (Va. Cir. Ct. Fluvanna Cnty. Nov. 30, 2022) [Redacted].....	274a
Declaration of LTC Rosemary M. Reed, A.A. <i>v. J.M.</i> , No. CL22000186-00 (Va. Cir. Ct. Fluvanna Cnty. Mar. 27, 2023) [Redacted] ...	281a
Order Granting Summary Judgment, A.A. <i>v. J.M.</i> , No. CL22000186-00 (Va. Cir. Ct. Fluvanna Cnty. May 3, 2023).....	289a

TABLE OF CONTENTS—Continued

	Page
 Court of Appeals of Virginia	
Letter from United States Department of Justice to Clerk Court of the Court of Appeals of Virginia regarding redactions to Circuit Court record, Nos. 0876-23-2 et al. (Va. Ct. App. Dec. 21, 2023)	302a
 Supreme Court of Virginia	
Order Granting Stay of Circuit Court Proceedings, <i>J.M. v. A.A.</i> , No. 240707 (Va. Sept. 3, 2024)	304a
Letter from United States Department of Justice to Clerk of Court of the Supreme Court of Virginia Withdrawing Its January 6, 2025 <i>Amicus Curiae</i> Brief, <i>J.M. v. A.A.</i> , No. 240707 (Va. Mar. 5, 2025).....	305a
Order Denying Petition for Rehearing, <i>Mast v. A.A.</i> , No. 240707 (Va. Apr. 22, 2026)	306a
 United States District Court for the Western District of Virginia	
Transcript of Sealed TRO Hearing held February 26, 2020, “ <i>Baby L.</i> ” <i>ex rel. Doe 1 v. Esper</i> , No. 20-CV-00009 (W.D. Va. Mar. 14, 2020) [Redacted] (excerpts)	307a
 Constitutional and Statutory Addendum	
U.S. Const. amend. XIV, § 1	325a
Va. Code § 20-146.16(A).....	326a

TABLE OF CONTENTS—Continued

	Page
Va. Code § 63.2-1202(L)	327a
Va. Code § 63.2-1216	328a
Va. Code § 63.2-1221	329a
Va. Code § 63.2-1230	330a
Va. Code § 63.2-1241	331a
Va. Code § 63.2-1242.1	334a
Va. Code § 63.2-1243	335a

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Armstrong v. Manzo</i> , 380 U.S. 545 (1965).....	22, 23, 29
<i>Bell v. Burson</i> , 402 U.S. 535 (1971).....	24
<i>Berhow v. Crow</i> , 423 So. 2d 371 (Fla. Dist. Ct. App. 1982).....	30
<i>Board of Regents of State Colleges v. Roth</i> , 408 U.S. 564 (1972).....	24
<i>C.V.C. v. Superior Court</i> , 29 Cal. App. 3d 909 (1973)	31
<i>Cox Broadcasting Corp. v. Cohn</i> , 420 U.S. 469 (1975).....	1
<i>D.L. v. Huck</i> , 978 N.E.2d 429 (Ind. Ct. App. 2012)	31
<i>Department of State v. Muñoz</i> , 602 U.S. 899 (2024).....	21, 22
<i>Doe v. Mast</i> , 745 F. Supp. 3d 399 (W.D. Va. 2024)	16
<i>Drummond v. Fulton County Department of Family & Children’s Services</i> , 563 F.2d 1200 (5th Cir. 1977).....	30
<i>Elwell v. Byers</i> , 699 F.3d 1208 (10th Cir. 2012).....	31

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Federal Republic of Germany v. Philipp</i> , 592 U.S. 169 (2021).....	35
<i>Goss v. Lopez</i> , 419 U.S. 565 (1975).....	24
<i>Graham v. Children’s Services Division</i> , <i>Department of Human Resources</i> , 591 P.2d 375 (Or. Ct. App. 1979)	34
<i>Kyees v. County Department of Public Welfare of Tippecanoe County</i> , 600 F.2d 693 (7th Cir. 1979).....	32
<i>Lassiter v. Department of Social Services of Durham County</i> , 452 U.S. 18 (1981).....	22
<i>M.S. v. People</i> , 303 P.3d 102 (Colo. 2013)	32
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	22
<i>Mikel v. Quin</i> , 58 F.4th 252 (6th Cir. 2023)	31, 32, 34
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950).....	22
<i>Mullins v. Oregon</i> , 57 F.3d 789 (9th Cir. 1995).....	34

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>In re P.C.</i> , 842 P.2d 364 (Okla. Ct. App. 1992).....	33, 34
<i>Reno v. Flores</i> , 507 U.S. 292 (1993).....	27
<i>Rivera v. Marcus</i> , 696 F.2d 1016 (2d Cir. 1982)	33
<i>Rodriguez v. McLoughlin</i> , 214 F.3d 328 (2d Cir. 2000)	32, 33
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982).....	22
<i>Smith v. Organization of Foster Families for Equality & Reform</i> , 431 U.S. 816 (1977).....	4, 23, 25, 26, 30
<i>Troxel v. Granville</i> , 530 U.S. 57 (2000).....	18, 26
<i>United States v. James Daniel Good Real Property</i> , 510 U.S. 43 (1993).....	22
<i>Volkswagenwerk Aktiengesellschaft v. Schlunk</i> , 486 U.S. 694 (1988).....	23, 24
<i>W.S. Kirkpatrick & Co. v. Enviromental Tectonics Corp., International</i> , 493 U.S. 400 (1990).....	25

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Washington v. Harper</i> , 494 U.S. 210 (1990).....	24
<i>Watterson v. Page</i> , 987 F.2d 1 (1st Cir. 1993)	33
<i>Wilson v. Family Services Division, Region Two</i> , 554 P.2d 227 (Utah 1976)	33
<i>Wisconsin v. Constantineau</i> , 400 U.S. 433 (1971).....	24

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV, § 1	21
28 U.S.C. § 1257	1
Va. Code § 20-146.16(A).....	6, 23
Va. Code § 63.2-1202(L)	23
Va. Code § 63.2-1216.....	12
Va. Code §§ 63.2-1221 to 1244.....	29

OTHER AUTHORITIES

Rozina Ali, <i>How Did This Man Think He Had the Right to Adopt This Baby?</i> , N.Y. Times Mag. (Nov. 10, 2022), https://www.nytimes.com/2022/11/10/maga zine/afghanistan-orphan-baby-l.html	35

TABLE OF AUTHORITIES—Continued

	Page(s)
Glenn Beck, <i>URGENT: Save ‘Baby Sparrow’ from the Taliban The Mast Family</i> (Feb. 18, 2025), https://www.youtube.com/watch?v=rM1VDNPi6-o	17
Riazat Butt et al., <i>A baby was found in the rubble of a US raid in Afghanistan. But who exactly was killed and why?</i> , Associated Press (updated Aug. 3, 2023), https://apnews.com/article/afghanistan-raid-marine-orphan-custody-1e73bba608994a53fca37b904dfd9a81	8
<i>Convention on Protection of Children and Cooperation in respect of Intercountry Adoption</i> , T.I.A.S. No. 08-401 (1993)	23
<i>Hold Joshua Mast Accountable for Abducting an Afghan Child</i> , Project ANAR, https://projectanar.org/campaigns/babydoe/ (last visited July 24, 2026)	35
Juliet Linderman et al., <i>Military board substantiates misconduct but declines to fire Marine who adopted Afghan orphan</i> , Associated Press (Oct. 9, 2024), https://apnews.com/article/afghan-baby-adoption-military-marines-0600f1da2b7af43490784aa27cd3e597	16

TABLE OF AUTHORITIES—Continued

	Page(s)
Macarena Liy, <i>The custody battle for a young Afghan girl: Was she adopted or abducted by a US family?</i> , El País (Sept. 19, 2023), https://english.elpais.com/usa/2023-09-19/the-custody-battle-for-a-young-afghan-girl-was-she-adopted-or-abducted-by-a-us-family.html	35
Martha Mendoza et al., <i>US fights to stop soldier from keeping Afghan war orphan</i> , Independent (Sept. 15, 2023), https://www.the-independent.com/news/world/americas/marine-major-joshua-mast-afghan-orphan-b2412256.html	35
Shawn Ryan Show, <i>Joshua Mast - U.S. Marine's Message to President Donald Trump</i> (Feb. 21, 2025), https://www.youtube.com/watch?v=A4BokmLYwHc ;	17
<i>The US said a Marine could not adopt an Afghan girl. Records show officials helped him get her</i> , Arab News (Feb. 8, 2026), https://www.arabnews.com/node/2632263/world	35

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request a writ of certiorari to review the Virginia Supreme Court's judgment.

OPINIONS BELOW

The Virginia Supreme Court's decision is reported at 925 S.E.2d 665. App.1a-106a. The Virginia Court of Appeals' decision is reported at 903 S.E.2d 513. App.107a-35a. The Fluvanna County Circuit Court's decisions are unpublished. App.214a-80a.

JURISDICTION

The Virginia Supreme Court entered judgment on February 12, 2026 (App.1a-106a) and denied rehearing on April 22, 2026 (App.306a). On July 16, 2026, the Chief Justice extended the time to file a petition for a writ of certiorari until September 18, 2026. This Court has jurisdiction under 28 U.S.C. § 1257. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 478-80 (1975).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

Relevant constitutional and statutory provisions are reproduced in the appendix. App.325a-36a.

INTRODUCTION

Every so often, a case comes along requiring this Court's intervention to correct an egregious miscarriage of justice—and to uphold the basic fairness and integrity of the American rule of law. This is such a case.

In its decision below, the Virginia Supreme Court upheld a state adoption order that a Virginia couple used to wrest a two-year-old child from the arms of the Afghan family who had raised her since infancy. The child, Baby Doe, had been orphaned during a 2019 military operation in Afghanistan. Months later, with the personal approval of then-Secretary of State Mike Pompeo, the Government of Afghanistan awarded custody to Afghan family members it identified as Baby Doe's next of kin. For the next year and a half, a married couple in that family (the A.s, petitioners here) lawfully raised Baby Doe in Afghanistan as their own daughter. Meanwhile, a Virginia couple (the Masts, respondents here) obtained an adoption order in Virginia state court, without informing petitioners or the United States. The Masts then convinced petitioners to bring Baby Doe to Virginia. Shortly after they arrived, the Masts seized the child.

The Virginia adoption order purportedly justifying the seizure was plainly unlawful under state law. And as the United States repeatedly emphasized, the Masts "obtained the final adoption order by committing a fraud on the court." App.166a. The Masts falsely told multiple Virginia judges that Baby Doe was stateless, that the Afghan government would waive jurisdiction over her, and that a search for her Afghan relatives was unsuccessful. App.159a. Just

as egregiously, the Masts concealed the Virginia adoption proceedings from both the United States and petitioners, who had no notice or opportunity to be heard. App.143a-46a. As a result, no one pointed out the misrepresentations underlying the Masts' illicit effort to adopt Baby Doe—which her family, her government, and the United States would all have vehemently opposed had they known about it.

After petitioners learned of the Virginia adoption order, they sued to overturn it. With full-throated support from the United States, petitioners won in Virginia circuit court. The Virginia Court of Appeals then unanimously agreed that the adoption order was void and unenforceable.

But in a sharply divided 4-3 decision, the Virginia Supreme Court reinstated the order on procedural grounds. Invoking a six-month Virginia limitations period that expired before the Masts seized Baby Doe—and before petitioners even knew the order existed—the majority refused to consider petitioners' state-law challenges. The majority also rejected petitioners' claim to procedural due process rights, holding that petitioners had no constitutionally protected liberty interest in their relationship with Baby Doe.

The Virginia Supreme Court has the last word on Virginia law, so petitioners cannot seek further review of its deeply flawed statute-of-limitations holding. But *this* Court is the final authority on the federal Due Process Clause. As to that bedrock constitutional guarantee, the decision below is profoundly wrong.

Procedural due process is the foundation of the rule of law. Under this Court's precedent, a teenager

facing suspension from school or revocation of a driver's license possesses a "liberty" interest triggering procedural due process protections. Guardians and caretakers facing the permanent loss of a child they have raised since infancy—and intend to love and support for the rest of their lives—have a far stronger claim to protection. That is especially so when their custodial relationship has been approved by the sovereign government of the country where they and the child live, and when an adoption order would consign the child to total strangers halfway around the world. In this country, any caretaker in that position deserves notice of adoption proceedings concerning that child and an opportunity to be heard. Petitioners received neither.

The Virginia Supreme Court's decision stems from entrenched confusion about when a child's nonparent caretakers are entitled to procedural due process in adoption proceedings. Nearly fifty years ago, this Court left open whether foster parents have a protected liberty interest in the relationships they build with their wards. *See Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 846-47 (1977). Since then, courts across the country have splintered not just on the right answer to that specific question, but also more generally on how to analyze the due process rights of a child's nonparent caretakers. The decision below is the latest in a long line of conflicting cases in this important area.

Petitioners have not seen Baby Doe since she was taken from them. Unless this Court intervenes, they may never see her again. The petition should be granted.

STATEMENT OF THE CASE

It is undisputed that petitioners were Baby Doe’s “physical custodians,” “caretakers,” and “parent figures” when the Virginia adoption order issued—yet petitioners received no notice of the adoption proceedings. App.23a. Those facts alone should have resolved the procedural due process question presented in this case.

The following summary draws from the two most thorough and independent accounts of the events at issue: the United States’ amicus brief to the Virginia Supreme Court, and the Virginia Court of Appeals’ unanimous decision. Both are reproduced, in full, in the petition appendix. App.136a-78a (amicus brief); App.107a-35a (decision).¹

A. Factual Background

1. After a September 6, 2019 military operation in Afghanistan, U.S. forces discovered a “severely wounded” infant, Baby Doe, whose parents died in the attack. App.111a. U.S. forces took Baby Doe to Bagram Air Force Base for medical treatment. *Id.* On September 17, U.S. medical personnel determined that she was “stable.” App.284a. Nine days later, they concluded that she “need[ed] normal infant care,” rather than continued “hospitalization.” App.285a. With Baby Doe “not in need of continuous medical care,” App.286a, the United States worked

¹ All appendix materials were publicly filed or later released with identifying information redacted. “R.____” refers to the compiled circuit court record transmitted to the Virginia Court of Appeals in case No. 0876-23-2, which the parties and the United States cited in their briefs to the Virginia Supreme Court. Petitioners will transmit that compiled record to this Court upon request.

with the Government of Afghanistan and the International Committee of the Red Cross (Red Cross) to reunite the child with her next of kin, App.139a.

During this time, respondent Joshua Mast was deployed in Afghanistan as a Marine Corps Judge Advocate. App.111a. Mast encountered Baby Doe while on a temporary assignment. App.141a. On October 23, 2019, Mast attended a meeting with officials from the United States, Afghanistan, and the Red Cross “to discuss the family reunification search,” where he was told the Red Cross “was ‘in contact with individuals claiming to be [Baby Doe’s] relatives.’” App.111a-12a.

Days after the meeting, Mast and his wife, respondent Stephanie Mast, sought legal custody of Baby Doe in Virginia juvenile and domestic relations court. App.112a, 141a. The Masts did not inform the United States of their custody petition, even though Virginia law requires that anyone “having physical custody of the child” be given “notice and an opportunity to be heard.” Va. Code § 20-146.16(A); see App.142a.

On November 6, 2019, the juvenile court granted the Masts legal custody of Baby Doe, without any input from the United States. App.141a. Accepting their *ex parte* representations, the court asserted that Baby Doe was a stateless child of non-Afghan fighters, and that the Afghan government would formally waive jurisdiction over her “in a matter of days.” App.141a-42a.

On November 7, Joshua Mast emailed the custody order to an attorney with U.S. Forces–Afghanistan. App.142a. Mast said the order “was not intended to interfere with the family trace” and instead was

meant to “create a path” to the United States for Baby Doe *if* Afghanistan waived jurisdiction over her. App.198a; *see* App.142a. Mast’s superior grew “concerned” that Mast “was attempting to interfere” with the government’s efforts “to identify [Baby Doe’s] next of kin,” and so he “excluded” Mast from further “deliberations or decision-making regarding” her care. App.141a.

2. On November 8, 2019, the Masts petitioned the Virginia circuit court for a “Certificate of Foreign Birth” listing Baby Doe’s nationality as “Unknown,” and her parents as “Unknown-Deceased.” App.179a-80a. Once again, the Masts did not notify the United States when seeking relief. App.308a. The circuit court granted their petition that same day. App.179a-81a.

On November 10, a Sunday, the Masts petitioned the circuit court to adopt Baby Doe, again without notice to the United States. App.141a, 143a. Taking the Masts at their word, the circuit court issued a same-day interlocutory adoption order deeming Baby Doe a “stateless minor orphan” with no known family. App.182a-86a.

As the United States later explained, the Masts “made no attempt to enforce the custody and adoption orders” for months, “[d]espite having represented [to the courts] that the child had urgent medical needs necessitating evacuation.” App.143a. Instead, Baby Doe remained in U.S. custody in Afghanistan. App.113a.

3. By December 31, 2019, the Afghan government “had identified [Baby Doe’s] relatives.” *Id.* Together with the United States and the Red Cross, the Afghan government “concluded that the child was an Afghan

national” and that Baby Doe’s “paternal uncle” was her next of kin. *Id.*; see App.199a-200a. As the United States explained, the Afghan government further “determined that [Baby Doe’s] Afghan parents lived next door to individuals the U.S. and Afghan forces had targeted” and were “incidental casualties in the fighting.” App.139a-40a.²

A month later, the Afghan government formally asked the United States to transfer Baby Doe, so that she could “be united with her government-identified family,” who had been “granted custody” according to Afghan law. App.113a. As the United States later noted, “[t]he responsible U.S. officials determined that the Afghan [government] had properly verified the identity of the child’s relatives.” App.140a. At the personal direction of then-Secretary of State Mike Pompeo, the United States agreed to transfer Baby Doe so she could be placed in her family’s custody. See *id.*; App.113a; R.2405 (Pompeo cable).

4. After learning of the United States’ plans to reunite Baby Doe with her relatives, the Masts sued Secretary Pompeo and then-Secretary of Defense Mark Esper in federal district court on February 26, 2020. App.113a, 307a. The Masts sought a temporary restraining order blocking Baby Doe’s transfer, citing the November 6 custody order and November 8 certificate-of-foreign-birth order. App.113a, 308a.

² See Riazat Butt et al., *A baby was found in the rubble of a US raid in Afghanistan. But who exactly was killed and why?*, Associated Press (updated Aug. 3, 2023), <https://apnews.com/article/afghanistan-raid-marine-orphan-custody-1e73bba608994a53fca37b904dfd9a81>.

The Masts “did not disclose” the Virginia circuit court’s November 10 “interlocutory adoption order” to the federal court or to the United States. App.113a; *see* App.143a. Instead, their counsel—Joshua Mast’s brother—told the court “that the [Mast]s did *not* intend to adopt the child.” App.113a (emphasis added); *see* App.314a (The Court: “Your client is not asking to adopt the child.” Counsel: “No, sir.”). The United States steadfastly opposed the Masts’ TRO, denying the validity of the Virginia custody order on federal and state grounds. App.310a-17a, 320a; *see* App.144a.

The federal district court denied the TRO. The court explained that (1) the juvenile court’s custody order and the circuit court’s certificate-of-foreign-birth order presumed that the Afghan government would “issue a waiver of jurisdiction,” which never happened; (2) under Virginia law, the “[U.S.] Department of Defense should have been formally served with and provided notice of the [state court] proceedings,” which was not done; and (3) the Masts “fail[ed] to proceed through proper channels.” App.321a-22a.

On February 27, 2020, the United States transferred Baby Doe to the Afghan government. App.113a-14a. The Afghan government “then placed the child with her new guardian” (i.e., her “paternal uncle”), who in turn “transferred guardianship to his son,” petitioner A.A. (i.e., Baby Doe’s “first cousin”), and his wife, petitioner F.A. *Id.* As Afghan and Islamic legal experts later testified, such a transfer is customarily accomplished under Afghan law by mutual agreement and without court involvement. App.192a-95a; R.4151-52, 4185-86; R.4804.

5. In March 2020, the Masts dismissed their federal suit. App.145a. They also asked an American attorney in Afghanistan to find petitioners. App.115a. After locating them, the attorney tried to “convince” petitioners “to send [Baby Doe] to the United States,” supposedly for “medical treatment.” *Id.* The communications continued for months and eventually included Joshua Mast. App.115a-16a.

In the meantime, the Masts persisted in Virginia court. On October 26, 2020, they asked the circuit court for a “final adoption order,” claiming that “red tape” was hindering Baby Doe’s “evacuation” from Afghanistan. App.114a. Petitioners “did not receive notice,” even though they had been raising Baby Doe for nine months. App.115a. The United States was not informed either. App.145a-46a.

The Masts did not tell the circuit court that (1) “the federal district court had denied their petition for a TRO,” (2) “Afghanistan had not waived its jurisdiction [over Baby Doe],” or (3) “the child had been transferred to people the United States had determined were the child’s relatives.” App.114a. Unaware of these facts, the circuit court granted the Masts a final adoption order on December 3, 2020. *Id.*

6. In August 2021, the Afghan government collapsed and the Taliban seized control of the country. App.115a. With the security situation deteriorating, petitioners finally “agreed to come to the United States.” *Id.* Joshua Mast arranged for U.S. forces to evacuate petitioners and Baby Doe, without telling petitioners about the adoption order or informing the U.S. personnel involved “that the Afghan Government had given custody of [Baby Doe] to her relatives.” App.146a.

Instead, as the United States later explained, Mast “falsely informed U.S. personnel that the child was his ‘daughter per both Afghan and U.S. court orders,” and “provided them with a fraudulent document that he described as an Afghan court order.” *Id.* Mast also presented “an Afghan passport” for Baby Doe, complete with “the name the [Masts] had given her” and a “digitally altered” photograph. App.115a n.12. Mast obtained the passport by paying a “friend of a friend” approximately \$2,000 to “make it happen.” R.5616. He described petitioners “only as a ‘Pashtun Couple’ who were accompanying the child.” App.146a.

In late August 2021, petitioners and Baby Doe entered the United States. App.116a. They were temporarily housed at a military base in Virginia. *Id.* On September 3, “police officers knocked on [petitioners’] door” and “brought A.A., F.A., and [Baby Doe] to a car,” where “a woman placed the child in a car seat and told [petitioners] that they were going to an interview.” *Id.*

“When they reached a meeting room,” the woman held onto Baby Doe, while “the child tried to get back to F.A.” *Id.* The woman told F.A. that “the child could not legally remain with [petitioners] because they were not her biological parents.” *Id.* Joshua Mast then “came into the room and said he was told that he must take [Baby Doe], or she would be placed in an orphanage.” App.116a-17a.

As Baby Doe cried, F.A. begged: “[P]lease give me [my] daughter. She is my daughter. Please give her to me.” App.117a. Mast took the child anyway. *Id.*

At the time, Baby Doe was two years old. Petitioners had raised her for eighteen months. They have not seen her since.

B. Procedural History

1. Soon after Baby Doe was taken from them, petitioners “discovered that a Virginia court had ordered [her] adoption” eight months earlier. App.117a. On December 8, 2021, petitioners petitioned the circuit court to vacate its final adoption order and grant them custody over Baby Doe. App.117a & n.14.

Petitioners urged vacatur on state and federal grounds, including that the circuit court “lacked jurisdiction” and the order was “the result of an intentional and material fraud” by the Masts. R.7-9. Most relevant here, petitioners argued that they “never received notice or opportunity to contest the adoption proceedings,” in violation of “due process.” R.161-62.

The Masts sought dismissal. App.109a-10a. They maintained that petitioners’ collateral attack was barred by Virginia Code § 63.2-1216, “which prohibits challenges to a final adoption order after six months.” App.110a.

The United States filed two statements of interest supporting petitioners. App.117a; *see* R.486-534; R.3204-308. The United States argued that “the custody and adoption orders were void because of the M[ast]s’ misrepresentations.” App.117a. The United States also maintained that Virginia courts “must defer to the federal government’s foreign policy decisions to recognize Afghanistan’s jurisdiction and transfer the child to the Afghan government for family reunification.” *Id.* In support, the United

States submitted detailed declarations from State and Defense Department officials “explaining the U.S. military’s custody and care for the child and the United States’ decision to transfer her to the Afghan Government for placement with her next of kin.” App.147a-48a; *e.g.*, App.196a-202a, 281a-88a.³

2. On November 11, 2022, Judge Richard Moore—who presided over the adoption proceedings—rejected the Masts’ dismissal request from the bench. App.203a-13a. Judge Moore explained that the Masts “knew” at least three important facts that “should have been brought to the attention of the court” but were not: (1) “the child had been placed” with “a couple claiming to be family”; (2) “the Afghan[] Government was not willing” to waive jurisdiction over Baby Doe; and (3) a federal district court denied the Masts’ request to halt Baby Doe’s transfer from U.S. custody. App.205a-07a.

Judge Moore explained that those undisclosed facts “addressed the very foundation of this court taking any action, at all.” App.207a. If he “had been informed of those three things” by the Masts, he could have said “sorry, the child is in Afghanistan,” so “[w]e’re just going to stand down.” App.208a-11a. But with “nobody on the other side,” Judge Moore thought the Masts were seeking “custody [of] an orphan with no family” and “in severe need” of medical care. App.211a. He found that petitioners had been “entitled to notice” but never received it,

³ After the United States confirmed that Baby Doe was found to be Afghan, petitioners unsuccessfully sought emergency injunctive relief. *See* R.1292-302; R.1653-58; Order, *A.A. v. Mast*, No. 220674 (Va. Nov. 2, 2022).

resulting in “one-sided” proceedings where the Masts’ assertions went uncontested. App.209a-10a, 212a.

On November 18, 2022, Judge Moore issued a letter opinion reiterating that he had entered the final adoption order “with apprehension and some hesitance.” App.225a. But because Judge Moore was “not aware of any opposition or objection,” and because he had been told that Baby Doe “desperately needed” medical care, he had moved ahead. *Id.* Judge Moore regretted not seeking “more detailed information on the person [already] caring for the child” at the time. *Id.*

Judge Moore disagreed with how petitioners described the Masts’ motives and determined—contrary to the United States, Afghan government, and Red Cross—that petitioners had not proved they were Baby Doe’s “biological kin.” App.246a. Nonetheless, he held that petitioners had a “liberty interest in their relationship with [Baby Doe]” as her “physical custodians,” “caretakers,” and “parent figures” for “18 months in Afghanistan.” *Id.* As a result, Judge Moore explained, petitioners “probably” were “entitled to notice” under the Due Process Clause, meaning that Virginia Code § 63.2-1216’s limitations period “does not bar an attack on the final adoption order.” App.271a-73a. Dismissal was therefore unwarranted. *Id.*

3. After Judge Moore retired, Judge Claude Worrell took over the case. On May 3, 2023, he granted petitioners’ request to vacate the final adoption order, citing “due process” violations suffered by petitioners and “extrinsic fraud” committed by the Masts. App.289a-95a. Judge Worrell concluded that petitioners were Baby Doe’s

“de facto parents,” having raised her for “18 months.” App.293a.

Judge Worrell further held that petitioners “were entitled to some process that they did not receive,” rendering the final adoption order “void.” *Id.* He also found that the Masts failed to provide “all of the information known to [them] at the time the [final adoption] order was entered”—including that “there was no waiver [of jurisdiction over Baby Doe] coming” from the Afghan government and that the United States had decided to “give the child to the Afghan government” for permanent placement with her relatives. App.294a.

Despite vacating the final adoption order, Judge Worrell declined to disturb the juvenile court’s custody order and the circuit court’s initial interlocutory adoption order. App.294a-95a.

4. Both sides appealed. The United States filed an amicus brief supporting petitioners, rejecting the custody and adoption orders as “void” due to the Masts’ “extrinsic fraud” and the Virginia courts’ lack of statutory authority to issue them. App.155a.

On July 16, 2024, the Court of Appeals unanimously sided with petitioners and held that the custody order and adoption orders were void under Virginia law. App.135a. On the custody order, the Court of Appeals explained that Baby Doe’s total lack of “significant connections” with Virginia was “sufficient in itself to find that the [juvenile] court lacked subject-matter jurisdiction under [Virginia] Code § 20-146.12(A)(2).” App.123a-24a. On the adoption orders, the Court of Appeals reasoned that the circuit court “lacked the power to render” them because “the adoption of [Baby Doe] does not fit any

of the five categories of adoption authorized” by Virginia law. App.128a-29a (analyzing agency, parental placement, stepparent, close relative, and adult adoptions). The court also emphasized that the Masts had misleadingly “represented that [Baby Doe] was stateless” and that “a waiver [of jurisdiction] from Afghanistan was imminent.” App.123a.

The Court of Appeals further concluded, as a matter of state law, that Virginia Code § 63.2-1216’s six-month time limit “does not bar collateral attacks challenging a lack of subject-matter jurisdiction or power to render.” App.130a-31a. The court found it unnecessary to reach petitioners’ federal due process challenge given its state-law holdings. App.134a-35a. The Court of Appeals accordingly “direct[ed] the circuit court to dismiss the adoption proceedings and conduct a hearing on the existing custody petition filed by [petitioners].” App.135a.

5. On August 15, 2024, the Masts petitioned for review in the Virginia Supreme Court. Shortly afterwards, that court granted the Masts’ request to stay all Virginia circuit court proceedings. App.304a. Three months later, the Virginia Supreme Court agreed to hear the case.⁴

⁴ In the meantime, multiple tribunals sanctioned Joshua Mast for related misconduct. On August 16, 2024, Mast was held in civil contempt for using “photos of Baby Doe” to “raise money for his legal defense,” in violation of a protective order. *Doe v. Mast*, 745 F. Supp. 3d 399, 403, 417-24 (W.D. Va. 2024). Then, on October 8, 2024, a Marine Corps panel found that Mast’s quest to adopt Baby Doe involved conduct unbecoming of an officer. Juliet Linderman et al., *Military board substantiates misconduct but declines to fire Marine who adopted Afghan orphan*, Associated Press (Oct. 9, 2024), <https://apnews.com/>

Petitioners advanced numerous grounds to affirm under federal and state law. Appellees’ Br. 22-46, *J.M. v. A.A.*, No. 240707 (Va. Dec. 30, 2024) (“VSC.Br.”). As relevant here, petitioners reiterated that the adoption proceedings violated their federal due process rights in “three independent ways”—i.e., the proceedings (1) “interfered with petitioners’ parental rights,” (2) failed to provide “constitutionally sufficient notice,” and (3) were conducted “without personal jurisdiction.” *Id.* at 41.

The United States filed another amicus brief supporting petitioners. The United States reiterated that Baby Doe “should never have been removed from [their] custody” and that the Masts had obtained the Virginia adoption orders “by committing a fraud on the court.” App.138a, 166a. The United States urged “the immediate return of the child.” App.178a.

In response, the Masts went on a media blitz, repeatedly describing this case as a “Taliban Elián González situation” and accusing A.A. of being on a terror watch list. *E.g.*, Shawn Ryan Show, *Joshua Mast - U.S. Marine’s Message to President Donald Trump* 0:15:22, 1:16:39, 04:43:21, 5:02:32 (Feb. 21, 2025), <https://www.youtube.com/watch?v=A4BokmLYwHc>; Glenn Beck, *URGENT: Save ‘Baby Sparrow’ from the Taliban | The Mast Family*, 0:57:17, 01:20:54 (Feb. 18, 2025), <https://www.youtube.com/watch?v=rM1VDNPi6-o>. The Masts did this even though petitioners had fled the Taliban with Joshua Mast’s assistance—and even though their (carefully counseled) merits briefing nowhere made the watch-list allegation, which the United States had

expressly rejected in a Virginia court filing a year earlier. App.146a, 303a.

On February 25, 2025, minutes before a Department of Justice attorney was set to present oral argument supporting petitioners, he was directed by Main Justice to stand down. The United States then withdrew its amicus brief to the Virginia Supreme Court. App.305a. But the United States has never disavowed that brief's factual representations or legal arguments. Nor has it withdrawn its similar lower court filings.

6. On February 12, 2026, the Virginia Supreme Court issued a 4-3 opinion reversing the Court of Appeals. App.1a-59a.

a. The majority did not address the merits of petitioners' state-law arguments that the adoption orders were void because (1) the circuit court lacked statutory power to render them, and (2) they were the product of the Masts' fraudulent representations and omissions. Instead, the majority deemed those contentions time-barred under Virginia Code § 63.2-1216's six-month limitations period. App.30a-39a.

The majority recognized that § 63.2-1216 could not block consideration of petitioners' federal due-process arguments. App.39a. But the majority held that petitioners had no constitutionally cognizable interest in their relationship with Baby Doe entitling them to notice of the adoption proceedings. App.43a-49a.

To the majority, petitioners' due process claim could be viable only if they possessed "the same constitutional rights" as "biological or adoptive parents" under *Troxel v. Granville*, 530 U.S. 57 (2000). App.40a. That is, the majority held that petitioners only had due process rights if they

qualified as “parents” protected by the Due Process Clause’s “substantive component.” App.44a. The majority then opined that “we have applied [*Troxel*’s] constitutional protections only to actual parents”—but *not* to grandparents, relatives, or other nonparent caretakers. App.44a-47a.

b. Justices Mann, Powell, and Millette dissented. App.60a-106a. To them, the bottom line was clear: “[T]his is just wrong.” App.60a.

The dissenters would have vacated both adoption orders and the custody order under Virginia law. App.77a-91a. They agreed with the Court of Appeals that the juvenile court lacked subject-matter jurisdiction to issue the custody order and that the circuit court lacked power to render the adoption orders, making all three orders void and § 63.2-1216’s time bar inapplicable. *Id.* In their view, this case involved “a full-blown lack of compliance with the adoption statutes,” which “categorically undermined the legitimacy of the orders.” App.88a.

Justice Mann further concluded that “the custody and adoption orders, entered without [petitioners’] knowledge, violated their federal constitutional rights to notice of the proceedings.” App.103a. In his view, a child’s “guardian[s]”—not just her parents—are entitled to “due process” in “an adoption proceeding.” App.104a. Because petitioners had raised Baby Doe for most of her young life, and because an American court was deciding whether she would remain in their care, Justice Mann maintained that petitioners “were constitutionally entitled to notice and an opportunity to object.” App.105a. “But they received neither.” *Id.*

7. Petitioners sought rehearing, challenging the majority’s holding that they lacked federal due

process protection simply because they did not qualify as “parents of Baby Doe under *Troxel*.” Appellees’ Reh’g Pet. 1-5, *Mast v. A.A.*, No. 240707 (Va. Apr. 15, 2026) (“Reh’g.Pet.”). Petitioners pointed out that their *procedural* due process argument did “not turn on the *Troxel* inquiry or whether [they] were equivalent to parents” for *substantive* due process purposes. *Id.* at 3. Rather, “as Baby Doe’s custodians and caretakers at the time of the final adoption order, [petitioners] still had basic procedural rights” under the Due Process Clause. *Id.*

On April 22, 2026, the Virginia Supreme Court denied rehearing. App.306a.

8. While the foregoing proceedings unfolded, petitioners were granted asylum in the United States. They live in Texas with their two young biological children, both of whom are American citizens. They have made a home for themselves in this country and have settled here for good. Petitioners seek certiorari in the hope that their family will finally be reunited.

REASONS FOR GRANTING THE WRIT

The case turns on a simple principle: If an American court is going to take a child away from her family, it must ensure a fair proceeding where the family can argue that the proposed adoption is illegal and that the child should remain with them. That did not happen here. As the United States recognized, the Masts “obtained the final adoption order by committing a fraud on the court,” without notice or any opportunity for petitioners to be heard. App.166a. The decision below refused to right that wrong. App.44a-47a. The American rule of law demands better.

This Court is the ultimate guardian of our Constitution’s Due Process Clause. It should grant review to vindicate the essential protections that provision gives anyone whose rights are adjudicated in an American court. In doing so, the Court can resolve significant division in the lower courts on when a child’s nonparent caretakers are entitled to procedural due process in adoption proceedings. Certiorari is warranted.

I. The Virginia Supreme Court’s Decision Defies Bedrock Due Process Principles

The Virginia Supreme Court did not dispute that petitioners were Baby Doe’s “physical custodians,” “caretakers,” and “parent figures.” App.23a. It did not dispute that petitioners intended to raise Baby Doe as their own child. Nor did it dispute that petitioners lacked any notice of the adoption proceedings. But according to the Virginia Supreme Court, petitioners had no constitutionally protected interest in their relationship with a child they had raised since infancy—and thus no due process right to notice of, or to participate in, the adoption proceedings that permanently removed Baby Doe from their care. That holding is profoundly wrong and sets a dangerous precedent.

A. Procedural Due Process Is Essential In Adoption Proceedings

The Fourteenth Amendment’s Due Process Clause provides that no state may “deprive any person of life, liberty, or property without due process of law.” That foundational guarantee offers two kinds of protection. First, “substantive” due process “provides heightened protection against government interference with certain fundamental rights.” *Dep’t of State v. Muñoz*,

602 U.S. 899, 910 (2024). Second, the Due Process Clause promises a “fair process” before someone may be deprived of “life, liberty, or property,” regardless of whether a fundamental right is involved. *Id.* at 909-10.

“The essence” of the second kind of protection—procedural due process—is the requirement that “a person in jeopardy of serious loss” receive “notice of the case” and an “opportunity to meet it.” *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976). Such notice to “interested parties” is the most “elementary and fundamental requirement of due process.” *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Besides ensuring simple “fair play,” the right to notice guards against “unfair or mistaken deprivations” by enabling the adversary system to function. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993).

Nowhere is that bedrock principle more vital than in the adoption context, where “the result of the judicial proceeding” can be to “permanently deprive a legitimate parent of all that parenthood implies.” *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). Separating a child from her caretakers “work[s] a unique kind of deprivation,” one as grave as anything else the government can do to a person. *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 27 (1981). Because an ill-gotten adoption order threatens “the irretrievable destruction of their family life,” a child’s caretakers have a “critical need for procedural protections.” *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). And “as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests.” *Lassiter*, 452 U.S. at 28. So in adoption

proceedings, “there can be no doubt” as to “the basic requirement of notice” to those whose relationship with the child is at stake. *Armstrong*, 380 U.S. at 550.

Nor can anyone “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). A “familial relationship” can arise not just from biological kinship, but also from “the emotional attachments that derive from the intimacy of daily association.” *Id.* That is especially true when a child is placed with her caretakers “as an infant, has never known h[er] natural parents, and has remained continuously for several years in the[ir] care.” *Id.*

Small wonder, then, that Virginia requires that *anyone* “having physical custody of the child”—not just natural parents—receive “notice and an opportunity to be heard” in custody and adoption proceedings. Va. Code § 20-146.16(A) (custody); *see id.* § 63.2-1202(L) (adoption). Similarly, the Hague Adoption Convention—a global treaty governing international adoptions signed by the United States—requires *anyone* in a child’s home country “whose consent is necessary for adoption” to “give[] their consent freely” and to be “duly informed of the effects of their consent” to an international adoption. *Convention on Protection of Children and Cooperation in respect of Intercountry Adoption*, T.I.A.S. No. 08-401, arts. 4(c)(1)-(2) (1993).

This Court has long recognized that “foreign nationals” located “abroad” have a procedural due process right to notice and to participate in domestic litigation affecting their rights. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705

(1988). The integrity of the American judicial system—and basic fairness—require notice to such “interested parties,” regardless of where they reside. *Id.* That is especially true in adoption proceedings, where the stakes are immense.

**B. Physical Custodians Raising A Child As
Their Own Have Procedural Due Process
Rights In Adoption Proceedings**

Petitioners indisputably lacked notice of, and an opportunity to be heard in, the Virginia adoption proceedings unfolding thousands of miles away from their home in Afghanistan. The sole question in this case is whether they were entitled to such notice under the Due Process Clause’s “protection of liberty and property.” *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 569-70 (1972). The answer is obviously yes.

1. The term “liberty” in the Due Process Clause is “broad indeed.” *Id.* at 572. Among other things, it encompasses “students’ standing with their fellow pupils and their teachers” after being “suspended” from school, *Goss v. Lopez*, 419 U.S. 565, 574-75 (1975); a clergyman’s continued possession of a “driver’s license,” *Bell v. Burson*, 402 U.S. 535, 537-39 (1971); an alcoholic’s desire not to be “designated” publicly as engaging in “excessive drinking,” *Wisconsin v. Constantineau*, 400 U.S. 433, 434 (1971); and a mentally ill prisoner’s “interest in avoiding the unwanted administration of antipsychotic drugs,” *Washington v. Harper*, 494 U.S. 210, 221-22 (1990).

Petitioners possessed a far more important protected liberty interest in their relationship with Baby Doe. They took her in “as an infant,” raised her as their own daughter, and developed “a deeply loving

and interdependent relationship” with her. *Smith*, 431 U.S. at 844; *supra* 9-12. That relationship—involving physical custody, the passage of eighteen months, and the creation of a permanent parent-like bond—is more than sufficient to establish procedural due process rights.

Petitioners’ biological relationship with Baby Doe independently establishes a protected liberty interest. *Infra* 33. The Afghan government—along with the United States and Red Cross—concluded that A.A.’s father is Baby Doe’s “paternal uncle” and therefore granted him custody of the child. App.148a; *see* App.199a. Judge Moore had no authority to second-guess that “act[] of a foreign sovereign.” *W.S. Kirkpatrick & Co. v. Env’t Tectonics Corp., Int’l*, 493 U.S. 400, 409 (1990) (act of state doctrine).⁵

To be clear: This is quite unlike a foster care case, where foster parents have only a temporary connection with their wards based on a “knowingly assumed contractual relation with the State,” subject to predefined “expectations and entitlements” under state law. *Smith*, 431 U.S. at 845-46 (acknowledging foster parents may still have protected liberty interests). Here, petitioners fully expected to continue their “deeply loving and interdependent relationship” with Baby Doe for the rest of their lives. *Id.* at 844. The “emotional attachments” petitioners

⁵ Judge Moore declined to find that A.A. and Baby Doe are “biologically related.” App.235a n.19. But petitioners appealed that determination, and the Virginia Supreme Court never resolved it because the majority held that only biological or adoptive parents have procedural due process rights. App.15a-16a. In any event, a liberty interest “may exist even in the absence of a blood relationship” between caretaker and child, *Smith*, 431 U.S. at 844, as Judge Moore agreed, App.268a.

formed “from the intimacy of daily association” with Baby Doe, as she grew from baby to toddler, deserve basic procedural due process protection. *Id.*

2. The Virginia Supreme Court held that unless petitioners could show that they were entitled to “the same constitutional rights as biological parents and legally adoptive parents” under *Troxel v. Granville*, 530 U.S. 57 (2000), they entirely lacked due process rights. App.45a. And it held that petitioners could not carry that burden because Virginia courts have “applied [*Troxel*’s] constitutional protections only to actual parents.” App.43a-45a. So to the Virginia Supreme Court, *all* nonparents caring for children—even grandparents or other relatives—lack a constitutionally protected interest in the child’s placement. *Id.* On that basis, the court rejected petitioners’ claim to “due-process protections” across the board. App.48a.

The Virginia Supreme Court’s holding rests on an obvious error. It conflates fundamental rights grounded in *substantive* due process with bare liberty interests sufficient to trigger *procedural* due process. *Supra* 21-22. As the United States recently explained, those “two types of due-process claims” are distinct. Cert. Pet. 21, *Genalo v. Black* (No. 25-886), *cert. granted*, 2026 WL 1718025 (June 15, 2026). Indeed, courts must refrain from “erroneously appl[ying] a procedural-due-process framework” to analyze “substantive-due-process claims”—and vice versa. *Id.* at 14; *see Troxel*, 530 U.S. at 92 n.1 (Scalia, J., dissenting). The Virginia Supreme Court made precisely that mistake.

Below, petitioners argued that their role as Baby Doe’s parent figures following the deaths of her parents afforded them *both* substantive *and*

procedural due process protection. VSC.Br.43-44. For their procedural due process claim, petitioners did not need to establish the same substantive due process rights as biological parents. They just had to show that their custodial relationship with Baby Doe established a protected liberty interest entitling them to notice and an opportunity to be heard before an American court extinguished that relationship in adoption proceedings. The Virginia Supreme Court should have addressed that procedural-due-process claim separately from petitioners' substantive-due-process claim. *E.g., Reno v. Flores*, 507 U.S. 292, 301-09 (1993). Instead, the court treated those distinct contentions as one. App.43a-47a.

Petitioners emphasized this mistake in their rehearing petition, reiterating that their entitlement to "basic procedural rights" did not turn on whether petitioners "were equivalent to parents" for substantive due process purposes. Reh'g.Pet.2-5. Yet the Virginia Supreme Court denied rehearing. App.306a. This Court should not countenance a federal constitutional problem of this magnitude.

C. The Masts' Egregious Misconduct Shows Why Procedural Due Process Is Essential

This case exemplifies why procedural due process is so important in the adoption context. The lack of notice led to entirely one-sided proceedings, which were rife with misrepresentations and omissions by the Masts. Notice to petitioners—or for that matter, to the United States—would have made all the difference.

Judge Moore, who originally issued the adoption order, later emphasized that he may well have decided to "stand down" had he been truthfully

informed of the facts. App.210a. But with “nobody on the other side,” *id.*, Judge Moore—in his own telling—was “not aware of any opposition or objection” to the Masts’ adoption efforts, App.225a. He therefore entered an adoption order that, unbeknownst to him, resulted in a two-year-old girl being taken from the arms of the people who had raised her since she was a baby. App.117a.

If petitioners had received notice and an opportunity to be heard, the Masts would never have gotten away with misleading Judge Moore about a slew of crucial facts. For example:

- The Masts represented in late 2020 that Baby Doe “desperately needed” medical care. App.225a. Petitioners would have pointed out that U.S. medical personnel had previously concluded that Baby Doe was “healthy and not in need of continuous medical care.” App.286a.
- The Masts represented that Baby Doe was a stateless, non-Afghan orphan over whom the Afghan government would soon waive jurisdiction. App.141a; App.112a. Petitioners would have shown that by February 2020, the Afghan government had (1) determined Baby Doe to be Afghan, (2) identified A.A.’s father as her next of kin, (3) refused to waive jurisdiction, (4) demanded custody of Baby Doe, and (5) transferred her to petitioners’ family. App.113a-14a.
- The Masts did not present Judge Moore with the federal district court’s oral order denying their request to block Baby Doe’s transfer from U.S. to Afghan custody. App.114a. Petitioners would have done so and emphasized the court’s reasoning that the Virginia custody and

certificate-of-foreign-birth orders were based on false factual representations and not obtained “through proper channels.” App.322a.

- The Mastts failed to disclose that the adoption order would require taking Baby Doe away from her government-identified family. Petitioners would have emphasized that they had been giving Baby Doe a loving home for nine months and counting. *Supra* 9-12.

Beyond the facts, petitioners would also have explained to Judge Moore why he lacked legal authority to issue the adoption orders. For example, petitioners would have shown that there was no personal jurisdiction over Baby Doe, since she was living with petitioners in Afghanistan and had zero connection to Virginia. *Contra* App.188a.

Petitioners would also have shown that Virginia law authorizes adoptions in only five carefully circumscribed circumstances. *See* App.128a-29a (citing Va. Code §§ 63.2-1221 to 1244); App.329a-30a. As the Court of Appeals correctly held, the Mastts’ adoption of Baby Doe fits *none* of them. *Id.* Judge Moore would not have issued the adoption order had he received adversarial briefing on these points, and any error would have been swiftly corrected on appeal.

In short, “failure to give [petitioners] notice of the pending adoption proceedings” violated the “most rudimentary demands of due process of law”—to disastrous effect. *Armstrong*, 380 U.S. at 550. That fundamental defect invalidates the adoption order as a matter of federal constitutional law, *id.* at 549-50, and renders Virginia’s six-month time bar

unenforceable here, *see* App.39a. The Virginia Supreme Court’s decision should not stand.

II. The Decision Below Deepens Acknowledged Division On When Nonparent Caretakers Enjoy Procedural Due Process Protection

By denying procedural due process to all caretakers except “biological” and “legally adoptive parents,” App.45a, the decision below exacerbates entrenched disarray on the question presented. A half-century ago, this Court found it “unnecessary” to decide when foster parents or other nonparent caretakers have “a constitutionally protected liberty interest” in their relationship with a child in their care. *Smith*, 431 U.S. at 847. Since then, lower courts have split on how to answer that question. Most apply a totality-of-the-circumstances test, while some require a near-final formal adoption or other permanent legal relationship. Courts are also divided on whether biological kinship itself establishes a protected liberty interest. This Court’s guidance is badly needed and long overdue.

1. In deciding whether nonparent caretakers are entitled to procedural due process in adoption proceedings and other child-placement matters, most courts apply a totality-of-the-circumstances test. These courts assess whether nonparent caretakers have “raised” the child, developed a “close family relationship,” and intended to provide “more than merely temporary care.” *Berhow v. Crow*, 423 So. 2d 371, 372-73 (Fla. Dist. Ct. App. 1982).

Under that standard, the question presented must “be addressed on a case by case basis.” *Drummond v. Fulton Cnty. Dep’t of Fam. & Child.’s Servs.*, 563 F.2d 1200, 1207 (5th Cir. 1977) (en banc). Caretakers will

possess a liberty interest if they “fall closer to the status of adoptive parents than in the ordinary, temporary foster arrangement.” *Elwell v. Byers*, 699 F.3d 1208, 1217 (10th Cir. 2012). Courts applying this standard also consider whether “the parental rights of [the child]’s biological parents ha[ve] been terminated.” *Id.* at 1216. But they have declined “to define precisely where the liberty interest threshold” lies. *Id.* at 1217.

For example, in *C.V.C. v. Superior Court*, the California Court of Appeal held that a child’s caretakers had a liberty interest as “prospective adoptive parents,” even though the child’s placement had been conditioned on “an agreement that no adoption petition would be filed until the child had spent a year in the family.” 29 Cal. App. 3d 909, 912-13 (1973). Similarly, in *D.L. v. Huck*, the Indiana Court of Appeal held that foster parents had a liberty interest because, besides being “blood relatives,” they had “raised [the child] practically since birth” and “were in the process of adopting her,” and the child’s natural parents had “terminated their parental rights.” 978 N.E.2d 429, 437 (Ind. Ct. App. 2012).

Petitioners would have easily prevailed under the totality-of-the-circumstances test. They had stepped in for Baby Doe’s deceased parents, raised her since she was an infant, and planned to give her a permanent home. *Supra* 9-12. In the foregoing jurisdictions, that is more than enough to trigger a right to notice and an opportunity to be heard in adoption proceedings.

By contrast, some courts have established a bright-line rule that caretakers must be “close to consummating [an] adoption” or otherwise have a “permanent legal relationship” with the child. *Mikel*

v. Quin, 58 F.4th 252, 260 (6th Cir. 2023). These courts also hold that a caretaker’s liberty interest exists (or not) “regardless of the [child’s] biological parents’ rights” having terminated. *Id.*

For instance, in *Kyees v. County Department of Public Welfare of Tippecanoe County*, the Seventh Circuit categorically rejected the proposition that a “foster care arrangement” can give rise to “a liberty interest.” 600 F.2d 693, 699 (7th Cir. 1979). And it did so even though the caretakers there had filed an “application” to adopt a child, whose “natural mother had waived parental rights.” *Id.* at 695. The Second Circuit has followed suit. *See Rodriguez v. McLoughlin*, 214 F.3d 328, 337 (2d Cir. 2000). So has the Colorado Supreme Court, while expressly disagreeing with “other courts” on the issue. *M.S. v. People*, 303 P.3d 102, 103, 106-07 (Colo. 2013).

The Virginia Supreme Court endorsed an especially rigid rule. According to the majority, petitioners lacked a liberty interest because they were not “legally adoptive parents.” App.45a. But under the totality-of-the-circumstances test, whether petitioners were legally “adoptive parents” is not dispositive. What matters is petitioners’ undisputed role as Baby Doe’s long-term caretakers.⁶

⁶ Because the Islamic tradition “does not authorize the termination of a child’s rights to their biological family,” Afghan law does not recognize adoption as such. App.194a. Nonetheless, petitioners have consistently argued that the “guardianship” they exercised under Afghan law “is the closest analog to the U.S. definition of an adoptive parent.” *Id.*; e.g., R.4; R.130-31; VSC.Br.44. The Virginia Supreme Court disregarded that reality because it believed only “biological or adoptive parents” under “American (not Afghan) law” have federal due process rights. App.40a; *see* App.47a-49a & n.27.

2. Lower courts have also diverged on the role played by a biological relationship in deciding whether nonparent caretakers are entitled to procedural due process in adoption proceedings and other child-placement matters.

Most courts hold that blood relatives have a liberty interest when they either live with the child or are next of kin. For example, despite concluding that “biologically unrelated foster [parents]” are *not* owed procedural due process, *Rodriguez*, 214 F.3d at 337, the Second Circuit holds that “foster parents” who are “related biologically” *do* possess a liberty interest, *Rivera v. Marcus*, 696 F.2d 1016, 1024-25 (2d Cir. 1982). The First Circuit and Oklahoma Court of Appeals agree that biological relatives who “reside[]” with a child necessarily have “constitutionally protected right[s].” *Watterson v. Page*, 987 F.2d 1, 8 n.6 (1st Cir. 1993); *accord In re P.C.*, 842 P.2d 364, 365 (Okla. Ct. App. 1992). And the Utah Supreme Court has held that grandparents have a liberty interest “in the custody and welfare” of “parentless” grandchildren—and are thus entitled to “a hearing” in adoption proceedings, even if they lack physical custody. *Wilson v. Fam. Servs. Div., Region Two*, 554 P.2d 227, 230-31 (Utah 1976).

Petitioners would have prevailed under this approach. As the Afghan government, United States, and Red Cross determined, A.A. is Baby Doe’s first cousin. *Supra* 7-9. He and his wife raised Baby Doe as their own child after her parents were killed. *Id.* This biological link, especially paired with physical custody, would itself entitle petitioners to procedural due process in most jurisdictions.

But not everywhere. Some courts, including the Virginia Supreme Court, have embraced a far more

restrictive rule. The Ninth Circuit has expressly “disagree[d] with the Utah [Supreme] [C]ourt[]” and held that a “biological bond,” without more, does not give rise to procedural due process protections. *Mullins v. Oregon*, 57 F.3d 789, 794-96 (9th Cir. 1995). And “Oregon courts have gone so far as to hold that even a *custodial* grandparent lacks a protected interest in the adoption of her grandchildren”—in direct conflict with the Oklahoma Court of Appeals, as well as the First and Second Circuits. *Id.* at 795-96 (contrasting *Graham v. Child.’s Servs. Div., Dep’t of Hum. Res.*, 591 P.2d 375, 378-79 (Or. Ct. App. 1979), with *In re P.C.*, 842 P.2d at 365). The decision below embraced this extreme position, holding that no caretakers other than “biological” or “legally adoptive parents” deserve procedural due process in adoption proceedings. App.45a. That unforgiving rule was dispositive here. *Id.*

3. The bottom line is that the Virginia Supreme Court’s across-the-board denial of procedural due process protection to *any* nonparent caretaker conflicts with the overwhelming majority of other courts. Review of that misguided decision will clear up the “blurred lines” left by *Smith* nearly fifty years ago. *Mikel*, 58 F.4th at 260 (Sutton, J.). Only this Court can mend the deep and acknowledged division on the question presented.

III. This Court’s Review Of The Decision Below Is Exceptionally Important

Our Nation prides itself on a judicial system that operates according to the rule of law. In this country, independent judges make informed decisions after hearing from all interested parties. By upholding an adoption order entered without notice to a child’s

longstanding caretakers, the decision below violates this bedrock principle of American law. The magnitude of that error itself warrants review.

Certiorari is especially justified because this high-profile case has cast a spotlight on how American courts treat efforts to adopt foreign-born children, especially in wartime. Petitioners' ordeal and the Masts' misconduct have garnered significant media attention, sparking public outcry here and abroad.⁷

The scrutiny is deserved. “As a Nation, we would be surprised”—*shocked*, actually—if a court in another country granted foreign nationals the right to adopt an American child living in the United States, without even informing her American caretakers. *Fed. Republic of Germany v. Philipp*, 592 U.S. 169, 185 (2021). We would be even more appalled if, after learning that the foreigners used such an adoption

⁷ E.g., Rozina Ali, *How Did This Man Think He Had the Right to Adopt This Baby?*, N.Y. Times Mag. (Nov. 10, 2022), <https://www.nytimes.com/2022/11/10/magazine/afghanistan-orphan-baby-1.html>; *Hold Joshua Mast Accountable for Abducting an Afghan Child*, Project ANAR, <https://projectanar.org/campaigns/babydoe/> (last visited July 24, 2026); Martha Mendoza et al., *US fights to stop soldier from keeping Afghan war orphan*, Independent (Sept. 15, 2023), <https://www.the-independent.com/news/world/americas/marine-major-joshua-mast-afghan-orphan-b2412256.html>; *The US said a Marine could not adopt an Afghan girl. Records show officials helped him get her*, Arab News (Feb. 8, 2026), <https://www.arabnews.com/node/2632263/world>; Macarena Liy, *The custody battle for a young Afghan girl: Was she adopted or abducted by a US family?*, El País (Sept. 19, 2023), <https://english.elpais.com/usa/2023-09-19/the-custody-battle-for-a-young-afghan-girl-was-she-adopted-or-abducted-by-a-us-family.html>; *supra* 8 n.2.

order to seize the child, the other country's judicial system did nothing about it. This Court should make clear that American courts must fully enforce our Constitution's most basic procedural protections in this uniquely sensitive context.

International comity also supports review. The Masts manipulated the American judicial system to countermand a custody decision that the (democratic) Afghan government made with full support from the United States. The Masts circumvented intercountry adoption procedures established by the Hague Adoption Convention, which the United States has signed and follows even when a nonsignatory nation (like Afghanistan) is involved. *See* App.162a-64a (United States explaining implementing statutes and regulations that require prospective adoptive parents to prove "adoption abroad" or "custody" in "accordance with the laws of the foreign-sending country"); R.2406 (Pompeo cable emphasizing Masts' non-compliance). And all along, the Masts kept the courts, the United States, and petitioners in the dark. Then, after their scheme came to light, the Masts convinced a state high court to let them get away with it. Appropriate respect for other countries—and for the American rule of law—requires vacatur of the unlawful adoption order in this case.

Any other course would harm more than just our Nation's global standing. The Masts' scheme offers a blueprint for future abuse. It leaves children orphaned or displaced abroad vulnerable to permanent separation from relatives, friends, and community members who take them in. And it poses troubling consequences for domestic adoptions as well: The Virginia Supreme Court's misguided due process analysis would have applied equally if

petitioners had been raising Baby Doe in Alabama, rather than in Afghanistan.

The life-altering harms inflicted by unlawful or fraudulent adoption orders are too severe to risk leaving the decision below on the books. This Court should intervene.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX

TABLE OF CONTENTS¹

	Page
Opinion of the Supreme Court of Virginia, <i>Mast v. A.A.</i> , 925 S.E.2d 665 (Va. 2026)	1a
Opinion of the Court of Appeals of Virginia, <i>A.A. v. J.M.</i> , 903 S.E.2d 513 (Va. Ct. App. 2024)	107a
Brief for the United States as <i>Amicus Curiae</i> Supporting A.A., et al., <i>J.M. v. A.A.</i> , No. 240707 (Va. Jan. 6, 2025)	136a
Fluvanna County Circuit Court, Virginia	
Order on Petition to Amend a Certificate of Birth, <i>In re “Baby [Redacted],”</i> No. 19CL719 (Va. Cir. Ct. Fluvanna Cnty. Nov. 8, 2019) [Redacted]	179a

¹ On October 6, 2025, the Fluvanna County Circuit Court ordered that the redacted circuit court record “be released publicly on October 27, 2025.” Order, *A.A. v. J.M.*, No. CL22000186-00 (Va. Cir. Ct. Fluvanna Cnty. Oct. 6, 2025). The redactions herein are consistent with that redacted record. “Red.” indicates redactions applied to the circuit court record; unlabeled redactions and Freedom of Information Act “(b)(6)” redactions were included in the original record.

The Supreme Court of Virginia and Court of Appeals of Virginia filings included here were either filed publicly or were subsequently unsealed. See Order, *J.M. v. A.A.*, No. 240707 (Va. Dec. 10, 2025).

The transcript from the U.S. District Court for the Western District of Virginia proceeding is redacted consistent with the redactions applied in that court.

TABLE OF CONTENTS—Continued

	Page
Interlocutory Order, <i>In re “Baby [Redacted],”</i> No. 19CL719 (Va. Cir. Ct. Fluvanna Cnty. Nov. 10, 2019) [Redacted].....	182a
Adoption Order, <i>In re “Baby [Redacted],”</i> No. 19CA12 (Va. Cir. Ct. Fluvanna Cnty. Dec. 3, 2020) [Redacted]	187a
Exhibit 1 to Brief in Support of Petition to Vacate Adoption: Declaration of Havva G. Guney-Ruebenacker, <i>In re “Baby</i> <i>[Redacted],”</i> No. 19CA12 (Va. Cir. Ct. Fluvanna Cnty. Jan. 14, 2021) [Redacted]	192a
Declaration of Donna Welton, <i>[Redacted] v.</i> <i>[Redacted]</i> , No. CL22000186-00 (Va. Cir. Ct. Fluvanna Cnty. Aug. 22, 2022) [Redacted]	196a
Transcript of Proceeding held Nov. 11, 2022, <i>[Redacted] v. [Redacted]</i> , No. CL22000186- 00 (Va. Cir. Ct. Fluvanna Cnty.) [Redacted] (excerpts).....	203a
Findings and Rulings, <i>[Redacted] v.</i> <i>[Redacted]</i> , No. CL22000186-00 (Va. Cir. Ct. Fluvanna Cnty. Nov. 18, 2022) [Redacted]	214a
Order Denying Pleas in Bar and Certifying for Interlocutory Appeal Pursuant to Va. Code § 8.01-675.5(A), <i>[Redacted] v. [Redacted]</i> , No. CL22000186-00 (Va. Cir. Ct. Fluvanna Cnty. Nov. 30, 2022) [Redacted].....	274a

TABLE OF CONTENTS—Continued

	Page
Declaration of LTC Rosemary M. Reed, <i>A.A. v. J.M.</i> , No. CL22000186-00 (Va. Cir. Ct. Fluvanna Cnty. Mar. 27, 2023) [Redacted] ...	281a
Order Granting Summary Judgment, <i>A.A. v. J.M.</i> , No. CL22000186-00 (Va. Cir. Ct. Fluvanna Cnty. May 3, 2023).....	289a
Court of Appeals of Virginia	
Letter from United States Department of Justice to Clerk Court of the Court of Appeals of Virginia regarding redactions to Circuit Court record, Nos. 0876-23-2 et al. (Va. Ct. App. Dec. 21, 2023)	302a
Supreme Court of Virginia	
Order Granting Stay of Circuit Court Proceedings, <i>J.M. v. A.A.</i> , No. 240707 (Va. Sept. 3, 2024)	304a
Letter from United States Department of Justice to Clerk of Court of the Supreme Court of Virginia Withdrawing Its January 6, 2025 <i>Amicus Curiae</i> Brief, <i>J.M. v. A.A.</i> , No. 240707 (Va. Mar. 5, 2025).....	305a
Order Denying Petition for Rehearing, <i>Mast v. A.A.</i> , No. 240707 (Va. Apr. 22, 2026)	306a

TABLE OF CONTENTS—Continued

	Page
 United States District Court for the Western District of Virginia	
Transcript of Sealed TRO Hearing held February 26, 2020, “ <i>Baby L.</i> ” <i>ex rel. Doe 1</i> <i>v. Esper</i> , No. 20-CV-00009 (W.D. Va. Mar. 14, 2020) [Redacted] (excerpts)	307a
 Constitutional and Statutory Addendum	
U.S. Const. amend. XIV, § 1	325a
Va. Code § 20-146.16(A)	326a
Va. Code § 63.2-1202(L)	327a
Va. Code § 63.2-1216	328a
Va. Code § 63.2-1221	329a
Va. Code § 63.2-1230	330a
Va. Code § 63.2-1241	331a
Va. Code § 63.2-1242.1	334a
Va. Code § 63.2-1243	335a

1a

[925 S.E.2d 665]

SUPREME COURT OF VIRGINIA

Joshua MAST and Stephanie Mast

v.

A.A. and F.A.

Record No. 240707

February 12, 2026

FROM THE COURT OF APPEALS OF
VIRGINIA, Court of Appeals Nos. 1855-22-2, 0876-
23-2, 0940-23-2, and 0953-23-2

PRESENT: Powell, Kelsey, McCullough, Chafin,
Russell, and Mann, JJ., and Millette, S.J.

OPINION BY JUSTICE D. ARTHUR KELSEY

In 2020, a Virginia circuit court issued a final order approving the adoption by Joshua and Stephanie Mast of a severely wounded orphan discovered by the U.S. military on a battlefield in Afghanistan in 2019. Two years later, A.A. and F.A. filed a petition to vacate the final adoption order claiming that Afghan law vested custody of the child with them. In response, the Masts relied upon Code § 63.2-1216, which states in pertinent part that “[a]fter the expiration of six months from the date of entry of any final order of adoption . . . , the validity thereof shall not be subject to attack in any proceedings, collateral or direct, for any reason.”

Asserting different rationales, the circuit court and the Court of Appeals found that Code § 63.2-1216

did not apply to this case. *See A.A. v. J.M.*, 81 Va. App. 213, 220, 903 S.E.2d 513 (2024). Because it does apply, we reverse and enter final judgment dismissing the A.s’ petition to vacate the 2020 final adoption order.¹

I.

A.

In this appeal, the Masts challenge each of the rationales offered by the circuit court and the Court of Appeals in support of their decisions to declare the 2020 final adoption order void ab initio. The A.s defend these rationales and argue that even if we find them unpersuasive, other reasons independently support the judgment in their favor. *See generally Rickman v. Commonwealth*, 294 Va. 531, 542, 808 S.E.2d 395 (2017) (recognizing the appellate power to affirm on different legal grounds).

As we survey the factual record, two markers establish its boundaries. First, given that the

¹ Before this Court is the consolidated appeal of the Masts and the A.s from a Court of Appeals ruling on two interlocutory orders—Record Nos. 1855-22-2, 0876-23-2, 0940-23-2, and 0953-23-2. The Masts filed their initial interlocutory appeal in December 2022 from the Order Denying Pleas in Bar. In February 2023, the Court of Appeals dismissed the Masts’ petition, holding that it did not have jurisdiction over interlocutory appeals, CAV R. at 5378, and the Masts appealed to this Court. Meanwhile, the matter proceeded in the circuit court, culminating in the Order Granting Summary Judgment. In May 2023, the parties each appealed this summary judgment order. In June 2023, this Court vacated the Court of Appeals order that had dismissed the first interlocutory appeal, remanded the case, and ordered the Court of Appeals to consolidate all the appeals in this case. *Id.* at 5390. All citations in this opinion to the record of the Court of Appeals refer to Record No. 1855-22-2.

consolidated appellate record exceeds tens of thousands of pages, we recite only the legally material facts that are relevant to the decisions of the lower courts and the arguments independently advanced by the parties.² Second, when “parties present evidence on the plea ore tenus,” we give the circuit court’s “factual findings” the same “weight of a jury finding” on disputed evidence. *Hawthorne v. VanMarter*, 279 Va. 566, 577, 692 S.E.2d 226 (2010).

Two circuit court judges presided over the A.s’ petition-to-vacate proceeding. The first judge also entered the final adoption order in 2020. On November 18, 2022, in this collateral proceeding filed by the A.s challenging the final adoption order, the first judge issued a 38-page, singled-spaced “Order” titled “Findings and Rulings.” R. at 2528 (altering capitalization). Presiding over at least 12 hearings, the judge heard from 10 witnesses who testified ore tenus and 2 by deposition. Over 100 exhibits were introduced into evidence. The judge’s Findings and Rulings addressed the conflicting evidence offered for

² Our recitation of the factual record includes facts previously sealed by the circuit court and provisionally sealed by this Court. “To the extent that we mention facts found only in the sealed record,” however, “we unseal only those specific facts, finding them relevant to our decision in this case. The remainder of the previously sealed record remains sealed.” *Minh Duy Du v. Commonwealth*, 292 Va. 555, 560 n.3 (2016). Following the issuance of this opinion, the Court will address any pending or contemplated motions seeking further appellate review of the circuit court’s sealing and nondisclosure orders. See *Daily Press, LLC v. Commonwealth*, 301 Va. 384, 414-15 & n.23 (2022) (addressing the open-courts doctrine, its limited exceptions, and the treatment of such disputes “as ancillary proceedings that can persist beyond and even arise after the entry of final judgment in the underlying case”).

and against the validity of the 2020 final adoption order. “Since the Court speaks through its orders,” the judge stated, “a more detailed and comprehensive ruling (with rationale) than what the Court was able to give from the bench [was] not only appropriate and merited, but necessary.” *Id.*³

In his subsequent “Order Denying Pleas in Bar” entered on November 30, 2022, the judge expressly “incorporat[ed] the Court’s comments, findings, and rulings from the bench November 11, 2022, and the supplemental written Findings and Rulings of this Court dated November 18, 2022.” *Id.* at 2603. After informing the parties that he would be retiring soon from the bench, the judge acknowledged that his Findings and Rulings order may be “revisited and modified” by later judges who preside over the case after his retirement. *Id.* at 2528.⁴

³ The A.s mischaracterize the Findings and Rulings order as a mere “non-binding letter” to counsel as opposed to a judicial order. *See* Appellee Br. at 16-17 & n. 12; *see also* CAV R. at 5963, 5973; Oral Argument Audio at 22:00 to 22:10, 30:44 to 30:50, 36:45 to 36:53; CAV Oral Argument Audio at 7:18 to 7:25. The heading on the first page of the order, however, includes the full style of the case, the case number assigned by the Clerk of Court, a heading titled “FINDINGS AND RULINGS” in full capitalization, “This Order” as the first two words in the first sentence, and the judge’s signature and date of entry on the last page. *See* R. at 2528-65.

⁴ The A.s interpret the circuit court’s “revisited and modified” qualifier as a basis for concluding that the order’s findings and rulings are nonbinding and have no precedential value. Just the opposite inference is warranted. The power to revise or modify prior orders within a court’s jurisdiction is a truism that applies to all interlocutory orders. *See Robbins v. Robbins*, 48 Va. App. 466, 474, 632 S.E.2d 615 (2006). The power to consider, after all, “carries with it the power to reconsider as a necessary adjunct.” *Commonwealth v. McBride*, 302 Va. 443,

Another judge took over the case after his colleague's retirement. The parties did not request, nor did the new judge conduct, any plenary ore tenus hearings with witnesses. Instead, the second judge heard argument from counsel, received a few additional exhibits,⁵ and entered a six-page, double-spaced "Order Granting Summary Judgment." *Id.* at 3694-99. The Order Granting Summary Judgment stated that "the reasons" for its ultimate decision included "the Court's written rulings and opinions." *Id.* at 3694. Only two were pertinent: the first judge's written Findings and Rulings order and his later Order Denying Pleas in Bar. Read together, these three orders comprise the only written judicial determinations specifically addressing the facts in this hotly disputed case.

One additional clarification of the evidentiary record should be made. The A.s rely heavily upon a timeline of events prepared by the second judge. They claim the timeline implicitly created "new written

449-50, 893 S.E.2d 391 (2023). Interlocutory orders bind the parties during the circuit court proceedings unless and until they are later vacated or modified by the circuit court.

Maybe so, the A.s respond, but the judge in a footnote stated that he wanted to be "confident" of his understanding of the evidence, and thus, he invited the parties to file proposed "corrections or revisions of the recited facts or evidence if based on references to the transcript of testimony or exhibits." R. at 2535 n.9. The A.s did so, but not until March 27, 2023, which was after the second judge took over the case. *See id.* at 3331. The second judge never acknowledged, much less adopted, the A.s' proffered "requested corrections to the court's findings and rulings," *id.* (altering capitalization).

⁵ During one of the hearings, the second judge permitted the Masts to call A.A. to the stand for the sole purpose of admitting three exhibits through him. *See id.* at 13756-73.

factual findings” that supersede the first judge’s factual findings. *See* Appellee Br. at 18; *see also* CAV R. at 5691, 5963, 5973, 6275-76; Oral Argument Audio at 22:00 to 22:10, 36:05 to 36:17. We disagree. The text of the timeline cites almost exclusively to pleadings, including the A.s’ Bill of Particulars, and to filings by a non-party,⁶ none of which were admitted into evidence. *See* R. at 16120. The second judge did not treat the timeline as a statement of factual findings. Instead, he said that he put together the “general timeline” to give him “some understanding” about the case. *Id.* at 13973; *see also id.* at 16120. At no point did the second judge suggest that he created the general timeline to revise or modify the factual findings of the first judge who had presided over the multiple evidentiary hearings.

We know this with certitude because the A.s submitted a proposed draft order to the second judge that expressly incorporated the general timeline and made specific “findings” that would “supersede the earlier, preliminary findings” made by the first judge. *See id.* at 3556-62, 3556 n.1, 3557 n.2. The Masts objected to the proposed order because the general timeline included factual inaccuracies. The order

⁶ The Declaration of Donna Welton dated August 22, 2022, *see id.* at 961-65, was not admitted into evidence and thus plays no role in our appellate review. *But see post* at ——— – ———, 925 S.E.2d at 695-96. In the circuit court, the Welton declarations were a subject of much debate. *See, e.g.*, R. at 5399-5400 (the circuit court refusing to admit the May 5, 2022 Declaration of Donna Welton and taking it under advisement); *id.* at 6256 (the circuit court refusing to admit the June 8, 2022 Declaration of Donna Welton). Ultimately, the only Welton declaration that was admitted as evidence was the November 8, 2022 declaration. *See id.* at 3114.

proposed by the A.s, the Masts added, was an “attempt to whitewash and supersede all of [the first judge’s] findings, which he made after thirteen days of hearings,” and it went “far beyond this Court’s verbal order, and propose[d] numerous facts which are hotly disputed.” *Id.* at 3581. The Masts proposed an alternative order, *id.* at 3573-82, and provided a corrected timeline “should the Court wish to incorporate” a timeline of some sort in the order, *id.* 3650, 3657-58. In reply, the A.s urged the second judge to adopt their proposed order to “make clear that its findings in this order are the operative findings in this proceeding.” *Id.* at 3595-96. In response to this dispute, the second judge adopted verbatim the Masts’ proposed order, rejected the A.s’ proposed order, and refused to incorporate any timelines in his order. *See id.* at 3694-99. The written order’s purposeful exclusion of the general timeline confirms that it carries little, if any, weight on appeal.

B.

Having framed the evidentiary record before us, we begin with the circuit court’s observation in its Findings and Rulings that this case involves “really only two possible overarching narratives.” *Id.* at 2560. “One is that the Masts, with no obligation, stepped up and stepped in early on when literally no one else did or would, to help a child in severe need who had no one, to save her life and procure her safety, to spend their time and money to try to help this child.” *Id.* But there was a competing “narrative,” the circuit court recognized, “championed” by the A.s. *Id.* They claimed that “the Masts, with bad motives from the beginning, decided to steal a child” away from her extended family and

her homeland in a brazen act of “child trafficking.” *Id.* at 2560 & n.29. The circuit court rejected the “interpretation and narrative” advanced by the A.S. *Id.* at 2560.

The circuit court’s factual findings begin with the discovery by U.S. Special Forces of a badly injured infant on a battlefield in Afghanistan in September 2019. The female infant had “sustained several fractures, including broken ribs, a broken femur, and a skull fracture” as well as “serious burns and other injuries.” *Id.* at 2531. She was found in an “Al Qaeda foreign fighter facility” and “was orphaned in a lawful combat operation against Al Qaeda terrorists.” *Id.* at 15104-05. It “has never been disputed,” the circuit court found, that the “parents” of the infant died in the firefight and that it “appeared from the evidence to possibly have been from self-inflicted wounds by a ‘suicide bomber.’” *Id.* at 2530; *see also id.* at 15107.

Witnesses “testified that the Afghan partner forces assisting the U.S. [f]orces did not want to save or care for the child at all, but desired to just kill the child there.” *Id.* at 2531; *see also id.* at 7172-75, 7286-88, 7290-91. Reflecting on this evidence, the circuit court stated, “most likely . . . [this was] because of who they believed the child’s parents to be, viz., not Afghan.” *Id.* at 2531. Further crediting this testimony, the circuit court found “that not only is this circumstantial evidence that the child was and is not Afghan, but more important, it contributes to the reasonable basis for the Masts’ belief [of the same].” *Id.*

Given the infant’s injuries, “[t]here was grave concern that without proper medical care she may die or be severely disabled, and serious doubt that such needed medical care and treatment could be provided

in Afghanistan.” *Id.* As a result, the child was first taken to an American military field hospital in Kandahar and later transported for medical care at Bagram Airfield in Afghanistan, which was then controlled by American forces.

Stationed in Afghanistan, Major (then Captain) Joshua Mast was serving at the time as a Judge Advocate General in the U.S. Marine Corps. In September 2019, he and his wife learned of the child’s condition and decided that the child would benefit from getting medical care in the United States. “This was the impetus for the legal proceedings,” the circuit court found. *Id.* The evidence supporting the circuit court’s finding included a contemporaneous memorandum from the U.S. Commander of Task Force Medical-Afghanistan, which stated:

Currently, [the infant] is living in a military hospital on Bagram Air Field in a combat zone. This Air Field receives indirect fire in the form of rockets and mortar rounds on a routine basis. In addition, the [Hospital Commander] has indicated that there is a serious risk of infection and disease in a military hospital due to the war wounds and diseased patients being treated there. This living situation is still far safer tha[n] any alternative available to [the infant], as both the U.S. Military and Afghan government have agreed it is safer for her in the military hospital, and illustrates the danger [the infant] faces if she remains in Afghanistan.

Due to [the infant’s] ongoing medical needs and the lack of any Afghan facilities that can adequately house her through the winter, care for her, and treat her medical needs, access to

the United States for follow on care is appropriate given the circumstances.

Id. at 15104 (paragraph numbers omitted).

Motivated by these circumstances, the Masts filed in a Virginia juvenile and domestic relations district court a petition for custody of the child “on an emergency basis on the ground that [the child] was a stateless, orphaned minor with severe medical needs.” *Id.* at 2532. In November 2019, the district court granted the petition “making specific findings in its order, including the child being stateless with no other home jurisdiction.” *Id.*

The Masts thereafter filed a petition for adoption in the circuit court. The petition stressed the “emergency nature of the situation,” “the need for prompt medical attention,” the Masts’ belief that “the child was stateless and not a citizen of Afghanistan or any other known nation, with no known living relatives,” and the fact that “the authorities in Afghanistan [had] at that point declined to take the child or assume responsibility for her care.” *Id.* Believing that the “only reasonable, logical, and compassionate course of action at [the] time” was to do so, the circuit court exercised jurisdiction over the case. *Id.* “[D]elaying legal action further,” the circuit court concluded, “could jeopardize the child’s life or recovery, and could result in loss of life or permanent or long-lasting residual effects.” *Id.*

Having “questions” about the proper procedural posture of the case, the circuit court “conferr[ed] with the Virginia Attorney General’s Office” about the scope of the district and circuit courts’ jurisdiction “given the novel nature of this emergency situation.” *Id.* at 2532 & n.2. A representative of the Attorney

General's office in 2019 "advised the Court that under the emergency circumstances (involving urgent medical treatment and no known home state)," the circuit court had "jurisdiction to go forward with the birth certificate proceeding" after the entry of the custody order by the district court. *Id.* at 2532 n.2.

The child, only a few months old at this time, was still at Bagram Airfield awaiting transport to the United States. Anticipating that the child would soon be arriving in the United States, the circuit court entered an interlocutory adoption order after finding that it was in the child's "best interest" and that the Masts were "suitable and proper persons for the custody and care of the child." *Id.* at 2533. The circuit court thereafter appointed a guardian ad litem to represent the child's interests and directed the Department of Social Services to conduct an independent evaluation of the proposed adoption.

After the entry of the interlocutory adoption order, the Masts learned that the child was going to be transferred from the U.S. medical facility to the International Committee of the Red Cross ("ICRC") and later delivered to an unknown person at an unknown location. "Capt. Mast credibly testified in the current proceedings," the circuit court found, "that he had no such specific identification information at that time." *Id.* at 2534. The day before the expected transfer, the Masts filed a motion for a temporary restraining order ("TRO") in the U.S. District Court for the Western District of Virginia seeking a temporary stay on the transfer of the infant until evidentiary hearings could be conducted. *See id.* at 1040-62 (Verified Complaint and Petition for TRO, *Baby L. v. Esper*, No. 3:20-cv-00009 (W.D. Va. Feb. 26, 2020)). The presiding federal judge denied the TRO

motion on the same day it was filed. The next day the child was transferred to the ICRC and later delivered to a man thought to be the child's uncle. The Mastas thereafter voluntarily dismissed the civil action as moot pursuant to Federal Rule of Civil Procedure 41(a).

At a later hearing before the circuit court, the Mastas presented a document that included a brief reference to the "denial" of a "temporary restraining order" issued by the federal district court. *Id.* at 2534. The circuit court recalled that the Mastas' counsel mentioned "in at least one hearing a 'TRO' and relayed difficulties with arranging for the child to leave Afghanistan." *Id.* at 2558. The circuit court, however, "did not notice or did not focus on the TRO when it was mentioned." *Id.*

The circuit court also received testimony from the "general in charge of the Bagram military hospital" and a nurse who cared for the infant. *Id.* at 2534. They "testified to the danger and risk if the child was left in Afghanistan with such injuries and the long-term care needed, and the risks in being left as a disabled (and believed foreign) orphan in a war zone in Afghanistan" and "that it was not in the child's best interest to be left in Afghanistan under those circumstances." *Id.*

At some point prior to the entry of the final adoption order, the Mastas learned that the "then-government of Afghanistan," *id.* at 2541, had turned the infant over to her "purported uncle," *id.* at 2552. Though the circuit court at the time knew none of these details, the court later concluded (after hearing the evidence during the petition-to-vacate hearings) that "[t]his was not a decision the United States initiated" but merely one "consented to or acquiesced

in” by U.S. officials. *Id.* at 2564; *see also id.* at 2541. The “main or principal determinant” in this decision, the circuit court found, was the ICRC, not the United States. *Id.* at 2564.

“[G]iven the danger and unstable situation” in Afghanistan at that time and the “delay in bringing the child” to the United States as planned, the circuit court decided it would be prudent to enter a final adoption order. *Id.* at 2535. Doing so, the circuit court found, was in the child’s best interests because it would “get [her] out of harm’s way and allow [her] to be brought safely to the United States to begin receiving the medical care that she had desperately needed.” *Id.* Both the Department of Social Services and the guardian ad litem representing the child recommended that the circuit court enter the final adoption order. *Id.* The circuit court did so in December 2020.

C.

In March 2022, the A.s filed a petition to vacate the 2020 final adoption order and to declare it void ab initio.⁷ They asserted two arguments in their petition: (i) the Masts obtained the adoption orders by committing fraud on the court, and (ii) the A.s are “in effect, the child’s adoptive parents as legal and permanent guardians of the minor child under Afghan law.” *Id.* at 1. The Masts denied both allegations and argued that even if they were true,

⁷ In December 2021, the A.s initially filed a petition to vacate in the original adoption proceedings. They refiled the same petition as a collateral action in March 2022. In neither of these petitions did the A.s seek to declare void ab initio the custody order issued by the juvenile and domestic relations district court.

Code § 63.2-1216 expressly states that six months after the entry of a final adoption order its “validity” cannot be attacked “for any reason” in any “collateral or direct” proceeding.

The circuit court treated the Masts’ defense as raising plea-in-bar issues and heard 11 days of contested evidence offered by the parties. On the issue of the parties’ credibility, the circuit court found that “overall, the Court had more confidence in the Masts and found them more believable, particularly with regard to the child, and the Court resolved any credibility conflicts in their favor.” R. at 2560. In contrast, the circuit court stated, the A.s “admitted in their testimony that on at least three different occasions one or the other of them misrepresented certain facts and lied (to either the Masts or the authorities) for their own purposes.” *Id.* at 2560-61; *see, e.g., id.* at 5273-74, 5296-97, 5663-64, 5714-17, 5728-31.

On the question whether the infant was and still is a stateless minor or an Afghan citizen, the circuit court stated that “circumstantial evidence” suggested “that the child was and is not Afghan” and that this evidence “contributes to the reasonable basis for the Masts’ belief.” *Id.* at 2531. “Not only does this Court find a basis for the Masts believing that the child likely was from somewhere other than Afghanistan, it finds that the Masts did in fact believe [this].” *Id.* at 2555. The circuit court acknowledged that the Masts may be “later proved wrong or incorrect” but that “has not occurred yet.” *Id.* at 2556. Supportive of this finding was the deposition testimony of Brigadier General Norman West, who was the Commander of the 455th Expeditionary Medical Group at the Craig Joint Theatre Hospital at the time

the child received medical treatment there. *See id.* at 15120-36, 15104-05.

On the question whether the A.s had proved that they have a familial relationship with the child, the circuit court stated: “The Court, after having heard all of the evidence, does not have confidence that the [A.s] are who they say they are regarding their asserted familial relationship to the child, so the Court is not convinced or persuaded on this point.” *Id.* at 2538. Emphasizing this point, the circuit court said that it was “not persuaded that Petitioners are who they say they are as to the family relation” and “not convinced that they are really relatives of the child.” *Id.* at 2541. “The Court finds, on the evidence presented[,] that it is at least as likely that [the A.s] are not biologically related, and [it] has not been proved by a preponderance that they are.” *Id.* at 2541 n.19. “To reiterate, the Court finds that [the A.s] have not proved to the Court’s satisfaction that they are in fact kin to the child” *Id.* at 2564.

The circuit court also stated that it had questions about “the true identity of the child. There was no Afghan birth certificate presented, the [A.s] had never met the child, and there were no photographs of the child from before the explosion [that killed her parents].” *Id.* at 2539. The circuit court added that it “cannot ignore” that the Masts have “asked for DNA evidence from the very beginning, and [the A.s] [have] resisted this from the very beginning.” *Id.* at 2540 n.16.

On the question whether Afghan law deemed the A.s to be guardians of the child, the circuit court was also unconvinced. None of the ICRC and Afghan Ministry of Labor and Social Affairs memoranda mention any placement of the infant with A.A. or F.A.

“They are not parents, and it has not been proved that they had legal custody,” the circuit court ruled. *Id.* at 2565. “In fact, by [the A.s]’ own evidence,” the child’s purported uncle (“H.I.”), who is A.A.’s father, “was the actual guardian or custodian and he allowed the child to be cared for by the [A.s] (he ‘gave the waleyah to A.A.’).” *Id.* at 2539.⁸ “[T]he Court has no confidence that Afghan law even gave [H.I.] the authority to give the child to A.A.” *Id.* at 2539 n.15. Further explaining the point, the circuit court added that the A.s

were at most guardians or custodians when they and the child were in Afghanistan. They are not natural parents or adoptive parents. (Even an aunt or uncle would be a closer family relation, and as noted, above, the Court has no confidence that they are even blood relatives.) That Afghanistan does not (and did not) have anything other than guardianship does not equate them to parents, natural or adoptive. The child was not placed with them by court order, but rather by a purported uncle who has never appeared and is not a party, who only by asserted Afghan tradition is the guardian. Again, to be similar to or “close to” something does not mean it is the same thing.

Id. at 2552.⁹

⁸ “Waleyah” is sometimes spelled “walaya” or “welyah” in the record. *See, e.g.*, R. at 5144, 5779.

⁹ The circuit court also found fault with the factual predicates for the A.s’ reliance on Afghan customary law:

While [the A.s] have relied on Afghan law to show their custody or guardianship, their experts [said] that the closest older relative in the father’s line would be the

On the question whether authorized representatives of the United States officially adjudicated the A.s to be “next of kin,” the circuit court stated that it was “not persuaded and does not see it that way.” *Id.* at 2563-64. “The fact that physical custody short of legal custody may have been given to someone *believed* to be next of kin, with the approval or acquiescence of the United States (DOD),” the circuit court added, “does not equate that to parenthood or legal custody and does not establish that they are in fact related. That has to be proved in court.” *Id.* at 2564 (emphasis added). As noted earlier, the circuit court found that “[t]his was not a decision the United States initiated, but rather consented to or acquiesced in. . . . There were numerous factors cited above causing this Court not to be convinced that [the A.s] are actually relatives.” *Id.*

wali. But it came out in [the A.s'] evidence that [A.A.'s] father shares a mother with the supposed father of the child ([B.]), but not the father, so [H.I.], who A.A. is claiming through, would not really be the wali under Afghan law, as it was explained, and he would not have the authority to give [A.A.] the authority. It appeared that [the A.s'] counsel may have been surprised by this testimony since they had made a point to emphasize the automatic operation of Afghan law. But that was never explained or followed up on by [the A.s'] counsel. In fact there was no evidence about [B.'s] father's line, or whether his father was alive. According to the experts' testimony, in the absence of survivors in the father's male line, the child's mother's line would assume the waleyah (and produce the wali). There was no evidence of that at all. So the Court has no confidence that Afghan law even gave [H.I.] the authority to give the child to [A.A.].

R. at 2539 n.15.

On the fraud issue, the circuit court stated that the A.s did not prove by “clear and convincing evidence” that the Masts had misrepresented “that the child was a stateless minor.”¹⁰ *Id.* at 2555. They had “ample reason for believing this,” the circuit court found, in light of the testimony of the U.S. Special Forces operators who described the child’s parents as non-Afghan, “foreign fighters” associated with Al Qaeda. *Id.* at 2555-56. The circuit court also found that the Masts “credibly testified that they had significant doubts when they were later told the petitioners were claiming to be relatives or kin.” *Id.* at 2556.¹¹ The circuit court also pointed to other

¹⁰ The circuit court stated it was willing to hear “additional evidence” on the fraud issue if that became necessary later in the proceeding, *id.* at 2538 n.12, and anticipated possible “continued proceedings” on this issue, *id.* at 2559, 2565. No additional evidence, however, was ever submitted to the circuit court in support of the A.s’ fraud allegations.

¹¹ The A.s also accuse the Masts of fraudulently obtaining an Afghan passport by using a “digitally altered” photo of the child. *Id.* at 8; *see also id.* at 2317-18; Appellee Br. at 49. The Court of Appeals placed considerable emphasis on this allegation. *See A.A.*, 81 Va. App. at 225-26 & n.12. The circuit court, however, summarily rejected this claim because the Masts merely altered a picture of the nude child (given to them by the A.s) to cover her naked body with clothes because the photo “was not acceptable to the authorities because the child was not adequately clothed.” R. at 2558.

In addition, the A.s alleged that the Masts fraudulently failed to fully inform the circuit court of the federal litigation that ended in a denial of the Masts’ TRO motion and their later voluntary dismissal of the case. The circuit court stated that it knew of the existence of the federal litigation and would have “preferred” that the Masts had provided more details about it. *Id.* at 2559. The circuit court nevertheless stated it knew of no

evidence in the sealed record in this case supporting its ruling that the Masts made no fraudulent statements. *See id.* at 2556-58.

The circuit court observed that “in the context of the fraud allegations” the A.s have “painted the Masts in a negative light throughout, including their motivations and intentions.” *Id.* at 2559. Rejecting these allegations, the circuit court stated

that from the beginning [the Masts] were concerned about the child foremost, and they acted for her welfare or what they believed to be her welfare when no one else was. The Court finds from the evidence it has heard so far that [the Masts’] main concern, from the beginning, was the life, health, safety, and welfare of the child. Their failing to inform the Court appears to have been a misguided effort to hasten the

“explicit legal duty” upon the Masts to provide those details. *Id.* at 2558-59.

We see no need to address the TRO issue further. Under Federal Rule of Civil Procedure 41(a)(1), a voluntary dismissal without prejudice deprives all earlier rulings in the case (including those granting or denying TROs and preliminary injunctions) of any stare decisis effect or other precedential weight. *See* Fed. R. Civ. P. 41(a)(1); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S.Ct. 2447, 2456, 110 L.Ed.2d 359 (1990) (“‘Dismissal without prejudice’ is a dismissal that does not ‘operate as an adjudication upon the merits,’ Rule 41(a)(1), and thus does not have a res judicata effect.”), *superseded by rule on other grounds*, Fed. R. Civ. P. 11; 8 James Wm. Moore et al., *Moore’s Federal Practice* § 41.33[6][b], at 41-79 to 41-80 (3d ed. 2023) (“The dismissal thus leaves matters as if no action were ever filed, and neither res judicata nor collateral estoppel result from a dismissal by notice.”); 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2367, at 649-61 (2020) (“[A] voluntary dismissal without prejudice under Rule 41(a) leaves the situation as if the action never had been filed.”).

child’s transport to the U.S. where she could receive necessary medical care and be a part of their family.

Id. at 2559-60.

Finally, the A.s’ counsel in the circuit court “asserted that [the Masts] may not benefit from their criminal acts.” *Id.* at 2546 n.24.¹² Similar allegations have been made by the A.s’ counsel during the appellate process.¹³ Most of these accusations arise out of the physical transfer of the child from the A.s to the Masts after their arrival in the United States. The circuit court specifically addressed this issue:

[The Masts] have not been convicted of any crime, nor charged with any, as far as this Court knows. This is a civil proceeding and the Court does not find they engaged in criminal behavior—however unwise their conduct may have been—even by a preponderance. In relation to the incident at the airport, [the Masts] did have a final adoption order, and the Court finds they believed it was valid, and certainly they would be able to keep the [A.s] from preventing them from taking custody of the child, and knowledge of the order in this

¹² *See, e.g.*, R. at 5086 (“What happened to [the child] was human trafficking . . .”); *id.* at 8874 (“[W]hat we are alleging is that Mr. Mast has engaged in human trafficking. He has effectively kidnapped this child from her family.”).

¹³ *See, e.g.*, CAV R. at 5714 (“This court should not reward flagrant kidnapping” (altering capitalization)); *id.* at 6260 (arguing that the words “child snatching” and “kidnapping” accurately “reflect the relevant body of law” in this case); Appellee Br. at 12 (“The [Masts] lure[d] the [A.s] to Virginia and kidnap[ped] their child” (altering capitalization)).

Court's view preempts any criminal intent unless they knew such was not valid, and the Court finds they clearly believed it was valid.

Id. at 2546 n.24.

D.

After making its factual findings, the circuit court turned its attention to Code § 63.2-1216—which it understood to be “[t]he ultimate issue and disposition in this case.” *Id.* at 2543. Surveying the statutory text and the Virginia cases interpreting it, the circuit court observed that the “unmistakable language” of the statute forbids attacks on final adoption orders based on allegations of “1) fraud, 2) lack of proper notice, 3) other procedural deficiencies, and 4) lack of jurisdiction, all of which were raised and relied on by [the A.s] in this case. And the list is not exhaustive, as the statute precedes those terms with ‘including but not limited to.’” *Id.*

The circuit court then addressed the A.s’ two-tiered argument: They asserted that the final adoption order was void ab initio and that Code § 63.2-1216 only applies to valid—not void ab initio—final orders. The underlying premise of that argument, the circuit court responded, “stands the statute on its head.” *Id.* at 2551. “The very purpose, function, and impact of this statute . . . is to say that all of that does not matter, and the orders are valid and final anyway. That is the only logical and rational interpretation and construction.” *Id.*

Quoting from a recent decision of the Court of Appeals, the circuit court recognized that the “purpose of the statute is clear. The General Assembly made the policy choice to favor finality, recognizing that repeatedly subjecting a child to

multiple changes in or even mere challenges to who his legal parents are has the potential to cause significant harm to the child.” *Id.* at 2544 (quoting *Nelson v. Middlesex Dep’t of Soc. Servs.*, 69 Va. App. 496, 509, 820 S.E.2d 400 (2018) (alterations omitted)). Given the clarity of the statutory text, the circuit court explained:

The whole point and purpose of [Code] § 63.2-1216 is not to allow such attacks or challenges as this. [The Masts] have asserted all along that this case really should never have gotten this far. Perhaps they are right, based on the statute. . . . The Court was inclined to impose the bar early on, but wanted the [A.s] to have the chance to argue and present their side of the case. But from the beginning, the Court viewed [Code] § 63.2-1216 to be a steep climb for the [A.s].

Id. at 2545. With the benefit of time and months of hearings, however, the circuit court declared what it had reasoned from the beginning:

To reiterate, the statute says that no final adoption may be “attacked” after six months for any reason, by anyone. It does not say, “unless there has been fraud, duress, lack of notice, other procedural defects or lack of jurisdiction”, but rather, even if there was such. The intent of the General Assembly is unmistakable. Those are all reasons that the adoption order might be able to be attacked after 21 days, but not after six months.

Id. at 2546.¹⁴

The “only chink in the armor” of Code § 63.2-1216, the circuit court concluded, was “the constitutional rights of a parent who has a fundamental liberty interest” in maintaining the parent-child bond. *Id.* at 2552. That posed quite a challenge for the A.s. They “are not natural parents,” the circuit court held, and “[t]hey are not parents at all. Neither of them is an actual biological parent, and they are not adoptive parents (or even grandparents).” *Id.* at 2547. Nor did they prove that “they are legal custodians.” *Id.* at 2604. Their status, the circuit court observed, “is not the equivalent of a parent, certainly not a natural, biological parent.” *Id.* at 2547.

“[T]he question comes down to this,” the circuit court reasoned, “under the facts of this case, not being parents, do the [A.s] nevertheless have a fundamental liberty interest in their relationship with the child due to being ‘in the role of’ parents.” *Id.* “[T]here is no case explicitly indicating such,” the circuit court conceded. *Id.* at 2547-48. But the court nonetheless held that even though the A.s had no “court-ordered custody or guardianship” rights to the child, *id.* at 2536-37, 2564, they nonetheless played the role as “*physical* custodians and caretakers of this child” and “parent figures” for a period of time, *id.* at 2547-48-34 (emphasis added).

¹⁴ The circuit court acknowledged that the final adoption order did not satisfy all the “procedural requirements” imposed by the adoption statutes. R. at 2562. The A.s argued, for example, that “since the child was not placed by an entity listed in [Code] § 63.2-1200,” this was a “fatal defect” requiring vacatur of the final adoption order. *Id.* at 2563. “[B]ut [Code] § 63.2-1213 says this is not so,” the circuit court replied. *Id.*

This physical role was enough, the circuit court held, to recognize that the A.s had “a fundamental liberty interest in their relationship with this child, despite not being natural parents, adoptive parents, legal custodians, or even biological kin.” *Id.* at 2548. Acknowledging that the A.s could not assert this interest while they were foreign nationals living in Afghanistan and that the six-month period of statutory repose had expired before they entered the United States, the circuit court nonetheless “ruled that the statute was unconstitutional as applied in this case, despite there being no case that explicitly says this.” *Id.* at 2550.

E.

The circuit court also addressed and rejected the assertion that the final adoption order violated the Supremacy Clause of the U.S. Constitution. Even though the United States had unsuccessfully sought to intervene in the case, the circuit court nonetheless permitted an attorney from the Department of Justice to attend the evidentiary hearings to monitor testimony and exhibits that may involve “classified or sensitive” national security matters. *Id.* at 2563. The DOJ attorney advised the circuit court that she would “not [be] weighing in on the merits of the case,” but that later changed when the representative began “championing” various positions on the “merits” of the case. *Id.*

The DOJ attorney argued that the federal government, in its foreign relations role, accepted the view that the A.s were the child’s “next of kin” and that a state court had no power to conclude otherwise. *Id.* at 2563-64. The circuit court disagreed on factual grounds. The next-of-kin assertion, the circuit court

held, “has to be proved in court.” *Id.* at 2564. “The fact that physical custody short of legal custody may have been given to someone believed to be next of kin,” the circuit court explained, “with the approval or acquiescence of the United States (DOD), does not equate that to parenthood or legal custody and does not establish that they are in fact related.” *Id.* “This was not a decision the United States initiated,” the circuit court found, “but rather consented to or acquiesced in.” *Id.* The issue is further complicated, the circuit court observed, by the fact that the “Afghan government the Court is being asked to defer to in vacating this order no longer exists, and the successor government is not recognized by the U.S.” *Id.*

F.

In the end, based upon its ruling that the A.s had a “fundamental liberty interest” as “caretakers and physical custodians” of the child, the circuit court denied the Masts’ plea in bar asserting the statutory bar of Code § 63.2-1216 and granted leave for the parties to seek an interlocutory appeal pursuant to Code § 8.01-675.5(A). *Id.* at 2604. Given the circuit court’s factual findings and its view of Code § 63.2-1216’s statutory bar, it believed an appellate determination of this issue “could be dispositive of the entire case.”¹⁵ *Id.* at 2565; *see also id.* at 2605.

After the retirement of the circuit court judge who had presided over the evidentiary hearings, a colleague took over the case. The second judge heard

¹⁵ The circuit court summarily rejected the A.s’ argument that the court lacked subject matter jurisdiction over the adoption proceeding. This case, the circuit court stated, “raises an issue of procedural defect and trial error, but not jurisdiction.” *Id.* at 2554.

argument on various motions and issued an Order Granting Summary Judgment in May 2023. The order stated that it was based upon, among other things, “the reasons stated on the record in this hearing and in previous hearings and in the Court’s written rulings and opinions.” *Id.* at 3694. As noted earlier, there were only two prior “written rulings and opinions,” *id.*, relied upon as “reasons” for the circuit court’s summary judgment: the Findings and Rulings order (entered November 18, 2022) and the Order Denying Pleas in Bar (entered November 30, 2022).

The Order Granting Summary Judgment repeated the circuit court’s earlier conclusion that Code § 63.2-1216 barred collateral attacks based upon “statutory objection[s]” to the adoption proceeding. *Id.* at 3697 (stating that there is “no way” around that conclusion). The Order Granting Summary Judgment also addressed, albeit in a less than clear manner, the A.s’ allegations of extrinsic fraud:

There are some things that the Court should have been made aware of from [the Masts] in this process that the Court was never made aware of. There is an argument to be made. There is evidence of some extrinsic fraud as it relates to this process and what was happening in Afghanistan at the same time the Court was issuing its final order. And so the Court finds that there is a due process basis to avoid [Code] § 63.2-1216. The Court also finds that there is evidence of extrinsic fraud, not extrinsic fraud in a tortious conduct way. The Court is not sure that the evidence will show that there was an intentional hiding of anything by [the Masts]. But the fact of the matter is the Court did not

have all of the information known to the [Masts] at the time the order was entered.

Id. at 3698. The circuit court did not explain how Code § 63.2-1216 (which specifically precludes challenges alleging fraud) is sidelined by a finding of some non-tortious genre of fraud that did not involve “intentional hiding” of information, *id.*¹⁶

In its conclusion, the Order Granting Summary Judgment repeated the earlier finding that the A.s were “de facto parents” entitled to the same constitutional rights as de jure parents. *Id.* at 3697. The circuit court acknowledged that it could not “point to any actual determination of law that was made in Afghanistan or elsewhere, because none was made. No court in Afghanistan made any final ruling or anything else.” *Id.* Because the A.s’ constitutional interests as “de facto parents” were not considered in the adoption proceeding, the circuit court held that “the [final adoption] order issued by this court on December 3, 2020, is void.” *Id.* at 3697-98.

G.

On appeal to the Court of Appeals,¹⁷ the Masts challenged the circuit court’s de facto parent theory used to declare Code § 63.2-1216 unconstitutional as

¹⁶ The Order Granting Summary Judgment addressed the citizenship of the child in an equally puzzling manner:

There is some thought that the child might have been something else. And there is some thought that the child might have been yet something else. And there is another thought that the child might have been something else, too. But in the end, it was determined that the child was an Afghan child.

Id. at 3695.

¹⁷ See *supra* note 1.

applied to the A.s. In response, the A.s defended that holding and asserted alternative legal theories in support of the circuit court's rulings in their favor:

- The circuit court did not have subject matter jurisdiction to enter the Masts' final adoption order.
- Code § 63.2-1216's bar of untimely fraud claims does not apply to fraud claims that render an order void ab initio.
- The final adoption order violated the Supremacy Clause of Article VI of the U.S. Constitution.

The Court of Appeals rejected the A.s' argument that the circuit court lacked subject matter jurisdiction over the adoption case. Given "the broad grant of jurisdiction of Code § 17.1-513," the Court of Appeals held, "the circuit court had subject-matter jurisdiction over the adoption proceeding." A.A., 81 Va. App. at 233, 903 S.E.2d 513. The Court of Appeals, however, deemed the A.s' position to be "nominally fashioned under the doctrine of subject-matter jurisdiction" but better understood "as an argument that the circuit court lacked the power to render." *Id.* at 234, 903 S.E.2d 513.

The Court of Appeals then applied the power-to-render doctrine as an alternative ground supporting the circuit court's vacatur order.¹⁸ The Court of

¹⁸ The Court of Appeals also ruled on the validity of the custody order issued by the juvenile and domestic relations district court. *See* A.A., 81 Va. App. at 230-36, 903 S.E.2d 513. The A.s' petition to vacate filed in the circuit court, however, did not challenge the district court custody order. *See* R. at 10 (limiting the request for relief to the December 3, 2020 final adoption order); *see also* Appellants' Br. at 7, 38 (arguing that

Appeals did not rule on the A.s’ fraud and de facto parent claims. Addressing the A.s’ claim that the final adoption order violated the Supremacy Clause, however, the Court of Appeals stated: “To the extent that our interpretation of Code § 63.2-1216 is lacking, federal preemption principles counsel the same result But we need not decide this case on such grounds, given the power to render rationale contained herein.” A.A., 81 Va. App. at 239 n.24, 903 S.E.2d 513.

II.

On appeal to us, the Masts argue that the syntactic clarity of Code § 63.2-1216 bars the various challenges advanced in the A.s’ collateral attack¹⁹ on

the custody order was not properly before the Court of Appeals). In their Appellee Brief before us, the A.s concede that “the custody and interlocutory adoption orders were subsumed into the final adoption order and have no independent continuing force.” Appellee Br. at 16 n.11. Given our ruling reinstating the final adoption order, we need not address the issue further.

¹⁹ The expression “collateral attack” has different meanings in different historical contexts, *see generally* 2 Restatement (Second) of Judgments § 80 reporter’s note, cmt. a, at 247-48 (1982), and modern contexts, *see, e.g., Wall v. Kholi*, 562 U.S. 545, 552, 131 S.Ct. 1278, 1284, 179 L.Ed.2d 252 (2011). Without attempting to mark off the exact metes and bounds of the concept, we use the term “collateral attack” in this opinion to describe any challenge to the validity of a court order (whether interlocutory or final) in any judicial proceeding *other than* the proceeding (from commencement to final resolution, if any, on appeal) in which the challenged order was entered. However precisely we define the concepts, it is certain that “the distinction between a direct and a collateral attack is thus clearly drawn: ‘Any proceeding provided by law for the purpose of avoiding or correcting a judgment is a direct attack, which will be successful upon *showing error*; while an attempt to do the same thing in any other proceeding is a collateral attack which will be

the final adoption order and that their constitutional claims are unavailing. For the following reasons, we agree.

A

We hold to the historical maxim that “[t]he power to open or vacate judgments is essentially judicial.” 1 Henry Campbell Black, *A Treatise on the Law of Judgments* § 298, at 455 (2d ed. 1902). English judges exercised this power in the common-law courts by reaching back into prior terms of court, *see generally* 1 A.C. Freeman, *A Treatise on the Law of Judgments* § 96, at 133-34 (4th ed. 1892), and chancellors in equity accomplished the same result by enjoining litigants from enforcing void common-law judgments, *see* Black, *supra*, § 357, at 563; 1 W.F. Bailey, *The Law of Jurisdictions* § 142, at 117-18 (1899); 4 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 1360, at 3248-49 (4th ed. 1919). Early American courts did the same. *See generally* 2 Restatement (Second) of Judgments § 78 cmt. c, at 230 (1982).

But the voiding power was not then and is not now boundless. The judicial power to retrospectively vacate an order as void has always been subject to *statutory limits* “either in respect to the grounds upon which it may be put in operation, the time within which it may be invoked, the manner of calling it into play, or the practice upon an occasion for its exercise. And such [statutory] regulations may either enlarge or abridge its common law scope, or otherwise transform it.” Black, *supra*, § 297, at 453; *see also*

successful only upon *showing a want of power.*” *Eagle, Star & British Dominions Ins. Co. v. Heller*, 149 Va. 82, 104, 140 S.E. 314 (1927) (emphasis added) (quoting John M. Van Fleet, *The Law of Collateral Attack on Judicial Proceedings* § 3 (1892)).

Pomeroy, *supra*, § 1364, at 3258 (observing that voiding powers can be “modified or abrogated by statute”).

This first premise takes us to the centerpiece of this case, Code § 63.2-1216. It applies to “any” final order of adoption, and thus it applies to the final order of adoption in this case. The statute then addresses the kind of “validity” attacks that are prohibited after the expiration of six months. The statute answers that question by again using the capacious “any” adjective. The statutory bar applies to attacks “in any proceedings, collateral or direct, for any reason.” Code § 63.2-1216. If that were not clear enough, the statute continues by textually reinforcing the definition of “any reason” as “including but not limited to” attacks alleging “fraud, duress, failure to give any required notice, failure of any procedural requirement, or lack of jurisdiction over any person.” *Id.*

The legislative evolution of Code § 63.2-1216 reinforces the any-means-any theme of the statutory text. In 1942, the General Assembly enacted the first version of what is now Code § 63.2-1216. *See* 1942 Acts ch. 205, at 258-59. It included a two-year statute of repose on attacks “collateral or direct” on final orders of adoption “by reason of any irregularity in proceedings.” *Id.* In 1954, the legislature reduced the statutory repose period to six months and excised the undefined “irregularity” scope of the statutory bar. *See* 1954 Acts ch. 489, at 586.

In 1995, based upon a report of a joint subcommittee, the General Assembly unanimously amended the statute, codified then as Code § 63.1-237. *See* 1995 Acts ch. 772, at 1444; *Report of the Joint Subcommittee Studying the*

Commonwealth's Adoption Laws, House Doc. No. 65, at 14 (1995). The 1995 amendment “strengthen[ed] [the] existing Code section” by adding the expansive, adverbial phrase “for any reason, including but not limited to fraud, duress, failure to give any required notice, failure of any procedural requirement, or lack of jurisdiction over any person.” *Report of the Joint Subcommittee Studying the Commonwealth's Adoption Laws*, House Doc. No. 65, at 14; *see also* 1995 Acts ch. 772, at 1444. Although the statute was later reenacted and renumbered as Code § 63.2-1216, the statutory text enacted in 1995 has remained unaltered. *See* 2000 Acts ch. 830, at 1768 (renumbered and reenacted as Code § 63.1-219.23); 2002 Acts ch. 747, at 1186 (renumbered and reenacted as Code § 63.2-1216).

For these reasons, we cannot accept the A.s’ assertion that the final adoption order in this case is just a piece of “paper”—not an “order” at all—because “as a legal nullity,” it can “be challenged at any time.” Appellee Br. at 2, 34. From the A.s’ perspective, the statutory bar to challenging the validity of “any” final adoption order excludes all orders that can be successfully challenged as void ab initio. Under this circular logic, the statutory bar applies only when it is unnecessary to apply it—an odd type of performative contradiction that turns back on itself. There is no need for a statute to place a time limit on an ineffectual collateral attack on a mere voidable judgment.

B.

Guided by these principles, we first address the holding of the Court of Appeals that the judicially created “power to render” doctrine negates the

statutory operation of Code § 63.2-1216. 81 Va. App. at 234-41, 903 S.E.2d 513.²⁰ When properly applied, this doctrine authorizes a court to vacate a final order even in cases where the prior circuit court adjudicated the case within its subject matter jurisdiction.

The power-to-render doctrine applied in this case, the Court of Appeals held, because the final adoption order, which treated the case as an agency adoption proceeding, did not comply with a procedural requirement that the child be “properly committed or entrusted to [the agency’s] care.” A.A., 81 Va. App. at 236, 903 S.E.2d 513 (citing Code § 63.2-1230). The Court of Appeals acknowledged that the Department of Social Services (the applicable “agency”) and the guardian ad litem appointed by the circuit court “[b]oth recommended” that the child be adopted by the Masts. *Id.*; *see also* R. at 2535. But because the child was not “present in the United States and neither the [DSS] nor the guardian ad litem ever met the child prior to issuance of the [adoption] orders,” the Court of Appeals held that these “procedural errors” rendered the final adoption order void ab initio

²⁰ The Court of Appeals ruled on this issue because the A.s “nominally fashioned” their argument as a limited attack on the circuit court’s “subject matter jurisdiction” to enter the final adoption order. A.A., 81 Va. App. at 234, 903 S.E.2d 513. The Court of Appeals summarily rejected the A.s’ argument that the circuit court lacked subject matter jurisdiction. *Id.* at 233, 903 S.E.2d 513. We likewise find no merit in this argument. *See Bonanno v. Quinn*, 299 Va. 722, 735, 858 S.E.2d 181 (2021) (holding that “circuit courts have subject-matter jurisdiction to adjudicate adoptions” and the “power to adjudicate adoption petitions under Code §§ 17.1-513 and 63.2-1201”).

under the power-to-render doctrine. A.A., 81 Va. App. at 236, 903 S.E.2d 513.²¹

Though rarely applied, the power-to-render doctrine has found its way into an eclectic array of settings, each marked by indistinct conceptual boundaries. Its ad hoc unpredictability validates Justice Holmes’s observation that “repetition of inadequate catch words” can “delay further analysis for fifty years.” Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 455 (1899). A good example is the oft-repeated statement that a collateral challenge to a void ab initio order can be asserted “by all persons, anywhere, at any time, or in any manner.” *Bonanno v. Quinn*, 299 Va. 722, 736, 858 S.E.2d 181 (2021) (citation omitted).

For over a century, legal scholars have called out as “misleading” the view that an “absolutely void” judgment “may be impeached whenever and wherever confronted, either in a direct or collateral proceeding.” Bailey, *supra*, § 165a, at 136. It is an overstatement because “much depends on the character of the proceeding and the manner in which the question is

²¹ This absentee situation did not go unnoticed by the circuit court. Because the Masts were Virginia “residents” and had been granted legal custody over the child by a Virginia court, the circuit court reasoned that “the child was necessarily deemed to be a resident or domiciliary” of Virginia, and it was unnecessary for the child to be “physically” present in Virginia at the time of the interlocutory adoption order. R. at 2533. Under this view, the same situation existed at the time of the final adoption order, which the circuit court entered “to get the child out of harm’s way and allow the child to be brought safely to the United States to begin receiving the medical care that she had desperately needed.” *Id.* at 2535.

presented.” *Id.*; accord Freeman, *supra*, § 116, at 176. We agree.

The anytime-anywhere “rhetorical flourish,” we recently held, “does not accurately state the law.” *Bonanno*, 299 Va. at 736, 858 S.E.2d 181. Virginia cases “do not support the broad statement there that voidness may be raised by ‘all persons, anywhere, at any time, or in any manner.’” *Id.* at 738, 858 S.E.2d 181. “There are limitations on where, when, and how such challenges may be brought in court, and by whom,” and thus, “we strongly discourage litigants from invoking that language in future proceedings.” *Id.* Only a court can declare a judicial order void ab initio, *Bonanno* held, and a litigant’s request for such relief must be raised in a “proceeding where the voidness of the order is properly at issue.” *Id.* at 736-37, 858 S.E.2d 181.

This last principle—*properly at issue*—undermines the reasoning of the Court of Appeals in this case *even if* the circuit court’s “procedural errors,” A.A., 81 Va. App. at 236, 903 S.E.2d 513, justified the void ab initio remedy. The alleged voidness of the final adoption order was never “properly at issue,” *Bonanno*, 299 Va. at 736-37, 858 S.E.2d 181, in the circuit court. Mistakenly thinking that it was, the Court of Appeals relied on several of our cases that approve of motions to vacate filed long after the challenged final order. In not one of those cases, however, was there a statute that expressly placed a time limit on filing such motions. The only time limit we set aside in those power-to-render cases was our own 21-day deadline in Rule 1:1—a judicially promulgated rule of court establishing a deadline for challenges to final judgments—pursuant to a judicially created exception to the deadline. *See, e.g.*,

Collins v. Shepherd, 274 Va. 390, 402-03, 649 S.E.2d 672 (2007).

This case presents a very different scenario. Code § 63.2-1216 is a legislatively created statute of repose, not a judicially created procedural deadline. Statutes of repose “reflect a legislative decision to extinguish all causes of action after passage of an arbitrary period of time,” *Roller v. Basic Constr. Co.*, 238 Va. 321, 329, 384 S.E.2d 323 (1989). “The purpose and effect of a statute of repose . . . is to override customary tolling rules arising from the equitable powers of courts.” *California Pub. Emps.’ Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 508, 137 S.Ct. 2042, 2051, 198 L.Ed.2d 584 (2017). In this respect, a statute of repose involves a “policy determination,” *Friends of Clark Mountain Found., Inc. v. Board of Supervisors*, 242 Va. 16, 20, 406 S.E.2d 19 (1991), legislating a “redefinition of the substantive rights and obligations of the parties,” *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 52, 392 S.E.2d 817 (1990) (citation omitted).

For these reasons, the power-to-render doctrine (when applicable) sets aside Rule 1:1’s deadline—but not Code § 63.2-1216’s deadline. The statute supersedes any contrary judicial doctrines and cannot be subordinated to caselaw exceptions to Rule 1:1. In the clearest of terms, Code § 63.2-1216 establishes a six-month repose for collateral challenges filed “in any proceedings” seeking to “attack” the “validity” of a final adoption order “for any reason” including the “failure of any procedural requirement.” Citing “procedural errors” committed by the circuit court in this case, *A.A.*, 81 Va. App. at 236, 903 S.E.2d 513, the Court of Appeals invoked the power-to-render doctrine to attack the validity of the final adoption

order. The unmistakable meaning of Code § 63.2-1216, however, has taken this argument off the table.

The only way to put it back on the table is to subordinate the precise language of a statute enacted by the legislature to an imprecise legal doctrine applied by the judiciary. Both the text and the tone of the A.s' arguments ask us to do just that. We respectfully decline the invitation. Our interpretative task considers only "what the statute says" and not what we or the litigants "think it should have said." *Verizon Va. LLC v. State Corp. Comm'n*, 302 Va. 467, 477, 894 S.E.2d 318 (2023) (2023) (citation omitted). We cannot engage assertions that "a statute is 'unwise, improper, or inequitable' because the legislature, not the judiciary, is the sole 'author of public policy.'" *Tvardek v. Powhatan Vill. Homeowners Ass'n*, 291 Va. 269, 279-80, 784 S.E.2d 280 (2016) (citations omitted). Emotive narratives, whether factually supported or not, do not authorize courts "to rewrite [a] statute under 'the subtle "guise of judicial interpretation."'" *Commonwealth v. Hall*, 297 Va. 143, 148, 823 S.E.2d 485 (2019) (citation omitted).

In short, Code § 63.2-1216 evinces a legislative "policy choice to favor finality, recognizing that repeatedly subjecting a child to multiple changes in or even mere challenges to who his legal parents are has the potential to cause significant harm to the child." *Nelson*, 69 Va. App. at 509, 820 S.E.2d 400. Because the textual clarity of the statute is strong and the invocation of the power-to-render doctrine is weak, the validity of the final adoption order cannot be set aside on this basis. The Court of Appeals erred in concluding otherwise.

C.

We next address the A.s' claim that the Masts "perpetrated an extraordinary fraud on the Virginia courts to take an Afghan baby (now a young child), Baby Doe, from her family" and that failing to remedy this fraud would constitute "state-sanctioned kidnapping." Appellee Br. at 1, 38. The Masts vigorously contest this accusation on multiple factual and legal grounds.²² We will address only one of them.

Code § 63.2-1216's six-month deadline applies to fraud claims. Extrinsic fraud *is* fraud. And, thus, the statute bars the A.s' untimely assertion of an extrinsic fraud claim. The A.s appear to suggest that claims of extrinsic fraud by their very nature should not be subject to any time limitation. But that has never been the case. In *Rowe v. Big Sandy Coal Corporation*, we addressed a litigant seeking an "annulment" of a prior judicial decree, arguing that it was "utterly void and of no effect" because it was allegedly procured by a "fraud upon the court." 197 Va. 136, 137-41, 87 S.E.2d 763 (1955). Whether fraud had been proven or not, we held, the equitable doctrine of "laches" barred this claim. *Id.* at 143, 87 S.E.2d 763; *see also O'Neill v. Cole*, 194 Va. 50, 59-61,

²² The statutory bar precludes the necessity for us to address the Masts' arguments that (i) the A.s failed to shoulder the burden of proof to establish extrinsic fraud by "clear and convincing evidence," *Gulfstream Bldg. Assocs., Inc. v. Britt*, 239 Va. 178, 183, 387 S.E.2d 488 (1990); *see R.* at 2555-58, and (ii) the A.s' allegations, even if true, involve intrinsic, not extrinsic fraud, *see generally Rowe v. Big Sandy Coal Corp.*, 197 Va. 136, 143, 87 S.E.2d 763 (1955); *O'Neill v. Cole*, 194 Va. 50, 56, 72 S.E.2d 382 (1952); *Justis v. Georgia Indus. Realty Co.*, 109 Va. 366, 369-70, 63 S.E. 1084 (1909).

72 S.E.2d 382 (1952). This principle has been traditionally applied to voidness. *See generally* Black, *supra*, § 387, at 615; Pomeroy, *supra*, § 1442, at 3417-23. Code § 63.2-1216 replaced the indeterminate nature of laches with a determinate statutory deadline for voidness claims asserting fraud. *See generally* Pomeroy, *supra*, § 1364, at 3258 (stating that an equitable vacatur doctrine applies to a claim “except where it has been modified or abrogated by statute”).

We thus reject the A.s’ argument that Code § 63.2-1216 does not apply because the final adoption order should be declared void ab initio due to extrinsic fraud. This inverted argument seeks to set aside the final adoption order by first setting aside the unqualified text of Code § 63.2-1216. This non sequitur assumes what it should be proving. In short, Code § 63.2-1216 imposes a statutory deadline for making a void ab initio challenge to a final adoption order based upon an allegation of fraud. The circuit court did not err in rejecting the argument to the contrary, and the Court of Appeals did not err in declining to address it at all.

D.

Our interpretation of Code § 63.2-1216 does not render it wholly invulnerable to judicial review. Relying on this foundational truth, the A.s raise two theories of constitutional law that they claim render Code § 63.2-1216 unconstitutional as applied to them.²³ They first argue that the circuit court

²³ “The nature of an as-applied challenge assumes the possibility of different circumstances in which the statute could be constitutional.” *McKeithen v. City of Richmond*, 302 Va. 422, 438-39, 893 S.E.2d 369 (2023).

correctly held that they were “de facto” parents of the child and that no American court could constitutionally sever that relationship. Second, they claim that the Supremacy Clause of Article VI of the U.S. Constitution subordinates Code § 63.2-1216 to the federal government’s alleged interest in dissolving the final adoption order. We find no legal merit in either assertion.

1.

Given its application of the power-to-render doctrine, the Court of Appeals chose not to address the circuit court’s “de facto parents” thesis. *A.A.*, 81 Va. App. at 228, 240, 903 S.E.2d 513. The A.s raise the “de facto parents” issue again with us as an alternative basis for affirmance. *See Appellee Br.* at 43-46. To succeed on this theory, the A.s need to prevail on each of the following three assertions. First, the preponderance of the evidence would have to factually establish that the A.s’ relationship with the child justifies their claimed status as de facto parents. Second, the A.s would have to demonstrate that de facto parents (however defined) have the same constitutional rights under American (not Afghan) law as biological or adoptive parents. And, finally, they would have to establish that they—Afghans living in Afghanistan at the time the final adoption order was entered—can assert a claim attacking the entry of that order in an American court.

a.

On the first point, the circuit court made multiple factual findings concerning the A.s’ relationship with the child while in Afghanistan. The Findings and Rulings order set forth a series of factual findings on this issue. The repetitive and emphatic nature of the

findings underscores the circuit court's view of the evidence:

- The A.s “are not natural parents, adoptive parents, grandparents, or anyone with court-ordered custody or guardianship, and have not proved they are even biological relatives.” R. at 2536-37.
- The A.s “are not natural parents or adoptive parents, or the equivalent thereof.” *Id.* at 2562. “They are not parents at all.” *Id.* at 2547.
- The A.s “are not the natural or biological parents of the child or adoptive parents.” *Id.* at 2537.
- There was no “court-ordered custody to the [A.s],” and “they are not parents (natural or adoptive) and do not have legal custody, and did not have a parent’s right of consent.” *Id.* at 2562.
- “There is no evidence [the A.s] were ever given legal custody,” and their witness on this issue “said that custody could only be granted by court order.” *Id.*; *see also id.* at 2541-42.
- The circuit court was “not convinced or persuaded” that the “[A.s] are who they say they are regarding their asserted familial relationship to the child.” *Id.* at 2538.
- “To reiterate, the Court finds that [the A.s] have not proved to the Court’s satisfaction that they are in fact kin to the child” *Id.* at 2564.
- “The Court did not ever have confidence that his child is the child of [B.], [A.A.’s]

purported uncle, and there was no basis in the case to find this beyond the [A.s'] testimony." *Id.* at 2562.

- "[The Masts] asked for DNA evidence from the very beginning, and [the A.s] resisted this from the very beginning. The Court cannot ignore this." *Id.* at 2540 n.16.
- "[T]he Court has no confidence that Afghan law even gave [the child's uncle] the authority to give the child to [A.A.]." *Id.* at 2539 n.15.
- In sum, the A.s "are not and never were parents." *Id.* at 2547.

The circuit court also pointed out that the A.s "have asserted from the beginning [of this litigation] that there is no adoption in Afghanistan." *Id.* And their claimed status as physical caretakers or guardians, the circuit court observed, is not "the same as an adoptive parent." *Id.*

Despite these factual findings, the circuit court viewed the A.s as "parent figures" for the 18 months prior to the child leaving Afghanistan and coming to the United States and thus had a "fundamental liberty interest" protected by the U.S. Constitution. *Id.* at 2548. "Admittedly no case the Court is aware of explicitly holds this," the circuit court acknowledged, particularly given the fact that the [A.s] were not "natural parents, adoptive parents, legal custodians, or even biological kin." *Id.*

The circuit court recognized that "non-U.S. citizens who do not reside in the U.S. do not have constitutional rights under our law." *Id.* The A.s, the circuit court observed, "are not U.S. citizens and they were not residing in the U.S. when the events

occurred.” *Id.* at 2552. “Nevertheless,” the circuit court held, “I find that Va. Code § 63.2-1216 would be unconstitutional as applied to the facts of this case.” *Id.* With the statute of repose set aside, the circuit court denied the initial plea in bar so that the case could proceed to its “ultimate outcome.” *Id.* at 2553.

Later the circuit court, with the second judge presiding, entered the Order Granting Summary Judgment. Adopting the findings of the first judge who presided over the evidentiary hearings,²⁴ the second judge deemed the A.s to be “de facto parents” whose constitutional rights were violated by the entry of the final adoption order. *Id.* at 3697. Like his predecessor, the second judge conceded that “[t]he Court cannot point to any actual determination of law that was made in Afghanistan or elsewhere, because none was made.” *Id.* “No court in Afghanistan made any final ruling or anything else.” *Id.* Even so, because the A.s’ constitutional rights as “de facto parents” had been violated, the circuit court held, the final adoption order entered three years earlier “is void.” *Id.* at 3697-98.

b.

Whatever the strength or weakness of the A.s’ disputed factual allegations, we reject their de facto parent thesis as a matter of law.²⁵ No Virginia state

²⁴ See *supra* Section I.A.

²⁵ Rule 3:20 governs summary judgments in Virginia courts. Its “key phrase—‘entitled to [summary] judgment’—requires the moving party to demonstrate that no ‘material’ facts are ‘genuinely in dispute.’” *AlBritton v. Commonwealth*, 299 Va. 392, 403, 853 S.E.2d 512 (2021). Given our legal ruling on the de facto parent issue, we need not address the procedural propriety of entering summary judgment in this case.

or federal court has endorsed this constitutional theory. Nor has any American court applied it extraterritorially to foreign citizens living in a foreign country at the time of the alleged violation of their claimed rights under the U.S. Constitution. For several reasons, we will not be the first to do so.

The U.S. Supreme Court in *Troxel v. Granville* addressed the question whether the Fourteenth Amendment's Due Process Clause protected the liberty interest of "parents in the care, custody, and control of their children." 530 U.S. 57, 65, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000) (plurality opinion). There was no majority opinion in *Troxel*. Among the six opinions issued, a plurality of four Justices opined that the "substantive component" of the Fourteenth Amendment forbids a state court from ordering a biological parent (in that case, a mother) against her will to make her children available for visitation by nonparents (in that case, the child's grandparents). *Id.* at 65, 68, 120 S.Ct. at 2060, 2061. The state statute authorizing such visitation orders was unconstitutional, these Justices opined, because a "fit custodial parent" has a constitutionally protected "interest" in decisions affecting the "care, custody, and control" of her children. *Id.* at 65, 67, 120 S.Ct. at 2060. Concurring in the judgment only, Justice Souter agreed with the result but questioned the need "for turning any fresh furrows in the 'treacherous field' of substantive due process." *Id.* at 76, 120 S.Ct. at 2065 (Souter, J., concurring). Justice Thomas also concurred in the judgment only. On various dissimilar grounds, Justices Stevens, Scalia, and Kennedy dissented.

Since *Troxel*, more than 6,000 judicial opinions have cited it in an effort to discern its precedential

parameters. One issue sometimes raised is whether nonparents (grandparents, close relatives, etc.) have the same constitutional rights as biological parents and legally adoptive parents. That issue did not arise in *Troxel*. None of the six opinions in *Troxel* recognized nonparents as having constitutionally protected parental rights over a child. The only person in *Troxel* recognized by the four-Justice plurality as having constitutional “fit parent” rights, *id.* at 70, 120 S.Ct. at 2062, was the child’s biological mother.

We will not survey the extensive list of post-*Troxel* citations in other jurisdictions. In every one of our opinions applying *Troxel*, we have applied its constitutional protections only to actual parents. See *L.F. v. Breit*, 285 Va. 163, 182-83, 736 S.E.2d 711 (2013); *Copeland v. Todd*, 282 Va. 183, 198-201, 715 S.E.2d 11 (2011). The same is true of the opinions issued by the Court of Appeals.²⁶ Two of those Court of Appeals opinions are particularly pertinent.

²⁶ See, e.g., *Williams v. Panter*, 83 Va. App. 520, 540-42, 911 S.E.2d 212 (2025); *Chaphe v. Skeens*, 80 Va. App. 556, 567-68, 899 S.E.2d 91 (2024); *Moore v. Joe*, 76 Va. App. 509, 517-20, 882 S.E.2d 534 (2023); *Bedell v. Price*, 70 Va. App. 497, 507-08, 828 S.E.2d 263 (2019); *Nelson*, 69 Va. App. at 512-13, 512 n.11, 820 S.E.2d 400; *Hawkins v. Grese*, 68 Va. App. 462, 471-74, 809 S.E.2d 441 (2018); *Geouge v. Traylor*, 68 Va. App. 343, 368-70, 808 S.E.2d 541 (2017); *Rhodes v. Lang*, 66 Va. App. 702, 708-10, 791 S.E.2d 744 (2016); *Thach v. Arlington Cnty. Dep’t of Hum. Servs.*, 63 Va. App. 157, 172-74, 754 S.E.2d 922 (2014); *Todd v. Copeland*, 55 Va. App. 773, 789-90, 689 S.E.2d 784 (2010), *aff’d in part, rev’d in part*, 282 Va. 183, 715 S.E.2d 11 (2011); *Damon v. York*, 54 Va. App. 544, 551-52, 680 S.E.2d 354 (2009); *Stadter v. Siperko*, 52 Va. App. 81, 88-91, 661 S.E.2d 494 (2008); *Surles v. Mayer*, 48 Va. App. 146, 166-69, 628 S.E.2d 563 (2006); *Griffin v. Griffin*, 41 Va. App. 77, 82-86, 581 S.E.2d 899 (2003).

In *Nelson*, the Court of Appeals addressed whether grandparents of a child could attack the validity of a final adoption order in a petition to vacate filed after the expiration of Code § 63.2-1216's six-month deadline. 69 Va. App. at 508-09, 820 S.E.2d 400. The grandparents argued that their close familial relationship with the child had the same constitutional status as a parent-child relationship protected by the *Troxel* plurality. The Court of Appeals disagreed. The *Troxel* principle, *Nelson* held, was applicable to "the *parent*-child relationship," not the grandparent-child relationship. *Id.* at 512, 820 S.E.2d 400 (emphasis in original).

Another decision by the Court of Appeals has persuasive weight on this issue. In *Stadter v. Siperko*, a woman gave birth to a child via artificial insemination during a romantic relationship with someone other than the biological father. 52 Va. App. 81, 86, 661 S.E.2d 494 (2008). After the couple separated, the nonparent sought court-ordered visitation rights claiming she was a "de facto parent" of the child. *Id.* at 87, 661 S.E.2d 494. The separated partner claimed that she previously had "shared parenting responsibilities" with the mother and "provided substantial financial support." *Id.* at 86, 661 S.E.2d 494. This "de facto parent" status, the separating partner argued, entitled her to constitutional rights under *Troxel*. *Id.* at 90-91, 661 S.E.2d 494.

Deeming the argument as an invitation to exercise "judicial fiat," the Court of Appeals refused to adopt the novel "doctrine of de facto or psychological parent in the Commonwealth." *Id.* at 91, 661 S.E.2d 494. "[N]o appellate court in Virginia has ever so applied the de facto parent doctrine," the Court of Appeals

held, “despite numerous opportunities under analogous circumstances to do so. We likewise decline to do so now.” *Id.* (citation omitted); *see also Griffin v. Griffin*, 41 Va. App. 77, 81, 86, 581 S.E.2d 899 (2003) (finding that a “non-parent seeking to play the role of a de facto father” does not have the protected constitutional status of an actual parent).

The concurring opinion in *Stadter* further emphasized this point. The claimant had “no legal claim under United States law or Virginia law to parental rights. She did not give birth to the child, she did not adopt the child, and no previous court order gave her any parental rights.” *Stadter*, 52 Va. App. at 96, 661 S.E.2d 494 (Beales, J., concurring) (citation omitted). Agreeing with the majority, the concurring judge stated that Virginia courts have no power “to create by judicial fiat a new category of parent, a de facto parent, who would have the same rights as an actual, fit parent.” *Id.* at 98, 661 S.E.2d 494.

On this issue, we agree with the Court of Appeals. Only a venturesome expansion of *Troxel* could justify the judicial recognition of the de facto parent theory. If *Troxel* had held as much, of course, we would be “duty bound” to apply it. *See Jones v. Commonwealth*, 293 Va. 29, 56, 795 S.E.2d 705 (2017). “However, our ‘duty to follow binding precedent is fixed upon case-specific holdings, not general expressions in an opinion that exceed the scope of a specific holding.’” *Id.* (citation omitted). “This limiting principle exists because ‘words [in judicial] opinions are to be read in

the light of the facts of the case under discussion.” *Id.* (alteration in original) (citation omitted).²⁷

For these reasons, the circuit court erred in holding that the A.s were “de facto parents” entitled under *Troxel* to the Fourteenth Amendment’s due-process protections afforded to actual parents. R. at 3697. The de facto parent theory, therefore, cannot serve as a right-result-different-reason basis for

²⁷ The A.s also claim that the *Troxel* plurality held that “guardians” have constitutional rights over children to the same degree as biological and adoptive parents. See Appellee Br. at 43-44; CAV Oral Argument Audio at 4:59 to 5:04 (“*Troxel v. Granville*, for example, is very clear that parenthood can extend to guardians with a parental relationship.”). There was no such holding. The mention of “guardians” in *Troxel*’s four-Justice opinion quotes *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925), which in turn relies upon *Meyer v. Nebraska*, 262 U.S. 390, 401-02, 43 S.Ct. 625, 627, 67 L.Ed. 1042 (1923). The mention of “guardians” in *Pierce* referred to legal guardians in the context of a state statute that criminalized parents and guardians for sending children to private rather than public schools. Even more attenuated, *Meyer* refers to “official guardians” imagined in Plato’s Republic where wives “are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent.” *Id.* at 401-02, 43 S.Ct. at 627.

We find this line of cases to have little, if any, precedential weight on the question whether a self-identifying “guardian,” not legally appointed by any court, has the same constitutional rights over a child as a biological or adoptive parent. Given the paucity of the A.s’ argument on this point, see Appellee Br. at 43-44 (a single paragraph); *Coward v. Wellmont Health Sys.*, 295 Va. 351, 367, 812 S.E.2d 766 (2018) (“Lack of an adequate argument on brief in support of an assignment of error constitutes a waiver of that issue.” (citation omitted)), the absence of persuasive precedent, and the circuit court’s findings of fact, we reject the A.s’ assertion that *Troxel* supports their constitutional claim in this case.

affirming the Court of Appeal’s vacatur of the final adoption order.²⁸

2.

In their final collateral attack on the final adoption order, the A.s assert that it violates the Supremacy Clause of the U.S. Constitution. They see this ground as one of several “other reasons why the courts below found the adoption order void and challengeable under Section 1216.” Appellee Br. at 3. We read the record differently. The circuit court addressed the federal preemption theory and concluded only that it “is to be considered, but is not dispositive.” R. at 2564. And the Court of Appeals expressly stated it “need not decide this case on such grounds, given the power to render rationale contained herein.” A.A., 81 Va. App. at 239 n.24, 903 S.E.2d 513. The federal preemption claim, therefore, is before us on a right-result-different-reason basis—which means that it can succeed only if there are no disputed facts and the law supports the alternative reason. *See Rickman*, 294 Va. at 542, 808 S.E.2d 395; *Morgan v. Board of Supervisors*, 302 Va. 46, 62 n.6, 883 S.E.2d 131 (2023).

²⁸ Given our rejection of the de facto parent theory, we need not address the question whether a *Troxel* claim can be asserted in an American court by foreign nationals living in a foreign country at the time that their alleged *Troxel* rights were purportedly violated. *See generally Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 591 U.S. 430, 433, 140 S.Ct. 2082, 2086, 207 L.Ed.2d 654 (2020) (stating that “it is long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution”).

a.

We first consider the role of the United States in this case. As the circuit court emphasized, “[t]he United States is not a party to this case.” R. at 2549. Its two motions to intervene were denied by the circuit court. With the permission of the circuit court, the United States appeared as an amicus curiae. It filed briefs supporting the A.s’ federal preemption argument in the lower courts and in our Court. Prior to oral argument before us, however, the U.S. Department of Justice stated that “the United States has now had an opportunity to reevaluate its position in this case.” Mot. by U.S. Dep’t of Just. to Withdraw Amicus Br. at 1 (Mar. 5, 2025). As a result of this reevaluation, “[t]he United States has determined, in light of current U.S. foreign-policy interests and intervening foreign-policy developments, including developments in Afghanistan, to respectfully withdraw its amicus curiae brief filed in [this] case.” *Id.* Given the withdrawal by the United States of its prior support for the A.s’ federal preemption argument, we focus our analysis solely on the A.s’ position as they articulate it.

b.

A successful federal preemption claim must have “its roots’ in the Supremacy Clause,” *Maretta v. Hillman*, 283 Va. 34, 40, 722 S.E.2d 32 (2012) (citation omitted), which provides in pertinent part that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” U.S. Const. art. VI, cl. 2.

This case does not involve a state court's interference with any "Treaties made," *id.*, with an existing foreign government. There was no treaty between the United States and the Government of the Islamic Republic of Afghanistan. Nor could there be today. The Government of the Islamic Republic of Afghanistan no longer exists. It was overthrown by the Taliban and replaced by the Islamic Emirate of Afghanistan after American forces evacuated in August 2021. The same could be said of any bilateral agreements between the United States and the now-nonexistent Islamic Republic of Afghanistan.

The circuit court expressed concern over this issue, observing that the "Afghan government the Court is being asked to defer to in vacating this order no longer exists, and the successor government is not recognized by the U.S." *See* R. at 2564. The concern was justified. The United States does not officially recognize the Islamic Emirate of Afghanistan as a sovereign state²⁹ and deems the Taliban to be a "Specially Designated Global Terrorist[]" entity.³⁰ These anomalous circumstances—described diplomatically by the U.S. Department of Justice as

²⁹ *See* R. at 15294 (the U.S. Department of State's "Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban and the United States of America" dated February 29, 2020).

³⁰ *See Executive Order 13224*, U.S. Dep't of State, <https://www.state.gov/executive-order-13224> (last visited Jan. 8, 2026) (summarizing the background behind U.S. designations of terrorists for financial purposes); Exec. Order No. 13,224, 3 C.F.R. 78 (2002) (blocking designated individuals from receiving funds to aid terrorist activities); Exec. Order No. 13,268, 3 C.F.R. 240 (2003) (designating the Taliban as an entity to be blocked).

“current U.S. foreign-policy interests and intervening foreign-policy developments, including developments in Afghanistan”³¹—cut deeply into the taproot of the A.s’ argument.

The A.s’ core claim is that the final adoption order offends the President’s constitutional “responsibility for foreign affairs” and puts the Commonwealth of Virginia at risk of “establish[ing] its own foreign policy.” Appellee Br. at 41-42 (alteration in original) (citations omitted).³² The unique facts and circumstances of this case, however, support a more measured view of the impact of the final adoption order on the President’s Article II powers over the foreign policy of the United States.

The U.S. Embassy in Kabul agreed to “facilitate” the transfer of the child to the former Afghan Ministry of Labor and Social Affairs. R. at 2413. No evidence suggests that the U.S. Embassy conducted its own

³¹ Mot. by U.S. Dep’t of Just. to Withdraw Amicus Br. at 1 (Mar. 5, 2025).

³² Under settled principles, “conflicting state family law” can be preempted “when Congress validly legislates pursuant to its Article I powers” on the subject. *Haaland v. Brackeen*, 599 U.S. 255, 277, 143 S.Ct. 1609, 1630, 216 L.Ed.2d 254 (2023) (rejecting a state challenge to the Indian Child Welfare Act). The A.s, however, do not identify any “Laws of the United States,” U.S. Const. art. VI, cl. 2, that address the fact specific issues surrounding the entry of the final adoption order. In a footnote of their brief, *see* Appellee Br. at 42 n.28, the A.s briefly mention the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001), which authorized President Bush “to use all necessary and appropriate force” against those responsible for the 2001 attack on the Twin Towers of New York City. Nothing in this Joint Resolution expressly or implicitly seeks to displace final adoption orders entered by state courts under the *sui generis* circumstances of this case.

independent investigation to determine the child's true identity or her extended family relationships.³³ "This was not a decision the United States initiated," the circuit court stated, but rather one the United States merely "consented to or acquiesced in." *See id.* at 2564, 2541. The A.s assert that the U.S. officials involved in the decision believed they had to defer to that decision because of the Bilateral Security Agreement between the United States and Afghanistan. *See* Appellee Br. at 42. Fully titled "Security and Defense Cooperation Agreement Between the Islamic Republic of Afghanistan and the United States of America," this bilateral agreement stated in part that U.S. forces would "respect the Constitution and laws of Afghanistan."³⁴ Relying on

³³ The Court of Appeals and the A.s rely upon the circuit court's later statement that "in the end, it was determined that the child was an Afghan child." A.A., 81 Va. App. at 232, 903 S.E.2d 513 (alterations omitted); *see* R. at 3695. That is true, but only in context. "[I]n the end," R. at 3695, the determination was made by the then-existing Government of Afghanistan, *id.* at 2398, not the U.S. Embassy in Kabul. The circuit court was skeptical that it was factually true. *See supra* at ——— – ———, 925 S.E.2d at 674. *Compare* R. at 8308-09 (the Afghan Minister of Labor and Social Affairs testifying that his agency does not "make a determination as to whether or not the child was Afghan" because "[t]hat is the court's job"), *with id.* at 9688-89 (A.A. acknowledging in testimony that "there's no court order" for him or his father related to guardianship of the child). The circuit court stated that it could not "point to any actual determination of law that was made in Afghanistan or elsewhere, because none was made. No court in Afghanistan made any final ruling or anything else." R. at 3697.

³⁴ *See* Security and Defense Cooperation Agreement Between the United States of America and the Islamic Republic of Afghanistan, Afg.-U.S., Sep. 30, 2014, T.I.A.S. No. 15-101.

that agreement, U.S. officials turned the child over to the Islamic Republic of Afghanistan on February 27, 2020, R. at 2398.

The circumstances changed almost immediately thereafter. Two days later, on February 29, 2020, the United States entered into a “comprehensive peace agreement” with the Taliban insurgency, which, at that time, was in hostile control of various sectors of Afghanistan. *See id.* at 15294. The peace agreement’s title, “Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban and the United States of America,” and its various later provisions repeatedly stated that notwithstanding the withdrawal of its military forces, the United States did not officially recognize the Taliban’s “Islamic Emirate of Afghanistan” as a sovereign state. *See id.* at 15294-97.

The next year, in 2021, the Taliban violently toppled the Islamic Republic of Afghanistan, gained control of the entire country, and declared it to be governed by the Islamic Emirate of Afghanistan—effectively extinguishing the 2015 bilateral agreement with the Islamic Republic of Afghanistan. These developments undermine the A.s’ federal preemption argument. If we frame the requested exercise of our judicial power in the present, the A.s’ federal preemption argument can be understood as a request that we vacate a state final adoption order on the ground that it interferes with a past, not present, federal interest arising out of a past, not present,

The bilateral agreement was signed on September 30, 2014, and became effective on January 1, 2015. *See id.*

bilateral agreement, with a past, not present, foreign government. We know of no logical or legal principle counseling, much less compelling, us to do so.³⁵

To be clear, we fully agree that “[t]he ‘President has unique responsibility’ for ‘foreign and military affairs,’” Appellee Br. at 41-42 (citation omitted), and that “the Constitution ‘vests the residual foreign affairs powers of the Federal Government—*i.e.*, those not specifically enumerated in the Constitution—in the President,’” *Trump v. Vance*, 591 U.S. 786, 821-22, 140 S.Ct. 2412, 2437, 207 L.Ed.2d 907 (2020). We do not believe, however, that the final adoption order that the A.s collaterally challenge in this case jeopardizes or undermines the President’s constitutional foreign-policy prerogatives.

Nor does the United States. The United States abandoned this theory on appeal based upon “current U.S. foreign-policy interests and intervening foreign-policy developments.” See Mot. by U.S. Dep’t of Just. to Withdraw Amicus Br. at 1 (Mar. 5, 2025). The brevity of this statement does not diminish its weight. The very doctrine we are applying, after all, insists that “[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.” *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 265, 138 S.Ct. 1386, 1403, 200 L.Ed.2d 612 (2018).

³⁵ Given our ruling on this issue, we need not address in any further detail the circuit court’s factual findings that call into question the factual predicates for the federal preemption claim.

c.

We also cannot overlook that the A.s use the federal preemption argument not as a defense to the entry of a judicial decree but as a collateral attack seeking the vacatur of a final judicial order. This defend-attack distinction polices the line between voidable orders and void ab initio orders. We know of no authority for the A.s' unstated assumption that the U.S. Constitution implies an omnibus right of action to collaterally attack final judicial decrees that allegedly misapplied federal constitutional law. In various contexts, just the opposite assumption begins and often ends the analysis.³⁶ This "constitutional conclusion" follows from "[t]he interest in promoting the finality of judgments" and guards against "inroads on the concept of finality [that] tend to undermine confidence in the integrity of our procedures' and inevitably delay and impair the orderly administration of justice." *Custis v. United States*, 511 U.S. 485, 497, 114 S.Ct. 1732, 1739, 128 L.Ed.2d 517 (1994) (citation omitted). Exceptions to this general principle exist but are rare.³⁷

The A.s offer no justification for creating an exception in this case. The cases they cite involve

³⁶ See, e.g., *Jones*, 293 Va. at 52, 795 S.E.2d 705 (stating that "Virginia law does not permit a motion to vacate that is filed in a trial court long after the court lost active jurisdiction over the criminal case to serve as an all-purpose pleading for collateral review of criminal convictions" and that "we have never held, nor are we aware of any court that has held, that a motion to vacate (rather than a petition for habeas corpus) is a proper vehicle under Virginia law to challenge a conviction or sentence based solely on a federal constitutional challenge"); see also *Johnson v. United States*, 544 U.S. 295, 303, 125 S.Ct. 1571, 1578, 161 L.Ed.2d 542 (2005) ("We recognized [in prior cases]

federal preemption arguments raised as a defense to the application of a state statute, a state judicial decree, or a state-law doctrine in a then-pending case. None involve collateral attacks on final judicial decrees that allegedly violated the Supremacy Clause.³⁸ To be sure, their brief does not even address

only one exception to this rule that collateral attacks were off-limits, and that was for challenges to state convictions allegedly obtained in violation of the right to appointed counsel, an exception we thought necessary to avoid undermining *Gideon v. Wainwright*, 372 U.S. 335 [83 S.Ct. 792, 9 L.Ed.2d 799] (1963).”); *Daniels v. United States*, 532 U.S. 374, 381-82, 121 S.Ct. 1578, 1582-83, 149 L.Ed.2d 590 (2001) (observing that “only one exception” exists to the prohibition on collateral attacks: “[i]f an enhanced federal sentence will be based in part on a prior conviction obtained in violation of the right to counsel”).

³⁷ See, e.g., *supra* at ——— – ———, 925 S.E.2d at 685-88 (reviewing the *Troxel* doctrine as a possible, but inapplicable, exception in the present case).

³⁸ See Appellee Br. at 41-42 (citing *Haaland*, 599 U.S. at 263-64, 143 S.Ct. at 1622 (holding that a federal statute concerning Indian adoption preempted state family law on adoption); *Hernandez v. Mesa*, 589 U.S. 93, 96, 140 S.Ct. 735, 739, 206 L.Ed.2d 29 (2020) (declining to extend a cause of action to an area with “foreign relations and national security implications” when Congress had been reluctant to provide similar causes of action); *Medellin v. Texas*, 552 U.S. 491, 498-99, 128 S.Ct. 1346, 1353, 170 L.Ed.2d 190 (2008) (“We conclude that neither *Avena* [an International Court of Justice decision] nor the President’s Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions.”); *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 401, 405-08, 123 S.Ct. 2374, 2379, 2381-83, 156 L.Ed.2d 376 (2003) (holding that an executive agreement settling liability claims preempted a state insurance statute because the statute “interfere[d] with the National Government’s conduct of foreign relations”); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187-88, 113 S.Ct. 2549, 2567, 125

the difficult question whether the U.S. Constitution implies a right of action to assert a collateral attack on a final judicial decree claiming it to be a void ab initio order in violation of federal preemption principles.³⁹ Because the A.s fail “to provide

L.Ed.2d 128 (1993) (holding that a congressional statute and ratified treaty involving immigration did not preempt a repatriation executive order that was consistent with the statute and treaty); *Zschernig v. Miller*, 389 U.S. 429, 432, 88 S.Ct. 664, 666, 19 L.Ed.2d 683 (1968) (holding that Oregon’s inheritance statute was “an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress”).

³⁹ Cf. *People v. Thompson*, 398 Ill.Dec. 74, 43 N.E.3d 984, 990 (Ill. 2015) (“[T]his court has held that the void ab initio doctrine does *not* apply to an as-applied constitutional challenge.” (emphasis in original)); *Berry v. Berry*, 786 S.W.2d 672, 673 (Tex. 1990) (rejecting a “collateral attack” on a final divorce decree that was violative of a federal statute “retroactively applied”). See generally *Foster v. Foster*, 505 Mich. 151, 949 N.W.2d 102, 117 (Mich. 2020) (Viviano, J., concurring) (“The preemption doctrine does not deprive state courts of subject matter jurisdiction over claims involving federal preemption unless Congress has given exclusive jurisdiction to a federal forum.” (citation omitted)), *remanded to*, No. 324853, 2020 WL 4382784, 2020 Mich. App. LEXIS 4880 (Mich. Ct. App. July 30, 2020) (per curiam) (unpublished) (stating that “[s]tate courts are deprived of subject-matter jurisdiction when principles of federal preemption are applicable”), *rev’d*, 509 Mich. 109, 983 N.W.2d 373, 376 (Mich. 2022) (holding that the “federal preemption at issue in this case does not deprive state courts of subject-matter jurisdiction” and that the “challenge to enforcement of the provision at issue is an improper collateral attack on a final judgment”); *Parish v. Parish*, 314 Neb. 370, 991 N.W.2d 1, 8 (Neb. 2023) (“It has been widely held, and we agree, that if the military benefits are initially divided by a state court in violation of federal preemption, but the service member fails to file a proper appeal, the decision is final and the benefits at issue are divided in accordance with the initial award.”).

sufficient legal reasoning, factual analysis, or citations to authority,” *Amazon Logistics, Inc. v. Virginia Emp. Comm’n*, 304 Va. 107, 112 (2025) (citation omitted), in support of their assumption that such a right exists,⁴⁰ we offer no ruling on whether it does or not.

d.

We thus hold that the lower courts’ vacatur of the final adoption order cannot be sustained on the right-result-different-reason doctrine based on the claim that the final adoption order violates the Supremacy Clause of the U.S. Constitution. Such a conclusion is not warranted by the facts, required by the law, or supported by the United States.

III.

In sum, the uncompromising text of Code § 63.2-1216 bars the A.s’ collateral attack on the validity of the final adoption order. None of their efforts to exempt themselves from this statute of repose have the support of the circuit court’s factual findings or our understanding of the governing legal principles. For these reasons, we reverse the opinion of the Court of Appeals and enter final judgment dismissing with prejudice the A.s’ petition to vacate the final adoption order.

Reversed and Final Judgment.

⁴⁰ Their argument on brief (under the heading, “The U.S. Supremacy Clause Voids the Final Adoption Order and Preempts Section 1216”) consists of two paragraphs and a footnote. See Appellee Br. at 41-42 & n.28.

JUSTICE MANN, with whom JUSTICE POWELL and SENIOR JUSTICE MILLETTE join as to Part II, dissenting.

A dispassionate review of this case reveals a scenario suffused with arrogance and privilege. Worse, it appears to have worked. It would be naïve to expect that there would not be, sometimes, unintended consequences to legislation. But here, the construction of the statute at play in this case legitimizes the manipulation and artifice employed by Appellants. Put simply: this is just wrong.

In summary, no valid process was undertaken that would have authorized the power of rendition over the adoption order in the first place. This case exemplifies a *perfect voidness*, and we should vacate every single order entered by any court that, in any way, supported the entry of the final order in this case.

I appreciate that facts can be viewed through different lenses when it comes to the conduct of these parties. But looking at what happened here through a pinhole exposes an incontestable truth: The General Assembly, in thoughtful fashion, created a protective and comprehensive adoption process that requires strict adherence to avert pure voidness.

After all, we must recognize what an adoption really is: the severance and termination of the rights naturally flowing to an otherwise legitimate claimant to parental authority. Of course, the process must be impeccable. An evolved society could not sanction anything less than that. And here, it was less; if this process was represented by a straight line, Appellants went above it, under it, around it, and then blasted

right through it until there was no line at all—just fragments collapsing into a cavity.

Both the Juvenile and Domestic Relations District Court (JDR court) and circuit court below entered orders that they simply could not. The JDR custody order was entered without subject-matter jurisdiction, and the circuit court order relied on that faulty order to later enter an adoption order when it had no power to do so. Under these circumstances, we would hold that Code § 63.2-1216's time bar does not apply and affirm the judgment of the Court of Appeals.

I would also affirm the Court of Appeals on two other grounds. By intruding into an area of foreign affairs and military operations, the custody and adoption orders were preempted by the federal Constitution's Supremacy Clause. Finally, I would hold the application of Code § 63.2-1216's time bar unconstitutional because the A.s had no notice of the adoption proceedings.

For these reasons, I respectfully dissent.

I. BACKGROUND

A. The Record in Context

Adding to the challenging nature of this case, two judges (one retiring from the bench, one his replacement on the case) presided over successive stages of the litigation and made, at times, divergent factual findings before the case was certified for interlocutory appeal. Three of their orders principally memorialize the judicial findings of fact in this interlocutory appeal: (1) the first judge's "Findings and Rulings," (2) the first judge's "Order Denying [the Masts'] Pleas in Bar," and (3) the second judge's "Order Granting Summary Judgment [for the A.s]."

Our survey of the record landscape, however, reveals additional factual findings. Specifically, I conclude that a general timeline of events prepared by the second judge contains factual findings that are entitled to deference on appeal. The timeline itself is a one-page table of dates alongside companion facts. Each of these factual findings is supported by a citation to the record.

At the close of argument on the A.s' motion for summary judgment, the second judge distributed this timeline to all parties present at the hearing. He remarked on its applicability to the proceedings, then immediately ruled in favor of the A.s:

THE COURT: Thank you. Would you pass these over to this side and this side. [Guardian Ad Litem], if you would pass that—you can keep one for yourself and then leave one for [Counsel for the Masts].

What you've just received a copy of is the court's timeline that, I've gone through and constructed my own timeline as to dates and facts. And what you can see is the file, page, or number where this particular date is taken from, so that you can see along the way where, as the court went through this, [it] tried to come to some understanding about what happened and when it happened and the order in which it happened.

I know that today and I noted today in some of the argument that some of the dates that are mentioned are different than the dates that the court has by a day or so, **but still the general timeline is applicable**. There are some things to be said about the nature of the case

that's in front of you. There has never been a case that I can find that is like this case. . . .

(emphasis added).

Having just won their motion for summary judgment, the second judge asked the A.s to draft an order for his entry. The A.s did so and appended the second judge's timeline to their draft order. The Masts, however, objected to the A.s' summary of the facts, arguing that they were attempting to "whitewash and supersede" the first judge's factual findings. The Masts then drafted their own order, whose body was a near-verbatim transcription of the second judge's oral ruling from the summary judgment hearing. The Masts then attached their own timeline for the second judge's entry. The second judge ultimately declined to enter the A.s' proposed order and instead entered the Masts' version, and then it certified the case for interlocutory appeal. The second judge did not expressly attach or incorporate any timelines to his order.

Despite the facial irregularity of the Order Granting Summary Judgment, I think its entry makes intuitive sense: In what is universally regarded as a fiercely litigated contest, what could be less objectionable than an order that simply restates the judge's own words? I do not view the adoption of the Masts' order under these circumstances, or the circuit court's omission of the timeline from the written order, as a disavowal by the second judge of his own factual findings.

Trial judges, of course, are not required to memorialize their findings of fact in an order or opinion unless there is some statutory mandate to do so. See *Bowman v. Commonwealth*, 290 Va. 492, 500

n.8, 777 S.E.2d 851 (2015) (quoting *Fitzgerald v. Commonwealth*, 223 Va. 615, 627, 292 S.E.2d 798 (1982)). Indeed, absent express disavowal by the second judge, our appellate standard of review compels us to consider the timeline when reviewing the second judge’s findings of fact. As we have explained on review of a plea in bar—the evidentiary vehicle from which the predicate findings of fact in this appeal principally derive—“this Court’s review ‘is not limited to the evidence mentioned by a party in trial argument or by the trial court in its ruling,’ [thus] the absence of any specific factual findings by the circuit court simply requires the Court to examine the evidence presented at the plea in bar hearing with the presumption that the circuit court relied on it and any inferences reasonably drawn from it.” *Fines v. Rappahannock Area Cmty. Servs. Bd.*, 301 Va. 305, 312, 876 S.E.2d 917 (2022) (first quoting *Perry v. Commonwealth*, 280 Va. 572, 580, 701 S.E.2d 431 (2010), then citing *Commonwealth v. White*, 293 Va. 411, 421 n.4, 799 S.E.2d 494 (2017)). This Court’s appellate function is to “presume that the trial court made the requisite findings of fact to support its decision.” *Commonwealth v. Holland*, 304 Va. 34, 47, 910 S.E.2d 327 (2025).

Moreover, the first judge never intended to insulate his factual findings from later modification. In fact, the record confirms that he intended just the opposite: that whichever judge succeeded him should revise his findings however they saw fit. The very first page of his “Findings and Rulings” acknowledged as much and served as an express qualifier:

While this Court believes that these findings and rulings might be helpful to the reviewing appellate Court and the new presiding judge,

such may be considered or not considered as they deem appropriate, and **any pre-trial finding or ruling may be revisited and modified by the [new presiding] trial judge at a later time.**

(emphasis added).

Even if the first judge had wanted to guard his rulings, it would have mattered little. True, the first judge, having presided over the evidentiary hearings, was closer to the evidence.¹ But it does not alter the law as I understand it: That “[t]he power to revise or modify prior orders within a court’s jurisdiction is a truism that applies to all interlocutory orders.” *Robbins v. Robbins*, 48 Va. App. 466, 474, 632 S.E.2d 615 (2006). Accordingly, to the extent that the second judge made different factual findings than the first, those second findings control, and I would accord those findings the “weight of a jury finding.” *Hawthorne v. VanMarter*, 279 Va. 566, 577, 692 S.E.2d 226 (2010).

Guided by these principles, I next recite the relevant facts.

B. FACTS

This case concerns a child, orphaned in 2019 after a military strike in Afghanistan. After American soldiers found the child in the aftermath of the strike, the International Committee of the Red Cross (“ICRC”) began its search to reunite the severely

¹ In his “Findings and Rulings,” however, the first judge shared misgivings about his ability to recollect all the evidence presented, explaining, “[w]ith all of the evidence in this case (hours of testimony and hundreds of pages of exhibits), the Court is not confident that it has remembered all of the evidence presented completely.”

injured child with her family.² Days later, U.S. Department of Defense personnel transferred the child to Bagram Airfield in Kabul for medical treatment. Joshua Mast, then deployed in Afghanistan as a Marine Corps Judge Advocate, became preoccupied with the child's medical needs. Meanwhile, the child's maternal uncle requested assistance from the ICRC to return the child to her extended family in Afghanistan.

On October 26, 2019, Afghan officials from the Afghan Ministry of Labor and Social Affairs ("MOLSA"), ICRC representatives, and U.S. officials met to discuss the ongoing family reunification search. Mast attended this meeting. There, the United States expressed its intent to place the child in the custody of the Afghan government, so that she could be reunified with her family. This was consistent with the United States' obligations under its bilateral security agreement with the Afghan government. Days after this meeting, a United States Colonel sent a memorandum to the ICRC and MOLSA to assist with the family-reunification process. The Colonel alleged that the child was likely the daughter of either Turkmen or Uighur fighters (*i.e.*, not Afghan), against whom the strike was executed. Disagreeing with the memo's conclusion, however, the Afghan government continued to search for the child's next of kin in Afghanistan.

Even though that process was unfolding in the ordinary course in Afghanistan, Mast and his wife

² With few exceptions, under the Fourth Geneva Convention, the ICRC alone cares for children who are orphaned during military conflicts and assists in the family-reunification process.

petitioned the Fluvanna County, Virginia JDR court for custody of the child in November 2019. The Masts failed to inform the JDR court of the ongoing familial search or the United States' intent to deliver the child into Afghan custody. To the contrary, the Masts assured the JDR court that the Afghan government would issue a waiver within a matter of days to allow for the child's adoption in the United States. This was the prevarication which formed the basis of everything else to follow. Based on these misrepresentations, the JDR court found that the child was "a stateless minor" and granted the Masts sole legal custody over the child.

The State Department later criticized this court order in a cable transmission.

68a

UNCLASSIFIED
SBU



MRN:	20 STATE 20556
Date/DTG:	Feb 25, 2020 / 252325Z FEB 20
From:	SECSTATE WASHDC
Action:	KABUL, AMEMBASSY IMMEDIATE
E.O.:	13526
TAGS:	CVIS, PGOV, PREL, AF
Captions:	SENSITIVE
Pass Line:	Pass to A/COM Donna Welton and Consul General Michael Katula
Subject:	Transfer of Afghan Child

* * *

3. (SBU) Virginia custody order: The Virginia custody order in favor of an individual U.S. servicemember and his wife, which was issued on November 6, 2019, is flawed in a number of respects. It relies in part on assertions that the baby was stateless and that the Government of Afghanistan was in the process of issuing a waiver to consent to the United States acting on behalf of the child. Yet MOLSA concluded that the child is Afghan, and no such waiver was issued by the Government of Afghanistan. In these circumstances, it is unclear on what basis the court had jurisdiction to adjudicate the custody claim. And although the couple has not sought to go through the inter-country adoption process, the requirements for U.S. prospective adoptive parents seeking to adopt a child from Afghanistan have not been met.

The cable ends with the State Department's recommendation to proceed with reunification of the child with her family in Kandahar.

Still, Mast persisted. He emailed the custody order to Foreign Service Officers stationed in Afghanistan, conceding that the order “doesn’t impact [the Afghan government’s] decision but [it] does allow me to create a path to the U.S. as soon as we can secure a waiver.” He acknowledged that “this path could only be used if the Government of Afghanistan gave formal consent and waived jurisdiction over the child.” The United States thereafter “became concerned” that “Mast had diverged from” its position, largely because “he was

attempting to interfere inappropriately in decision-making regarding the child.” As a result, the United States stopped including Mast in any deliberations or decision-making about the child.

The government’s concerns proved well founded. On November 8, 2019, thousands of miles from Afghanistan, the Masts secured an interlocutory adoption order from the Fluvanna County Circuit Court, under Code § 63.2-1201,³ relying on the nugatory custody order issued by the JDR court. Later, the circuit court approved a certificate of foreign birth.

Mast attempted to medically evacuate the child from Bagram Airfield in Afghanistan to the United States, but that was cancelled when the Afghan government successfully identified and verified the

³ Section 63.2-1201, which authorizes *only* domestic adoptions, reads:

Proceedings for the adoption of a minor child and for a change of name of such child shall be instituted only by petition to a circuit court in the county or city in which the petitioner resides, in the county or city in which the child-placing agency that placed the child is located, or in the county or city in which a birth parent executed a consent pursuant to § 63.2-1233.

The interlocutory adoption order here was purportedly granted on an emergency basis for two reasons. First, the order stated that the search for the child’s family was fruitless (it wasn’t), and thus the child was “stateless” (she wasn’t). But the Masts never disclosed this to the court. Second, the order stated that the child was in the “physical care and custody” of the Masts in Virginia, who were looking after her urgent medical needs. But the Masts did not have physical custody of the child at this point. The circuit court anticipated that the child would soon be arriving in the United States only due to the Masts’ misrepresentations.

child's next of kin—her paternal uncle, H.I.—in Afghanistan and notified the United States State Department. A State Department official replied to the message, requesting that MOLSA “expedite” its request for custody “so that the infant can be reunited with her family members as soon as possible.” After MOLSA transmitted its formal request for custody in February 2020, the State Department concluded that the child was an Afghan national (not “stateless”), that no waiver of jurisdiction would issue from Afghanistan,⁴ and that transfer of the child into Afghan custody was necessary.

When the Masts learned of the State Department's plans to reunite the child with her family in Afghanistan, they maneuvered around the government's plans. In February 2020, they sought a temporary restraining order (“TRO”) in the United States District Court for the Western District of

⁴ I note that the timeline includes an entry dated October 26, 2020 that reads “waiver by the Afghan government. File 145-149.” This appears to be a clerical error rather than the circuit court's factual finding for four reasons. First, the Afghan government never waived jurisdiction over the child, and nothing in the record suggests otherwise. Second, the record cites expressly contradict any finding that the Afghan government waived jurisdiction. They instead describe the A.s' peaceful life and their intention to raise the child as their own—with the Afghan government's recognition—until the Masts persuaded the A.s to bring the child to Virginia. Third, the entry appears to be only a sentence fragment, as it begins with a lowercase letter. And fourth, the A.s alerted the trial court to this error and requested that it be corrected.

In their responses to interrogatories, the Masts stated that they “are still not aware of any declination to issue a waiver by the Government of Afghanistan.” Therefore, I cannot conclude that any waiver was issued, notwithstanding this entry in the timeline.

Virginia. When asked by the District Court whether they were ultimately seeking to adopt the child, the Masts falsely represented that they were not.

The Court: How do you perceive – I mean, what – what are you asking for, ultimately? Your client is not asking to adopt the child.

Mr. [Richard L.] Mast:⁵ No, sir. [Joshua] wants to get her medical treatment in the United States because we dispute that [MOLSA] is Al-Qaeda. If it were family, Taliban knows how to immediately go and get their child back from US custody Her head is deformed. She has that massive scar on her leg. UVA is right here ready to treat her.

The District Court ultimately denied the Masts' request for a TRO. It ruled that the Masts failed to demonstrate "a likelihood of success on the merits" of their Fourteenth Amendment claim because of "their failure to proceed through proper channels" and "lack of service and notice upon [the Defense Department]." The District Court also found the Masts did not show that the "balance of equities . . . tip in [their] favor." In announcing the court's decision, the District Court judge remarked that he "cannot overlook the international ramifications of the Court granting the request for [a TRO]." "[The Masts] should have

⁵ Richard Mast represented his brother Joshua and Joshua's wife, Stephanie, from the initial custody proceedings in JDR court to the TRO proceeding in federal district court. Like Joshua, Richard is a Virginia attorney. Even if the Masts were not *required* to apprise the district court of the interlocutory adoption order, entered three months before, this glaring omission by officers of the Court with a duty of candor to the tribunal is striking.

obtained the consent of the Afghan government to the transfer of [the child]. While plaintiff's counsel conceded both that it was required and they sought it, it ultimately was not obtained."

Consequently, the United States released the child to the director of MOLSA who transferred her to her uncle in Kandahar. Under Afghan law, her uncle subsequently delegated his guardianship of the child to his son, A.A., and his wife, F.A.

In March 2020, the Masts made efforts to contact the child's family in Afghanistan. The Masts employed Kimberly Motley, an American attorney based in Afghanistan, to reach out to the A.s and let them know that they wanted to help with the child's medical issues. Motley began requesting photographs of the child, telling the A.s that she knew "someone who would like to help [the child]." This turned out to be entirely pretextual.

Though the child had never stepped foot in the United States, the Masts obtained a final order of adoption in December 2020 and additionally obtained—using the photographs acquired by Motley—a Department of Defense beneficiary card for the child. In securing the final order of adoption, the Masts failed to apprise the circuit court of their earlier TRO filing in the District Court—or that it had been denied. The Masts made only one oblique reference to the TRO denial in a subsequent document filed with the circuit court, "which was being looked at for other reasons." The Masts failed to make the circuit court aware of any "actual court proceeding (in the Western District of Virginia or elsewhere) or any ruling by a court that addressed the validity of the Juvenile Court's custody order or [the circuit court's] birth certificate order." The Masts also

failed to apprise the circuit court that the Afghan government had identified the child as Afghan, verified her next of kin, or had placed her with family. Mast instead lied to the circuit court, testifying that he did not recollect whom the child had been placed with, and explaining that he had “no such specific identification information at that time,” even though he was actively communicating with the A.s through Motley.

Thus, the final order of adoption falsely described the child as an “undocumented, orphaned, stateless minor subject to this court’s jurisdiction pursuant to Virginia Code § 63.2-1201” and “suitable for adoption.” The order stated that “no further consent to adoption or notice of these proceedings is required and that all requirements of law have been met or have been waived by this [c]ourt.” The Masts then obtained an Afghan passport for the child after representing themselves as the legal guardians of an Afghan national.

Three months later, the Masts asked the A.s to send the child to the United States for medical treatment. The A.s refused to send the child if they could not accompany her. As the Afghan government began to collapse in August 2021, the A.s and the child fled to the United States.

On August 29, 2021, the three arrived at Dulles International Airport and were assigned refugee housing at Fort Pickett, Virginia. F.A. was then roughly eight months pregnant.

Five days later, armed with the custody and adoption orders, the Masts took physical custody of the child for the first time on the U.S. military base. On the afternoon of September 3, 2021, as F.A. was

putting the child to sleep, two officers knocked at their front door. With little explanation, the officers ordered the A.s to grab their belongings and brought them to a vehicle waiting outside their residence. A woman emerged from the car and took the child from F.A., placing her in a car seat. When F.A. asked to be with the child, the woman refused, saying that they must go to an “interview.”

At the “interview,” the woman continued to hold the child. The child tried to crawl to F.A., but the woman kept her in her arms. Another woman, purporting to be from the State Department, told the A.s that they were not the legal parents of the child under U.S. law and thus must be separated from the child. A.A. protested, questioning how they had lost custody after raising the child for two years. Mast soon after entered the room. When A.A. asked him what was happening, Mast said that he was “working in my job” and “just got an e-mail and I came here.” Mast threatened that he would either “take the baby” or “they will put her in the orphanage.” F.A. and the child began crying. F.A. begged Mast and the woman to “[p]lease give me my daughter.” A.A. told the people taking custody of the child, “I respect the rules and laws of the United States, but if you are saying that this child does not belong to us, she should be separated either in front of a court or in front of the police or even in front of, like, an office. But there is no one. It’s like you are kidnapping her.” F.A. continued to cry as the group took the child.

The A.s have not seen the child since.

C. Challenges to the Adoption Order

In March 2022, the A.s filed a petition in the Fluvanna County Circuit Court to vacate the Masts' final order of adoption, arguing that the order had been procured by fraud, and that the circuit court had no jurisdiction because the A.s never received notice of the proceedings, proper adoption procedures were not followed, and the child did not then reside in the United States. The United States filed a Statement of Interest in the case, under 28 U.S.C. § 517, to argue that the custody and adoption orders interfered with U.S. foreign policy and its commitment to reunite the child with her family in Afghanistan. The Masts, in turn, filed pleas in bar challenging the A.s' standing to contest the adoption order and arguing that Code § 63.2-1216's time bar foreclosed the A.s' petition.

Our colleagues in the majority ably set forth the complex procedural posture in this case, including the holdings of the Court of Appeals, which I will not repeat here. That said, a few salient points bear mentioning. Consistent with Part I.A, I recite the circuit court's operative findings of fact and conclusions of law:

- The child was Afghan. (“There is some thought that the child might have been something else [with regard to citizenship]. . . . But in the end, it was determined that the child was an Afghan child. And this is important to the court.”).
- The A.s effectively adopted the child under Afghan law and were thus legal guardians of a child subject to adoption.
- The final adoption order issued on December 3, 2020 is void because:

- “There is some evidence of extrinsic fraud as it relates to this process and what was happening in Afghanistan at the same time the Court was issuing its final order;”
- There is a federal due process basis to avoid the application of § 63.2-1216; and as the child’s legal guardians, the A.s “were entitled to some process that they did not receive.”
- Afghanistan never waived jurisdiction over the child; and
- The circuit court lacked jurisdiction to issue a final adoption order because the child was not “stateless.”

In sum, the child, a citizen of Afghanistan, was in the custody of the A.s, who were her legal guardians under Afghan law. As well, Afghanistan never waived jurisdiction over the child to permit adoption by the Masts. The Masts brazenly misled the JDR and circuit court about the “stateless” child’s legal status and coaxed the A.s into bringing the child to the United States to finalize the adoption.⁶ With that factual background in mind, we next address the orders’ numerous infirmities.

⁶ The circuit court tempered much of its criticism of the Masts’ fraud because it believed that their motives were noble. (“Their failing to inform the [c]ourt appears to have been a misguided effort to hasten the child’s transport to the U.S. where she could receive necessary medical care and be a part of their family.”)

II. THE CUSTODY AND ADOPTION ORDERS ARE
VOID AB INITIO, AND CODE § 63.2-1216 DOES
NOT APPLY TO SUCH JUDGMENTS

The A.s contend that they can collaterally challenge the custody and adoption orders, notwithstanding Code § 63.2-1216, because the orders were void ab initio rather than merely voidable. We agree and would affirm the judgment of the Court of Appeals on this ground.

“The distinction between an action of the court that is void *ab initio* rather than merely voidable is that the former involves the underlying authority of a court to act on a matter whereas the latter involves actions taken by a court which are in error.” *Singh v. Mooney*, 261 Va. 48, 51, 541 S.E.2d 549 (2001). This Court recognizes several ways in which an order is void ab initio, including:

if [the order was] entered by a court in the absence of jurisdiction of the subject matter or over the parties, if the character of the order is such that the court had no power to render it, or if the mode of procedure used by the court was one that the court could ‘not lawfully adopt.’

Id. at 51–52, 541 S.E.2d 549 (quoting *Evans v. Smyth-Wythe Airport Comm’n*, 255 Va. 69, 73, 495 S.E.2d 825 (1998)). On the other hand, “an order is merely voidable if it contains reversible error made by the trial court.” *Id.* at 52, 541 S.E.2d 549.

The difference is significant. When a court simply makes reversible error and the court’s judgment is not appealed, the error becomes final under Rule 1:1 and cannot be challenged collaterally in a later proceeding. See *Kelley v. Stamos*, 285 Va. 68, 79, 737

S.E.2d 218 (2013). In contrast, an order that is void ab initio “is a complete nullity.” *Hicks v. Mellis*, 275 Va. 213, 219, 657 S.E.2d 142 (2008). “[I]t is no order at all.” *Cilwa v. Commonwealth*, 298 Va. 259, 266, 836 S.E.2d 378 (2019). An order void ab initio, therefore, may be challenged later in a valid collateral proceeding. *Bonanno v. Quinn*, 299 Va. 722, 736–37, 858 S.E.2d 181 (2021).

A. The Custody and Adoption Orders Are Void Ab Initio

With those principles in mind, the Court of Appeals found that the custody and adoption orders were void ab initio because (1) the JDR court had no subject-matter jurisdiction to issue the custody order and (2) the circuit court had “no power to render” the adoption orders. We address each of these findings below and ultimately agree with both.

1. The JDR Court Lacked Subject-Matter Jurisdiction to Enter a Custody Order

“[S]ubject matter jurisdiction is unique.” *Watson v. Commonwealth*, 297 Va. 347, 352, 827 S.E.2d 782 (2019). It “refers to a court’s power to adjudicate a class of cases or controversies.” *Cilwa*, 298 Va. at 266, 836 S.E.2d 378 (quoting *In re Commonwealth*, 278 Va. 1, 11, 677 S.E.2d 236 (2009)). That power “can only be acquired by virtue of the Constitution or of some statute.” *Pure Presbyterian Church of Wash. v. Grace of God Presbyterian Church*, 296 Va. 42, 56, 817 S.E.2d 547 (2018). When a court issues an order without subject-matter jurisdiction, that order is void ab initio. *Hannah v. Commonwealth*, 303 Va. 109, 123, 899 S.E.2d 621 (2024).

The JDR court, extralegally, issued a custody order to the Masts granting them temporary custody

over the child. JDR courts “are courts of limited jurisdiction and may exercise only such subject matter jurisdiction as has been expressly conferred by statute.” *Parrish v. Federal National Mortgage Association*, 292 Va. 44, 49, 787 S.E.2d 116 (2016). Code § 20-146.12 grants JDR courts limited subject-matter jurisdiction over custody claims.⁷

JDR courts have “jurisdiction to make an initial child custody determination only if the custody petition falls within one of four categories—with those four categories serving as “the exclusive jurisdictional basis for making a child custody determination by a court of this Commonwealth.” Code § 20-146.12(B). In relevant part, the statute allows a JDR court to issue a custody order if:

1. This Commonwealth is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this Commonwealth but a parent or person acting as a parent continues to live in this Commonwealth;
2. A court of another state does not have jurisdiction under subdivision 1, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this

⁷ See Unif. Child Custody Jurisdiction and Enforcement Act art. 2, § 201 cmt. 2 (Nat’l Conf. of Comm’rs on Unif. State Laws 1997) (“[J]urisdiction to make a child custody determination is subject matter jurisdiction . . .”). Virginia adopted and enacted the UCCJEA in 2001. *Prashad v. Copeland*, 55 Va. App. 247, 260, 685 S.E.2d 199 (2009); see Code § 20-146.1 *et seq.*

Commonwealth is the more appropriate forum under § 20-146.18 or § 20-146.19, and (i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this Commonwealth other than mere physical presence and (ii) substantial evidence is available in this Commonwealth concerning the child's care, protection, training, and personal relationships;

3. All courts having jurisdiction under subdivision 1 or 2 have declined to exercise jurisdiction on the ground that a court of this Commonwealth is the more appropriate forum to determine the custody of the child under § 20-146.18 or § 20-146.19; or

4. No court of any other state would have jurisdiction under the criteria specified in subdivision 1, 2, or 3.

Code § 20-146.12(A). As the Court of Appeals correctly held, “[n]one of these requirements is satisfied here.” *A.A. v. J.M.*, 81 Va. App. 213, 231, 903 S.E.2d 513 (2024).

The JDR court, however, wrongfully relied on Subsections (1) and (2) to establish its jurisdiction. With respect to Subsection (1), Virginia was not “the home state of the child on the date of the commencement of the proceeding,” nor was it within the six months preceding the custody determination. *See* Code § 20-146.12(A)(1). In fact, the child remained in Afghanistan throughout the custody proceedings and did not enter the United States until some 21 months later.

As for Subsection (2), there are several problems. First, despite the Masts' contrary representations to the JDR court, Afghanistan "never actually formally waived jurisdiction" over the child. Even if Afghanistan had waived jurisdiction, no evidence showed that it waived jurisdiction "on the ground that this Commonwealth [was] the more appropriate forum." *See* Code § 20-146.12(A)(2). Second, although the custody order falsely stated that the Masts were "acting as [parents]," the child simply did not have the requisite "significant connection with this Commonwealth" required by the statute, let alone "mere physical presence." *Id.*

No other jurisdictional basis under Code § 20-146.12(A) applied either. Both Subsections (3) and (4) require as a precondition that no other court has jurisdiction, or that all other courts have declined to exercise jurisdiction because the Commonwealth is the better forum. *See* Code § 20-146.12(A)(3), (4). But again, Afghanistan never waived its jurisdiction over the child. And at the time the custody order was issued, the Masts were well aware that the United States military was working with Afghanistan's MOLSA to find the child's relatives in Afghanistan, where the child had been for months. Given that reality, Afghanistan was no doubt the more appropriate forum than Virginia for determining custody of the child.

Because Code § 20-146.12 is a subject-matter-jurisdiction statute, and the custody proceeding fell outside the statute's limited jurisdictional categories, the JDR court had no subject-matter jurisdiction to adjudicate the Masts' custody petition, thus rendering it void ab initio.

(Mis)using the JDR order as a pathway, the circuit court further compounded the error. The circuit court could not have relied on that void order to issue its interlocutory or final adoption orders. Like a house built on a rotten foundation, an order void for lack of subject-matter jurisdiction taints all subsequent orders based upon it. *See Morrison v. Bestler*, 239 Va. 166, 170, 387 S.E.2d 753 (1990) (“Any subsequent proceeding based on such a defective judgment is void or a nullity.”).

2. The Circuit Court Lacked the Power to Render the Adoption Orders

We next turn to the circuit court’s interlocutory and final adoption orders and conclude that they, too, are void ab initio, but for a different reason.

The Court of Appeals correctly held that the circuit court had subject-matter jurisdiction to issue the adoption orders. Generally speaking, “circuit courts have subject-matter jurisdiction to adjudicate adoptions” and the “power to adjudicate adoption petitions under Code §§ 17.1-513 and 63.2-1201.” *Bonanno v. Quinn*, 299 Va. 722, 735, 858 S.E.2d 181 (2021). But while the circuit court had subject-matter jurisdiction over the adoption generally, at every turn, the circuit court went on to adjudicate the Masts’ adoption petition, though it fell completely outside the statutory adoption scheme. We therefore conclude that the circuit court lacked the power to render the interim and final adoption orders, making them void ab initio.

The power of Virginia’s circuit courts “are entirely prescribed by statute.” *Kelley v. Stamos*, 285 Va. 68, 75, 737 S.E.2d 218 (2013); *see also* Va. Const. art. VI, § 1 (“The judicial power of the Commonwealth shall

be vested in a Supreme Court and in such other courts of original or appellate jurisdiction subordinate to the Supreme Court as the General Assembly may from time to time establish.”).

Virginia law has long recognized that even when a court acts within its subject-matter jurisdiction, its action may still be void *ab initio* if it exceeds its grant of authority.⁸ Those cases hold that an order is void *ab initio* when the issuing court “had no power to render it” or adopted a “mode of procedure” that it “could ‘not lawfully adopt.’” *Singh*, 261 Va. at 51–52, 541 S.E.2d 549 (quoting *Evans v. Smyth-Wythe Airport Comm’n*, 255 Va. 69, 73, 495 S.E.2d 825 (1998)). This principle is based on the longstanding maxim that a court cannot “transcend the limits of its authority.” *Windsor v. McVeigh*, 93 U.S. 274, 282, 23

⁸ *Anthony v. Kasey*, 83 Va. 338, 340, 5 S.E. 176 (1887) (“Now it is essential to the validity of a judgment or decree, that the court rendering it shall have jurisdiction of both the subject matter and parties. But this is not all, for both of these essentials may exist and still the judgment or decree may be void, because the character of the judgment was not such as the court had the power to render, or because the mode of procedure employed by the court was such as it might not lawfully adopt.”); *see also Windsor v. McVeigh*, 93 U.S. 274, 282, 23 L.Ed. 914 (1876) (“Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. . . . [A court] cannot then transcend the power conferred by the law.”), *cited with approval in Anthony*, 83 Va. at 340, 5 S.E. 176; *Collins v. Shepherd*, 274 Va. 390, 402–03, 649 S.E.2d 672 (2007) (finding an order dismissing an action void *ab initio* because the dismissal “was done pursuant to a local rule that,” by statute, the “circuit court was not authorized to adopt”); *Cabral v. Cabral*, 62 Va. App. 600, 608, 751 S.E.2d 4 (2013) (“[A]t some point, an unlawful exercise of judicial power becomes so palpable that it can be considered void *ab initio* . . .”).

L.Ed. 914 (1876), *cited with approval in Anthony v. Kasey*, 83 Va. 338, 340, 5 S.E. 176 (1887). We would adhere to our holdings that a circuit court cannot enter orders that exceed its statutory authority. But when a court does so it has, by definition, rendered a judgment that it had no power to render.

For example, in *Rawls v. Commonwealth*, we held that when a court imposes a sentence greater than the “prescribed statutory range of punishment,” the sentence is “void *ab initio* because ‘the character of the judgment was not such as the [c]ourt has the power to render.’” 278 Va. 213, 221, 683 S.E.2d 544 (2009) (quoting *Anthony*, 83 Va. at 340, 5 S.E. 176).⁹ And in *Evans v. Smith-Wythe Airport Commission*, we declared a circuit court’s action void *ab initio* when it approved a settlement agreement that limited an airport authority’s exercise of eminent domain. 255 Va. 69, 74, 495 S.E.2d 825 (1998). Eminent domain “is an inherent and inseparable incident of the sovereignty of this Commonwealth,” therefore the court “could not[] divest the Airport Commission, acting through its delegation of power from the General Assembly, of the power or right of eminent domain.” *Id.* at 73, 495 S.E.2d 825. In *Burrell v. Commonwealth*, we addressed a provision of a sentencing order that purported to reduce a defendant’s conviction from a felony to a

⁹ See also *Commonwealth v. Watson*, 297 Va. 355, 361, 827 S.E.2d 778 (2019) (“[O]nce a court has imposed the greatest sentence that the legislature has authorized, the court has exhausted all its power to punish and ‘its further exercise [i]s prohibited.’ Thus, any excessive sentence is void ‘because the power to render any further judgment did not exist.’” (second alteration in original) (quoting *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 176, 21 L.Ed. 872 (1873))).

misdemeanor once the defendant completed his terms of incarceration and probation. 283 Va. 474, 476, 722 S.E.2d 272 (2012). Yet we held that because no statute gave the circuit court the power to do so, the entire sentencing order was void ab initio. *Id.* at 480, 722 S.E.2d 272.

Like those cases, the circuit court here strayed from its authority so completely that its actions were void ab initio.

First, no Virginia statute gives a court the power to adjudicate an adoption of this character, whether interlocutory or final. Why would it? Adoptions, as previously pointed out, require strict adherence to the Code to make sure of at least two things: First, the severance of the parental ties must be as legally perfect as possible given the massive grant of power by the legislature to the courts when what was never designed to be severed is judicially severed. Second, the process must be viewed as sacred given that the subject of the process is a child whose best interests is likely the most important consideration any trial judge may be called upon to adjudicate.

Of course, from start to finish, this adoption process bypassed all the protections placed by the legislature in the Virginia Code. And, unbelievably, orders were entered referencing statutory compliance when there was none. And this was not an artificial intelligence hallucination. This was an engineered scheme, and judges entered orders either in reliance on the scheme, or by not scrutinizing the facts before them—or both.

The Code authorizes only five categories of adoption: “agency, parental placement, stepparent, close relative, and adult adoption.” Code §§ 63.2-1221

through -1244. The Masts' adoption petitions fit none of these categories. The interlocutory adoption order cited Code § 63.2-1221, which governs agency-placement adoptions. But the proceeding could not be an agency-placement adoption because no "licensed child-placing agency or local board" was facilitating the adoption, nor was the child "properly committed or entrusted to [an agency's] care." *See* Code § 63.2-1221. Instead, the child was in the temporary care of the United States military and was later placed by the Afghan government with people the Afghan government had determined were her family. The Masts' adoption petitions were effectively an attempt to adopt "a child who was born in a foreign country," "not a citizen of the United States at the time of birth," and who had not yet entered the United States. Yet Virginia recognizes such adoptions only if they are "finalized pursuant to the laws of the country from which the child was adopted" and if "the child was admitted to the United States with an IR-3 or IH-3 visa issued by the United States Citizenship and Immigration Services." *See* Code § 63.2-1200.1(A). The Masts never pursued this path for adopting the child. The adoption here represents a wholesale deviation from any species of adoption recognized by Virginia law.

Second, the circuit court had no power to issue an interlocutory adoption order. Code § 63.2-1209 allows for the entry of an interlocutory adoption order in two very limited circumstances: (1) in a "direct personal placement adoption pursuant to § 63.2-1230" or (2) where "an interlocutory order is necessary in an agency adoption," assuming certain preconditions are met. *See* Code § 63.2-1209. Neither of those circumstances applied here because the proceedings

were neither a personal-placement adoption nor an agency adoption. Citing “emergency circumstances,” the interlocutory adoption order ostensibly “waive[d] . . . all of the procedural requirements . . . set forth in Code § 63.2-1221, 63.2-1222, 63.2-1224, and 63.2-1225.” Yet no statute grants the circuit court such power.

Lastly, the circuit court also had no power to render the final order of adoption. After an interlocutory order of adoption has been entered, a court may finalize an adoption after reviewing the required report on supervisory visits and concluding, based on that report, that the final adoption is in the child’s best interests. Code § 63.2-1213. The supervisory-visit report, which is mandated by Code § 63.2-1212, must be conducted by the local social services director or the child-placing agency and requires “at least three” visits *with the child* “within a period of six months” by an agent of the relevant social services department or child-placing agency. Code § 63.2-1212. It is uncontested, however, that the child did not enter the United States until after the entry of the final adoption order, making any such report impossible.¹⁰ Instead, the circuit court “waived” the requirements of “multiple home visits”

¹⁰ The final adoption order states that the circuit court ordered the Fluvanna County Department of Social Services to “conduct an investigation and file a report in this matter in accordance with . . . § 63.2-1208 and [§] 63.2-1228.” But a final order of adoption requires a “report made pursuant to § 63.2-1212 or as permitted pursuant to § 63.2-1210.” Code § 63.2-1213.

and “home visits with the child,” even though no statute allows such a waiver.¹¹

The circuit court effectively ignored the statutory limits on its power to adjudicate adoptions by ordering an adoption of a character it had no authority to render. And in doing so, it failed at every turn to comply with the requirements for issuing an interlocutory or final adoption order. In effect, the circuit court simply made up the procedure as it went.¹² This was more than a procedural failure but rather a full-blown lack of compliance with the adoption statutes which categorically undermined the legitimacy of the orders, thus the “character of the judgment was not such as the [c]ourt has the power to

¹¹ It appears the circuit court attempted to finalize the adoption under Code § 63.2-1208(G), which allows a court to partially waive that statute’s visitation requirement under certain circumstances. But the court could not lawfully proceed under that subsection because the statute allows for a final adoption only where the “child has been placed in the physical custody of the petitioner.” Code § 63.2-1208(G)(1), (2). And as previously explained, any custody order entered in this case was void. This child’s custody was not adjudicated. This little girl was taken: by force on a military base and through duplicity in two courts.

¹² Also jarring is the circuit court’s oversight of the A.s’ relationship to the child as legal guardians from the adoption order. The A.s stood *in loco parentis* to the child, meaning that they stand “in the place of a parent” and are accorded “all or some of the responsibilities of a parent.” *In loco parentis*, Black’s Law Dictionary (12th ed. 2024). An adoption permanently terminates parental rights by operation of law. The circuit court’s adoption order, though, does not identify the A.s, H.I., or the child’s ostensibly deceased parents. The involuntary termination of parental rights cannot be haphazard or hasty; our process demands accuracy and diligence even in the face of unusual circumstances.

render.” See *Rawls*, 278 Va. at 221, 683 S.E.2d 544. We would therefore conclude that the circuit court had no power to render the adoption orders, making them void ab initio.

B. Code § 63.2-1216 Does Not Apply
to Void Ab Initio Orders

Having determined that the custody and adoption orders were void ab initio, we must next determine whether Code § 63.2-1216 nevertheless barred the A.s’ collateral challenge to the orders. Code § 63.2-1216 states in full:

After the expiration of six months from the date of entry of any final order of adoption from which no appeal has been taken to the Court of Appeals, the validity thereof shall not be subject to attack in any proceedings, collateral or direct, for any reason, including but not limited to fraud, duress, failure to give any required notice, failure of any procedural requirement, or lack of jurisdiction over any person, and such order shall be final for all purposes.

“The primary purpose of statutory interpretation ‘is to ascertain and give effect to legislative intent.’” *Botkin v. Commonwealth*, 296 Va. 309, 314, 819 S.E.2d 652 (2018). We do that by looking to the plain language of the statute, mindful of the fact that “the legislature chose its words with care” and that “we are bound by those words.” *Chesapeake Hosp. Auth. v. State Health Comm’r*, 301 Va. 82, 95, 872 S.E.2d 440 (2022) (first quoting *Simon v. Forer*, 265 Va. 483, 490, 578 S.E.2d 792 (2003); then quoting *Anderson v. Commonwealth*, 182 Va. 560, 566, 29 S.E.2d 838 (1944)). “Indeed, as we have observed, we regularly

reject invitations to ‘read into [a] statute language that is not there,’ because of the long-established rule that ‘[c]ourts cannot add language to [a] statute the General Assembly has not seen fit to include.’” *Va. Elec. & Power Co. v. State Corp. Comm’n*, 300 Va. 153, 163, 861 S.E.2d 47 (2021) (quoting *Wakole v. Barber*, 283 Va. 488, 495-6, 722 S.E.2d 238 (2012)).

Here, the plain language of Code § 63.2-1216 creates a time bar to all challenges to the “validity” of a “final order of adoption.” That is, six months after its entry, all attacks on the entry of that order, such as “fraud,” “duress,” or “lack of jurisdiction over any person,” are barred. But nowhere by its plain language does the statute purport to either retroactively confer, nor retroactively waive, what is at all other times an *unwaivable* requirement for court action: lawful authority.

To conclude otherwise requires an impermissible judicial rewriting of the statute, one that goes well beyond its plain meaning. *Chesapeake Hosp. Auth.*, 301 Va. at 95, 872 S.E.2d 440. Indeed, unlike the defects listed in the statute, lack of subject-matter jurisdiction and lack of power to render are so fundamental that they undermine a court’s legitimacy. Subject-matter jurisdiction goes to “whether a court has authority to enter judgment, and a judgment will always be void without it.” *Id.* Likewise, power-to-render analysis looks at whether a court has gone beyond its statutory authority to enter a judgment, regardless of subject-matter jurisdiction. *Anthony v. Kasey*, 83 Va. 338, 340, 5 S.E. 176 (1887). It too concerns a court’s “authority,” and whether the court “transcend[ed] the limits of [that] authority.” *Windsor*, 93 U.S. at 282.

Significantly—and unlike the defects listed in Code § 63.2-1216—neither a lack of subject-matter jurisdiction nor a lack of the power to render is waivable. *Morrison v. Bestler*, 239 Va. 166, 169-70, 387 S.E.2d 753 (1990) (“Subject matter jurisdiction alone cannot be waived or conferred on the court by agreement of the parties.”); see *Evans*, 255 Va. at 71-72, 74, 495 S.E.2d 825 (invalidating for lack of power to render a court-approved settlement agreement between the parties after one party, the Airport Commission, later challenged the agreement in a collateral proceeding). Because these concepts address the fundamental authority of a court to act, any trespass of that authority makes the resulting ruling cancerous. We believe the General Assembly did not intend to *impliedly* forgive such fundamental defects in a court’s authority through its enactment of Code § 63.2-1216 and accordingly would find that the statute does not apply when a court lacks subject-matter jurisdiction or the power to render the judgment in question.¹³

In sum, the custody order and both adoption orders were “null from the beginning.” *Nelson v. Warden of the Keen Mt. Corr. Ctr.*, 262 Va. 276, 285, 552 S.E.2d 73 (2001). We would therefore affirm the Court of Appeals and vacate all three as void ab initio.

¹³ Although it is not necessary to explore the issue in depth here, we question whether the legislature could ever cure a void order without raising separation of powers concerns. Va. Const. Art. III, § 1. A void order is no order at all. It does not exist. We are skeptical that the legislature’s authority to define the contours of Virginia courts’ jurisdiction extends to blessing a legal fiction, especially where the legislative action seeks to validate a violation of rights or invalidate vested rights.

III. THE CUSTODY AND ADOPTION ORDERS ARE PREEMPTED BY FEDERAL LAW

Notwithstanding our conclusions that the custody and adoption orders were void ab initio and that Code § 63.2-1216 does not apply here, I would also vacate the custody and adoption orders for an additional reason: The orders are preempted under the foreign affairs preemption doctrine.

Under our system of federalism, state law exists in comity with federal law. First principles under the Constitution's Supremacy Clause tell us that.¹⁴ But the Supreme Court of the United States has been clear that state law “must give way if [it] impair[s] the effective exercise of the Nation's foreign policy.” *Zschernig v. Miller*, 389 U.S. 429, 440, 88 S.Ct. 664, 670, 19 L.Ed.2d 683 (1968). Here, undisputed facts in the record show that the issuance of the custody and adoption orders interfered with the federal government's efforts to provide for the safe transfer of a child out of a warzone. And the application of Code § 68.2-1216 interfered with the federal government's constitutional powers over foreign relations. I would countenance neither.

¹⁴ U.S. Const. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); see *Printz v. United States*, 521 U.S. 898, 918-19, 117 S.Ct. 2365, 2376, 138 L.Ed.2d 914 (1997) (discussing the “dual sovereignty” between the states and federal government).

A. Foreign-Affairs Preemption

Even before the founding, it was universally agreed that the powers of foreign affairs lay with national governments, not local ones. *See* 1 William Blackstone, Commentaries *245 (“With regard to foreign concerns, the king is the delegate or representative of his people.”). Underlying that longstanding allocation of power is the premise that those “decision[s]” that “touch on foreign relations . . . must be made with one voice.” *See Arizona v. United States*, 567 U.S. 387, 409, 132 S.Ct. 2492, 2505, 183 L.Ed.2d 351 (2012). That voice is singular, and it is the federal government’s. The founders understood this vital principle. *See, e.g.,* The Federalist No. 42, at 199 (Madison) (Timeless Publ’ns 2022) (“If we are to be one nation in any respect, it clearly ought to be in respect to other nations. . . .”); The Federalist No. 44, *supra*, at 213 (Madison) (crediting “the advantage of uniformity in all points which relate to foreign powers”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 317, 57 S.Ct. 216, 219, 81 L.Ed. 255 (1936) (“The Framers’ Convention was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs were one.”). Thus, the founders designed our Constitution to “commit manners of foreign policy and military affairs to the exclusive control of the National Government.” *Perpich v. Dep’t of Def.*, 496 U.S. 334, 353, 110 S.Ct. 2418, 2429, 110 L.Ed.2d 312 (1990).

“The Supremacy Clause provides that the Constitution, federal statutes, and treaties constitute ‘the supreme Law of the Land.’” *Kansas v. Garcia*, 589 U.S. 191, 202, 140 S.Ct. 791, 801, 206 L.Ed.2d 146 (2020) (quoting U.S. Const. art. VI, cl. 2). This Court

has recognized that Virginia laws preempted by federal laws are “without effect.” *Maretta v. Hillman*, 283 Va. 34, 40, 722 S.E.2d 32 (2012), *aff’d*, 569 U.S. 483, 133 S.Ct. 1943, 186 L.Ed.2d 43 (2013). Invoking the Supremacy Clause, the U.S. Supreme Court has invalidated state action that interferes with the federal government’s power to dictate foreign policy—a doctrine called “foreign-affairs preemption.”¹⁵ There are two principal forms of foreign-affairs preemption: narrower “conflict preemption” and broader “field preemption.”¹⁶ As the custody and adoption orders in this case, however, violate broader field preemption principles, I limit my discussion accordingly.

Zschernig v. Miller is the starting point for the modern doctrine of foreign affairs preemption. 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968). In that

¹⁵ See generally Anagha Sundararajan, *Foreign Affairs Federalism: The Doctrine of Foreign Affairs Preemption and State Regulation in Light of the Paris Agreement*, 55 U.S.F. L. Rev. 363, 363 (2021) (surveying the doctrine); Joseph B. Crance, Jr., *Gara-Mending the Doctrine of Foreign Affairs Preemption*, 90 Cornell L. Rev. 203 (2004) (same).

¹⁶ See *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 419 n. 11 (2003) (noting that conflict preemption and field preemption in the context of foreign affairs preemption “can be seen as complementary”); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 617 (9th Cir. 2013) (“Under foreign affairs preemption there are two grounds for preemption: (1) conflict preemption and (2) field preemption.”); *Alario v. Knudsen*, 704 F. Supp. 3d 1061, 1082 (D. Mont. 2023) (“[T]he foreign affairs field preemption doctrine straddles both the conflict preemption and field preemption doctrines. . . .”); *Kyocera Document Sols. Am., Inc. v. Div. of Admin.*, 708 F. Supp. 3d 531, 544-547 (D.N.J. 2023) (discussing both field and conflict preemption in the context of foreign-affairs preemption).

case, an Oregon citizen died intestate and left her property to heirs living in East Germany. *Id.* at 430, 88 S.Ct. at 665. Yet the Oregon legislature, through its probate scheme, prohibited transfers to non-resident foreign nationals except in narrow circumstances. *Id.* at 430-31, 88 S.Ct. at 665. As the U.S. Supreme Court remarked, the statutory scheme indirectly required Oregon state courts to discern the credibility of diplomatic statements and compare rights accorded in both the United States and East Germany—activity that “make[s] unavoidable judicial criticism of nations established on a more authoritarian basis than our own.” *Id.* at 440, 88 S.Ct. at 670. The statute, therefore, inappropriately authorized state courts to reach results that conflict with the Executive Branch’s ability to—even potentially—negotiate or deal with a foreign power. *See id.*

The U.S. Supreme Court held that, while states traditionally regulate family law, “those regulations must give way if they impair the effective exercise of the Nation’s foreign policy.” *Id.* at 440, 88 S.Ct. at 671. The U.S. Supreme Court dismissed any need for a direct conflict with federal law, explaining that “even in the absence of a treaty, a state’s policy may disturb foreign relations.” *Id.* at 441, 88 S.Ct. at 671. The Oregon statute was preempted because it had “more than some incidental or indirect effect” on foreign relations and carried “great potential for disruption or embarrassment” for the United States. *Id.* at 434-35, 88 S.Ct. at 667 (internal quotation marks omitted). There is no disputing that most all

family law matters are within the state's ambit.¹⁷ But "[t]he relative importance to the state of its own law is not material when there is a conflict with valid federal law" *Ridgway v. Ridgway*, 454 U.S. 46, 54, 102 S.Ct. 49, 55, 70 L.Ed.2d 39 (1981). After all, "the Framers of our Constitution provided that the federal law must prevail." *Id.*

Because the state law in *Zschernig* had a "direct impact upon foreign relations and may well adversely affect the power of the central government," state law was preempted by the federal foreign relations power. *Zschernig*, 389 U.S. at 441, 88 S.Ct. at 671.

B. Applying *Zschernig*

In this case, viewed through the lens of field preemption, the custody and adoption orders interfered with federal foreign policy and thus cannot stand. That is, the orders below "must give way" because they "impair[ed] the effective exercise of the Nation's foreign policy." *Zschernig*, 389 U.S. at 440, 88 S.Ct. at 671. And here, the JDR and circuit courts could not even consider the issue of field preemption because the activities of Afghan officials from MOLSA, ICRC representatives, and U.S. officials were hidden by the Masts.

¹⁷ I say "most all" because this power is not exclusive, but increasingly shared, as history shows. Congress has, for years, used its spending and commerce powers to legislate in the traditional state area of family law. See Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 Cornell J.L. & Pub. Pol. 298-305 (2009) (summarizing Congress' commerce power legislation to regulate family law). Consider also the overlay of the Immigration and Nationality Act, 8 U.S.C. §§ 1101-07, on international adoptions.

Zschernig demonstrates that “even in the absence of any express federal policy, a state law may be preempted under the foreign affairs doctrine if it intrudes on the field of foreign affairs without addressing a traditional state responsibility.” *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1072 (9th Cir. 2012).

So too here. The custody and adoption orders entered in the case intruded into foreign policy and military involvement in a foreign country. The states—even ours—have “no serious claim” of authority to pass judgment on the custody or adoption of a non-citizen child on a United States military base in a foreign war zone. *See Garamendi*, 539 U.S. at 419 n.11, 123 S.Ct. at 2389 n.11. Extraterritorial custody determinations are quintessentially the federal government and the Executive’s realm—not ours. *Cf.* Department of Defense Law of War Manual, U.S. Dep’t of Def. Off. of Gen. Counsel, § 17.10.1 (2023), <https://perma.cc/328W-8E6P> [hereinafter Law of War Manual]; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S., § 1 cmt. 5 (AM. L. INST. 1987) (“A State of the United States is not a “state” under international law, since by its constitutional status it does not have capacity to conduct foreign relations. The United States alone, not any of its constituent States, enjoys international sovereignty and nationhood.”) (citations omitted).

Here, the child was receiving medical care by the United States military in a foreign country. When United States military personnel found the child in the middle of a battlefield, the sensitive and immediate determination of *whom* she should go with, *where* to transport her, and *what* next steps needed to be taken was for the military and other

governmental personnel on the ground in Afghanistan to determine. Consequently, the fate of the child fell squarely within the authority of the U.S. government against the backdrop of our then-existing diplomatic and military relationship with Afghanistan.

Further, the Virginia orders had “more than some incidental or indirect effect in [a] foreign countr[y].” *Zschernig*, 389 U.S. at 434, 88 S.Ct. at 667 (internal quotation marks omitted). The custody and adoption orders directly “affect[ed] the legal rights and responsibilities of . . . individuals [and a] foreign government[]” by attempting to override the A.s’ putative rights as the child’s guardians. *See Gingery v. City of Glendale*, 831 F.3d 1222, 1231 (9th Cir. 2016). In effect, the JDR court supplanted the Afghan government’s claimed jurisdiction over the child. The Masts, indeed, used the Virginia custody orders to—unsuccessfully—attempt to persuade a federal court to issue a temporary restraining order to stop the United States from transferring custody of the child to the Afghan government. *See Doe v. Mast*, 741 F. Supp. 3d 409, 422-27 (2024). As that federal court succinctly observed:

[B]ased on [the Masts’] representations, the Virginia family court awarded temporary custody to the Masts. . . . Then, the day before Baby Doe was to be reunited with her biological family in Afghanistan, the Masts came to this Court [the United States District Court for the Western District of Virginia] and sued the government, asking for an emergency order stopping the transfer.

Id. at 422.

The orders also went beyond the “traditional state responsibility” of custody and adoption. *See Mosesian*, 670 F.3d at 1072; *Haaland v. Brackeen*, 599 U.S. 255, 276, 143 S.Ct. 1609, 1629, 216 L.Ed.2d 254 (2023) (recognizing that although “Congress lacks a general power over domestic relations” and the “responsibility for regulating . . . child custody remains primarily with the States,” the “Constitution does not erect a firewall around family law”). By purporting to adjudicate the custody and adoption of a non-citizen child in a foreign war zone, the orders intruded on international relations and military affairs. As in *Zschernig*, where the Oregon law dealt strictly with probate, a “traditional” area of state regulation, the order purporting to deal only with adoption intruded on foreign relations in its application. *See* 389 U.S. at 440, 88 S.Ct. at 670.

One need not go far to understand why and how these orders intruded on the federal foreign relations powers with respect to our relationship with Afghanistan. On September 30, 2014, the United States entered a bilateral security agreement with the Islamic Republic of Afghanistan.¹⁸ As part of that agreement, the United States promised that its forces would operate “with due respect for applicable Afghan laws and regulations, and in accordance with applicable United States laws and regulations and applicable international agreements.” Security Agreement, *supra* note 18, art. 7, § 6. A custody determination for a child in an Afghanistan warzone

¹⁸ Security and Defense Cooperation Agreement Between the United States of America and the Islamic Republic of Afghanistan, Afg.-U.S., Sept. 30, 2014, T.I.A.S. No. 15-101, <https://perma.cc/59FT-Q7BG> [hereinafter Security Agreement].

is certainly subject to “Afghan law and regulations.” And any involvement by the United States in that determination would necessarily fall within the Executive’s discretion. The Department of Defense’s Law of War Manual is illustrative, mandating that “[a]ll appropriate steps shall be taken to facilitate the reunion of families temporarily separated.” Law of War Manual, *supra*, § 17.10.1 (addressing the rules for non-international armed conflict, which includes “military operations against non-State armed groups”).

Legitimizing the custody and adoption orders by reversing the judgment of the Court of Appeals creates “great potential for disruption or embarrassment” in United States foreign relations. *Zschernig*, 389 U.S. at 434-35, 88 S.Ct. at 667. The State Department said as much in its diplomatic cable. After providing an update on the adoption process and expressing some confusion about how the custody order was obtained, the cable expressed “significant foreign policy concerns about any further delays in transferring the child to the Government of Afghanistan in response to its request.” Its concerns “include[ed] security concerns and concerns about the perception of the U.S. government holding an Afghan child against the will of her extended family and the Afghan government.” That “great potential” for a diplomatic cross-up exists even today. I fear reversal in this case implies that a foreign government’s decision regarding the custody of its children is tenuous or revocable by any American state court—solely because a U.S. citizen improperly obtained a domestic order to wrest custody of a foreign child without any input from the foreign government.

Some may argue that custody orders like this one are the norm for our state's courts: that the state's power to adjudicate adoptions is its normal business, domestic in nature. That is, one might be led to conclude that the JDR and circuit courts below did not purport to express any foreign policy stance at all. But that impression ignores all wider context. Even when state inheritance provisions or escheat schemes were only dimly related to diplomacy, as in *Zschernig*, state actions that had the potential to provoke international powers were invalidated under the Supremacy Clause. *Deutsch v. Turner Corp.*, 324 F.3d 692, 711 (2003) (remarking that "the inheritance provision at issue in *Zschernig*, although superficially unrelated to war, was seen by a Court operating at the height of the Cold War as a potential provocation to foreign powers").

The U.S. Supreme Court emphasized precisely this wider context when invalidating the state law in *Zschernig*: "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted by a government." *Zschernig*, 389 U.S. at 441, 88 S.Ct. at 671 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 63, 61 S.Ct. 399, 402, 85 L.Ed. 581 (1941)). The federal government must have the flexibility to prevent these types of international controversies without state interference. Yet the custody and adoption orders issued in the present proceedings undermined that foreign policy decision.

The United States' eleventh-hour change-of-heart in this appeal does not change my conclusion that the orders are preempted. We granted leave to the United States to present oral argument in support of

Appellees as amicus. But on the morning of oral argument, the United States instructed its counsel not to present. The United States eventually withdrew its amicus brief, citing “current U.S. foreign-policy interests and intervening foreign-policy developments.” Mot. by U.S. Dep’t of Just. to Withdraw Amicus Br. at 1 (Mar. 5, 2025).

A change in the government’s position between administrations does not cure the overstep into the Executive branch function at issue here. It also does not sweep the cynical chicanery occurring years prior under the rug. After all, foreign affairs preemption broadly addresses a state’s intrusion into the federal power of international relations. It does not require the government to say that the state law interfered with foreign affairs. See *Zschernig*, 389 U.S. at 434-35, 88 S.Ct. at 667. As *Zschernig* demonstrates, State action may be preempted “*even in the absence of any express federal policy*.” *Movsesian*, 670 F.3d at 1072 (emphasis added).¹⁹

In sum, the doctrine established by the U.S. Supreme Court in *Zschernig* necessitates a preemption holding. The custody and adoption orders issued in these proceedings interfered with the United States’ foreign relations and military operations in a foreign war zone. The Constitution entrusts those areas to the federal government alone.

¹⁹ See also Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 Wm. & Mary L. Rev. 825, 855 & n.116 (2004) (describing *Zschernig* as holding that a law may be preempted for intruding on constitutional foreign affairs powers even “in the absence of a treaty provision, a law, or even an executive branch policy” and citing the government’s position in *Zschernig* as evidence).

Because of the orders' intrusion on those constitutional powers, I would find that these orders are preempted by the Supremacy Clause.

IV. THE CUSTODY AND ADOPTION ORDERS
VIOLATED THE A.S' FEDERAL CONSTITUTIONAL
DUE PROCESS RIGHTS

Finally, I would affirm the judgment of the Court of Appeals on the ground that the custody and adoption orders, entered without the A.s' knowledge, violated their federal constitutional rights to notice of the proceedings.²⁰

"The relationship between a parent and child is a constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment." *L.F. v. Breit*, 285 Va. 163, 182, 736 S.E.2d 711 (2013) (citing *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2059, 147 L.Ed.2d 49 (2000)). The federal constitutional rights of parents, however, do not hinge on the "mere existence of a biological link." *Lehr v. Robertson*, 463 U.S. 248, 259-60, 103 S.Ct. 2985, 2992, 77 L.Ed.2d 614 (1983). That liberty interest also "stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children." *Id.* at 261, 103 S.Ct. at 2993

²⁰ Although at the time of the custody and adoption hearings, the A.s were neither American citizens nor physically present in the United States, I would nevertheless find that, for the purposes of these proceedings, they enjoyed federal constitutional due process protections to the same extent as a U.S. citizen. See *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 232-33 (5th Cir. 2022) (en banc) (permitting a foreign corporation to assert constitutional due process rights in domestic litigation instituted by American victims who suffered injuries abroad).

(cleaned up). Thus, when a biological parent has voluntarily relinquished their rights or is otherwise absent, legal custodians who stand in their stead assume the same federally protected liberty interest as the parent. *Cf. Denise v. Tencer*, 46 Va. App. 372, 393, 617 S.E.2d 413 (2005) (“[I]t surely does not follow that rights analogous to the constitutional rights enjoyed by a parent may not be established by other means, the most salient of which are court-adjudicated findings that . . . the non-parental party is a proper custodian.”). Indeed, “[t]here is nothing in our jurisprudence that supports the conclusion that legal and/or physical custody placed in a non-parent is subject to diminished protection under the law.” *Id.*

Consistent with these principles, Code § 63.2-1216’s finality bar simply cannot apply when a parent or legal guardian has not received due process with respect to an adoption proceeding—particularly notice of the proceeding and an opportunity to object. *F.E. v. G.F.M.*, 35 Va. App. 648, 670, 547 S.E.2d 531 (2001) (en banc); *McCallum v. Salazar*, 49 Va. App. 51, 56-58, 636 S.E.2d 486 (2006); *Santosky v. Kramer*, 455 U.S. 745, 752-57, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Even on a practical level, it cannot stand that *no* relevant party—the child or their custodians—receives notice of an ex parte adoption proceeding. Yet that is precisely what happened here.

The circuit court found that the A.s had effectively adopted the child under Afghan law, and were, in any case, her legal guardians. As such, the A.s were entitled to the same constitutional protections of that liberty interest as would have been the child’s biological parents. *See Denise*, 46 Va. App. at 393, 617 S.E.2d 413 (“As a matter of legal definition and fact, according grandfather the status of custodian gave

him precisely the same child-rearing autonomy as that enjoyed by a parent.”). At the most fundamental level, before custody or adoption of the child could be awarded to the Masts by an American court, the A.s were constitutionally entitled to notice and an opportunity to object. *F.E.*, 35 Va. App. at 665, 547 S.E.2d 531. But they received neither. Accordingly—and notwithstanding my earlier conclusions regarding void ab initio judgments and foreign-affairs preemption—I would find that the application of Code § 63.2-1216’s time bar is unconstitutional here and must yield to the guarantees of the Fourteenth Amendment.

CONCLUSION

Void is void. Wrong is wrong. The JDR and circuit courts exceeded their statutory authority to issue custody and adoption orders that they otherwise could not issue. From the very beginning, those orders were void due to that fundamental lack of authority. Code § 63.2-1216 cannot be abused in the way Appellants attempt. It plainly does not forgive such fundamental defects with a court’s attempted exercise of authority. Nor can it spirit away children from their recognized legal guardians’ custody and then forbid any challenge to fundamental defects to judicial process. And yet, it has happened here.

Separately, I would also find the orders preempted under the foreign-affairs preemption doctrine articulated in *Zschernig*. Finally, even if Code § 63.2-1216 saves the void orders, and even if the orders were not preempted, I would—at the very least—find the time bar inapplicable in the face of the violations of the A.s’ federal constitutional due process rights.

For the foregoing reasons, I respectfully dissent.

JUSTICE POWELL, with whom SENIOR JUSTICE MILLETTE joins, dissenting.

I join with Part II of Justice Mann's dissent. However, as the question of whether a Virginia court had the power to render an adoption decision in this case is a purely legal matter that may be decided independent of any factual disputes between the parties, I join with Justice Mann's factual analysis only with regard to those facts that are necessary to undergird his analysis of the procedure followed by the lower courts. As I agree with Justice Mann and the Court of Appeals that no Virginia court ever acquired the power to render a decision in the underlying cases, I believe that all Virginia custody and adoption orders issued in these cases should be vacated.

107a

[903 S.E.2d 513]

**COURT OF APPEALS OF VIRGINIA
RICHMOND**

A.A., et al.

v.

J.M., et al.

J.M., et al.

v.

A.A., et al.

J.M., et al.

v.

A.A., et al.

J.M., et al.

v.

A.A., et al.

**Record No. 0876-23-2, Record No. 0953-23-2,
Record No. 1855-22-2, Record No. 0940-23-2**

July 16, 2024

FROM THE CIRCUIT COURT OF FLUVANNA
COUNTY, Claude V. Worrell, Judge¹

OPINION BY JUDGE DANIEL E. ORTIZ

The power to adjudicate the adoption of a child and the associated termination of parental or familial relationships stems from the statutory framework enacted by the General Assembly. Well-meaning

¹ Judge Richard Moore originally presided over these matters. Upon his retirement, the matters were reassigned to Chief Judge Claude V. Worrell.

intentions and emergency circumstances are not enough to grant a court the authority or power to complete an adoption. This is especially true when a child is physically present in a foreign country—here, Afghanistan—that has not waived jurisdiction.

Code § 63.2-1216 is a broad bar against attacking a final adoption order after six months. Despite this, the circuit court found that the A.s'² challenge—brought well past six months after the final adoption order—was not barred and that the final adoption order was void because the A.s are de facto parents with parental due process rights in Virginia. But we need not reach this issue. Instead, we affirm the circuit court's decision for a different reason—that while the circuit court had subject-matter jurisdiction over the adoption in general terms, it lacked the power to render the final adoption order, rendering it void ab initio. The court further lacked the power to render the interlocutory adoption order, making it also void ab initio; thus, we reverse the circuit court's decision to leave the interlocutory adoption order in place. We further reverse the decision to maintain the temporary custody order, as we determine that the custody order is void ab initio because the circuit court lacked subject-matter jurisdiction to issue it. Finally, we remand the case to the circuit court to consider the A.s' request for custody of the child.³

² Consistent with our February 16, 2023 order, we use the parties' initials to maintain their anonymity.

³ This opinion does not preclude the M.s from filing further custody petitions.

BACKGROUND⁴

This case comes before us with a lengthy procedural history, revolving primarily around four court orders: (1) a custody order, issued November 6, 2019; (2) an interlocutory adoption order, issued November 10, 2019; (3) a final adoption order, entered December 3, 2020; and (4) an order voiding the final adoption order, dated May 3, 2023. In November 2019, J.M. and his wife, S.M., petitioned the Fluvanna County Juvenile and Domestic Relations (“J&DR”) District Court for custody of a child living in Afghanistan. Based on representations by J.M. that the child was a stateless orphan with severe medical needs and no known family, the court granted the M.s custody. Following a petition by the M.s to adopt the child, the Fluvanna Circuit Court issued an interlocutory adoption order on an emergency basis. A year later, on December 3, 2020, the circuit court issued a final order allowing the M.s to adopt the child.

On March 28, 2022, the A.s, an Afghan couple whom the United States government had determined were relatives of the child,⁵ petitioned the circuit court to vacate the final adoption order and grant

⁴ “Although parts of the record are sealed, this [consolidated] appeal requires unsealing certain portions to resolve the issues raised by the parties. To the extent that certain facts mentioned in this opinion are found in the sealed portions of the record, we unseal only those portions.” *Mintbrook Devs., LLC v. Groundscapes, LLC*, 76 Va. App. 279, 283 n.1, 881 S.E.2d 657 (2022).

⁵ The M.s dispute the A.s’ biological relationship to the child, asserting that the child’s parents were non-Afghan nomadic terrorists and that the A.s have failed to provide DNA evidence or other documentary evidence of the relationship.

them custody of the child. The M.s argued that the A.s lacked standing to challenge the adoption and that Code § 63.2-1216, which prohibits challenges to a final adoption order after six months, barred their collateral attack.⁶ The A.s filed a motion for summary judgment. The court denied the plea in bar and a motion to reconsider the plea in bar filed jointly by the M.s and the guardian ad litem. On May 3, 2023, following several evidentiary hearings, the circuit court entered summary judgment in part for the A.s. The court voided the final adoption order, finding that the A.s were de facto parents of the child and “were entitled to some process that they did not receive,” and thus their claim was not barred by Code § 63.2-1216. The court left in place both the interlocutory adoption order and the custody order. The court then certified its entire May 3 order, including the most pertinent question of whether Code § 63.2-1216 and a lack of standing bar the A.s’ claim.

Because this appeal comes before us following both the denial of a plea in bar and the partial grant of summary judgment—each of which requires us to review the facts through a particular lens⁷—we recite

⁶ The M.s initially raised these arguments in two demurrers. Although they did not file a written plea in bar, the parties agreed to proceed as if the demurrers were pleas in bar and the circuit court treated the demurrers accordingly.

⁷ When considering a summary judgment motion, the court assesses the facts “in the light most favorable to the nonmoving party,” but it is “not permitted to draw inferences that are forced, strained, or contrary to reason.” *Quadros & Assocs., P.C. v. City of Hampton*, 268 Va. 50, 51, 597 S.E.2d 90 (2004). When considering a plea in bar, the circuit court’s factual findings are “accorded the weight of a jury finding and will not be disturbed on appeal unless they are plainly wrong or without

below the uncontested facts while also highlighting the material disputes between the parties.

In September 2019, the United States military found a severely wounded child, about six to eight weeks old, on a battlefield in Afghanistan. The A.s claim that the child's parents were farmers killed accidentally in a U.S. airstrike, while the M.s assert that the child's biological parents were non-Afghan terrorists and the child's mother was killed when she attempted to detonate a suicide bomb.

Because of the child's serious injuries, United States servicemembers brought her to the Department of Defense's ("DOD") Bagram Air Base for medical help. Military leaders from the U.S. Forces-Afghanistan ("USFOR-A")⁸ coordinated with the International Committee for the Red Cross ("ICRC") and Afghan government officials from the Afghan Ministry of Labor and Social Affairs ("Ministry"),⁹ in their search for the child's relatives.

During this time, J.M. was deployed in Afghanistan as a Marine Corps Judge Advocate. He met the child and became concerned for her medical needs and placement. On October 23, 2019, J.M. attended a meeting with officials from the United States, Afghanistan, and the ICRC to discuss the family reunification search. The meeting minutes state that ICRC was "in contact with individuals

evidentiary support." *Hawthorne v. VanMarter*, 279 Va. 566, 577, 692 S.E.2d 226 (2010).

⁸ USFOR-A is "a component of U.S. Central Command responsible for joint U.S. military operations in Afghanistan."

⁹ The Ministry is a government agency in charge of child protection programming, custody, and placement in Afghanistan.

claiming to be relatives of the infant. The Ministry and ICRC need to conduct a proper assessment to determine whether these are rightful claims.”

J.M. began arrangements for the child to travel to the United States because he doubted that the medical care she needed could be provided in Afghanistan. The M.s petitioned the J&DR court for custody of the child. J.M. represented that the Afghan government did not want custody of the child or jurisdiction over the matter and that it did not object to United States officials assuming jurisdiction and custody. The court believed a waiver of jurisdiction would be provided in “a matter of days.” The Afghan government, however, never waived its jurisdiction. J.M. also testified that Afghan representatives stated that they did not have the capacity to care for the child. The J&DR court issued the custody order on November 6, 2019, granting the M.s custody of the child.

Four days later, the circuit court issued the interlocutory adoption order based on the M.s’ petition for adoption. The court granted the order on an emergency basis, relying on the M.s’ statements that if the child was J.M.’s dependent, she could be evacuated from Afghanistan and receive medical care at the University of Virginia Health Children’s Hospital (“UVA”). The interlocutory adoption order stated that the child was stateless, the search for relatives was unsuccessful, and the child was in urgent need of medical treatment. Although the child remained with the United States in Afghanistan on Bagram Air Base, the order stated that she was in the “physical care and custody” of the M.s in Virginia. Notwithstanding the emergency order, the child was not transported to the United States.

On December 31, 2019, the Ministry announced that it had identified the child's relatives, who had been vetted consistent with Afghan law. The Ministry identified M.I.¹⁰ as the child's paternal uncle, and the Ministry and USFOR-A concluded that the child was an Afghan national. After a month, the Ministry requested that the United States transfer the child to the Afghan government for her to be united with her government-identified family, noting that it had granted custody to M.I. under Afghan law. The United States determined the Ministry had properly verified the child's family. Based on this, and Afghanistan's jurisdiction over the child, the United States chose to transfer the child to the Afghan government who would proceed to place the child in M.I.'s custody.

On February 26, 2020, after learning that the United States was planning to transfer the child, the M.s sought a temporary restraining order ("TRO") in the United States District Court for the Western District of Virginia to prevent the transfer. In this proceeding, the M.s relied on the custody order and did not disclose the interlocutory adoption order. The M.s' counsel represented that the M.s did not intend to adopt the child. The district court denied the M.s' request for a TRO. The district court held that the M.s were unlikely to succeed on the merits because the custody order was based on Afghanistan's waiver of jurisdiction and Afghanistan had not yet waived jurisdiction. It further held that the DOD should have been provided notice of the custody proceedings. The next day, the United States government

¹⁰ M.I. is also referred to in the record as H.B., H.I., and H.M.

transferred the child to the Afghan government, which then placed the child with her new guardian, M.I. M.I. transferred guardianship to his son, A.A., identified by the United States and the A.A.s as the child's first cousin, and A.A.'s partner, F.A.¹¹

After the circuit court issued the interlocutory adoption order, the M.s informed the court of “red tape” and bureaucratic difficulties” with evacuating the child without a final adoption order. The M.s did not relay to the circuit court that the federal district court had denied their petition for a TRO, that Afghanistan had not waived its jurisdiction, or that the child had been transferred to people the United States had determined were the child's relatives. A timeline of events submitted to the court stated that the child was “turned over to [an] anonymous person in unknown location by ICRC” in February 2020. J.M. represented to the court that the child was being looked after by a young Afghan girl and that he had no specific information as to her identity. On December 3, 2020, the circuit court issued a final adoption order. The court based its order on the recommendations of the Fluvanna County Department of Social Services and the guardian ad litem's recommendation—neither of which had ever met the child—as well as the court's earlier finding that the child was a stateless orphan. The parties dispute whether the United States had notice at any

¹¹ The A.s argue that, according to Afghan law, as M.I. is the child's eldest uncle on her father's side he automatically became the child's legal guardian or *wali* once her father died. They further assert that as *wali* M.I. had the power to transfer the child to A.A. irrevocably. The M.s counter that the A.s' experts confirmed that this transfer was not in accordance with Afghan law.

stage of the adoption proceedings, and the circuit court did not make a conclusive finding on the issue. The A.s did not receive notice.

Not long after the child was transferred to the A.s' physical custody, the M.s hired Kimberly Motley, an attorney practicing in Afghanistan, to locate the A.s. Motley contacted the A.s and told them that an American family wanted to provide the child with medical care. Motley tried to convince the A.s to send the child to the United States for medical treatment.

While Motley, the M.s, and the A.s were communicating, the Taliban was quickly overtaking Afghanistan. A.A. told J.M. that the Taliban had denied his request to send the child to the United States. Therefore, J.M. proposed to the A.s that they could come to the United States with the child. The M.s assert that J.M. made clear to the A.s that the M.s intended for the child to live with them, but the A.s dispute this. After the Afghan government collapsed on August 15, 2021, and following more than a year of communication, the A.s agreed to come to the United States. The United States asserts that when coordinating the evacuation of the A.s, J.M. "falsely informed U.S. personnel that the child was his 'daughter per both Afghan and U.S. court orders,' and he provided them with a fraudulent document that he described as an Afghan court order."¹² Though the child had lived with and been cared for by

¹² J.M. had an Afghan passport for the child with the name the M.s had given her. The passport photo was a digitally altered version of a photo that the A.s provided to Motley. F.A. states that when she asked about the name, J.M. told her to be quiet and that the purpose was for the child to obtain medical treatment and nothing else.

the A.s for as long as 18 months¹³ and had been determined to be the A.s' relative, J.M. described the A.s only as a "Pashtun Couple" accompanying the child. The M.s counter that "the White House, the Office of the Vice President, the DOD, and members of Congress . . . supported the efforts to bring [the child] to safety." The M.s further allege that "[t]he Commandant of the Marine Corps approved" of J.M.'s actions "with full knowledge of the facts, including [the child]'s location and status as a patient in a U.S. military hospital."

In August 2021, the A.s first flew from Afghanistan to Germany, where they met J.M. in person. J.M. asserts that it was only upon meeting that he learned of F.A.'s attachment to the child and that A.A. had promised F.A. that the child would not leave her side if they left Afghanistan. Instead, J.M. believed that M.I. was responsible for the child, who was incidentally being cared for by a teenage girl.

Upon arriving in the United States, the A.s stayed on the military base at Fort Pickett, Virginia. On September 3, 2021, two police officers knocked on the A.s' door and told them they were being moved to a different apartment. They brought A.A., F.A., and the child to a car; a woman placed the child in a car seat and told the A.s that they were going to an interview. When they reached a meeting room, the woman from the car continued to hold the child. As the child tried to get back to F.A., the woman told her that the child could not legally remain with the A.s because they were not her biological parents. J.M. came into the room and said he was told that he must take the child,

¹³ The M.s dispute whether the child lived consistently with both F.A. and A.A. during this time.

or she would be placed in an orphanage. As the child began to cry, F.A. begged the woman, saying, “[P]lease give me [my] daughter. She is my daughter. Please give her to me.” A few days later, they discovered that a Virginia court had ordered the child’s adoption by the M.s. The child has lived with the M.s ever since.

On March 28, 2022,¹⁴ the A.s petitioned the circuit court to vacate the M.s’ final adoption order and obtain custody of the child. Under 28 U.S.C. § 517, the United States filed two statements of interest. The United States argued that (1) the custody and adoption orders were void because of the M.s’ misrepresentations and (2) the circuit court must defer to the federal government’s foreign policy decisions to recognize Afghanistan’s jurisdiction and transfer the child to the Afghan government for family reunification. The United States also filed two motions to intervene along with declarations of officials from the Departments of State and Defense.¹⁵ The court denied the motions without prejudice.

In its May 3, 2023 order, the circuit court stated that while the child’s citizenship had initially been unclear, “it was determined that the child was

¹⁴ The A.s originally filed the petition on December 8, 2021, under the docket number of the original adoption case. The circuit court required the A.s to refile their petition as a collateral proceeding, and their original briefs were incorporated in their case after refiling on March 28, 2022.

¹⁵ The M.s argue that these declarations were improperly admitted. Because the issue is not addressed in the interlocutory May 3 order, this Court does not have jurisdiction to address the matter and will assume without deciding the declarations were properly admitted.

Afghan,” a fact the court felt was “important.” The court found “evidence of some extrinsic fraud” on the part of the M.s in obtaining the custody and adoption orders. It further found that the A.s were de facto parents of the child and “were entitled to some process that they did not receive.” So the court voided the final adoption order, but left the custody order and interlocutory adoption order in effect. The court also concluded that “the United States[] determination with regard to its foreign policy imperatives have been met” through its May 3 order vacating the adoption and that the May 3 order did not conflict with any federal foreign policy decisions. The court then certified the May 3 order for consideration by this Court, staying any further proceedings concerning the best interests of the child.¹⁶

ANALYSIS

As this case is before us on interlocutory appeal, we first affirm that we have jurisdiction over all matters presented in the May 3 order certified for interlocutory review. We then review whether the circuit court had authority to issue each of the three underlying orders in this case: the custody order, the interlocutory adoption order, and the final adoption order. We conclude that the court lacked subject-matter jurisdiction to issue the custody order, making it void ab initio. Whether the circuit court had jurisdiction to issue the interlocutory and final adoption orders is more complicated. The circuit court had subject-matter jurisdiction over the adoption proceeding. Yet it lacked the power to

¹⁶ Both the M.s and the A.s appealed the circuit court’s order; we consolidated all four appeals for consideration here.

render the adoption orders because this adoption bore no resemblance to those authorized by the adoption code and the child was not present in the United States. Thus, the adoption orders are void ab initio. This is true even in light of Code § 63.2-1216's bar, because the power to render is indispensable and in its absence an order may be attacked at any time. As we conclude that the final adoption order was void ab initio, we need not address the claim that the A.s are the child's de facto parents and that this gives them parental due process rights in Virginia.

I. The May 3 Order

We must first consider whether the Court has subject-matter jurisdiction over all the matters raised by the parties in this interlocutory appeal. *See Morrison v. Bestler*, 239 Va. 166, 170, 387 S.E.2d 753 (1990) (“[A] court always has jurisdiction to determine whether it has subject matter jurisdiction”); *Minor v. Commonwealth*, 66 Va. App. 728, 737-38, 791 S.E.2d 757 (2016) (“[T]he question of jurisdiction is one for the determination of the appellate court only. Before the merits of this case can be considered, [this Court] must determine whether it has jurisdiction.” (alterations in original) (quoting *Comcast of Chesterfield Cnty., Inc. v. Bd. of Supervisors*, 277 Va. 293, 299, 672 S.E.2d 870 (2009))). The M.s argue that the A.s’ appeal, No. 0876-23-2, is improper. They argue we cannot consider No. 0876-23-2 because the A.s are appealing the non-final May 3 order.

“[F]or the Court to have jurisdiction of this appeal, the order from which [the A.s] appealed must be either a final order or an interlocutory order from which an appeal is statutorily authorized.” *Comcast*, 277 Va. at 300, 672 S.E.2d 870. While the May 3 order

is not final,¹⁷ we conclude that the parties here are statutorily authorized to appeal the entirety of the May 3 order. Code § 8.01-675.5(A) permits any party to move for certification of an “order or decree for interlocutory appeal,” and provides that a circuit court may certify an order for appeal if it makes certain findings. The Court may then, in its discretion, grant the appeal “from the interlocutory order or decree.” *Id.* Here, in an order titled “Order Certifying for Interlocutory Appeal” issued on May 12, 2023, the circuit court stated that “*the May 3, 2023 Order* of this [c]ourt granting partial summary judgment is certified for interlocutory appeal pursuant to Virginia Code § 8.01-675.5.” (Emphasis added). This Court granted the petitions for interlocutory appeal filed by both the M.s and the A.s “from certain orders entered by” the circuit court—meaning the May 3 order, as certified by the May 12 order. Because Code § 8.01-675.5 authorizes appeals from orders or decrees, as opposed to appeals of isolated issues, the Court may consider any issue raised by the parties that the circuit court addressed in the May 3 order.

¹⁷ Rule 1:1(b) describes an order as final “if it disposes of the entire matter before the court, including all claim(s) and all cause(s) of action against all parties, gives all the relief contemplated, and leaves nothing to be done by the court except the ministerial execution of the court’s judgment, order or decree.” In the May 3 order, the circuit court contemplates further hearings to determine the best interest of the child. This is far from mere ministerial execution of an order. *See* Rule 1:1(b). Further, the circuit court in its May 12, 2023 order stated that the May 3 order involved a question of law that met the four elements required to certify an order as interlocutory under Code § 8.01-675.5. For these reasons, we find that the May 3 order is interlocutory.

II. Subject-Matter Jurisdiction and The Power to Render

We turn first to the A.s’ arguments about subject-matter jurisdiction. When issuing an order, a court must have subject-matter jurisdiction. “[S]ubject-matter jurisdiction is the paramount consideration in assessing whether a court has authority to enter judgment, and a judgment will always be void without it.” *Watson v. Commonwealth*, 297 Va. 347, 352, 827 S.E.2d 782 (2019). Subject-matter jurisdiction “cannot be waived or conferred on the court by agreement of the parties.” *Morrison*, 239 Va. at 169-70, 387 S.E.2d 753. “[A] judgment on the merits made without subject matter jurisdiction is null and void.” *Id.* at 170, 387 S.E.2d 753. A court must also have the power to render any decision or decree. *See Ellis v. Commonwealth*, 75 Va. App. 162, 167, 875 S.E.2d 91 (2022). This Court reviews questions regarding subject-matter jurisdiction and whether a lower court had the power to render a judgment de novo. *Gray v. Binder*, 294 Va. 268, 275, 805 S.E.2d 768 (2017); *Collins v. Shepherd*, 274 Va. 390, 397, 649 S.E.2d 672 (2007).

A. *The J&DR court lacked subject-matter jurisdiction to issue the custody order.*

We first consider the J&DR court’s subject-matter jurisdiction over the custody order. “As courts not of record, [juvenile and domestic relations district] courts are creations of the General Assembly.” *Parrish v. Fannie Mae*, 292 Va. 44, 49, 787 S.E.2d 116 (2016) (citing Va. Const. art. VI, § 8; Code § 16.1-69.7). “They are courts of limited jurisdiction and may exercise only such subject matter jurisdiction as has been expressly conferred by

statute.” *Id.* Under Code § 20-146.12, Virginia’s J&DR courts have “jurisdiction to make an initial child custody determination only if” a case falls within one of four categories. The following four categories are “the exclusive jurisdictional basis for making a child custody determination by a court of this Commonwealth.” Code § 20-146.12(B).

A court may only make a custody determination if:

1. This Commonwealth is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this Commonwealth but a parent or person acting as a parent continues to live in this Commonwealth;
2. A court of another state does not have jurisdiction under subdivision 1, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this Commonwealth is the more appropriate forum under § 20-146.18 or § 20-146.19, and (i) the child and the child’s parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this Commonwealth other than mere physical presence and (ii) substantial evidence is available in this Commonwealth concerning the child’s care, protection, training, and personal relationships;
3. All courts having jurisdiction under subdivision 1 or 2 have declined to exercise jurisdiction on the ground that a court of this Commonwealth is the more appropriate forum to determine the custody of the child under § 20-146.18 or § 20-146.19; or

4. No court of any other state would have jurisdiction under the criteria specified in subdivision 1, 2, or 3.

Code § 20-146.12(A).

None of these requirements is satisfied here. The first category's requirements are not met because the child was less than six months old and had never been to the Commonwealth prior to the issuance of the custody order. As to the second category, the J&DR court originally determined it had jurisdiction in part because the M.s represented that the child was stateless and that a waiver from Afghanistan was imminent. Yet J.M. attended a meeting at which Afghan officials and agents of the Red Cross informed United States officials that they had potentially identified the child's Afghan family members and planned to verify if this was a rightful claim. The M.s did not disclose this information to the court. The circuit court noted that "[t]here is evidence of some extrinsic fraud" here and that the circuit court "did not have all of the information known to the [M.s] at the time the [final] order was entered. For example, that there was no waiver coming and that the United States decided to surrender or give the child to the Afghan government." The circuit court also stated that "in the end, it was determined that the child was an Afghan [c]hild" and the circuit court deemed this "important." Had all the information been before the J&DR court, it could not have found that Afghanistan lacked jurisdiction and therefore the court did not have jurisdiction under the second category. *See* Code § 20-146.4(A) ("A court of this Commonwealth shall treat a foreign country as if it were a state of the United States . . ."). Even if Afghanistan had declined jurisdiction, the M.s concede that the child

did not have significant connections with the Commonwealth, which is sufficient in itself to find that the court lacked subject-matter jurisdiction under Code § 20-146.12(A)(2). For the third category, no other states declined jurisdiction on the basis that the Commonwealth was the more appropriate forum. Lastly, the catchall fourth category's requirements are not met because Afghanistan had jurisdiction. Because the custody order does not meet the requirements of any of the four categories that provide the J&DR court with exclusive jurisdiction to make a custody determination, we find the custody order void for lack of subject-matter jurisdiction.¹⁸ Therefore, we reverse the circuit court's finding that the custody order remains valid.¹⁹

¹⁸ The M.s also argue that Afghanistan's child custody laws violate fundamental principles of human rights and therefore the J&DR court had jurisdiction under Code § 20-146.4(C). That section states that "[a] court of this Commonwealth need not apply this act if the child custody law of a foreign country violates fundamental principles of human rights." Code § 20-146.4(C). Nothing in the record demonstrates that Afghanistan's child custody laws violate fundamental principles of human rights as they relate to the child in the present matter.

¹⁹ We also note that the custody order is no longer active, as the J&DR court stated that it was "a temporary order" that "did not finally dispose of the matter." The J&DR court further explained that the custody order "ended upon entry of the Circuit's [sic] Court's assumption of jurisdiction . . . by its entry of the interlocutory order of adoption." (Capitalization normalized).

B. The circuit court had subject-matter jurisdiction over the final and interlocutory adoption orders but lacked the power to render the orders.

We next evaluate whether the circuit court had authority to issue the interlocutory and final adoption orders. The A.s argue that the circuit court’s subject-matter jurisdiction is limited to the categories of adoption contained in the adoption code and that the present case does not fit any of these categories. The M.s rely on *Bonanno v. Quinn*, 299 Va. 722, 858 S.E.2d 181 (2021), for the proposition that the circuit court had subject-matter jurisdiction over the adoption proceedings. The Supreme Court in *Bonanno* stated that “circuit courts have subject-matter jurisdiction to adjudicate adoptions” and the “power to adjudicate adoption petitions under Code §§ 17.1-513 and 63.2-1201.” *Id.* at 735, 858 S.E.2d 181. Code § 17.1-513 states that circuit courts “shall have original and general jurisdiction of all civil cases.” Code § 63.2-1201 explains what an adoption petition must contain, who may file it, and where it can be filed. It does not contain any language limiting a court’s jurisdiction if these requirements are not met. Given this, and the broad grant of jurisdiction of Code § 17.1-513, the Court finds that the circuit court had subject-matter jurisdiction over the adoption proceeding.²⁰

Even so, subject-matter jurisdiction does not mean that circuit courts have unfettered power to rule on

²⁰ As noted above in relation to the custody order, this Court has jurisdiction to consider whether the circuit court had subject-matter jurisdiction to issue the interlocutory adoption order. *See supra* note 15. We also note that the interlocutory

any matter that a party claims to be an adoption. The circuit court must still have the power to render a judgment—a requirement related to, but distinct from, subject-matter jurisdiction. The A.s’ argument is nominally fashioned under the doctrine of subject-matter jurisdiction. But we understand it as an argument that the circuit court lacked the power to render. We interpret it thus because the two doctrines of subject-matter jurisdiction and the power to render are interlinked and the power to render may be raised *sua sponte*.²¹ See *Hannah v. Commonwealth*, 303 Va. 109, 119-20, 899 S.E.2d 621 (2024).

Since the nineteenth century, our Supreme Court has recognized that, even when a court has subject-matter jurisdiction, an order is void *ab initio* if “the character of the judgment was not such as the court had the power to render, or because the mode of procedure employed by the court was such as it might not lawfully adopt.” *Anthony v. Kasey*, 83 Va. 338,

adoption order is part of the same matter as the final adoption order, and it was issued “subject to” the “final order of adoption” and “converted to [the] Final Adoption Order effective December 3, 2020.” See also *Morgan v. Lynchburg Dep’t of Soc. Servs.*, No. 0627-21-3, slip op. at 13, 2022 WL 4136397 (Va. Ct. App. Sept. 13, 2022) (finding “interim ruling denying grandmother’s demurrers to” Department of Social Services’ emergency removal petitions for children “merged into the final order”). Thus, it does not appear the interlocutory adoption order is still its own freestanding order and instead, it merged into the final adoption order. Even still, because the circuit court left the interlocutory adoption order in place in its May 3 order, we consider it separately here.

²¹ See footnote 23 for a further explanation of the connection between subject-matter jurisdiction and the power to render.

340, 5 S.E. 176 (1887).²² “The Constitution of Virginia sets out the general powers of the judiciary, and the Constitution grants power to the General Assembly, subject to certain limitations, to determine the jurisdiction of the courts of the Commonwealth.” *Ellis*, 75 Va. App. at 167, 875 S.E.2d 91 (internal citation omitted). Accordingly, an order is void ab initio “when a court acts outside of such jurisdiction or authority.” *Id.*; see also *Yourko v. Yourko*, 74 Va. App. 80, 99, 866 S.E.2d 588 (2021) (“The ‘power to render’ inquiry requires that Virginia courts must act within the scope of their derived power. Virginia state courts derive their power from Virginia’s Constitution, the General Assembly, and grants of power from the federal government.”), *rev’d on other grounds*, 302 Va. 149, 884 S.E.2d 799 (2023). An

²² *Anthony* relied upon the reasoning of a United States Supreme Court opinion, *Windsor v. McVeigh*, 93 U.S. 274, 23 L.Ed. 914 (1876). There, the Supreme Court reasoned that:

Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will The judgments mentioned, given in the cases supposed, would not be merely erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases.

93 U.S. at 282.

order that is void ab initio is a “complete nullity.” *Singh v. Mooney*, 261 Va. 48, 52, 541 S.E.2d 549 (2001).

This Court and our Supreme Court have repeatedly applied this doctrine, including as recently as last year. *See Windset Cap. Corp. v. Debosky*, No. 1216-22-4, slip op. at 8-9, 2023 WL 5918229 (Va. Ct. App. Sept. 12, 2023) (affirming that the lower court did not have the power to render default judgment where the judgment was based on a null complaint), *cert. granted*, No. 230733, slip op. at 1, 2024 WL 1090838 (Va. Mar. 5, 2024); *see also Amin v. Cnty. of Henrico*, 63 Va. App. 203, 210, 755 S.E.2d 482 (2014) (holding that a conviction order was void ab initio because it was based on “an offense that did not exist”); *Rawls v. Commonwealth*, 278 Va. 213, 221, 683 S.E.2d 544 (2009) (holding that a sentence in excess of statutory limits was void ab initio because it was outside the court’s power to render); *Collins*, 274 Va. at 402-03, 649 S.E.2d 672 (holding that a dismissal order was void ab initio because the circuit court utilized a mode of procedure it “could not lawfully adopt”); *Evans v. Smyth-Wythe Airport Comm’n*, 255 Va. 69, 74, 495 S.E.2d 825 (1998) (circuit court “did not have the power to render a judgment which permitted a governmental entity to relinquish the power or right of eminent domain”); *Yourko*, 74 Va. App. at 99, 866 S.E.2d 588 (lower court’s order was void ab initio because it was preempted by federal law and therefore the court did not have the power to render it).

We agree with the A.s that the adoption of the child does not fit any of the five categories of adoption authorized in Code §§ 63.2-1221 through -1244. The five categories of adoption are agency, parental

placement, stepparent, close relative, and adult adoption. *T.S.G. v. B.A.S.*, 52 Va. App. 583, 591 n.5, 665 S.E.2d 854 (2008); Code §§ 63.2-1221 to -1244. Stepparent, close relative, and adult adoptions are obviously not applicable to the present matter. The circuit court's interlocutory and final adoption orders cite to the agency adoption statutory provisions. And the circuit court did refer the adoption to a child-placing agency, the Department of Social Services, as required by Code § 63.2-1208, and appointed a guardian ad litem. Both recommended that the child be adopted by the M.s. But, again, all this occurred before the child was living with the M.s or present in the United States and neither the Department of Social Services nor the guardian ad litem ever met with the child prior to the issuance of the orders. Thus, the statutory requirements of an agency adoption were not met as the child was not "properly committed or entrusted to [the agency's] care." Code § 63.2-1221. Neither was this a parental-placement adoption, as the child was not placed with the M.s by a "birth parent, legal guardian, or adoptive parent." Code § 63.2-1230. We find that these procedural errors are so outside the scope of the adoption code that the circuit court lacked the power to render the adoption orders, rendering both adoption orders void ab initio.

C. Subject-matter jurisdiction and power to render are essential despite Code § 63.2-1216's language and the statute's general purpose of favoring the finality of adoptions.

We must now evaluate the role of Code § 63.2-1216 in the A.s' collateral attack on this improper adoption. Of course, our determination that the circuit court

lacked the power to render the final adoption order is of little import if the A.s are barred from bringing this claim by Code § 63.2-1216. The statute states:

After the expiration of six months from the date of entry of any final order of adoption from which no appeal has been taken to the Court of Appeals, the validity thereof shall not be subject to attack in any proceedings, collateral or direct, for any reason, including but not limited to fraud, duress, failure to give any required notice, failure of any procedural requirement, or lack of jurisdiction over any person, and such order shall be final for all purposes.

Code § 63.2-1216. The legislative intent of Code § 63.2-1216 is clear: to favor the finality of adoptions. This Court has stated that “[t]he General Assembly made the policy choice to favor finality, recognizing that repeatedly subjecting a child to multiple changes in or even mere challenges to who his legal parents are has the potential to cause significant harm to the child.” *Nelson v. Middlesex Dep’t of Soc. Servs.*, 69 Va. App. 496, 509, 820 S.E.2d 400 (2018). Additionally, “[t]he policy of stability in a family relationship, particularly when a young minor is involved, outweighs the possible loss to a person whose rights are cut off through fraud and ignorance.” *F.E. v. G.F.M.*, 35 Va. App. 648, 661, 547 S.E.2d 531 (2001) (quoting *McKinney v. Ivey*, 287 Ark. 300, 698 S.W.2d 506, 507 (1985)).

The combination of the text of Code § 63.2-1216 and the unique nature of subject-matter jurisdiction and the power to render leads us to conclude that Code § 63.2-1216 does not bar collateral attacks

challenging a lack of subject-matter jurisdiction or power to render. Subject-matter jurisdiction is essential and necessary to every act taken by a court. *See Watson*, 297 Va. at 352, 827 S.E.2d 782; *Morrison*, 239 Va. at 170, 387 S.E.2d 753. Subject-matter jurisdiction is so central to a court’s decision-making power that acts undertaken without it are void ab initio. *Hannah*, 303 Va. at 119-20, 899 S.E.2d 621. In fact, our Supreme Court

has recognized five circumstances that may give rise to judgments which are void ab initio: when “(1) [the judgment] was procured by fraud, (2) the court *lacked subject matter jurisdiction*, (3) the court lacked jurisdiction over the parties, (4) the judgment is of a character that *the court lacked power to render*, or (5) the court adopted an unlawful procedure.”

Id. (alteration in original) (emphasis added) (quoting *Watson*, 297 Va. at 350, 827 S.E.2d 782). Thus, objections to issues of subject-matter jurisdiction or power to render “may be raised by any party in the case *at any point* during a valid direct or collateral proceeding where the voidness of the order is properly at issue, including by a court for the first time on appeal.” *Id.* at 120, 899 S.E.2d 621 (emphasis added) (citing *Bonanno*, 299 Va. at 736-37, 858 S.E.2d 181). We therefore conclude that the final adoption order here may be attacked after six months for lack of subject-matter jurisdiction.

Even if the power to render is better understood as a type of jurisdiction,²³ the final adoption order is void

²³ Virginia courts have described the power to render in two different ways, in both instances it is interlinked with subject-matter jurisdiction. At times, courts have treated the

ab initio for lacking it. The power to render, like subject-matter jurisdiction, is essential to all orders.

power to render as a related but distinct concept from jurisdiction, and thus from subject-matter jurisdiction. See *Yourko*, 74 Va. App. at 97, 866 S.E.2d 588 (“[T]he circuit court had subject matter jurisdiction to issue the challenged orders However, in examining whether the orders are void, Virginia law looks *beyond jurisdiction* and also directs that an order is void if the circuit court was without power to render the order.” (emphasis added)); *Singh*, 261 Va. at 51-52, 541 S.E.2d 549 (“An order is void ab initio if entered by a court in the absence of jurisdiction of the subject matter or over the parties, [or] if the character of the order is such that the court had no power to render it”); *Anthony*, 83 Va. at 340, 5 S.E. 176 (“Though the court may possess jurisdiction of a cause, of the subject-matter and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgments.” (quoting *Windsor*, 93 U.S. at 282)). But at other times, we have conversely treated the power to render as a type of jurisdiction. Our Supreme Court in *Farant Inv. Corp. v. Francis*, 138 Va. 417, 122 S.E. 141 (1924), explained that:

There are, indeed, four essential requisites to confer upon a court “active jurisdiction,” which may be thus classed, (1) potential jurisdiction, (2) territorial jurisdiction, (3) actual jurisdiction of the subject matter where the proceeding is in rem, and also of the proper parties where the proceeding is personal, and (4) the other conditions of fact must exist which are demanded by the unwritten or statute law as the pre-requisites of the authority of the court to proceed to judgment or decree.

Id. at 427-28, 122 S.E. 141; see also *Richardson v. Commonwealth*, 67 Va. App. 436, 442 n.2, 796 S.E.2d 854 (2017) (“[Jurisdiction] embraces several concepts including subject matter jurisdiction[,] . . . territorial jurisdiction[,] . . . notice jurisdiction[,] . . . and the other conditions of fact [that] must exist which are demanded by the unwritten or statute law as the prerequisites of the authority of the court to proceed to judgment or decree.” (first, third, fifth, seventh, and eighth alterations in original) (quoting *Porter v. Commonwealth*, 276 Va. 203, 228, 661 S.E.2d 415 (2008))).

See *Hannah*, 303 Va. at 119-20, 899 S.E.2d 621. This conclusion is also consistent with the text of Code § 63.2-1216. We find it significant that the General Assembly affirmatively included “jurisdiction *over any person*,” instead of merely stating “jurisdiction.” Code § 63.2-1216 (emphasis added). Because challenges based on a lack of subject-matter jurisdiction, or the power to render, can be raised anytime, it is unsurprising that the General Assembly would not intend for Code § 63.2-1216 to prevent them. The unique quality of subject-matter jurisdiction and the power to render distinguishes them from the type of claims listed in Code § 63.2-1216.

Therefore, despite the broad language of Code § 63.2-1216 and the statutory purpose of promoting the finality of adoptions, the statute is inapplicable to the final order, as the order was invalid from the outset.²⁴ We affirm the circuit court’s ruling that the

²⁴ To the extent that our interpretation of Code § 63.2-1216 is lacking, federal preemption principles counsel the same result. A conflict between state and federal law is of particular concern when it involves the United States’ diplomatic relationships with other governments. See *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413, 123 S.Ct. 2374, 2386, 156 L.Ed.2d 376 (2003) (“[A]t some point an exercise of state power that touches on foreign relations must yield to the National Government’s policy, given the ‘concern for uniformity in this country’s dealings with foreign nations’ that animated the Constitution’s allocation of the foreign relations power to the National Government.” (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25, 84 S.Ct. 923, 940 n.25, 11 L.Ed.2d 804 (1964))). “To permit [states to operate in foreign relations] would be to sanction a dangerous invasion of Federal authority.” *United States v. Pink*, 315 U.S. 203, 233, 62 S.Ct. 552, 567, 86 L.Ed. 796 (1942). In addition to “conflict preemption” where particular foreign policy decisions conflict with the operation of a state statute, the

final adoption order is void ab initio under the right result for the wrong reason doctrine. *See Perry v. Commonwealth*, 280 Va. 572, 579, 701 S.E.2d 431 (2010) (“[I]t is the settled rule that how[ever] erroneous . . . may be the reasons of the court for its judgment upon the face of the judgment itself, if the judgment be right, it will not be disturbed on account of the reasons.” (alterations in original) (quoting *Schultz v. Schultz*, 51 Va. (10 Gratt.) 358, 384 (1853))). Because the final adoption order is void ab initio and the statute is inapplicable, we need not decide if the A.s are de facto parents with due process rights that were violated, which would allow them to

United States Supreme Court has recognized a dormant federal foreign affairs power, which is a type of federal field preemption. *Zschernig v. Miller*, 389 U.S. 429, 440, 88 S.Ct. 664, 671, 19 L.Ed.2d 683 (1968) (invalidating a state action because of the federal government’s inherent authority over foreign affairs where the state law had “a direct impact upon foreign relations and may well [have] adversely affected the powers of the central government to deal with those problems”). There was significant evidence presented below that the United States took direct actions in an exercise of federal executive authority by turning over custody of a child found on Afghan soil, during a military engagement, to Afghanistan, and that strict application of Code § 63.2-1216 would conflict with this decision. In the absence of direct action, the dormant foreign affairs doctrine would nevertheless seem to block the statute from preventing the reopening of an adoption of a foreign-born child, while the child was on foreign soil, in an adoption that occurred without the consent (or knowledge) of the foreign country or any agency therein. *See Zschernig*, 389 U.S. at 440, 88 S.Ct. at 670-71 (explaining that preemption principles apply where state action has more than an “incidental or indirect effect” on national foreign relations (quoting *Clark v. Allen*, 331 U.S. 503, 517, 67 S.Ct. 1431, 1439, 91 L.Ed. 1633 (1947))). But we need not decide this case on such grounds, given the power to render rationale contained herein.

overcome the statute's time limitations on yet another ground. See *Commonwealth v. Swann*, 290 Va. 194, 196, 776 S.E.2d 265 (2015) ("The doctrine of judicial restraint dictates that we decided cases "on the best and narrowest grounds available."" (quoting *McGhee v. Commonwealth*, 280 Va. 620, 626 n.4, 701 S.E.2d 58 (2010))).

CONCLUSION

Because the circuit court lacked the power to render the interlocutory and final adoption orders and the J&DR court lacked subject-matter jurisdiction to issue the custody order, we find all the orders here void ab initio. We affirm the circuit court's decision voiding the final adoption order but reverse its decision to leave the interlocutory adoption order and custody order in place. We direct the circuit court to dismiss the adoption proceedings and conduct a hearing on the existing custody petition filed by the A.s, which remains pending before the circuit court. The M.s may file custody or adoption petitions at their discretion.

Affirmed in part, reversed in part, and remanded.

IN THE SUPREME COURT OF VIRGINIA

Record No. 240707

J.M., et al.,
Appellants,
v.
A.A., et al.,
Appellees

**BRIEF FOR THE UNITED STATES AS AMICUS
CURIAE SUPPORTING A.A., ET AL.**

* * *

INTRODUCTION AND NATURE OF THE CASE

This case involves custody and adoption orders issued by Virginia courts concerning an orphaned Afghan baby, recovered by U.S. forces on a battlefield in Afghanistan, who, at the time of the orders, had never been in the United States, let alone in Virginia. The Virginia courts granted the orders in *ex parte* proceedings, without notice to the child's Afghan family or the United States, based on significant misrepresentations and omissions by J.M. and S.M. (the M.s) about both the child's status and the United States' determinations and actions involving the child.

Most centrally, the M.s falsely represented to the courts that the child was stateless and that the Afghan Government was going to waive its jurisdiction over the child. They failed to tell the courts that the Afghan Government, with the assistance of the International Committee of the Red

Cross (Red Cross), was actively searching for—and eventually found—an Afghan family it determined to be the child's relatives and that the Afghan Government concluded that the child is an Afghan citizen subject to its jurisdiction. Far from waiving its jurisdiction over the child, the Afghan Government granted custody to her next of kin pursuant to Afghan guardianship law and formally requested that the United States transfer the child to it so she could be united with her Afghan family.

The M.s also withheld the facts that the United States supported the Afghan Government's search, later accepted the Afghan Government's determination that it had found the child's Afghan family, and transferred the child to the Afghan Government so that it could give custody of the child to her Afghan relatives. A.A. and F.A. (the A.s), the orphan's relatives and surrogate parents in Afghanistan, proceeded to raise the child in Afghanistan for the next 18 months.

After inducing the A.s to bring the child to the United States under false pretenses, the M.s used the Virginia court orders they had improperly obtained to take custody of the child from the A.s without any further judicial process. The child remains in their physical custody today. The M.s lacked any lawful basis for taking the child from her rightful Afghan family. The A.s argue that the Court of Appeals of Virginia correctly held, as a matter of state law, that the limitation statute concerning final adoptions does not prevent their challenge to the orders and that all of the custody and adoption orders are void. This Court's determination that the court of appeals' judgment should be affirmed as a matter of Virginia

law would be consistent with the United States' interest in this case.

But should the Court determine that there is no state-law basis for affirmance, the Court should hold that orders are preempted as a matter of federal law, as is the limitations statute, to the extent it would preclude the A.s' challenge. The state-court orders irreconcilably conflict with the federal government's decision, made in the exercise of its authority over military and foreign affairs in a foreign country in connection with combat operations, to recognize Afghanistan's jurisdiction over the child and to recognize the Afghan Government's decision to give custody of the child to her surviving Afghan family. Moreover, the M.s' continued custody of the child imposes ongoing harms on the Nation's foreign policy interests. Because the child should never have been removed from the A.s' custody, and there is no legal basis for the M.s to continue to keep her from the A.s, the United States urges the Court to direct the immediate return of the child to the A.s. That is the only outcome consistent with federal law.¹

¹ The United States participates in this matter pursuant to 28 U.S.C. § 517, which authorizes the U.S. Attorney General to send a Department of Justice lawyer "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State," and Virginia Supreme Court Rule 5:30(a) and (b)(1), which authorizes the United States to file an amicus curiae brief without leave in proceedings before this Court.

STATEMENT OF THE FACTS

1. In September 2019, U.S. forces found an infant on a battlefield in Afghanistan.² R. 513. The conditions under which the child was found suggested that her parents had been killed as a result of the military operation. *Id.* The infant was injured, so the U.S. forces took physical custody of her and brought her to Bagram Air Base for treatment. *Id.*

While the child was being treated, the Afghan Government and the Red Cross actively sought to identify her relatives so that she could be united with her family. R. 514. The United States supported that effort, consistent with its obligations under the law of war and with its longstanding practice of working with the Red Cross and host countries to unite families separated during times of armed conflict. R. 513-14. Although some military personnel considered the possibility that the baby might not be Afghan, R. 514, in December 2019, the Afghan Ministry of Labor and Social Affairs (Afghan Ministry), the agency responsible for child welfare and protection under Afghan law, notified the U.S. Embassy in Kabul that, with the Red Cross's help, it had determined that the child's Afghan parents lived

² The facts described below are taken, in part, from declarations and exhibits submitted by the United States, which explain the United States' decisions and actions taken in furtherance of the foreign policy of the United States. Throughout this litigation, the M.s have urged the circuit court not to consider the United States' declarations and exhibits, and they have attempted to establish a competing narrative. *See, e.g.,* M.s' Opening Br. 8-12. As described below, *see infra* n.11, the circuit court accepted into evidence and implicitly relied on the declarations and exhibits sustaining the facts as set forth here before issuing its order vacating the final order of adoption.

next door to individuals the U.S. and Afghan forces had targeted during the military operation and that the child's parents were incidental casualties in the fighting, R. 532. The Afghan Ministry also confirmed that it had identified the child's next of kin and verified, pursuant to Afghan law, that they were legitimate relations. *Id.*

In February 2020, the Afghan Ministry, through a diplomatic note, formally notified the United States that it was granting custody of the child to her next of kin pursuant to Afghan guardianship law and asked the United States to transfer the child to the Afghan Government so that she could be united with her family. R. 532-33, 2384-85, 2403. The responsible U.S. officials determined that the Afghan Ministry had properly verified the identity of the child's relatives. R. 532. And considering Afghanistan's assertion of jurisdiction over the child, senior U.S. policy makers determined, *see, e.g.*, R. 532, 2385, 2405-07, that the United States should transfer the child to the Afghan Government, consistent with the United States-Afghanistan bilateral security agreement, which says that U.S. forces will "respect the Constitution and laws of Afghanistan," as well as other applicable international law principles concerning the need to take appropriate steps to unify families separated by armed conflict. Security and Defense Cooperation Agreement Between the United States of America and the Islamic Republic of Afghanistan, Afg.-U.S., art. 3.1, Sept. 30, 2014 (entered into force Jan. 1, 2015), <https://perma.cc/RT6G-VMED> (U.S.-Afghanistan Security Agreement); *see also, e.g.*, U.S. Dep't of Def., *Law of War Manual* § 17.10.1 (last updated Dec. 2016), <https://perma.cc/2ZPH-EJEE> ("All appropriate

steps shall be taken to facilitate the reunion of families temporarily separated.”).

2. J.M., then a U.S. Marine Captain, had encountered the baby at Bagram Air Base in Afghanistan while he was on a brief, temporary assignment. R. 512-14. J.M. attended an October 23, 2019, meeting between U.S. officials and officials of the Afghan Ministry and the Red Cross during which the Afghan Ministry and the Red Cross informed U.S. officials that they had possibly identified the child’s next of kin and were working to verify that the individuals were the child’s relatives. R. 2383-84. But shortly thereafter, J.M.’s superior excluded him from “deliberations or decision-making regarding the child” because the superior “became concerned” that J.M. “had diverged from [the Department of Defense]’s position” that it was necessary to work with the Afghan Government to try to identify the child’s next of kin and “[J.M.] was attempting to interfere inappropriately in decision-making regarding the child.” R. 514.

On November 1, 2019, while J.M. was still in Afghanistan—and only a short time after he first encountered the child—J.M. and S.M. petitioned the Juvenile and Domestic Relations Court of Fluvanna County, Virginia (Juvenile Court), for sole legal custody over the child. See R. 1061. The M.s gave the United States no notice of the custody proceedings; unaware of the proceedings, the United States did not participate. The Juvenile Court granted the M.s temporary custody on November 6, 2019. R. 1061-68. Based on the M.s’ *ex parte* representations, the court found that: the baby was a stateless child of non-Afghan fighters, R. 1063; no living family members had been located, despite

diligent efforts by the Afghan Government and the Red Cross, *id.*; the Afghan Government had twice refused to take custody of the child, R. 1063-64; Afghanistan would provide a written waiver of jurisdiction over the child “in a matter of days,” R. 1064; and J.M. “has acted as ‘parent’” to the child, R. 1065.³

The order also stated that notice had been given to “all proper and necessary parties,” R. 1066, even though the M.s gave no notice of their custody petition to the United States, which then had physical custody of the child, R. 533 (noting child’s transfer from U.S. custody on February 27, 2020); *see* Code § 20-146.16 (requiring notice to physical custodian). J.M. did notify certain U.S. personnel of the custody order after the fact. On November 7, 2019, J.M. wrote to an attorney in the Office of the Legal Advisor for U.S. Forces–Afghanistan informing him of the order. R. 514, 518. However, J.M.’s email stated that while the M.s had obtained a custody order, “[o]f course, this doesn’t impact [the Afghan Government]’s decision, but [it] does allow [J.M.] to create a path to the U.S. as soon as we secure a waiver [of jurisdiction from the Afghan Government].” R. 518.

³ The court stated that some of its findings were based on “[m]ilitary documents.” R. 1062. However, the documents the M.s submitted were not authorized for use in those proceedings or authenticated by the United States and do not represent the official position of the federal government. *See* U.S. Dep’t of Def., Directive 5405.2, *Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses* (July 23, 1985), <https://perma.cc/R4MZ-T7HD> (establishing procedures for the release of official information in litigation and testimony by Defense Department personnel as witnesses).

Days later, on November 10, 2019, the M.s petitioned the Circuit Court for Fluvanna County to adopt the child. *See* R. 14868-73 (order). The M.s again gave the United States no notice of the proceedings. The court granted the petition the same day, based on its findings that the child was a stateless minor whose family could not be located. R. 14869. The court acted on an emergency basis because the M.s represented that the child needed urgent medical treatment and that making the child a dependent of J.M. would allow the child's medical evacuation from Afghanistan for treatment at the University of Virginia Children's Hospital. *Id.* Because of the purported emergency circumstances, the court waived the usually applicable prerequisites for adoption under state law, including a home study. R. 14869-70.

3. Despite having represented that the child had urgent medical needs necessitating evacuation to the United States, the M.s made no attempt to enforce the custody and adoption orders for over three months. Upon learning that the United States was planning to transfer the child to the Afghan Government for unification with her Afghan relatives, on February 26, 2020, the M.s sued the United States in federal court seeking a temporary restraining order that would bar the transfer. R. 1031-53 (verified complaint). *See generally Baby L. v. Esper*, No. 3:20-cv-9 (W.D. Va.). The M.s relied on the temporary custody order issued by the Juvenile Court. R. 1061-68 (exhibit to verified complaint). They made no mention of the interlocutory adoption order they had obtained, of which the United States had no knowledge. R. 1031-53. Indeed, the M.s' counsel represented to the court that the M.s had no intention to adopt the child.

R. 1258 (The court: “Your client is not asking to adopt the child.” Counsel: “No, sir. He wants to get her medical treatment in the United States because we dispute that this is a family member.”); *see also Doe v. M./J.*, No. 3:22-cv-00049, 2024 WL 3524070, at *1 (W.D. Va. July 24, 2024).

The U.S. district court denied the M.s’ request for a temporary restraining order. R. 1274-77. *See generally Doe*, 2024 WL 3524070, at *4-5 (discussing temporary restraining order proceedings). Among other things, the court accepted the United States’ argument that the M.s were unlikely to prevail on the merits because their custody order was defective as a matter of Virginia law as it was premised on an incorrect representation that Afghanistan would waive jurisdiction over the child. R. 1276 (“Afghanistan has not issued any waiver of jurisdiction. Instead, . . . Afghanistan is expressly requesting that [the child] be returned under Afghan authority and care.”). In fact, the M.s “conceded” that Afghanistan’s consent “was required and they sought it” but “it ultimately was not obtained.” R. 1277.

The district court also held that the M.s were unlikely to prevail on the merits because “as custodian of [the child the] Department of Defense should have been formally served with and provided notice of the [custody] proceedings.” R. 1276. The district court further denied the temporary restraining order because of the “significant[foreign policy interests] implicated by this case. . . . [I]t is the role of the State Department and not private litigants or the Court to determine the foreign policy interest of the United States.” R. 1277.

The day after the district court ruled, on February 27, 2020, the United States transferred the child to

the Afghan Government. R. 2386. That same day, the Afghan Government granted custody of the child to her next of kin, her paternal uncle, A.A.'s father. *Id.* “[A]s a courtesy in recognition of [J.M.]’s expressed interest in the child,” a U.S. official informed J.M.’s attorney that the child had been “transfer[red] to her relatives.” R. 955. The M.s were also notified of the transfer when the United States informed the U.S. district court in the federal proceedings. R. 1571-72. The M.s subsequently dismissed their federal suit.

4. Although the M.s knew that Afghanistan had not waived its jurisdiction over the child and that the child instead had been united with her Afghan relatives, they did not tell the Circuit Court for Fluvanna County of that development, and they continued to pursue the child’s adoption. On December 3, 2020, at the M.s’ request, the circuit court converted the interlocutory adoption order into a final adoption order. R. 2009-12. The final order noted the reports of the county department of social services and the guardian *ad litem* recommending entry of a final order of adoption. R. 2010. But the order otherwise relied on the findings of the earlier interlocutory adoption order that the child is “orphaned,” “stateless” and of “[u]nknown” nationality. R. 2009-10 (quotation marks omitted). The court stated that “no further consent to adoption or notice of these proceedings is required,” R. 2011, even though the child had been in the A.s’ custody in Afghanistan since late February 2020.

According to the A.s, not long after the Afghan Government transferred the child to her family’s care, the M.s contacted the A.s through an intermediary. R. 140 (bill of particulars). The M.s offered to assist

the A.s in bringing the child to the United States, ostensibly for specialized medical care, without revealing their ongoing efforts to adopt her. *Id.* After more than a year of communications, first with the intermediary and then with J.M. directly, the A.s accepted the offer, unaware of the existence of the Virginia court final adoption order. R. 140, 144-45.

As the security situation in Afghanistan deteriorated, J.M. arranged for the emergency evacuation of the A.s and the child by U.S. forces, with the unwitting assistance of federal employees who had no knowledge of the prior events involving the child. R. 3280-3304. J.M. falsely informed U.S. personnel that the child was his “daughter per both Afghan and U.S. court orders,” and he provided them with a fraudulent document that he described as the Afghan court order. R. 3284, 3298-302; *see* R. 3280 (stating that the child “is completely clear on the Afghan side”). In his communications with U.S. officials conducting the evacuation, J.M. did not disclose that the Afghan Government had given custody of the child to her relatives, describing the A.s only as a “Pashtun Couple” who were accompanying the child. R. 3286.

The A.s and the child entered the United States in late August 2021 and ended up at a military base in Virginia at which some Afghan evacuees were processed. R. 8-9, 146-47. At that point, the A.s had been the child’s legal guardians under Afghan law as determined by the Afghan Government and had been raising her for 18 months. On September 3, 2021, after presenting the final adoption order to federal personnel at the base who lacked knowledge of the preceding events, the M.s were allowed to leave with the child, over the A.’s objections. *Id.* The child has

been in the M.s' custody since. The A.s now reside in the United States and have not seen the child since the M.s took physical custody of her. R. 147, 4274.

STATEMENT OF MATERIAL PROCEEDINGS

1. In March 2022, the A.s filed a petition in the Circuit Court for Fluvanna County seeking to vacate the M.s' final adoption order and an order requiring the M.s to return the child to them. R. 1-11. The A.s principally claimed that the M.s obtained the adoption order through fraud (by representing that the child was stateless and that Afghanistan would waive jurisdiction over the child) and without complying with Virginia statutory procedure (because, among other things, they did not notify the United States of their custody petition). R. 1-3; *see* R. 105 (bill of particulars). The A.s also claimed that the custody and adoption orders are preempted by the United States' foreign policy decision to transfer the child to the Afghan Government for unification with her Afghan relatives. *See, e.g.*, R. 3103-11. The circuit court held numerous hearings, and there have been voluminous filings by the parties and the United States.

The United States filed two statements of interest pursuant to 28 U.S.C. § 517 and two motions to intervene for purposes of removing the case to federal court, *see* 28 U.S.C. § 1442(a)(1), accompanied by declarations from officials from the U.S. Departments of State and Defense explaining the U.S. military's custody and care for the child and the United States' decision to transfer her to the Afghan Government for

placement with her next of kin.⁴ R. 486-534, 2349-2407, 2802-31, 3204-3308.

The declarations provide details concerning the Afghan Ministry's efforts to identify the child as an Afghan citizen and to locate her next of kin. R. 531-32, 2383-86. They described the Ministry's method for verifying the identity of the child's paternal uncle and the evidence that convinced U.S. officials that the Ministry had indeed located the child's family. *Id.*; *see* R. 2395-97 (transcript of interview with child's uncle). One declaration attached a cable from the State Department informing the U.S. Embassy in Kabul of the State Department's determination, after interagency consultation, that the United States should respect the Afghan Government's diplomatic request for the child's custody in light of its identification of the child's next of kin, consistent with the United States' obligations under the U.S.-Afghanistan Security Agreement and international legal norms applicable in armed conflicts regarding family reunification. R. 532-33, 2385; *see* R. 2405-07 (State Department cable).

Relying on the federal government's determinations and actions described above, the United States' circuit court filings argued, among other things, that the M.s' custody and adoption orders are void due to the M.s' misrepresentations. *See, e.g.*, R. 503-06. The United States also argued that the federal government's decision to recognize Afghanistan's assertion of jurisdiction over the child in Afghanistan and to transfer the child to the Afghan

⁴ The circuit court denied the United States' intervention motions without prejudice. *See* R. 12253, 12297.

Government's custody for family unification was a foreign policy decision that must be respected by state courts. The filings argued that the United States made that decision pursuant to the federal government's foreign affairs power, which therefore preempts any inconsistent application of state law, even in an area of traditional state regulation such as domestic relations. Because the custody and adoption orders conflict with the United States' foreign policy decision to transfer custody of the child to the Afghan Government for unification with her family and were based on the M.s' false representation that the child was stateless, those orders are preempted. *See, e.g.*, R. 501-03, 506-10.

2. On November 30, 2022, the court rejected the M.s' pleas in bar seeking dismissal of the A.s' challenge. R. 2589-93. The M.s had argued that the A.s' challenge was precluded by the Code provision prohibiting challenges to Virginia adoption orders raised more than six months after the final order of adoption. *See, e.g.*, R. 33-34; see Code § 63.2-1216. The circuit court held that the A.s could maintain their challenge under court of appeals precedent permitting a biological parent who participated in the rearing of the child to challenge a final adoption order after expiration of the limitation period because the time limit otherwise would violate the parent's due process rights under the U.S. and Virginia Constitutions. R. 2590; *see* R. 2532-33 (discussing *F.E. v. G.F.M.*, 35 Va. App. 648 (2001) (en banc)). The M.s sought interlocutory review of that decision.

Four months later, the circuit court vacated the final adoption order because it concluded that the order violated the A.s' due process rights and was issued based on extrinsic fraud. R. 12861-13016. In

a written order, *see* R. 3672-82, the court observed that “[a]t the time that the child was found it was unclear to anybody in an official capacity what the child’s status was with regard to citizenship,” R. 3673. But, the court recognized, “in the end, it was determined that the child was an Afghan child,” a fact the court found “important.” *Id.* The court observed that “at the time all of this began this child was in the custody of the United States and the United States maintained custody of this child, until the child’s custody was transferred to the government of Afghanistan, and thereby to Petitioner A.A.’s uncle [sic], and thereby to [the A.s] later on.” *Id.*

The court explained that it “did not have all of the information known to the [M.s] at the time the [final] order was entered.” R. 3676. The court noted as examples the facts “that there was no waiver coming [from the Afghan Government] and the United States made a determination to surrender or give the child to the Afghan government.” *Id.* That constitutes “evidence of some extrinsic fraud as it relates to this process and what was happening in Afghanistan at the same time the Court was issuing its final order.” *Id.* In short, “[t]here are some things that the Court should have been made aware of from [the M.s] in this process that the Court was never made aware of.” *Id.*

The court further found that the A.s “were de facto parents of this child at the time that they arrived in the United States” and for 18 months before then. R. 3675. Considering that status, the court concluded that the A.s “were entitled to some process that they did not receive” before the M.s took custody of the child from them. R. 3676. Because the A.s did not receive the process due, and because the M.s failed to inform the court of material information, the court

voided the final adoption order. *Id.* However, the court denied the A.s' motion seeking legal and physical custody of the child. R. 3677. Instead, the court determined that the prior order giving custody to the M.s remains in effect, as does the interlocutory adoption order, and it ordered that the child remain in the M.s' custody. R. 3676. In so ruling, the court did not consider whether those orders also were infected by the M.s' extrinsic fraud. *See id.*

With respect to the United States' foreign policy arguments, the court stated without explanation that "for purposes of this ruling . . . the United States' determination with regard to its foreign policy imperatives ha[s] been met." R. 3674. "And," the court opined, its "order does not run afoul of any finding or any foreign policy determination of the United States." *Id.* Although the court's decision does not further explain these statements, in an earlier hearing, the circuit court suggested that the United States' foreign policy interests were satisfied once the United States transferred custody of the child to the Afghan Government. R. 12975. The court also stated that "there are people within the United States government that knew" what J.M. "was trying to accomplish on behalf of this child," but the United States "did nothing" until urging the court to vacate the final adoption order as preempted by federal foreign policy interests.⁵ R. 3674.

The circuit court stayed the case pending any further appeal. R. 3677. The court indicated that, after any appeals are concluded, it intends to rule on

⁵ *But see infra* n.9 (noting that the record contains no evidence that the United States was ever served with notice of the custody or interlocutory adoption proceedings).

the original adoption petition based on the court's assessment of the best interests of the child. R. 3676-77. The A.s and the M.s both appealed.

3. The court of appeals affirmed. *A.A., et al. v. J.M., et al.*, 81 Va. App. 213, 241 (2024).

a. First, the court held that the Juvenile Court lacked subject-matter jurisdiction to issue the initial, November 2019, custody order. The Code identifies four situations in which a court may make an initial custody determination. *A.A.*, 81 Va. App. at 231; *see* Code § 20-146.12(A). Those conditions are the “exclusive jurisdictional basis for making a child custody determination by a court of this Commonwealth.” *A.A.*, 81 Va. App. at 231 (quoting Code § 20-146.12(B)). The court of appeals concluded that “[n]one of these requirements is satisfied here.” *Id.*; *see id.* at 231-32. (explaining why). Accordingly, it held that the initial custody order is void for lack of subject matter jurisdiction. *Id.* at 232-33.

The court of appeals then held that the circuit court had subject-matter jurisdiction over the M.s’ interlocutory and final adoption petitions by virtue of the Code’s broad grant of “original and general jurisdiction of all civil cases” to circuit courts. *AA.*, 81 Va. App. at 233 (quoting Code § 17.1-513) (citing *Bonanno v. Quinn*, 299 Va. 722, 735 (2021)). However, the court of appeals concluded that the circuit court lacked “the power to render” the orders, which the court of appeals described as “a requirement related to, but distinct from, subject-matter jurisdiction” involving a court’s authority to act pursuant to statute or other authority. *Id.* at 234. When a court enters an order outside its authority, the order “is void ab initio.” *Id.* In this case, the court of appeals determined that the circuit court lacked

the power to render the interlocutory and final adoption orders because “the adoption of the child does not fit any of the five categories of adoption authorized” by the Code. *Id.* at 236 (identifying “agency, parental placement, stepparent, close relative, and adult adoption” as the five categories of adoption). The statutory requirements for agency adoption, the category on which the circuit court relied, were not met because “the child was not ‘properly committed or entrusted to [the agency’s] care.’” *Id.* (alteration in original) (quoting Code § 63.2-1221). “[T]hese procedural errors are so outside the scope of the adoption code,” the court of appeals concluded, “that the circuit court lacked the power to render the adoption orders, rendering both adoption orders void ab initio.” *Id.*

b. Next, the court of appeals held that the statute prohibiting challenges to final adoption orders after six months does not bar the A.s’ challenge. *A.A.*, 81 Va. App. at 237-38 (discussing Code § 63.2-1216). This statute reflects the Virginia General Assembly’s intent “to favor the finality of adoptions” over “the possible loss to a person whose rights are cut off through fraud and ignorance.” *Id.* at 237 (second quotation quoting *F.E.*, 35 Va. App. at 661). However, “the unique nature of subject-matter jurisdiction and the power to render” led the court “to conclude that Code § 63.2-1216 does not bar collateral attacks challenging a lack of subject-matter jurisdiction or power to render.” *Id.* The court observed that orders entered without subject matter jurisdiction or the power to render are void ab initio and subject to attack in any direct or collateral proceeding. *Id.* at 237-38. In addition, the court found it meaningful that the limitations statute identifies lack of personal

jurisdiction, but not lack of jurisdiction generally, as the sort of ground to challenge an adoption order that is foreclosed. *Id.* at 238-39.

Since the court determined that the limitations statute did not preclude the A.s' challenge, and because it held that the final adoption order is void ab initio, the court of appeals concluded that it "need not decide if the A.s are de facto parents with due process rights that were violated," which would be an alternative basis for avoiding the statute's time limits. A.A., 81 Va. App. at 240.

c. In a footnote, the court of appeals observed that, "[t]o the extent that [the court's] interpretation" of the limitations statute "is lacking, federal preemption principles counsel the same result." A.A., 81 Va. App. at 239 n.24. After describing the doctrines of conflict and field preemption in the foreign affairs context, the court noted that "[t]here was significant evidence presented below that the United States took direct actions in an exercise of federal executive authority by turning over custody of a child found on Afghan soil, during a military engagement, to Afghanistan, and that strict application of Code § 63.2-1216 would conflict with this decision." *Id.* The court also opined that "the dormant foreign affairs doctrine" would "seem to block the statute from preventing the reopening of an adoption of a foreign-born child, while the child was on foreign soil, in an adoption that occurred without the consent (or knowledge) of the foreign country or any agency therein." *Id.* But given the decision's "power to render rationale," the court stated that it "need not decide this case on such grounds." *Id.*

ARGUMENT

All the custody and adoption orders issued in this case are void because they conflict with the decision of the United States, in the exercise of its constitutional powers over military and foreign affairs, to respect the determination of a foreign government concerning the status of a child within its territory in the context of an armed conflict. For the same reason, the limitations statute as applied in this case is also preempted, because it would shield from review *ex parte* state court orders entered in violation of the United States' decisions made in that context in Afghanistan.

It would be consistent with the interests of the United States for this Court to affirm the judgment of the court of appeals on state-law grounds. And, as we argue below, there is ample evidence that the M.s obtained the custody and adoption orders through extrinsic fraud. But should the Court nonetheless determine that there is no basis in state law to affirm, it should hold that the limitations statute as applied in this case and the custody and adoption orders are preempted because they conflict with decisions entrusted to the federal government under our constitutional structure. *See Primov v. Serco, Inc.*, 296 Va. 59, 68 (2018) (stating that this Court may affirm the circuit court “on any ground supported by the record” (quotation marks omitted)). As there is no legal basis for keeping the child from her Afghan family, this Court should direct her immediate return to the A.s, which was the status quo when they entered the United States.

I. The Limitations Statute as Applied in This Case and the Custody and Adoption Orders Are Preempted by the United States' Decision to Recognize Afghanistan's Jurisdiction Over the Child

The threshold question this Court must consider is whether the limitations statute precludes the A.s' challenge to the custody and adoption orders. As applied in this case, the limitations statute is preempted because it would insulate from review *ex parte* custody and adoption orders, entered without the United States' knowledge, that are themselves preempted because they conflict with the United States' decision when it had physical custody of the child after finding her injured as a result of combat operations. That decision was to recognize the Afghan Government's jurisdiction over the child and to transfer the child to the Afghan Government so that it could confer custody on individuals that government had determined to be her relatives, after United States officials concluded that the Afghan Government correctly identified the family.

A. Standard of Review

Whether federal law preempts state law is a question of law reviewed de novo by this Court. *Maretta v. Hillman*, 283 Va. 34, 40 (2012), *aff'd*, 569 U.S. 483 (2013). While there ordinarily is "a presumption against pre-emption of state laws governing domestic relations," there is no established tradition of state law governing the adoption of children in foreign countries, and where state family law does "major damage to clear and substantial federal interests[,] . . . the Supremacy Clause will demand that state law . . . be overridden." *Hillman v.*

Maretta, 569 U.S. 483, 490-91 (2013) (quotation marks omitted).

B. Argument

1. The U.S. Supreme Court has made clear that when the federal government exercises its constitutional authority, it preempts conflicting state law, even in areas of traditional state regulation. For example, in a recent decision, the Court explained that “Congress lacks a general power over domestic relations” and “responsibility for regulating marriage and child custody remains primarily with the States.” *Haaland v. Brackeen*, 599 U.S. 255, 276 (2023). Nevertheless, “when Congress validly legislates pursuant to its Article I powers,” the Court “ha[s] not hesitated to find conflicting state family law preempted.” *Id.* at 277 (quotation marks omitted). *See generally id.* at 276-80 (holding that adoption provisions of the Indian Child Welfare Act preempt conflicting state adoption law). And when federal law preempts conflicting state law, state courts are required to apply the federal law. *Id.* at 286. Thus, in *Brackeen*, the Supreme Court held that state courts must apply federal-law placement preferences in making custody determinations concerning Indian children, notwithstanding state law to the contrary. *Id.*

Similarly, the U.S. Supreme Court has held that the “foreign policy of the Executive Branch” preempts conflicting determinations made in the execution of state law because the President’s authority with respect to the Nation’s foreign policy is part of the “executive Power” vested in the President by Article II of the Constitution. *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413-14 (2003) (quotation marks omitted). To be preempted, state law need not

make the Executive's actions in the area of foreign affairs impossible to effectuate. It is enough "that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government." *Id.* at 420. See generally *id.* at 420-25 (holding that state law regulating Holocaust-era insurance policies was preempted by executive agreements with foreign states addressing Holocaust-era claims). State courts may not apply state law that is preempted by Executive Branch actions taken in furtherance of the United States' foreign policy. See *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968); see also *Garamendi*, 539 U.S. at 413-19.

2. In this case, Afghanistan had the sovereign right to determine whether an infant found on a battlefield within its territory was an Afghan citizen. See generally *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute."). And the United States' decisions to recognize Afghanistan's assertion of jurisdiction over the child based on that determination, and to transfer the child in Afghanistan to the Afghan Government so it could confer custody on an individual the Afghan Government determined to be her living relative, were self-evidently made pursuant to the Executive Branch's authority to make such decisions. That authority encompasses the United States' dealings with Afghanistan concerning a non-U.S. national in United States custody in Afghan territory, see R. 1757-65, 2383-87, 2405-07, 14882-14906, particularly considering the Executive Branch's determination that those decisions were supported by

the United States' bilateral security agreement with Afghanistan as well as the law of war, which the United States, through the Executive, was responsible for implementing in that setting. *See* U.S.-Afghanistan Security Agreement art. 3.1; *Law of War Manual, supra*, § 17.10.1; R. 2386-87 (¶¶ 14, 16).

The Virginia courts' custody and interlocutory adoption orders were premised on the courts' determination, based on the M.s' false representations, that the child was stateless and had no living relatives and that Afghanistan intended to waive its jurisdiction over the child. R. 1061-68, 2009-12, 14868-69. As the various declarations from U.S. officials explain, at that time those orders were entered, the United States had decided to work with the Afghan Government and the Red Cross to determine whether the child was Afghan and to identify her next of kin. *See, e.g.*, R. 14874-86. The United States' intent was to give the Afghan Government custody of the child if U.S. officials were satisfied that the child was an Afghan citizen and that her family had been located. *See, e.g.*, R. 1759, 1762-63, 14882-83. The custody and interlocutory adoption orders conflicted with the implementation of the federal government's decision, in the exercise of its authority in military and foreign affairs in Afghanistan, to cooperate with the Afghan Government in its efforts to identify the child's Afghan relatives and unite the child with her family.

The M.s obtained the final custody order based on the same misrepresentations, after they knew that the United States had determined that Afghanistan had correctly identified the child's living relatives and after the United States transferred the child to the Afghan Government for unification with her family.

See R. 955, 1571-72, 2009-12, 2386. Courts lack authority to second-guess such a determination by the federal government made in the execution of foreign policy in foreign territory. *See, e.g., Nestlé USA, Inc. v. Doe*, 593 U.S. 628, 638 (2021) (“[T]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns” (quotation marks omitted)); *Hernandez v. Mesa*, 589 U.S. 93, 104 (2020) (“[M]atters relating to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.” (second alteration in original) (quotation marks omitted)). Yet, the final adoption order was directly contrary to the United States’ decision to recognize Afghanistan’s assertion of jurisdiction based on the determination that the child was an Afghan citizen who had living relatives.

It is “beyond dispute” that

at some point an exercise of state power that touches on foreign relations must yield to the National Government’s policy, given the concern for uniformity in this country’s dealings with foreign nations that animated the Constitution’s allocation of the foreign relations power to the National Government in the first place.

Garamendi, 539 U.S. at 413 (quotation marks omitted). In this case, the federal government’s decision to recognize the Afghan Government’s determination of the child’s Afghan citizenship and to transfer the child to the Afghan Government for unification with her Afghan family preempts the lower courts’ custody and adoption orders, which

granted the M.s' petitions based on the conflicting findings that the child was stateless and lacked any living relatives and on the assumption that Afghanistan was going to waive its jurisdiction.

The considered decision by the United States to recognize the Afghan Government's determination of the status and placement of a foreign child in its territory in the context of an armed conflict is not subject to collateral attack in these proceedings; any Virginia court order that is based on a determination that the child was stateless and had no living family members is preempted. Further, the M.s may not use the limitations statute to enforce an *ex parte* final adoption order they surreptitiously obtained that directly conflicts with the United States' decision in this context of a child over whom it had assumed physical custody after finding her injured on the battlefield. Where parties consciously used state law to circumvent a decision the Constitution entrusts to the federal government in this context, and where they intentionally kept the United States ignorant of their actions—thus preventing the United States from participating in the judicial proceedings—a limitations statute that otherwise would foreclose collateral attack on the conflicting state-court orders is preempted because it conflicts with the foreign policy of the United States.⁶

⁶ Relying on *Medellín v. Texas*, 552 U.S. 491 (2008), the M.s argued below that the Executive Branch's foreign policy determinations are not binding on state courts in this case. See, e.g., R. 3186; see also M.'s Opening Br. 6, 26 n.24. *Medellín* is inapposite. That case involved a "non-self-executing" treaty—an international agreement that has no domestic effect unless implemented by legislation. See 552 U.S. at 504, 508. *Medellín* held that the President cannot give binding domestic legal effect

3. The United States' policy interests did not end upon transfer of the child to the Afghan Government. The United States has a continuing interest in ensuring that its decisions in this case are not undermined.

First, as described above, the United States has an ongoing interest in ensuring that its determination made in the exercise of its authority over military and foreign affairs in a foreign country in connection with combat operations are not surreptitiously undone by state court orders that fundamentally conflict with those determinations and actions the United States took to implement them.

Other foreign policy considerations underscore the United States' continuing interest in the recognition of the A.s' rightful custody of the child. For example, the United States is a party to a treaty concerning intercountry adoptions that permits such adoptions from other state parties to proceed only if authorities

to the provision of a non-self-executing treaty with respect to an inmate convicted in state court of a crime committed in the State, where there was no question about the state court's authority to adjudicate. *See id.* at 523-32. This case does not implicate that principle. The foreign policy decisions at issue here—the decisions to recognize the Afghan Government's determination of the citizenship of a foreign child found on a battlefield in Afghanistan and to transfer the child to the Afghan Government so it could give the child's surviving Afghan family legal custody—are “matter[s] well within the Executive's responsibility for foreign affairs.” *Garamendi*, 539 U.S. at 420. And the lower courts' authority to enter the custody and adoption orders is anything but clear. States have not traditionally made adoption determinations concerning children in foreign countries who have no connection to the United States. And Virginia law does not provide authority for custody and adoption determinations in the context of this case. *See infra* pp. 38-43.

in the child's country of origin have deemed the child to be adoptable and only after due consideration has been given to finding an adoption placement for the child in its country of origin. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption art. 4(a), (b), May 29, 1993, S. Treaty Doc. No. 105-51, <https://perma.cc/5HCH-YU3G> (Hague Convention or Convention).

Afghanistan is not a party to the Convention. However, as a member of the Hague Conference on Private International Law, the United States has joined in a recommendation that party states apply the Convention's principles, as far as practicable, with respect to adoptions involving non-party states to prevent the abduction, sale, and traffic in children and their illicit procurement. *See* Hague Conference on Private Int'l Law, *Conclusions and Recommendations and Report of the Special Commission on the Practical Operation of the 1993 Hague Intercountry Adoption Convention (17-25 June 2010)*, at 5, 9 (Mar. 2011), <https://perma.cc/29JT-QL77>. Consistent with that recommendation, federal statutes and regulations governing the immigration and intercountry adoption of an "alien orphan" from states that are not parties to the Convention require the prospective parents to provide evidence of either "adoption abroad" or "custody of the orphan in accordance with the laws of the foreign-sending country." 8 C.F.R. § 204.3(a), (d)(1)(iv); *see* 8 U.S.C. § 1101(b)(1)(F)(i) (alien orphan classification). Also consistent with that recommendation, Congress extended certain provisions of the Hague Convention's implementing legislation addressing the accreditation of adoption service providers to cover

the adoptions of orphans from countries that are not parties to the Convention. *See* 42 U.S.C. § 14925(a).

The custody and adoption orders by the circuit court in this case were not based on a determination by the Afghan Ministry—or any Afghan authority—that intercountry adoption was in the best interests of the child. Nor did the M.s establish that they had either adopted the child in Afghanistan or had legal custody of her under Afghan law. *But see* R. 3284 (J.M. falsely claiming that the child “is my wife and I’s daughter per both Afghan and U.S. court orders”); R. 3298-302 (fraudulent Afghan court order). The custody and adoption orders in this case are therefore inconsistent with federal regulations applicable to the adoption of alien orphans and with the policy reflected in a key provision of the Convention. *See* 8 C.F.R. § 204.3(a), (d)(1)(iv); Hague Convention art. 4(a), (b); *see also* R. 2406 (State Department cable) (noting that the M.s’ custody order did not satisfy “the requirements” of “the inter-country adoption process”). Because the custody and adoption orders are inconsistent with the process the United States has implemented by statute and regulations for the adoption of orphans from non-Convention states, a failure to vacate the orders and direct return of the child to the A.s would undermine the United States’ international leadership concerning intercountry adoption.

In addition, the United States has a continuing foreign policy interest in supporting international law principles that require, when possible, the unification of families separated by armed conflict. *See Law of War Manual, supra*, § 17.10.1. Notably, the United States has publicly condemned Russia’s conduct in the context of armed conflict in Ukraine of facilitating

the “adoption” of Ukrainian children by families in Russia even though they have guardians in Ukraine. See Beth Van Schaack, U.S. Ambassador-At-Large for Global Criminal Justice, *Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression*, U.S. Dep’t of State (Mar. 27, 2023), <https://perma.cc/VB79-Z88R>; see also Hague Conference on Private Int’l Law, *Information Note - Children Deprived of Their Family Environment Due to the Armed Conflict in Ukraine* (Mar. 16, 2022), <https://perma.cc/DPU4-4V7U> (warning that armed conflict “should not be used as a justification for expediting intercountry adoptions, or for circumventing or disregarding international standards and essential safeguards for safe adoption”). The fact that a U.S. state court has facilitated a U.S. Service Member’s adoption of an Afghan orphan and her nonconsensual removal from her Afghan family could present a challenge to the United States’ ongoing diplomatic objectives in other contexts concerning the unification of families separated by armed conflict. That also presents a continuing foreign policy interest in this litigation.

Virginia courts lacked authority to issue the custody and adoption orders concerning the child, and the United States’ ongoing foreign policy interests underscore that the orders did not become retroactively valid after the United States transferred the child to Afghan Government custody.

II. The Custody and Adoption Orders Are Void Because the M.s Obtained Them Through Extrinsic Fraud

The A.s argue that fundamental jurisdictional defects and due process preclude the application of the

limitations statute to their challenge. Resp. Br. 22-46. The United States takes no position on those questions. But should the court reach the underling merits under Virginia law, the United States agrees with the A.s, *see* Resp. Br. 46-47, that the custody and adoption orders are void because the M.s procured them by extrinsic fraud.

A. Standard of Review

“A finding of extrinsic fraud on the court must be supported by clear and convincing evidence.” *Gulfstream Bldg. Assocs., Inc. v. Britt*, 239 Va. 178, 183 (1990).

B. Argument

Extrinsic fraud is a “fraud upon the court.” *State Farm Mut. Auto. Ins. Co. v. Remley*, 270 Va. 209, 218 (2005). It occurs when a litigant obtains a judgment through “conduct which prevents a fair submission of the controversy to the court.” *Id.* (quotation marks omitted). Extrinsic fraud includes “[k]eeping the unsuccessful party away from court by . . . purposely keeping him in ignorance of the suit.” *Bonanno v. Quinn*, 299 Va. 722, 736 (2021) (third alteration in original) (quotation marks omitted). “[A] controlling factor” in determining whether a party committed extrinsic fraud “is whether the misconduct tampers with the judicial machinery and subverts the integrity of the court itself.” *State Farm*, 270 Va. at 217 (quotation marks omitted).

1. There is clear and convincing evidence supporting the circuit court’s finding that the M.s obtained the final adoption order by committing a fraud on the court. The same rationale applies also to the initial custody order and the interlocutory adoption order.

As the circuit court explained, “the fact of the matter is the Court did not have all of the information known to the [M.s] at the time the [final] order was entered.” R. 3676. The court noted as examples the fact “that there was no waiver coming [from the Afghan Government of its jurisdiction over the child] and the United States made a determination to surrender or give the child to the Afghan government.” *Id.* That constitutes “evidence of some extrinsic fraud as it relates to this process and what was happening in Afghanistan at the same time the Court was issuing its final order.” *Id.*

The circuit court’s findings are amply supported by the record. The final adoption order rested on the circuit court’s finding that the child was an “orphaned, stateless minor” of “[u]nknown” nationality. R. 2009-10 (quotation marks omitted). Those findings were based solely on the M.s’ *ex parte* representations. R. 2010-11. The court entered the final adoption order on December 3, 2020. R. 2012. By that date, the M.s were plainly aware that the Afghan Government had not disclaimed jurisdiction: Nine months earlier, the M.s had unsuccessfully sued to try to stop the United States from transferring the child to the Afghan Government so that Afghanistan could grant custody of the child to her Afghan relatives. R. 1274-77; *see* R. 1236 (identifying February 26, 2020, as date of the hearing). And shortly after the United States transferred the child on February 27, 2020, a U.S. official informed the M.s’ attorney that the transfer occurred and that the Afghan Government had given custody of the child to her Afghan relatives. R. 955. However, the M.s did not inform the circuit court of those developments. They instead urged the court to enter a final adoption

order in December 2020 based on what they knew to be misrepresentations.

Had the M.s informed the circuit court of the child's status and the United States' and Afghan Government's actions (as well as the U.S. district court's order), the court could not properly have entered a final adoption order. The circuit court asserted subject-matter jurisdiction over the M.s' petition for purposes of the final adoption order under Code § 63.2-1201. That provision requires a petitioner to "disclos[e] . . . the circumstances under which the child came to live, and is living, in the home of the petitioner." Code § 63.2-1201. When the circuit court entered the final adoption order, the child had never been in the United States, let alone in the M.s' home. The circuit court apparently relied on a legal fiction that the child was living with the M.s. *See* R. 2010 (stating that "the petitioners and minor child's *legal* residence is [in North Carolina], but they consider their domicile to be Fluvanna County, Virginia" (emphasis added)).

Putting aside whether such a fiction could support an adoption order under § 63.2-1201, the fiction could be sustained only if the M.s properly had legal custody of the child. But the Juvenile Court lacked jurisdiction to enter the custody order that was the basis for the circuit court's adoption order. The Juvenile Court had asserted jurisdiction under Code § 20-146.12(A)(2) and (4). R. 1061. The former subdivision applies "only if," among other things, the child's home state "has declined to exercise jurisdiction on the ground that this Commonwealth is the more appropriate forum." Code § 20-146.12(A)(2). That condition was not satisfied.

When the M.s began the custody proceedings, Afghanistan was the child's "home state." In "the case of a child less than six months of age," the Code defines "[h]ome state" as "the state in which the child lived from birth" with "a parent or a person acting as a parent." Code § 20-146.1 (quotation marks omitted). At the time the M.s filed their custody petition, the child, who was approximately four months old, had lived in Afghanistan, either with her Afghan parents or, after her parents' death, with the U.S. military. See R. 2384 (child's biological Afghan parents died as incidental casualties in combat operations just before child was found by U.S. forces on September 6, 2019); R. 2386 (child transferred from U.S. to Afghan custody on February 27, 2020); Code § 20-146.1 (defining "[p]erson" to include a "government, governmental subdivision, agency, or instrumentality" as well as "an individual" (quotation marks omitted); see also *id.* § 20-146.4(A) (treating a foreign country as a "state" for purposes of § 20-146.12). And the Afghan Government was looking for the child's family and had not declined to exercise jurisdiction. See, e.g., R. 531-32, 2383-84. Thus, subdivision (A)(2) could not have been a basis for the Juvenile Court's jurisdiction.⁷

⁷ The M.s argued below that only an Afghan court, not the Afghan Ministry, had authority to determine the child's placement. See R. 2324-25. That is incorrect and, in any event, immaterial. In this case, what is relevant for purposes of § 20-146.12 is whether the Afghan Ministry waived jurisdiction over the child. In deciding to transfer the child to the Afghan Government for family unification, State Department officials concluded that the Afghan Ministry had responsibility under Afghan law for identifying and verifying the extended family of children found orphaned in Afghanistan and for determining

The other subdivision on which the Juvenile Court relied likewise did not apply. Code § 20-146.12(A)(4) provides for jurisdiction if “[n]o court of any other state would have jurisdiction under the criteria specified in subdivision 1, 2, or 3.” Another state has jurisdiction under the criterion specified in subdivision (A)(1) if it “is the home state of the child on the date of the commencement of the proceeding.” Code § 20-146.12(A)(1). Because Afghanistan was the child’s home state when the M.s commenced the custody proceedings and Afghan courts were available in the event the Ministry’s search gave rise to disputed claims, subdivision (A)(4) did not give the Juvenile Court jurisdiction. The Juvenile Court did not rely on the remaining subdivisions, (A)(1) and (3). *See* R. 1061. But they are similarly inapplicable. Subdivision (A)(1) applies only if Virginia is or was the child’s home state; the child had never been to Virginia. Code § 20-146.12(A)(1). And like subdivision (A)(2), subdivision (A)(3) requires a waiver of jurisdiction by the child’s home state. *Id.* § 20-146.12(A)(3). Nor did the Juvenile Court rely on a Code provision that confers temporary emergency jurisdiction in some circumstances but only “if the

whether such children are Afghan citizens. State Department officials further understood at the time that an Afghan court might play a role in assigning an appropriate guardian for an orphaned child in the event Ministry officials were not able to identify any living relatives or when relation claims were in doubt—contingencies that did not come to pass in this case because the Ministry was able to identify living relatives. R. 2386-87 (¶¶ 14, 16). But assuming for the sake of argument that the M.s were correct in contending that only an Afghan court had authority to determine the child’s placement, it remains the case that no Afghan court waived jurisdiction over the child, so the requirements of § 20-146.12(A)(2) would still not be satisfied.

child is present in this Commonwealth.” *Id.* § 20-146.15(A).

The Juvenile Court’s determination that it had jurisdiction over the M.s custody petition was thus the direct result of misrepresentations and omissions by the M.s. As a consequence, the circuit court’s reliance on the M.s’ purported legal custody over the child could not provide a basis for the final adoption order under Code § 63.2-1201, even assuming that legal custody could be sufficient for such an order.

Even if the circuit court could have properly adjudicated the final adoption order, it could not have properly entered the order *ex parte*, had the M.s informed the court of the actions that occurred in Afghanistan. Because the circuit court believed, based on the M.s’ false representations, that the child was an “orphaned, stateless” minor, R. 2010, it held that “no further consent to adoption or notice of these proceedings is required,” R. 2011. However, Code § 63.2-1202(L) required the M.s to give “proper notice . . . and an opportunity to be heard” to the A.s, who were the child’s “legal custodian[s]” in Afghanistan at the time. And the M.s knew that the Afghan Government had given her Afghan family custody of the child. R. 955. Had the court known that the child was in the custody of her Afghan family, it would have had to require the M.s to give the A.s notice and an opportunity to be heard before the court acted on the M.s’ petition.

The record thus provides extensive support for the circuit court’s finding that the M.s obtained the final adoption order through extrinsic fraud. The M.s withheld from the court the facts that the Afghan Government had not waived jurisdiction over the child but had instead asserted it, that the United

States had decided to recognize the Afghan Government's determination of the child's Afghan citizenship and to transfer the child to the Afghan Government for family unification, and that a federal court had held that the custody order was legally deficient because of the M.s' misstatements and omissions. The M.s thereby deprived the court of critical information the court needed to determine whether it had jurisdiction over the M.s' adoption petition. And by keeping the A.s "in ignorance of" the adoption proceedings, *Bonanno*, 299 Va. at 736 (quotation marks omitted), the M.s deprived them of their opportunity to be heard and thereby undermined the fundamental fairness of the proceeding. Theirs was "conduct which prevent[ed] a fair submission of the controversy to the court" and "subvert[ed] the integrity of the court itself." *State Farm*, 270 Va. at 217-18 (quotation marks omitted). Accordingly, the circuit court properly held that the final adoption order is void. *See id.* at 218.

2. The circuit court's legal mistake was in failing to see that the same evidence of extrinsic fraud applies equally to the custody and interlocutory adoption orders that the M.s had obtained. The circuit court found that the M.s engaged in extrinsic fraud in obtaining the final adoption order because they failed to inform the court that Afghanistan did not waive its jurisdiction over the child and that the United States had transferred the child to the Afghan Government, which conferred custody of the child on her Afghan family. R. 3676. But the final order's finding that the child was an orphaned, stateless minor subject to the court's jurisdiction, on the theory that no other state had jurisdiction over her, derived entirely from the court's findings in the earlier

interlocutory order of adoption, which itself relied on the findings made in the custody order. R. 2009-11.

As discussed above, the Juvenile Court had identified Code § 20-146.12(A)(2) and (4) as the grounds for its jurisdiction to grant the M.s' petition for custody over the child. R. 1061. That court determined that it had jurisdiction under subdivision (A)(2) in light of its finding, based on the M.s' *ex parte* representations and submissions, that the child was "an orphaned child of a foreign fighter family, not native to Afghanistan, of whom no relatives have been able to be located" despite "[d]iligent efforts [that] have been made by the United States Forces Afghanistan, the Government of the Islamic Republic of Afghanistan[,] . . . and the International Committee of the Red Cross for over seven weeks to identify living family members of the Child." R.1063. Because her family supposedly was "nomadic," the court held that "no court of another state has jurisdiction over the Child under subdivision §20-146.12(A)(1)," which the court believed gave it jurisdiction under subdivision (A)(2). R. 1064; *see* Code § 20-146.12(A)(2) (providing for jurisdiction where "[a] court of another state does not have jurisdiction under subdivision 1").

Yet two weeks before the court heard the M.s' custody petition and entered the custody order on November 6, 2019, R. 1066, J.M. had attended the October 23, 2019, meeting in which Afghan officials and representatives of the Red Cross informed U.S. officials that they had possibly identified the child's Afghan next of kin and were working to verify their familial relationship, R. 2383-84. The M.s withheld that information from the court. Had the court been aware that the Afghan Government had determined

that the child may have living Afghan family members, which would have made it likely that she was herself Afghan, the court could not properly have proceeded in those circumstances to determine that the child was stateless, that no other state had jurisdiction over her, and that the court had jurisdiction under subdivision (A)(2).⁸

The M.s' failure to inform the circuit court of the Afghan Government's possible identification of the child's living family members was the same extrinsic fraud that infected the final adoption order. *See* R. 3676 (describing the extrinsic fraud relating to the final adoption order as activity "happening in Afghanistan" known to the M.s and relevant to the court's order); *see also State Farm*, 270 Va. at 218 (describing extrinsic fraud as "conduct which prevents a fair submission of the controversy to the court" (quotation marks omitted)). The court's interlocutory adoption order—entered four days after the custody order—relied entirely on S.M.'s testimony and the "factual findings of the Fluvanna Juvenile and Domestic Relations District Court" to determine that the child was "stateless" and that "[a] diligent search for living relatives has been unsuccessful, and no other relations have been located." R. 14868-69. Because the M.s obtained the custody and

⁸ The court did not explain why it identified subdivision (A)(4) as a basis for its jurisdiction. But if the child was Afghan, then it would not be the case that "[n]o court of any other state would have jurisdiction" under the statutory criteria. Code § 20-146.12(A)(4).

interlocutory adoption orders through extrinsic fraud, both are void.⁹ *See State Farm*, 270 Va. at 218.

3. Rather than deny their failure to properly inform the courts of critical facts relevant to the courts' adjudication, the M.s' principal defense to the charge of extrinsic fraud in the courts below was to argue that the circuit court is not permitted to consider the declarations and exhibits submitted by United States officials establishing the decisions and

⁹ Both orders are also procedurally flawed. In its custody order, the Juvenile Court held that "[l]egal notice has been given to all proper and necessary parties." R. 1066. But the custody order also recognized that "[f]rom the age of two months, [the child] has lived under the custody of the US Military." R. 1064. The Code requires that, "[b]efore a child's custody determination is made under this act, notice and an opportunity to be heard . . . must be given to . . . any person having physical custody of the child." Code § 20-146.16(A); *see id.* § 20-146.1 (defining "[p]erson" to include a "government, governmental subdivision, agency, or instrumentality" as well as "an individual" (quotation marks omitted)). The United States was not served with notice of either the custody or interlocutory adoption proceedings. *See* R. 1276 (U.S. district court order denying M.s' motion for a temporary restraining order in part because of "lack of service and notice [of custody petition] upon [the Department of Defense]"). J.M.'s informal email to an attorney in the Office of the Legal Advisor for U.S. Forces–Afghanistan the day after the court entered the custody order, R. 518, obviously is not sufficient notice to preserve the United States' opportunity to be heard at the custody hearing. *See also* Fed. R. Civ. P. 4(i) (service on the United States). Moreover, J.M.'s informal email represented that the custody order "[o]f course[] . . . doesn't impact [the Afghan Government]'s decision" whether to exercise jurisdiction over the child. R. 518. The circuit court's interlocutory adoption order, issued while the child was in U.S. custody (and concealed from the United States during the federal proceedings), similarly concluded that all proper parties had been notified about the interlocutory adoption petition, R. 14870, and so was procedurally flawed for the same reason.

actions of the United States and Afghanistan. *See, e.g.,* M.s’ Ct. of Appeals Opening Br. 46-48. The M.s’ argument has no merit.

The argument is particularly specious because central to the A.s’ claim that the M.s committed extrinsic fraud is the M.s’ undisputed failure to inform the lower courts about the United States’ dealings with the Afghan Government concerning the child, the United States’ decision to recognize the Afghan Government’s assertion of jurisdiction over the child, and its decision to transfer her to the Afghan Government for family unification. The United States is the best (and in some instances the only) source of information concerning those matters, and the circuit court properly considered the United States’ submissions to evaluate the M.s’ extrinsic fraud, which directly concerned the United States’ interests.

The U.S. Attorney General is authorized to send a Department of Justice lawyer “to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State.” 28 U.S.C. § 517. That authorization includes the submission of any evidentiary material that is necessary for an understanding of the United States’ interests that are germane to the court’s disposition of the case. Otherwise, the lawyer sent by the U.S. Attorney General would be significantly hampered in, and sometimes prevented from, carrying out the statutory directive to attend to the United States’ interests.

That understanding is supported by the uniform practice of federal courts, which routinely consider evidentiary material submitted by the United States when it appears under § 517 to participate in a suit

between other parties. For example, in *Bennett v. Iran*, the court granted the United States' request, made in a statement of interest filed under § 517, to quash writs of attachment against certain property. 604 F. Supp. 2d 152 (D.D.C. 2009). The court did so based on a declaration from a State Department official attesting to the property's diplomatic status. *Id.* at 154, 156, 166-67. In quashing the writs, the court rejected the argument that the United States as a nonparty lacked authority to request that the writs be quashed. The court rejected that argument because "the United States in this action seeks to uphold its own, independent foreign policy obligations." *Id.* at 167; *see id.* (describing argument as "without merit and essentially frivolous"). The court of appeals affirmed, relying on the same State Department declaration.¹⁰ *Bennett v. Iran*, 618 F.3d 19, 22, 24 (D.C. Cir. 2010)

The circuit court therefore properly considered the government's declarations and exhibits in ruling on the issues presented, which directly implicated the "interests of the United States."¹¹ 28 U.S.C. § 517. It was especially critical for the court to consider that material because the court twice denied the United

¹⁰ Such reliance on declarations filed in connection with statements of interest filed under § 517 is typical. *See, e.g., Hegna v. Iran*, 376 F.3d 485, 492-93 (5th Cir. 2004); *Hegna v. Iran*, 376 F.3d 226, 232, 235 (4th Cir. 2004); *see also, e.g., Blondin v. Dubois*, 238 F.3d 153, 159 & n.6 (2d Cir. 2001).

¹¹ The circuit court initially did not consider the United States' declarations and exhibits. *See, e.g., R. 2550*. However, the court subsequently admitted them, *see R. 12983*, and implicitly relied on them in holding that the final adoption order was void because of the M.s' extrinsic fraud, *see R. 3673*.

States’ motions to intervene, which prevented the United States from submitting evidence as a party. *See* R. 12253, 12297.

Finally, we note that it would be extraordinarily inequitable to allow the M.s to use the fact of their physical custody, obtained through fraud, as the basis for establishing circuit court jurisdiction over a new adoption petition. *See LaRock v. City of Norfolk*, 301 Va. 100, 105 (2022) (“Under the equitable clean hands doctrine, a complainant seeking equitable relief must not himself have been guilty of any inequitable or wrongful conduct with respect to the . . . subject matter sued on.” (alteration in original) (quotation marks omitted); *see also* Code § 20-146.19(A).

CONCLUSION

There is no legal basis for keeping the child from her Afghan family, the A.s. This Court should affirm the court of appeals’ judgment and direct the immediate return of the child to the A.s.

* * *

January 6, 2025

VIRGINIA:

IN THE CIRCUIT COURT
OF FLUVANNA COUNTY

In the Matter of:	§	
“BABY RED.”	§	
<i>A child under eighteen</i>	§	No. ____
<i>years of age</i>	§	
	§	PETITION TO
	§	AMMEND A
RED.	§	CERTIFICATE
	§	OF BIRTH
	§	
<i>Petitioners, <u>Legal</u></i>	§	
<i><u>Guardians</u> of minor</i>	§	
<i>child</i>	§	

CAME this day Captain RED., USMC, and RED. for a hearing on the Petition to Amend a Certificate of Birth for the minor child before this Court. Petitioner, RED., legal guardians of the child, appeared through counsel, Richard L. Mast.

WHEREAS, after reviewing evidence submitted to the Court with the petition and hearing testimony *ore tenus*, the Court finds that this Order is an appropriate disposition of the issues of the petition before the court, and that is in accordance with the standards and requirements set forth in Section § 32.1-26[*Handwritten: E*] of the Code of Virginia, and that it is hereby, [*Handwritten: REM*]

ORDERED, ADJUDGED AND DECREED as follows:

1. CERTIFICATE OF FOREIGN BIRTH: The State Registrar for the Commonwealth of Virginia, through the Vital Statics Division of the Virginia Department of Health, shall issue a Certificate of Foreign Birth for Baby RED. consistent with the factual findings below.

2. FACTUAL FINDINGS: Pursuant to the the authority of Va. Code Ann. § 32.1-261(E), the Court makes the following factual findings in regard to the minor child:

- A. The minor, Baby RED., was born in an unknown jurisdiction and by medical estimation is determined to have been born on RED. . She is approximately four months old, is unmarried, and is a stateless minor. For the purposes of this order she is known as RED. and hereinafter referred to as “the Child.” For the purposes of a Virginia Certificate of Foreign Birth, the Court finds that the Child’s birth country and nationality is “Unknown” and her biological parents are “Unknown-Deceased.” [*Handwritten: REM* Custody of the child was granted to Petitioners by Fluvanna Juv. & Dom. Relations District Court, Nov. 6, 2019.]
- B. This Court has jurisdiction over this matter under Va. Code Ann. § 63.2-1201 and § 63.2-1220.01, as well as the authority to “establish” a date of birth for a person born in a foreign country pursuant to Va. Code Ann. § 32.1-261(E).
- C. On Nov. 8, 2019 this Court heard the Petition to Amend a Certificate of Birth in

181a

case number _____, bringing the Child
under this Court's jurisdiction.

[*Handwritten:* REM 3. Shaun Anderson or his
designee is authorized & directed to generate &/or
issue the Certificate of Foreign Birth as soon as
possible, on an expedited basis since critical medical
care is needed. This order & a Commonwealth of
Virginia application for Certification of a Vital Record
shall be all that is necessary to generate the
certificate designated by this order. An email shall be
forwarded to Petitioner Counsel at the earliest
opportunity.]

It is further ORDERED the Court will dispense
with the parties' endorsements of the Order and the
Clerk will send certified copies of this Order to the
parties.

ENTERED this 8th day of November 2019.

s/ Richard E. Moore
Judge

I ASK FOR THIS:

s/ Richard L. Mast
Richard L. Mast
VSB #80660
P.O. Box 11108
Lynchburg, VA
24506-1108
P: 407-875-1776
F: 407-875-0770

Attorney for RED.

VIRGINIA:

IN THE CIRCUIT COURT
OF FLUVANNA COUNTY

In the Matter of:	§	
“BABY RED.”	§	
<i>A child under eighteen years of age</i>	§	No. 19CL719
RED. & RED.	§	
<i>Petitioners, Legal Guardians of minor child</i>	§	
	§	

INTERLOCUTORY ORDER

1. This cause came to be heard upon the petition of RED. USMC, and RED. his wife, of Palmyra, Virginia, in the County of Fluvanna, Virginia, within the jurisdiction of this Court, praying for leave to adopt the above-named child, who was born in an unknown location, to parents who are Unknown-Deceased, who was placed in the legal and physical care and custody of said petitioners on November 6, 2019, by the Juvenile and Domestic Relations Court of Fluvanna County. The Department of Children and Families was not notified, due to the exigent circumstances and sensitive security concerns in this child’s circumstance.

[*Handwritten*: REM Oral, sworn testimony was taken by this Court on Nov. 8, 2019, & Nov. 10, 2019,

given by [REDACTED] Petitioner, & factual findings at the Fluvanna Juvenile & Domestic Relations District Court on Nov. 6, 2019, were also considered by this Court.]

2. The child is a stateless minor orphan injured in a military operation. The child's parents are confirmed by the U.S. Military to be deceased. A diligent search for living relatives has been unsuccessful, and no other relations have been located.

3. The child is currently in need of urgent medical evaluation, treatment and long-term care, due to serious injuries sustained by the child, including a [REDACTED]

4. A medical flight for treatment is available. The child's status as a dependent of [REDACTED] will enable her to be placed on a medical flight for continuing treatment, and will pay for her continuing treatment and care at the University of Virginia Children's Hospital.

5. Based on the emergency circumstances detailed herein and the record before the Court, [*Handwritten: REM* and in light of this being an interlocutory order,] the Court waives any requirements for all of the procedural requirements, including Order of Reference, Report of Home Study, Report of Investigation, Recommendation, and others set forth in sections 63.2-1221, 63.2-1222, 63.2-1224, and 63.2-1225 of the Virginia Code, that have yet to be met. [*Handwritten: REM* The procedural requirements may be required to be done or complied with prior to entry of a final order of adoption.]

6. This Court finds that [REDACTED] RED. USMC and [REDACTED] RED. his wife, are suitable parents, and will provide the child with a loving and stable home, and will be able to care for her unique medical needs and following care. Based on the best interests of the child, the Court finding in all respects proper so to do, it is accordingly

A. ADJUDGED, ORDERED, and DECREED that the child's place of birth is "UNKNOWN;" that her natural parents are "UNKNOWN-DECEASED;" that her date of birth is recognized as [REDACTED] RED. and that her Birth Registration Number shall be determined by the Registrar of the Virginia Department of Health, Division of Vital Records, or designee; and further

B. ADJUDGED, ORDERED, and DECREED that no further consent to adoption or notice of these proceedings is required and that all requirements of law have been met or have been waived by this Court; that the petitioners are financially, physically, and mentally able to maintain adequately and are morally suited and proper persons to care for and train said child; that this child is suitable for adoption by the petitioners; and that the best interests of this child will be promoted by this adoption, it is now by this Interlocutory Order of Adoption,

C. ADJUDGED, ORDERED, and DECREED that henceforth subject to the probationary period provided for by law and to the provisions of such final order of adoption as may hereafter be entered in this matter, [*Handwritten:* REM or any other requirements of law,] that the above-named child will be, to all intents and purposes, the child of Petitioner [REDACTED] RED. USMC, and [REDACTED] RED.

RED. his wife, and the name of this child shall be recognized as RED.

D. ADJUDGED, ORDERED, and DECREED that RED. USMC, born RED. in RED. and RED. born RED. in RED. his wife, are the adoptive parents of RED. and shall be listed as such on the Birth Certificate; and

E. ADJUDGED, ORDERED, and DECREED that the Clerk of this Court shall forward an attested copy of this Order to counsel of record, to the Commissioner of Social Services, and also to the Clerk of Court of the Juvenile and Domestic Relations District Court of the County of Fluvanna, and return all reports in this matter, including the copies thereof furnished to counsel, with the papers in this matter, and to make such other and further reports of this Interlocutory Order as are required by law; and to set a time within sixty days for review by this Court; and

F. ADJUDGED, ORDERED, and DECREED that the papers in this matter be placed in the closed files, endorsed and indexed in the new name of the child; and that they be sealed in the usual manner with an endorsement showing that they are not to be opened or inspected except upon the Order of this Court entered of record after such notice as the Court may require. It is further ORDERED that the Court will dispense with the parties' endorsements of the Order and the Clerk will send certified copies of this Order to the parties.

Subject to such further orders as may be entered by the Court in this matter, the petitioners shall have the care, custody, and control of this child during the probationary period as provided for by law.

186a

ENTER: s/ Richard E. Moore
Hon. Richard E. Moore, Judge

DATE: 11/10/19

I ASK FOR THIS:

s/ Richard L. Mast
Richard L. Mast
VSB # 80660
P.O. Box 11108
Lynchburg, VA
24506-1108
P: 407-875-1776
F: 407-875-0770

Attorney for **RED.** *and* **RED.**

VIRGINIA:

IN THE CIRCUIT COURT
OF FLUVANNA COUNTY

In the Matter of:	§	
RED.	§	<u>No. 19CA12</u>
	§	
(Virginia Foreign Birth	§	
Registration No. 145-FB-	§	
012012)	§	ORDER
<i>A child under eighteen years of</i>	§	
<i>age</i>	§	
	§	
RED.	§	
	§	
<i>Petitioners, legal guardians</i>	§	
<i>and parents of minor child</i>	§	
	§	

ORDER

1. This matter came before the Court the 26th day of October, 2020 for further review. Present were RED. and RED., Petitioners, along with their counsel Richard L. Mast.
2. Having determined jurisdiction over the case pursuant to Virginia Code § 20-146.12 A (2) and (4), and that it was in the best interests of the minor child, sole legal and physical custody of the minor was granted to petitioners by the Fluvanna County Juvenile and Domestic Relations Court on

November, 6, 2019, and a birthdate of July 24, 2019, was established.

3. On November 8, 2019, this court issued an Interlocutory Order of Adoption in favor of the petitioners and determined that the Child's birth country and nationality is "Unknown" and her biological parents are "Unknown-Deceased." Consequently, she is an undocumented, orphaned, stateless minor subject to this court's jurisdiction pursuant to Virginia Code § 63.2-1201.
4. Due to unique and exigent circumstances involving the health, life, and safety of the child and the RED. family, this Court waived the procedural requirements for the Interlocutory Order, subject to this Court's discretion in requiring a thorough investigation of the matter in accordance with Virginia Code § 63.2-1208, prior to an entry of a final order of adoption.
5. On 24 August 2020, this court issued an Order of Reference to the Fluvanna County Department of Social Services to conduct an investigation and file a report in this matter in accordance with sections § 63.2-1208, and 63.2-1228, of the Virginia Code, and report back to the court within sixty days. The requirement of specific multiple home visits, or home visits with the child present was waived by the Court.
6. At the time the Interlocutory Order was issued, RED. and his wife, RED. resided in the County of Fluvanna, at (b)(6) Palmyra, VA. Since this proceeding was initiated, the petitioners moved to Hampstead, NC. Consequently, the petitioners and minor child's legal residence is now (b)(6)

Hampstead, NC 28443, but they consider their domicile to be Fluvanna County, Virginia.

7. On October 21, 2020, this court received and subsequently reviewed the report of the Fluvanna County Department of Social Services. This report indicated the petitioners were qualified to adopt the child in question and recommended that the court issue this final order.
8. On October 26, 2020, the Court appointed a Guardian *ad litem* to represent the interests of the child and investigate the matter. His report was filed on November 11, 2020, in which he recommended entry of a final adoption order as being in the best interest of the child.
9. Based on the report of the Fluvanna County Department of Social Services, and the testimony and evidence provided during the course of this proceeding, and the recommendation of the Guardian *ad litem* this Court finds that RED. RED. and RED. his wife, are suitable parents, and will provide the child with a loving and stable home, and will be able to care for her unique medical needs and following care. Based on all the foregoing findings and the best interests of the child, the Court finding in all respects proper so to do, it is accordingly:
 - A. ADJUDGED, ORDERED, and DECREED: that the minor child, RED. who remains in continued need of medical care, and remains up to this point in time an orphaned, undocumented, stateless minor, has the legal identity granted by order of this Court as constituting her sole legal identity.

- B. ADJUDGED, ORDERED, and DECREED that no further consent to adoption or notice of these proceedings is required and that all requirements of law have been met or have been waived by this Court; that the petitioners are financially, physically, and mentally able to maintain adequately and are morally suited and proper persons to care for and train said child; that this child is suitable for adoption by the petitioners; and that the best interests of the child will be promoted by this adoption; therefore, the interlocutory order of November 8, 2019 is converted to a Final Adoption Order effective December 3, 2020.
- C. ADJUDGED, ORDERED, and DECREED that henceforth, the above named child will be, to all intents and purposes, the child of said Petitioners RED. and RED. his wife; and RED. shall be entitled to all the privileges, and subject to all the obligations, of a child of said petitioners born in lawful wedlock here in the Commonwealth of Virginia.
- D. ADJUDGED, ORDERED, and DECREED that the Report of Adoption Form shall be certified with the effective date of December 3, 2020.
- E. The Guardian *ad litem*, John David Gibson, shall be entitled to a reasonable fee for his time and services in this matter, and the Court reserves this determination until it receives a time sheet and fee requests from Mr. Gibson, such to be paid from the State's treasury.
- F. ADJUDGED, ORDERED, and DECREED that all previous orders, filings, and the proceedings of this

191a

case are sealed for the protection and safety of the minor child and the RED. family.

- G. And it is further ORDERED that the Clerk of this Circuit shall forward an attested copy of this Order to counsel of record, and to the Commissioner of Social Services, and shall make such reports of the adoption of this child as are required by law.

ENTER: s/ Richard E. Moore

Hon. Richard E. Moore,
Judge

DATE: 12/3/20

I ASK FOR THIS:

s/ Richard L. Mast

Richard L. Mast

VSB # 80660

P.O. Box 11108

Lynchburg, VA

24506-1108

P: 407-875-1776

F: 407-875-0770

Attorney for RED.

[Exhibit 1 to Brief in Support of Petition to Vacate Adoption, *In re “Baby [Redacted],”* No. 19CA12 (Cir. Ct. Fluvanna Cnty. Jan. 14, 2021) (Redacted)]

DECLARATION OF
HAVVA G. GUNEY-RUEBENACKER

I, Havva Guney-Ruebenacker, declare as follows:

1. I completed my doctoral degree, S.J.D., in family law, Islamic law, and comparative law from Harvard Law School in 2011 and my LL.M in international human rights law from Harvard Law School in 2001. I also received my LL.M in EU Law and European legal history from the University of Cambridge in 2002, and my B.A. in law from University of Tehran in 2000.
2. I was an Associate Research Scholar in Law & Fellow at Kamel Center for the Study of Islamic Law & Civilization, Yale Law School, 2019-2020, where I conducted research on Islamic and comparative family law.
3. I have studied both major schools of Islamic law, Sunni and the Shi’ite, in Saudi Arabia and Iran. I have been a Visiting Assistant Professor at Boston University Law School, where I taught Comparative Family Law and Islamic Law during the academic year 2009-2010. I was a Graduate Fellow at Edmond J. Safra Center for Ethics at Harvard University, and a Visiting Fellow at the Islamic Legal Studies Program at Harvard Law School.
4. In addition to English, I am fluent in Turkish, Arabic and Persian.

5. As a scholar of comparative family law and Islamic law, I have researched and studied the family laws of Afghanistan.
6. The legal system of Afghanistan is a combination of Islamic law (predominantly the Sunni Hanafi school of law), state legislation, and local customary law, creating a pluralistic legal system.
7. There are substantive legal obligations in Afghanistan derived from Islamic law that bind the family of a child who has been orphaned. In the Afghan application of Islamic law, which is also the case in the majority of Muslim countries, in the absence of a paternal grandfather and a brother, the legal guardianship of an orphan goes to the paternal uncle, and in his absence to his son, who assumes responsibility for the child's welfare. As the legal guardian of the child, the paternal uncle then has legal authority to delegate guardianship of the child as he sees fit. This is consistent with Islamic law in many other countries, such as Pakistan, Iran, Saudi Arabia and the majority of Muslim countries.
8. The placement and delegation of guardianship of the child is not often memorialized through courts in Afghanistan, unless it is contested, but the appointment of guardianship should not be misconstrued as informal simply because it occurs outside the state judicial apparatus. Rather, parties who abdicate their legal responsibilities under Islamic law in Afghanistan face legal and social consequences and sanctions for their behavior.

9. Under the law of Afghanistan, this guardianship is the closest analog to the U.S. definition of an adoptive parent. Islamic law, however, does not authorize the termination of a child's rights to their biological family, and the child's guardian must maintain the religion and identity of the child's family of origin. Therefore, when a child's parents have died, the child will be placed under this type of guardianship, which is a permanent relationship between the adult caregiver and the child and confers all the rights of a parent over a child, with the exception of any rights that would sever the child from their identity or religion of origin.
10. I have received [REDACTED] s Petition to Vacate Adoption and their factual statements regarding the process through which [REDACTED] came to live with them for eighteen months before they arrived in the U.S.
11. As the paternal uncle of [REDACTED] [REDACTED] [REDACTED] was responsible for taking guardianship over her when her parents died and had the legal authority to transfer his guardianship of [REDACTED] to his son, [REDACTED].
12. [REDACTED] by transferring physical and legal custody of [REDACTED] to [REDACTED], conferred guardianship rights to them, with the actual authority to do so.
13. This guardianship relationship is analogous to an adoptive parent relationship in the U.S. legal system, with the exceptions noted above. As guardians of the child, [REDACTED]

195a

RED. have the same legal obligations towards the child, and the same rights over the child, as a natural parent has.

I swear and affirm, under penalty of perjury, that the foregoing is true and correct, to the best of my knowledge and belief.

s/ Havva Guney-Ruebenacker

Havva Guney-Ruebenacker

1/14/2022

Date

[notary seal omitted]

* * *

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[clerk's seal and signature]

VIRGINIA:

**IN THE CIRCUIT COURT OF FLUVANNA
COUNTY**

RED. [REDACTED]
[REDACTED],
Petitioners,

vs.

RED. [REDACTED]
[REDACTED],
Respondents.

**Case No.:
CL22000186-00**

DECLARATION OF DONNA WELTON

I, Donna Welton, hereby state as follows:

1. I am employed by the U.S. Department of State as a Foreign Service Officer. I am currently Acting Deputy Assistant Secretary for Programs and Operations in the Bureau of Political-Military Affairs at the Department of State.
2. From August 2019 to August 2020, I served as the Assistant Chief of Mission (ACOM) at the U.S. Embassy in Kabul, Afghanistan. In my capacity as the ACOM, I became familiar with certain matters that I understand are at issue in this proceeding.

3. I make the following statement based upon my personal knowledge gained through engaging in my official duties and official Department of State records I received in the ordinary course of said duties. This statement describes activities of the Department of State and matters observed within the scope of my official duties.
4. In October 2019, I became aware that, following a military operation in early September in **RED.** Afghanistan, U.S. forces had recovered a baby, who was continuing to receive medical treatment and care at Bagram Airfield's Craig Hospital.
5. On October 23, 2019, I participated in a meeting convened by Department of Defense (DoD) officials in Kabul in order to develop a plan for the child's care going forward. In addition to myself and DoD personnel, attendees included representatives of the Government of Afghanistan's Ministry of Labor and Social Affairs (MOLSA), the agency responsible for child welfare and protection under Afghan law and thus the agency responsible for determining what steps should be taken with regard to this child's future. A representative of MOLSA along with the Senior Advisor on Children and Armed Conflict to the U.S. Resolute Support Commander and an International Committee of the Red Cross (ICRC) representative provided information on the case to date. This included a discussion of the various legal obligations that Afghanistan has in place to protect orphans, including its

March 2019 enactment of the Law on the Protection of Child Rights. Further, MOLSA's representative explained that family is extremely important in Afghanistan and next of kin take seriously the importance of caring for children who have lost their parents. It was my understanding based on my prior interactions with MOLSA personnel in my role as ACOM that MOLSA routinely was responsible for coordinating investigations relating to family relationships and legal guardianship of Afghan children. At the meeting, it was agreed that MOLSA would continue efforts to locate any family members and reunite them with the child. ICRC would do the same.

6. **RED.** [REDACTED], a U.S. servicemember, also attended the October 23 meeting. On November 12, 2019, the Embassy was informed that **RED.** [REDACTED] had obtained a Virginia court order granting him legal guardianship of the child but that this step was not intended to interfere with the family trace that MOLSA was conducting. Instead, the Embassy was told that this step was intended to create a path to bring the child to the United States if the Government of Afghanistan decided to waive jurisdiction over the child following an unsuccessful family trace. I understood that **RED.** [REDACTED] left Afghanistan soon afterwards. **RED.** [REDACTED] had no involvement in the diplomatic discussions with the Government of Afghanistan regarding the child, which continued through February 2020.

7. On December 31, 2019, MOLSA met with me and other officials of the U.S. Embassy in Kabul and informed us of the results of its efforts to locate and reunite the child with her extended family. MOLSA reported that it had confirmed that the baby had maternal and paternal uncles. The child also had living siblings.
8. At this meeting, MOLSA provided a copy of an interview with the paternal uncle, RED. RED. , as well as a report on an interview with the maternal uncle. The paternal uncle explained in the interview how his brother and family, including the child, came to be living near the compound that was targeted in September 2019 and provided a sworn statement that he was the brother of the child's deceased father, accompanied by certifications from the village elder, the district governor, and a resident. Under Afghan law, these certifications were recognized as proper verification of the uncle's statements. MOLSA informed the U.S. Embassy officials at the meeting, including myself, that a DNA test was not required under Afghan regulations and that MOLSA was confident of the legitimacy of the uncle's relation, based on his statements and confirmations through the community and others in the Child Protection Action Network, a group of government departments, non-governmental organizations, and community and religious leaders which worked to protect children in Afghanistan. The information MOLSA provided suggested to me and other Embassy personnel that it had appropriately

vetted the paternal uncle consistent with Afghan law and procedures, and I had no basis to question MOLSA's conclusion that it found the child's family.

9. Because the family trace documents indicated that both the paternal and maternal uncles were from the same region of Afghanistan, spoke Pashto, and had family in different provinces in Afghanistan, I concluded that all available evidence indicated both the child's parents were Afghan, and so was she. I understood MOLSA to have reached the same conclusion, as did ICRC.
10. On February 9, 2020, I received a formal diplomatic communication from the Minister of Labor and Social Affairs confirming that MOLSA had located the child's next of kin, was granting custody of the baby to the next of kin per Afghan guardianship law, and wished to reunify the child with her family. The minister also asked me to pass to Brigadier General Patrick Matlock, the Deputy Commander of U.S. Forces-Afghanistan, MOLSA's formal request that the United States transfer the infant to MOLSA so that she could be reunited with her family. This correspondence was attached to my Declaration of June 8, 2022. I shared this request with Brigadier General Matlock and with Department of State personnel in Washington, D.C.
11. The Department of State concluded that compliance with the aforementioned request was the proper course of action. Doing so would properly recognize Afghanistan's sovereignty

and was consistent with the Bilateral Security Agreement (BSA) between the United States and the Government of Afghanistan, a binding international agreement which established certain requirements for U.S. military operations in Afghanistan. The BSA reflected the expectation that members of U.S. forces and the civilian component would conduct themselves in a manner consistent with Afghan law. Compliance with the request would also avoid any perception that the U.S. Government was holding an Afghan child against the will of her extended family and the Government of Afghanistan.

12. Further, the United States takes seriously the importance of family reunification in times of armed conflict. Facilitating such relocations is consistent with the law of war applicable in non-international armed conflicts, like the one which existed in Afghanistan at the time.
13. On February 25, 2020, I received a cable—the method the Department of State uses to communicate between personnel in the United States and overseas—from the Department of State in Washington, D.C. informing me that interagency consultation in Washington, D.C. (which included senior policy officials in the Department of State and Department of Defense) had occurred and the transfer of the child should proceed in accordance with MOLSA's request. This cable observed that MOLSA had concluded the baby was Afghan and no waiver of jurisdiction consenting to the

United States acting on behalf of the child had been issued by the Government of Afghanistan.

14. I notified MOLSA that the child would be transferred to MOLSA to facilitate family reunification, consistent with MOLSA's request.
15. On February 27, 2020, I witnessed the child's transfer from Craig Hospital to two MOLSA representatives. ICRC personnel facilitated the transfer. An ICRC pediatric nurse conducted a medical exam of the baby and received her medical records from Hospital personnel. The group then departed by plane to **RED.** to reunite the baby with her family.
16. MOLSA's Senior Child Protection Specialist reported to me by email on February 27, 2020 that he had witnessed the baby's reunion with her uncle and other family in **RED.** and that it had gone smoothly, and that the child's family had become emotional when they saw her.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on: 8/19/2022

s/ Donna Welton
Donna Welton

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE COUNTY
OF FLUVANNA

RED.	)	
	)	
Petitioners,	)	
	)	NO.CL22000186-00
RED.	)	
	)	
Respondents.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RICHARD E. MOORE
VOLUME XII

Palmyra, Virginia
Friday, November 11, 2022
9:29 a.m.

* * *

A P P E A R A N C E S
ON BEHALF OF THE PETITIONERS:
DAMON PORTER, ESQUIRE
EHSON KASHFIPOUR, ESQUIRE
TIMOTHY SNYDER, ESQUIRE
MEREDITH SHEILS
LATHAM & WATKINS, LLP

204a

* * *

ON BEHALF OF THE RESPONDENTS:

HANNON E. WRIGHT, ESQUIRE
RICHARD MAST, ESQUIRE
RAKNESS & WRIGHT, PLC

* * *

--AND--

JOHN S. MORAN, ESQUIRE
(VIDEOCONFERENCING)
MCGUIRE WOODS, LLP

* * *

ON BEHALF OF THE GUARDIAN AD LITEM:

SAMANTHA FREED, ESQUIRE
TREMBLAY & SMITH

* * *

ON BEHALF OF THE U.S. DEPARTMENT OF
JUSTICE:

KATHRYN L. WYER, ESQUIRE
U.S. DEPARTMENT OF JUSTICE

* * *

[3466]

* * *

[THE COURT:] I believe they had a sufficient interest to raise this issue with the court and pursue it. I don't think the court was wrong about that. Whether there's a biological relation or not, whether they were legal custodians or not, they were keeping or caring for the child at least long enough to get

attached to her and that says something. So I would address the merits.

* * *

[3468]

* * *

[THE COURT:] There were other allegations and **[3469]** assertions. They include and support fraud. And I read most of them. I did not agree they were indications of fraud. But there clearly are facts and circumstances that respondents, in this court's view, should have brought to the attention of the court.

I'm just going to name three or four of them. That couple, some time between, I'll say between December or January and the following year were claiming to be December or January of '19, '20 up to December of '20, there was a couple claiming to be family. And that the child had been placed within the ICRC. I should have been told that, I think.

I'll say in all candor on that timeline that I referred to, I think somebody else referred to it, there was a reference in February to a TRO. And it didn't register with me, because that's not why I was interested in the timeline. And it said something about TRO denial, that wasn't articulated. But there was also an entry of the child either placed with or being cared for by an unknown person in an unknown location. That was in February. And that may have been true at that time. I think at that time they might not have known who it was and learned it was young woman later or where they were. **[3470]** But in any event, at some point, it's my understanding at some point they knew that somebody was claiming to be related to the child. That is something I think the court should have been informed of.

A couple of other things, I fully believe Captain RED. when he said early on when they were really trying to make things happen quickly, that somebody from the Afghan government said they couldn't take care of the child. They didn't want custody of the child and they were content with the U.S. to do that. I believe that.

I also believe they probably indicated that a waiver would be forthcoming. However, a waiver never came, a written formal waiver never came, which technically would be a requirement for even the juvenile proceeding, which represented a waiver was forthcoming. When that statement was made, I think they probably believed that, too, that a waiver was forthcoming. They were given reason to believe. And, in fact, I glanced at the attachments to the motion to reopen or motion to compel, whatever. And there were a bunch of text messages there.

And one of them was a series where it said, they're going to sign it today or they're going to [3471] get to it tomorrow. I don't have any reason to believe that's not true. I think that was realtime what was happening. And then all of a sudden, there's a roadblock. But at some point in time, I do believe it came to the RED. attention that Afghanistan was no longer willing to furnish that. That's what it appeared by a preponderance. And I think I should have known that.

I think that if -- even though they expected one, even though they hoped in good faith and I believe they did, that they would change their mind and finally get the waiver. I do believe that. That they were expecting. They were hoping for that. Obviously, they were praying for that.

But I think at some point, there was a communication for an awareness that somebody in the Afghanistan Government was not willing to do that. That's what I think the court should have been informed of, not necessarily that it wasn't ever going to come, but there was reason to believe it might not come.

The third thing, obviously, was the Western District proceeding, particularly Judge Moon's statement about the custody order. In my mind, I thought it was about the adoption order, but maybe it [3472] was just a birth certificate. I'm not sure. But I know that Judge Moon, when I read the transcript months ago, said something like that testimony is not worth anything. It was because of the requirement in J&DR that the custodian be notified and DOD was the custodian. I think that was his thinking.

It never was obvious to me, but I think I know what it was. Whether that was truly legal custody or whether that's just physical custody acquiesced and by an Afghan. But in any event, he had questions about that ruling. And he thought DOD needed to be notified. And so he thought that that order was of no effect and there were two other reasons. I can't remember what they were. There were three reasons he cited in his ruling.

So I think this court should have been given more details about what was going on in that court because it addressed the very foundation of this court taking any action, at all, as everybody knows by now, when this happened it was presented to me as a true emergency. I believe that it was. RED.

RED. That's never disputed. But I was reluctant to do anything until I found out. And then I wanted to do something, because of the emergency

nature. I mean, it's your human reaction [3473] to try to do something. But until I heard that Judge Lowe had entered a custody order, I didn't think I could do anything because the child wasn't here.

This court made the conclusion rightly or wrongly, that if we had Fluvanna residents and represented no living parents and represented no known state of residence, and a local judge giving custody, I thought I could act. Because I didn't -- I couldn't figure out why I was only thinking physical custody. I couldn't figure out how if a court had given custody to a couple that's here in Fluvanna, I couldn't figure out how that wouldn't be the residence and domicile of the child. I thought that through. I thought, where else would it be? If they've been given custody by a judge and the parents are represented to be deceased, which is not disputed, and they're believed to be the children of foreign insurgents and didn't know where they were coming from. I thought this can't be a limbo case where nobody has jurisdiction. And I certainly did not think under those circumstances with custody having been given to the **RED**, that this court shouldn't have jurisdiction. But I think I should have been told about those other proceedings, more than just saying there was a TRO and timeline. I [3474] think I should have been given more details about it.

* * *

[3476]

* * *

[THE COURT:] But that's at least three other items that I felt like should have been told to the court, only because and this is the whole point of this, if I had been informed of those three things just like if the U.S. had sought to intervene earlier, maybe that

could have caused me to look further into the matter [3477] for taking a different tactic. That's the whole point of that is, in all that language is a full and fair investigation, a full and fair consideration, and if I had found out there was people purporting to be family and they were placed by the ICRC, I might have said, well, I'm not doing anything until I hear about that. That could have happened.

Or if I found out Afghanistan had retracted its offer to do the waiver. I might have said, well, that's what the custody order was based on. So I'm going to wait and see if they do turn around or if I heard about Judge Moon's comments, I might have thought to take a different attack as well.

So I don't think the fraud itself has to be intentional to mislead the court. I think it just has to -- you have to acknowledge and I think it has to have the effect of misleading the court. That's what I think. I'm just saying there's a prima facie. That's enough for them to go forward on that. We're not making a merit decision on that. Those are the three things that did concern me. And I couldn't -- I couldn't even figure out in my own mind since those are communications with the court, but not in the trial whether that's intrinsic or extrinsic. I assume it's extrinsic, but I don't really even know.

* * *

[3479]

* * *

[THE COURT:] So I felt like the status of the RED. as to notice is somewhere between a foster family who wouldn't have rights and the DSS who would. They're sort of in the gray area. So my best outcome is I think they may be entitled to notice.

They may have been entitled to notice of the final adoption order. Obviously, they didn't want to be in the interlocutory. And I was going to proceed as if they were entitled to notice.

So then that's the procedural deficiencies and clearly, clearly there were procedural irregularities and deficiencies in this case. There's no question about that. It was an anomaly of the case. It was the only thing like that I've ever seen in my life. And it was presented as a [REDACTED] RED.

[REDACTED] RED.
[REDACTED] RED. in a combat field's medical facility in Afghanistan.

Clearly, I did not follow the procedures for a foreign born adoption. That's why I was so hesitant. That's why I lingered over it. Even though I was out of town. That's why I talked to the attorney general. But the normal procedures, it's either one of two things. Either the child is [3480] adopted in a foreign country and it's domesticated here. You have to show they were adopted there and it's the same here. Or they were placed in a foreign country with permission of the country to pursue an adoption in the U.S., which is where I think they thought they were headed. I think in good faith, that's where they thought they were headed. I think they were given reason to believe that's where they were headed, but that's not where it ended up.

So we didn't have a child placed with them and we didn't have a waiver of jurisdiction by Afghanistan and this court went forward, because it didn't have -- well, because of the emergency situation. I mean, that's really -- and I'll probably think about this the rest of my life whether I should have said, sorry, the

child is in Afghanistan. We're just going to stand down.

I don't know whether that's what I should have done. When there's nobody on the other side and there's no other parents and the juvenile court has said there's no home state. I mean, that's what Judge Lowe said. There's no home state. And one of the places a custody can be brought is where the petitioners live.

So in any event, clearly there were [3481] procedural deficiencies. One question in this case is whether the emergency provides a justification for the exception of the normal procedures or does the J&DR awarding custody of the found couple act as a proxy for child being here. That's what I thought. I thought if they had been given custody to an orphan with no family and is in severe need, that's just as if the child is here, maybe that was wrong. And it was based on fraud. Does that neutralize that? I don't know.

* * *

[3490]

* * *

[THE COURT:] But I'll get to what has concerned me and I think has changed my mind. First of all, granting the plea in bar, like striking evidence, is an extreme remedy. It short circuits the case before it's fully heard, which is the intent of a plea in bar, so I understand that. And it's the intent of the statute.

But here's the rub, I've been a lawyer a long time. I've been a judge for over ten years. And I felt like if I had this much trouble deciding this case, if I've struggled over it this much, I don't think I have the confidence to grant the plea in bar, not that I'm right

about that. Even though I just went over all the reasons why mentally, intellectually I think it applies.

And, obviously, if this is appealed, those are all things that Mr. Wright can echo. And maybe they would find this ruling is contrary to the law and the evidence. I don't know. But the other factors that disturb me is, this was a custody order, I mean, an adoption order that was one-sided. There [3491] was no other side to the case. It wasn't like a fact finder heard A and then heard B and decided. It was all one-sided, which is perfectly legal in a lot of adoptions, most adoptions are like that. But this is an extraordinary situation which there were potentially contested issues.

So even though it goes against my plain reading of the statute and it goes against my reading of the cases, I don't think I should sustain the plea in bar and short circuit the case. I do think even though I'm not comfortable with this, but I think they were in the place of parents as much as they could be. I mean, that's the guardian ad litem's argument.

* * *

[3495]

* * *

[THE COURT:] Because I have to also say, it doesn't seem American to me to say you're out of luck because of circumstances. It just -- I've struggled with that. So I don't do this very often. But I'm really making [3496] a decision that is contrary to my actual analysis of the case. I'm just persuaded that I should not short circuit this under 1216, because of their performing in the role of the parents, even though they're not parents. Because of their being in the

213a

United States and having Constitutional rights and I
may be wrong.

* * *

**VIRGINIA: IN THE CIRCUIT COURT OF THE
COUNTY OF FLUVANNA**

RED.	and	
RED.	,	Petitioners
v.		CL22- 186
RED.	and	
RED.	,	Respondents

FINDINGS AND RULINGS

This Order is being entered by the Court because the current presiding judge who has heard this case for the past 11 months is retiring and leaving the bench, and having just, on November 11, 2022, denied and overruled a plea in bar, will not be able to preside over further hearings. The Court is granting the request of Respondents for an Interlocutory Appeal of this Court's decision denying and overruling the plea in bar. In ruling on the plea in bar the Court made some, but not extensive, findings of fact and rulings, and the current presiding judge believes such an order would be helpful to whoever hears any proceedings in this case, after the appeal, and may also be helpful for the reviewing court. (The Court will set out in a separate order, for the Court and Counsel, the remaining disputed issues that have not yet been addressed, or have been addressed but not yet decided or resolved.) Since the Court speaks through its orders the Court believes and finds that a more detailed and comprehensive ruling (with rationale) than what the Court was able to give from the bench is not only appropriate and merited, but

necessary, given the extensive proceedings, with at least 17 hearings (about half of them being evidentiary hearings).

While this Court believes that these findings and rulings might be helpful to the reviewing appellate Court and the new presiding judge, such may be considered or not considered as they deem appropriate, and any pre-trial finding or ruling may be revisited and modified by the trial judge at a later time.

This Court also suggests, invites, and grants leave for counsel, after the appeal if this Court's decision is upheld, to prepare and file for the Court (a new judge presiding) a summary statement of the facts and proceedings based totally on admitted evidence (testimony and exhibits) to help guide the Court without having to rehear all of the evidence or read all of the voluminous transcripts from multiple evidentiary hearings. Perhaps counsel might attempt to set forth the undisputed facts in a joint agreed fact statement for the Court, and then each can supply their presentation of additional facts or evidence not agreed on.

FRAMING OR RESTATING THE DISPUTE

This matter is before the Court on a Petition to Vacate Adoption Order, originally filed by Petitioners December 9, 2021, and refiled March 28, 2022, with leave of court. This unfortunate case comes before the Court under perhaps the most unusual circumstances this Court has ever seen. The matter is perhaps also the most complex and difficult (with multiple issues) that this Court has ever been presented or involved in.

Petitioners allege that the Final Adoption Order entered by this Court December 3, 2020, was entered as the result of fraud and that the Court had no jurisdiction because Petitioners had no notice, the procedures for adoption of a foreign born child were not followed, and the subject child was not residing in the Commonwealth of Virginia (or anywhere in the United States) at the time.

Respondents reply that the child involved was and is an orphan and a “stateless minor”--or at least they believed (and continue to believe) her to be--and that under emergency (medical) circumstances they obtained custody and a U.S. birth certificate for the purpose of obtaining medical care and that the adoption was motivated by that; further, even if the child were now found to be an Afghan citizen or former Afghan resident, they acted upon the belief that she was not but was stateless, and that in any event Va. Code §63.2-1216 prevents the Court from going back and vacating the adoption order more than six months after entry. Furthermore, they say that Petitioners have no standing, and were not entitled to notice.

Petitioners reply that the Court never had any jurisdiction or authority for entry of such an order, that the order is *void ab initio*, and that Petitioners are relatives of the child and their constitutional rights would be violated by the application of this code section.

QUESTIONS PRESENTED

Must the final order of adoption in this case entered December 3, 2020, be vacated as *void ab initio*? Alternatively, may it even be attacked or challenged?

The central issue and ultimate question in this case is whether the Court should, or even can, set aside and vacate an adoption order entered nearly two years ago and more than a year before the Petition was filed, based on allegations of fraud, lack of notice, and lack of jurisdiction.

Four secondary or subsidiary questions are 1) whether Petitioners have standing to ask the Court to vacate this order; 2) whether the Respondents did commit fraud on the Court in obtaining the adoption order; 3) whether Petitioners' constitutional rights would be violated by application of Virginia Code §63.2-1216; and, 4) to what extent decisions made by various agencies or branches of the United States government control or impact the outcome in this state court adoption matter?

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The following is culled from the pleadings, testimony, and exhibits.¹ On November 10, 2019, RED. and RED. (the Respondents in this proceeding) filed a petition for adoption. They alleged that an infant child ("Baby RED.") had been injured in a military action in Afghanistan, and that she had sustained multiple serious injuries that required immediate medical attention as well as extensive care (which has never been denied, disputed, or challenged). As Petitioners there, they alleged that both parents of the child were killed in the same action (which also has never been disputed), which

¹ Some general information is in the knowledge of the Court from the original adoption proceedings, which is sealed.

appeared from the evidence to possibly have been from self-inflicted wounds by a “suicide bomber”.

The evidence shows that immediately after the incident, and in the following weeks and months, no surviving relatives of the child were known or identified, and the Court so finds. Respondents further believed that the child was not an Afghan citizen or resident, but that her parents were nomadic insurgents that moved from place to place to fight alongside other insurgents. They were believed to be foreign fighters (either Turkmen or Uighur), and not Afghan. It was further represented originally and in this proceeding that at the outset, the Afghanistan government did not wish to take custody of the child or take, exercise, or maintain jurisdiction over the case. It appears that the Afghanistan government or authorities never actually formally waived jurisdiction over the matter, though an Afghan official expressed early on that they had no interest in taking the case, and would not take custody of the child; they were not in a position to provide the medical care the child needed, and they had no objection to the U.S. authorities taking jurisdiction over and custody of the child. Respondent **RED.** testified that he personally heard this decision made or expressed by an Afghan government representative in a meeting, possibly on more than one occasion. Respondents’ witnesses testified that the Afghan partner forces assisting the U.S. Forces did not want to save or care for the child at all, but desired to just kill the child there (most likely, in the Court’s view, because of who they believed the child’s parents to be, viz., not Afghan). The Court finds that not only is this circumstantial evidence that the child was and is not

Afghan, but more important, it contributes to the reasonable basis for the RED. belief.

The immediate concern in the case was the baby's severe injuries. She had sustained RED.

RED. In addition, she had sustained serious burns and other injuries. There was grave concern that without proper medical care she may die or be severely disabled, and serious doubt that such needed medical care and treatment could be provided in Afghanistan. Arrangements had been made at the University of Virginia Hospital, near where the RED. resided, to receive her as a patient, that they were capable of providing her the medical care needed, and it was reported that UVA hospital was ready to receive her immediately. This was the impetus for the legal proceedings. She was being maintained first in a U.S. military field hospital at RED., but later was transferred to one at Bagram Air Base, until transport to UVA could be arranged.

There were efforts by the RED. to have her become a military dependent in order to transport her quickly and have then RED.'s insurance cover her medical care. She needed a birth certificate to do that, and there was a prior proceeding to provide her a Virginia birth certificate. (No Afghan birth certificate has ever been produced in evidence, nor was there testimony that anyone had seen one or that there was one.) It was hoped that this would be sufficient. This was after custody had been granted to the RED. by the Fluvanna Juvenile and Domestic Relations District Court, on an emergency basis on

the ground that she was a stateless, orphaned minor with severe medical needs.²

So when the Adoption Petition and the preceding petition for a birth certificate were brought, custody had already been granted to the **RED.**, who were residents and domiciliaries of Fluvanna County, on November 6, 2019, by the Fluvanna Juvenile and Domestic Relations District Court, that court making specific findings in its order, including the child being stateless with no other home jurisdiction.

Given the emergency nature of the situation, and the need for prompt medical attention, and the representation that the child was stateless and not a citizen of Afghanistan or any other known nation, with no known living relatives³, and the authorities in Afghanistan having at that point declined to take the child or assume responsibility for her care, and

² This Court recalls conferring with the Virginia Attorney General's Office, given the novel nature of this emergency situation, in early November 2019, about the jurisdiction of the Juvenile Court to enter the custody order and the propriety and authority of this Court to entertain the birth certificate proceeding, given that the child was out of the country and not physically present in our jurisdiction. (The Court desired some objective input by other than Petitioners.) The Court's recollection is that the Attorney General's Office advised the Court that under the emergency circumstances (involving urgent medical treatment and no known home state), which appeared to be a grave matter for the child's health and life, the Juvenile Court did have jurisdiction on the custody matter, and this Court did have jurisdiction to go forward with the birth certificate proceeding since custody had been granted to a Fluvanna couple. The birth certificate order was entered November 8, 2019.

³ All of this occurred before Petitioners (the **RED.**) were known or were in the picture at all.

the Juvenile Court having granted the RED's custody, this Court took jurisdiction over the adoption matter, finding it to be permissible and deeming such decision to be the only reasonable, logical, and compassionate course of action at that time. The Court was concerned that delaying legal action further could jeopardize the child's life or recovery, and could result in loss of life or permanent or long-lasting residual effects. Respondents' concerns were that for a severely injured female orphan of foreign fighters, her prospect for life, health, and safety looked bleak if left in a warzone in Afghanistan, and they were willing to provide the medical and other care for her.

The Court indeed had questions about whether this was proper in that normally an adoption of a foreign child is achieved (and in fact is required to be) in one of two ways: either 1) a foreign adoption is "domesticated" in Virginia, or 2) the child has been placed or allowed to be placed with the adoptive parents in the foreign country but the adoption was not initiated or finalized in the foreign country, but was permitted to be finalized in the Virginia.

Neither of those situations applied in this case.⁴ Nevertheless, given the representations that Afghanistan had expressed no objection and a formal waiver was anticipated, and that time was of the essence, this Court proceeded. But since the RED (Respondents here) were residents of Fluvanna County, though the child was not physically here, and they had been given custody of the child, this Court concluded the child was necessarily deemed to be a

⁴ This was based on the Fluvanna Juvenile Court custody order and the finding of no known home state.

resident or domiciliary of Fluvanna County. This Court determined that if custody had been given to Fluvanna residents, this Court must have jurisdiction to hear and address the adoption proceeding, and it was not clear who else would have jurisdiction, with no known home jurisdiction.

In any event, this Court did not believe it could or should grant a final adoption with the child not being physically in the United States, and without an investigation by and approval of the Department of Social Services (DSS) or other child-placing agency, and without the appointment of a guardian ad litem (GAL) for the child. On more than one occasion the RED. asked the Court to enter a final adoption order, asserting that a final adoption would allow the child to be treated as a dependent of RED. and facilitate her leaving Afghanistan to be transported to the U.S. for medical care, and would make her able to be covered by his medical insurance. Nevertheless, this Court refused to enter a final adoption order on more than one occasion. The Court did enter an interlocutory order, though not under circumstances anticipated by Va. Code §63.2-1209, as such appeared to be in the child's best interest at that point, and there seemed much to be gained for the child. The Court further found that the respondents were suitable and proper persons for the custody and care of the child.⁵

⁵ In hindsight, it appears to the Court that it should have considered giving custody to the local Department of Social Services, under the last provision in the statute, if they would have taken such, since it was a Fluvanna family, but that did not occur to the Court.

It was the Court's view that the DSS investigation and investigation by the GAL could take place after the interlocutory order was entered, but before any final order was entered; if there appeared any reason that such should not be finalized, then an appropriate order could be entered vacating the interlocutory order. The Court found that entry of the interlocutory order was in the best interest of the child.

After the entry of the interlocutory order the child was not airlifted or transported as initially hoped and expected, despite UVA hospital "standing at the ready", and months went by. There were other hearings, to update the Court. These included evidentiary hearings, one involving the general in charge of the Bagram military hospital, and a nurse who attended the child. Both testified to the danger and risk if the child was left in Afghanistan with such injuries and the long-term care needed, and the risks in being left as a disabled (and believed foreign) orphan in a war zone in Afghanistan. Both testified that it was not in the child's best interest to be left in Afghanistan under those circumstances.

The **RED.** did inform the court of "red tape" and bureaucratic difficulties between the military and Departments of Defense and State with regard to approving the child as a military dependent, confirming insurance coverage, and delays in transporting her out of the country without a final adoption order. There also was a disputed presidential election in Afghanistan and the COVID pandemic that took people's attention and may have slowed things down. They were hopeful that these issues could be resolved. A timeline of events submitted to the Court in a hearing, which was being looked at for other reasons, contained a reference to a

“TRO” [temporary restraining order] denial. This Court does not recall thinking of that specifically nor considering what that meant, both because that was not the focus of the Court’s review of the timeline, and because temporary restraining order is not a term frequently used in state court in Virginia. The timeline also contained an entry saying the child was “turned over to anonymous person in unknown location by ICRC” in February. But the Court does not recall any reference to an actual court proceeding (in the Western District of Virginia or elsewhere) or any ruling by a court, and certainly not one that addressed the validity of the Juvenile Court’s custody order or this Court’s birth certificate order. The Court believed that this was normal tension regarding governmental agency or administrative requirements, and not legal court issues regarding the Virginia court proceedings.

Also, the Court does not recall any identification of the person the child was turned over to. **RED.** credibly testified in the current proceedings that he had no such specific identification information at that time.

It was represented at some point that the child was being looked after by a young Afghan woman or girl (who as it turns out was 17 years old at the time) whom the **RED.** believed could be trusted. This Court is aware of a constant concern or danger in some countries for anyone who cooperates with the U.S. or Western allied authorities, frequently as interpreters.⁶ Many are concerned about their safety if they return and are concerned for the safety of

⁶ Many are here in the Charlottesville area, either through the IRC, NGIC, DIA, or other agencies.

families in the home country they have fled, if they were identified. (This concern was actually expressed by Petitioners in this proceeding.⁷) In light of this, the Court did not, *sua sponte*, press for any more detailed information on the person caring for the child; in hindsight, perhaps it should have. There was concern expressed that the **RED.** might lose track of the person caring for the child, given the ongoing military action in the area and that they were in an unknown location, that she and the child might be harmed, or that the caretaker might change her mind and not return the child or at some point might refuse to cooperate. These seemed reasonable concerns to the Court, given the danger and unstable situation in the area, and the delay in bringing the child to the States.

After a year, and having received both the report and consent of the DSS and the report and recommendation of the GAL⁸, but before the child had been brought to the United States, this Court, with apprehension and some hesitation, but not aware of any opposition or objection, did enter the final adoption order, thinking that this might be the final piece to get the child out of harm's way and allow the child to be brought safely to the United States to begin receiving the medical care that she had desperately needed.⁹

⁷ **RED.** showed concern when his photograph was taken as they were leaving the country.

⁸ The Court fully understood, when the GAL was appointed, that he would not be expected or able to meet with the child under such circumstances.

⁹ The parties may file with the Court (either with this presiding judge or the new presiding judge), any requested corrections or

After the final decree was entered, the Court learned at some later time that the child had been able to be brought to the U.S. just before the government of Afghanistan fell to the Taliban in August 2021.

On December 9, 2021, the Court received a filing by Petitioners seeking to vacate and set aside the adoption order as *void ab initio*, based on fraud and the Court having no jurisdiction or authority, and to give the child to the Petitioners.

THE CURRENT PROCEEDING and
PETITIONER'S CLAIMS

Petitioners filed their initial motion to reopen and vacate/set aside in December 2021. The Court, upon reading the allegations and seeing the seriousness of the concerns raised, and being unaware of Va. Code §63.2-1216 at that point, immediately, on that day, granted the request to reinstate the adoption on the docket for further proceedings so the motion to vacate could be considered. However the Court did not vacate the final order.

Upon further reflection and consideration, the Court some weeks later¹⁰ informed counsel that it believed it was improvident, premature, and inappropriate for the court to place the original adoption case back on the docket because the Petitioners, not having been parties to the adoption

revisions of the recited facts or evidence if based on references to the transcript of testimony or exhibits. With all of the evidence in this case (hours of testimony and hundreds of pages of exhibits), the Court is not confident that it has remembered all of the evidence presented completely.

¹⁰ Sometime between December 22, 2019, and March 30, 2020.

proceeding, were not proper persons to make such a motion. But the Court stated that this did not mean that they could not file a matter challenging the validity of such order, but it had to be a collateral attack and not a direct one since they were not parties to the adoption proceeding.

The Petitioners allege, among other things, that the final adoption order is *void ab initio*, because it was the result of fraud, including extrinsic fraud, and that this Court did not have jurisdiction. They allege that the Court had neither subject matter jurisdiction, because certain procedures were not followed and certain prerequisites were not present, nor personal jurisdiction, as the child was not in the United States or the Commonwealth (though the Department of Defense had physical custody and possibly legal custody, and Respondents had a Juvenile Court legal custody order). In addition they allege that they did not, as the purported closest family members of the child, receive any notice of the adoption proceedings, and that the Respondents here committed fraud upon Petitioners as well as the Court. They allege that if the order is void for lack of jurisdiction, it can be attacked at any time by anyone, and if they were entitled to notice, the final order can and should be set aside and they be allowed to object and participate. Finally, they allege that any order based on extrinsic fraud—misrepresentations or actions preventing a person entitled to participate in any ensuing proceeding from knowing about or being able to participate, or preventing the court from having a full understanding of the case or the evidence—is void and should be set aside.

Respondents reply that Petitioners do not have standing, and at the very least had not established

that they have standing. They are not natural parents, adoptive parents, grandparents, or anyone with court-ordered custody or guardianship, and have not proved they are even biological relatives. Respondents asserted in a demurrer that Petitioners had not alleged sufficient facts to show that they had standing, and at most they are unofficial guardians or custodians, by operation of Afghan tradition and law. In addition, Respondents assert they did not commit fraud as they did not make any statement or representation proved to be known by them to be false. Finally, Respondents assert that Va. Code §63.2-1216 is an absolute bar¹¹, in that more than six months had passed since entry of the order when the petition was filed, and in the interest of finality and “permanency” the General Assembly has made a policy choice that we will not (and cannot) go back and look behind such final adoption orders, even if such

¹¹ Respondents filed two demurrers, one addressing insufficient allegations in the Petition regarding standing, and the other addressing the bar of Va. Code §63.2-1216. Respondents also raise the lack of any constitutional rights being violated by the application of §63.2-1216. While they did not file a written Plea in Bar, the parties have proceeded as a plea in bar, and agreed for the Court to consider such. The two demurrers, taken together, clearly raise standing and the statutory bar of §63.2-1216, and the parties have proceeded in the various evidentiary hearings as if it were a plea in bar regarding both. It is clear, under Virginia law, that if any evidence is needed to resolve the issues, a demurrer is not the appropriate vehicle, as a demurrer challenges the pleading itself, not the evidence. The Court has treated the demurrers as a plea in bar. The Court finds that it could raise either standing or the statutory bar of §63.2-1216 *sua sponte*, in any event, and could, as well, consider the claim in a demurrer if insufficient facts are alleged to show that Petitioners’ constitutional rights would be violated by application of the statutory bar.

request is based on lack of personal jurisdiction, lack of proper notice, other procedural defects, or fraud, all four of which are alleged in this case.

Petitioners respond that while generally that is true, the bar does not apply if the application of the statute would violate the Petitioners' constitutional rights. They allege that since they are standing in the place of the parents, under Afghanistan law, and are "the closest analog" to adoptive parents, their U.S. constitutional rights would be violated by the application of the statute. Respondents assert that we cannot be certain--and Petitioners have not proved--that Petitioners are who they say they are, that Petitioners' alleged familial relation is based solely on their word, with no other corroboration. In any event, they are not the natural or biological parents of the child or adoptive parents, they are not U.S. citizens, and at the time in question they were not residents of or present in the United States. At the time the child was brought to the United States (August 2021) the adoption order had been entered for over eight months, and for more than a year before the Petition to Vacate was originally filed. Petitioners also were not in the picture at all and had no actual connection or relation to the child when the custody order was entered by the Juvenile Court or the interlocutory order was entered by this Court. So from the beginning of the adoption proceedings up through entry of the final order, Petitioners had no constitutional rights to assert.

So for this Court, at this stage, the case comes down to three issues: 1) Petitioners' standing to challenge or participate in the adoption proceeding at all, 2) the allegations of fraud and lack of jurisdiction, and, 3) the §63.2-1216 bar (and Petitioners'

constitutional rights). The Court originally framed the preliminary issues as Standing and §63.2-1216. Fraud was also included because it was the main basis for Petitioners' challenge, and if the Court found no evidence of fraud, the case would not go forward. Petitioners have repeatedly argued, most recently in their motion for an injunction, that the Court has heard sufficient evidence to find fraud, so the Court will also briefly address fraud, for that reason.¹²

ARGUMENT AND ANALYSIS

STANDING OR IDENTITY OF PETITIONERS

The Court, after having heard all of the evidence, does not have confidence that the RED. are who they say they are regarding their asserted familial relationship to the child, so the Court is not convinced or persuaded on this point.

The Petitioners, if they are believed, are relatives of the child. Mr. RED. purports to be a first cousin (his father and the child's father being half-brothers), but he had never seen the child before the fateful day and there were no photographs presented of the child before the incident.¹³ And no one came forward claiming to be family for months.

The Court believes from the evidence that they did not, until these proceedings, refer to the child as RED. the name Petitioners' counsel have adamantly

¹² If the case is not barred but is allowed to go forward, Petitioners can still offer additional evidence of fraud.

¹³ The Court may be wrong, but it does not recall any photographs even of the parents of the child, particularly Petitioner RED.'s uncle (the child's purported father); there were several photographs submitted of the child with the RED. later, after February 2020.

insisted be used for the child throughout these hearings. The Court does not recall any evidence that the child was referred to by that name before these proceedings. RED. had a nickname or term of endearment for the child while she cared for her (RED.). It appears that the RED. generally used the names RED. or RED. (the name given her by the RED.), depending on the circumstances. The Court believes that early on the RED. did not know that the child's name was RED., and it was never clear how or when the RED. learned of that name or first used that name. It was never clear to the Court that that really is the true identity of the child. There was no Afghan birth certificate presented, the RED. had never met the child, and there were no photographs of the child from before the explosion.

In addition, there was believable evidence, from RED. and Mr. Osmani, which was explained but which the Court does not recall being contradicted or disputed, that the RED. never referred to themselves when speaking with RED. or Mr. Osmani, as parents, or as mother or father of the child, and never referred to the child as their daughter, until these proceedings, with the possible exception of communication between RED. and Ms. Kimberly Motley.¹⁴ And there was evidence that they did not refer to themselves as masuleyat, saparasti, or wali—various terms meaning custodian, guardian, responsible person, or person in charge--

¹⁴ Respondent's counsel points out that in the original Petition, which was under oath, the Petitioners did not refer to themselves as parents or "the child" as their daughter or their child.

though RED. did refer to himself in this way in speaking with RED. (but it also did not appear that RED. ever, when speaking with RED. referred to himself as the parent of the child either, or refer to the adoption). In fact, by Petitioners' own evidence, RED. (Petitioner RED.'s father) was the actual guardian or custodian¹⁵ and he allowed the child to be cared for by the RED. (he "gave the waleyah to RED. ").

Also, it is, to say the least, interesting that, if the RED. did not recognize the authority of the RED. at that early stage, as RED. and Osmani testified, they would ever refer to the child as "RED.", which they apparently did repeatedly and frequently. If they viewed the child as theirs, and they were acting as parents, and if they were expecting to keep the child, why would they acquiesce in calling the child a name that is not hers? This makes no sense, unless they

¹⁵ While Petitioners have relied on Afghan law to show their custody or guardianship, their experts saying that the closest older relative in the father's line would be the wali. But it came out in Petitioner's evidence that RED.'s father shares a mother with the supposed father of the child (RED.), but not the father, so RED. who RED. is claiming through, would not really be the wali under Afghan law, as it was explained, and he would not have the authority to give RED. the authority. It appeared that Petitioners' counsel may have been surprised by this testimony since they had made a point to emphasize the automatic operation of Afghan law. But that was never explained or followed up on by Petitioners' counsel. In fact there was no evidence about RED.'s father's line, or whether his father was alive. According to the experts' testimony, in the absence of survivors in the father's male line, the child's mother's line would assume the waleyah (and produce the wali). There was no evidence of that at all. So the Court has no confidence that Afghan law even gave RED. the authority to give the child to RED. .

were actually originally strangers to the child and were knowingly serving merely as caretakers until the child could be brought to the U.S. for medical treatment. There would be no point in that. The Court does not believe it to be common or accepted in most Middle Eastern cultures to let someone else determine the name of your child, or that you would call them by another name assigned by someone else, not of your culture. If the child was really theirs, one would think they would ask “Why do you call the child RED? Her name is RED. (or RED.)” This did not come out in the evidence, as the Court recalls. They simply said that since the RED. and Osmani and Motley used that name, they used that name. This is unconvincing.

There also was no DNA evidence presented to show any likely family relation.¹⁶ At a minimum this is an absence of evidence supporting or corroborating Petitioners’ familial claims.

In addition there were significant questions raised in the evidence as to whether the child was actually living with Petitioner RED. at all. It was specifically testified to that often when Respondent

¹⁶ Respondents asked for DNA evidence from the very beginning, and Petitioners resisted this from the very beginning. The Court cannot ignore this. The Court believes this was long before DNA was looked into and it was found that there were certain problems or deficiencies with determining the ancestry of a female child through the male line. But it would seem to the Court that before this was found out, the Petitioners would have been as anxious as Respondents to confirm their purported family tie in any way they could, and at least not objected to or opposed such. It did appear that there were three or four full siblings of the child whose DNA might have been compared with the child’s for identification purposes.

RED. communicated with RED. the child was not there with him, but was somewhere else, perhaps most of the time.¹⁷

The child, now over three years old, has lived with the RED. since August 2021. But it appears that the RED. (or at least RED., or some other relative of the RED.) had the child from February 2020 to August 2021, a period of 18 months. It was during this time that RED. says she came to view herself as the mother of the child. It also appeared that at the Dulles airport, when the RED. took possession of the child and separated the child from RED. RED. was upset and distraught, and that RED. later spoke with Osmani, Motley, or RED. RED. about this. It is certainly understandable that RED. would have gotten attached to the child¹⁸ while caring for her for 18 months, even if there was no family relation or legal custody. So it would appear from the evidence that both families (at least RED. and the RED.) became attached to this child. (The Court does not recall any similar evidence regarding RED. and the child.)

So the Court is not persuaded that Petitioners are who they say they are as to the family relation. It is not convinced that they are really relatives of the

¹⁷ Petitioner RED. also was resistant at first for the child to come to the U.S. for medical care and preferred for her to go to India or Pakistan, seemingly for reasons other than the welfare or best interests of the child and obtaining the best medical care possible.

¹⁸ RED. no doubt, became attached to and emotionally bonded with the child when she was an infant. The RED. have been invested in the child--her survival, welfare, and future--from the beginning, and have bonded with her as a toddler.

child; the Court has wondered, might they be who they say they are, but there are too many questions and inconsistencies, and much left unexplained.¹⁹

But the remaining question is do the RED. have standing as guardians or custodians because the child was placed with them. The Court does believe that the child was placed or allowed to stay with RED., that she was caring for the child, at least some of the time, and that she later married RED.. It does not have any question that the child was placed with RED. before they were married, and that in some sense of the word they were acting as guardians or custodians, perhaps like a foster family, and the child was placed with them by the International Committee of the Red Cross, and such appears to have been consented to by the then-government of Afghanistan and acquiesced in by the United States.²⁰ RED. may have approved this because RED. and RED. were to be married; we do not know. But it was never made clear that this was more

¹⁹ When considering leaving the child with the RED., the Court is worried Petitioners might be who they say they are; that would be a tragedy. But the Court, when considering taking the child from the RED., is even more concerned that the RED. are not who they say they are. The Court finds, on the evidence presented that it is at least as likely that they are not biologically related, and has not been proved by a preponderance that they are.

²⁰ The Court does not have a clear picture of what involvement RED. had with the child. Again, the evidence was that many if not most of the times when RED. or Osmani were speaking with him, he was not where the child was, and the child was often with RED., or RED.'s or possibly RED.'s family, or at a later point with another member of the RED. family.

than physical custody—meaning where the child is and who was caring for her.²¹ But Petitioners have no court order or ruling by a judge, granting them legal custody; they have only their word and some communications by agency officials. This does not equate, in the Court’s view, to them having legal custody. (And as noted above, there is enough question about the application of Afghan traditional law that I do not find it proved that they had legal custody by that.)

There has never been a court order produced, nor did any witness say they ever saw one. Petitioner’s witness Sayed Anwar Sadat said only a court could grant or transfer legal custody, which may under the evidence given have required a DNA test and witnesses. So this Court does not believe that being merely a caretaker, such as a babysitter, nanny, or foster family, would give one standing. But even if **RED.** was in fact not the traditional guardian by operation of law, if he was recognized as such and was allowed to place the child with **RED.** or the **RED.** as guardians or physical custodians, that might give them standing to raise the issue, if they indeed cared for the child over a long period of time, and were acting in the place of parents (and the only persons doing so at the time). Though the Court is

²¹ Clearly persons with custody or guardianship would have the right to notice in the juvenile custody proceeding but they were not in the picture until February 2020, and the custody was granted November 6, 2019. And it was not clear that the custody of the Department of Defense was more than physical custody. The Western District (Va.) Court and Petitioners seems to have concluded it was legal custody; but at that time, the **RED.** had been given legal custody and that order was not attacked or vacated in state court.

not sure about this, it seems to the Court that as the custodians or guardians of the child they--at least **RED.**--should be able to at least raise the question. It is not clear that their position is strong enough to actually have standing to participate in the original adoption proceeding. And the Court initially expected to impose the statutory bar, so from the bench said it was "assuming without deciding" that they have standing, at least to raise the issue of vacating a void adoption order and to bring the matter before this Court, even though the Court is not ruling that they would have standing to participate in the original adoption proceeding or have access to the original adoption file; the Court de facto was finding that they have standing to bring this petition. They have a legitimate interest in the matter, as actual caretakers of the child, and the Court is confident they would litigate their claim vigorously (and in fact have), and there is no one else the Court is aware of to raise it (other than possibly **RED.**, who we have not heard from).

So the Court will not grant or sustain the plea in bar based on lack of standing and will proceed to address and examine on the merits the other claims and issues raised. If Petitioners are not barred, and if the final order is vacated, then their access to the original file can be addressed by the Court.

Petitioners assert fraud, lack of notice of the adoption proceedings, not following required procedure, and lack of subject matter jurisdiction as reasons the order should be set aside. These are all reasons that, under normal circumstances, an order may be revisited, modified, or vacated after 21 days, and why some orders might be deemed void. However, Respondents, though denying fraud, lack of

required notice, and lack of jurisdiction, argue that Va. Code §63.2-1216 bars the attack of an adoption order, even if any of these defects are present. It is thus this Court's view that the statute is key.

So that brings us to an examination and analysis of the statute for all of these reasons: fraud, lack of notice, and procedural deficiencies. The statute purports to totally insulate the order from attack based on fraud, notice, procedural irregularities, and even lack of jurisdiction. So it is important to address the statute in some detail. The Court will come back and address the underlying alleged defects briefly later.

THE EFFECT OF VA. CODE §63.2-1216

The Language of the Statute

The ultimate issue and disposition in this case, at this point, is the meaning and application of Virginia Code §63.2-1216. The starting point for the Court is the language of §63.2-1216.

Virginia Code §63.2-1216, states:

After the expiration of six months from the date of the entry of a final order of adoption from which no appeal has been taken to the Court of Appeals, the validity thereof shall not be subject to attack in any proceedings, collateral or direct, for any reason, including but not limited to fraud, duress, failure to give any required notice, failure of any procedural requirement, or lack of jurisdiction over any person, and such order shall be final for all purposes.

This is an extraordinary and extreme statute. Its clear purpose is to protect the child, and to further the goals of finality, stability, and permanence, which

have been paramount in the Commonwealth for years.

The extreme and unmistakable language of the statute includes the phrases “a final order of adoption”, “not...subject to attack”, “in any proceedings”, “for any reason”, and “shall be final for all purposes.” So while generally there are some means to attack an order after 21-days, those reasons are not be sufficient, in the words of this statute, for a final adoption order.

It is not insignificant that among the reasons specifically listed above as not sufficient reasons or bases for attacking or vacating such an order are 1) fraud, 2) lack of proper notice, 3) other procedural deficiencies, and 4) lack of jurisdiction, all of which were raised and relied on by Petitioners in this case. And the list is not exhaustive, as the statute precedes those terms with “including but not limited to”.

In making arguments against application of the statutory bar, have Petitioners and the Guardian Ad Litem misinterpreted the statute? Is there a sound reason that the statute does not apply and control in, and thus bar, this case?

Purpose of the Statute

The Court has reviewed several cases addressing this particular Code section.²² Many of the cases address the purpose of this statute.

²² Those case opinions relating to §63.2-1216, read together, seem to say as follows:

- 1) The statute was passed to further stability, finality, and permanence in adoptions and children’s situations;

In Lively v. Smith, 72 Va. App. 429 (2020), in denying a natural mother’s fundamental liberty interest in raising her own child and affirming an adoption by grandparents (her parents), the Court noted “the countervailing state interest in serving [the child’s] best interests by ensuring finality, and thus stability, in his parenting is a compelling one.” Citing Nelson v. Middlesex Dep’t of Soc Servs., 69 Va. 496, 509 (2018), the Court in Lively stated “the clear purpose of the statute [is] to favor finality of a child’s adoption and thus forestall changes in or challenges to ‘who his legal parents are,’ which ‘ha[ve] the potential to cause significant harm to the child.’” 72 Va. App. at 445. So obviously this is all for the welfare of the child.

The Nelson case cited goes much further:

The purpose of the statute is clear. The General Assembly made the policy choice to favor finality, recognizing that repeatedly subjecting a child to multiple changes in or *even mere challenges* to who his legal parents are has the potential to cause

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- 2) This is repeatedly noted as an important and compelling state interest;
 - 3) The legislature and Courts knew that this would extinguish the rights of persons, even if there were defects in the acquiring and entry of the order;
 - 4) The welfare of the child in the long term is greater than the rights of the individual who may be related;
 - 5) The only cases the Court is aware of where the statute was unconstitutional as applied were natural/biological parents;
 - 6) In determining whether to pierce §63.2-1216, the constitutional rights of the actual biological parent have been the basis for doing so.

significant harm to the child. As we previously have noted in interpreting a predecessor version of the statute, “the policy of stability in a family relationship, particularly when a young minor is involved, outweighs the possible *loss to a person whose rights are cut off* through fraud and ignorance.”

69 Va. App. 496, 509, citing F.E. v. G.F.M., 35 Va. App. 648, 661 (2001) (en banc) (italics added). So the Court of Appeals clearly is acknowledging that this policy will cause the loss of rights to some persons, potentially actual family members, even possibly by fraud or lack of notice.

Similar language is included in Cook v. Jensen, 2020 WL 543584 (2020), an unpublished Court of Appeals case helpful for its recent articulation of this purpose and quoting the language from F.E. and Nelson approvingly, emphasizing the General Assembly’s “policy choice to favor finality”, and that the policy of stability for the child outweighs the loss of rights to some. Id. at *6.

Furthermore, the statute does not just say the adoption order “cannot be vacated” or “should not be challenged”, but it says, “cannot be attacked”. This is the same as saying the order is not even to be challenged. As the Court in Cook says, the Circuit Court does not have the authority or jurisdiction to even revisit the matter and entertain such a challenge. Id. at *6, *9.

This provision in the statute effectively has the same purpose as a Plea in Bar; that is, to save a party the trouble of even defending against such an assault on the validity of the order. The whole point and purpose of §63.2-1216 is not to allow such attacks or

challenges as this. Respondents have asserted all along that this case really should never have gotten this far. Perhaps they are right, based on the statute. But this Court wanted to be sure that the **RED.** had the chance to contend and argue that this statute does not apply, and thus allowed Petitioners to proceed because the Court believed if they proved certain things they may be able to raise the challenge. So the Court gave Petitioners' counsel the opportunity to assert that the §63.2-1216 bar does not apply. The Court was inclined to impose the bar early on, but wanted the **RED.** to have the chance to argue and present their side of the case. But from the beginning, the Court viewed §63.2-1216 to be a steep climb for the Petitioners.

In addition, since the main vehicles for Petitioners to challenge the order were fraud and lack of jurisdiction (as well as notice), the Court gave them the opportunity to present evidence on that, and if they could not prove fraud or lack of jurisdiction or required notice, the case could not go forward and they could not prevail, even if the statutory bar did not apply.²³

To reiterate, the statute says that no final adoption may be “attacked” after six months for any reason, by anyone. It does not say, “unless there has been fraud, duress, lack of notice, other procedural

²³ With regard to the fraud issue, in hindsight this may have been poor judgment and poor case management on the Court's part, in that it may have been unnecessarily time consuming and resulted in a much longer proceeding, when the statute makes it clear that fraud is not a reason to allow the final order to be attacked. The only question was the application and effect or impact of the statute to bar the attack.

defects or lack of jurisdiction”, but rather, even if there was such.²⁴ The intent of the General Assembly is unmistakable. Those are all reasons that the adoption order might be able to be attacked after 21 days, but not after six months.

Fundamental Liberty Interest of a Parent?

Petitioners assert that the statute is unconstitutional as applied in this case, and therefore should not control. There have been two cases this Court has found where the reviewing courts found the statute, as applied, to be unconstitutional; both involved a natural, biological father. Based on those cases, the only time this statute does not apply and control would be if the application of such time limit would violate the fundamental liberty interest of a parent and their constitutional right to due process. Petitioners argue such here. However, there are two counter arguments.

First, as the Court has noted, in each of the two cases the prevailing party on appeal was a natural parent. In F.E. v. G.F.M., cited above, the Court refers to “a parent’s interest in the relationship with

²⁴ Petitioners counsel, in argument, have also asserted that Respondents may not benefit from their criminal acts. But they have not been convicted of any crime, nor charged with any, as far as this Court knows. This is a civil proceeding and the Court does not find they engaged in criminal behavior--however unwise their conduct may have been--even by a preponderance. In relation to the incident at the airport, Respondents did have a final adoption order, and the Court finds they believed it was valid, and certainly they would be able to keep the **RED** from preventing them from taking custody of the child, and knowledge of the order in this Court’s view preempts any criminal intent unless they knew such was not valid, and the Court finds they clearly believed it was valid.

his or her child,” 35 Va. App. at 662, and “parents’ relationship with their children”. Id. at 663. In explicating this right and reasoning, the Court goes on to use the terms “natural parents”, “parental responsibility”, “a biological parent”, a father’s “already established relationship with his biological child”, and “pre-existing relationship with his biological child.” Id. at 663, 664. It is clear that in F.E., the “fundamental right” is tied to a natural or biological parent relationship.

Similarly, McCallum v. Salazar, 49 Va. App. 51, 54 (2006), following F.E., involved a biological father asserting a procedural due process claim. The Court reversed the imposition of the special plea bar of §63.2-1216 until there could be a showing whether the biological father had an “actual relationship of parental responsibility” with the child, and not just a “mere biological relationship”. Id. at 57. So it appears that in that case the natural parent relationship (not disputed there) is a necessary but not a sufficient prerequisite. There must be an actual parenting relationship in addition to being an actual parent. The Court is not aware of any case or authority that expands the exception to §63.2-1216 beyond a natural or adoptive parent. These are the only two cases this Court has found.

Petitioners are not natural parents. They are not parents at all. Neither of them is an actual biological parent, and they are not adoptive parents (or even grandparents). From the evidence given, at most one of them, if believed, is a first cousin, and they had at best a guardian or custodian relationship. This is not the equivalent of a parent, certainly not a natural, biological parent. It may give rise to standing, and may have been the basis for a right to notice in a

custody proceeding. But the main question in this case is, in the absence of being a parent, does the physical custody/guardian relationship in this case convey the “fundamental liberty interest” that a natural parent has under the case law. Or is it limited to an actual parent and their interest in their own child?

The Court also does not find that someone who is a caretaker or guardian under the traditional Afghan law of their country is the same as an adoptive parent. Petitioners have asserted from the beginning that there is no adoption in Afghanistan. If there is no adoption, they cannot be adoptive parents under Afghan law. Respondents pointed out in cross-examination of one of Petitioners’ experts that the child would not inherit from the wali, and the Court does not believe they are on equal legal footing as the biological children, and there were other distinctions vis-a-vis adoption. Petitioners have asserted it is the “closest analog” to adoption. But Petitioners cannot prevail simply by being closely situated to something required by the law. Being “close to the same thing” or “similar” is not equal to “the same as”.

In any event, Petitioners are not and never were parents. So the question comes down to this: under the facts of this case, not being parents, do the **RED.** nevertheless have a fundamental liberty interest in their relationship with the child due to being “in the role of” parents. Stated differently, though there is no case explicitly indicating such, can anyone other than a natural or adoptive parent be allowed to pierce the bar of §63.2-1216? Petitioners’ counsel and the GAL argue there can be. The Court was not sure of this. But the Court is ruling that the exception described in F.E., and McCallum is not necessarily limited to

natural parents and that the RED., by virtue of being the physical custodians and caretakers of this child, and being “parent figures” for 18 months in Afghanistan²⁵ (no other person appears to have been caring for the child at the time), had such a fundamental liberty interest in their relationship with this child, despite not being natural parents, adoptive parents, legal custodians, or even biological kin. Admittedly no case the Court is aware of explicitly holds this, and this is a case of first impression on this issue.

The remaining question then is whether in this case, applying the statutory bar would violate a constitutional right, so the statute would be unconstitutional as applied.

Constitutional Rights of Petitioners

Perhaps even more important, non-U.S. citizens who do not reside in the U.S. do not have constitutional rights under our law. As the United States Supreme Court recently stated in Agency for Int’l Dev. v. Alliance for Open Society, -- U.S. --, 140 S. Ct. 2082, (2020) “...it is long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the United States Constitution. [several case citations omitted]. As the Court has recognized, foreign citizens in the United States may enjoy certain constitutional rights [such as] the right to due process in a criminal trial....But the Court has not allowed foreign citizens outside the United States or [a] U.S.

²⁵ It was a pertinent consideration to the Court on this point that the child did not come into the physical care and custody of the RED. until August of 2021.

territory to assert rights under the U.S. Constitution.” Id. at 2086.

Baaghil v. Miller, 1 F. 4th 427 (6th Cir. 2021), reiterates that holding, quoting Agency for Int’l Dev., ruling that the U.S. Constitution does not convey the right to a resident non-citizen to have his family granted a visa, nor does it give any rights to the non-resident family members to join the resident non-citizen.

In applying this clear recent constitutional case law to the facts of this case, Petitioners had no constitutional rights to assert at the time the final adoption order was entered, in December 2020. Bluntly, citizens of Afghanistan in Afghanistan are not protected by the U.S. Constitution, and do not have constitutional rights. They were still non-U.S. citizens residing outside of the U.S. and U.S. territories. They certainly did not have any constitutional rights prior to then—either at the time the interlocutory adoption order was entered, when the birth certificate order was entered, or when the initial custody order was entered in Juvenile and Domestic Relations District Court. Most important, at the time the six-month bar passed in June of 2021, Petitioners were still in Afghanistan, and non-resident non-U.S. citizens. A day after the passing of that time bar, they would not have been able to challenge or attack the adoption order, and the application of the statute would not have been unconstitutional as applied as it would not be in violation or denial of any constitutional rights, as they did not have any. They may have been able to make claims under other provisions of law or treaties, but not under the U.S. Constitution.

Thus, the order, arguably, became final and not subject to attack at that time. The difficult question for the Court here is, would it make any sense that the order would be final and unassailable then, but would become “unfinal” at a later time by virtue of their entry into the United States with U.S. permission? The Court has struggled with this question. Are their constitutional rights, in effect, retroactive, so the prior unassailability was a mirage? That seems to undercut the very finality the statute is meant to achieve. It is clear that those cases stand for the proposition that when there is a biological parent who has a fundamental liberty interest in the relationship with a biological or natural child, and who is a U.S. citizen or resident at the time of the proceeding, this could keep the §63.2-1216 bar from applying. That is the only explicitly stated exception. That is not the case here.

The current proceeding was premised on an emergency proceeding in Juvenile Court whereby custody of an orphaned child, believed to be a stateless minor, was given to a Fluvanna couple. The emergency did not evaporate. That couple filed an adoption proceeding in the jurisdiction of their residence. This Court, weighing all of the circumstances, entered first a birth certificate order (after conferring with the Attorney General’s office), and then an interlocutory order of adoption, but refusing to enter a final order of adoption until a Guardian Ad Litem was in the case and the Department of Social Services had received a referral and investigated, and waiting (at least at first) until the child was in the United States. At no time during all of that did Petitioners have any constitutional rights under the U.S. Constitution.

If they had no recourse and no constitutional rights immediately after the six months following entry, or before that when the final adoption order itself was entered, or when the interlocutory order was entered, then it would not seem they could then undo that by moving to and entering the U.S. That it would be final and unassailable one moment, and then at a later time would be vulnerable is not in keeping with the language and intent of the statute or the cases, and is a logical quandary. It is not just a matter of the Court's discretion not to set the order aside, but rather a prohibition—the Court is not allowed to. As observed and ruled in Cook v. Jensen, 2020 WL 543684 at *6, *9, the Court has no jurisdiction or authority to revisit the matter.

Petitioners are allowed certain constitutional rights now that they are in the United States. Those would include the ability to file this proceeding and participate in this months-long hearing, with ample legal counsel. They have certainly been provided procedural due process in this case, with multiple competent counsel. They have been provided all trial rights a citizen is entitled to, with many motions filed and argued, some of which were granted. They have subpoenaed and called witnesses and challenged Respondents' evidence. But does the due process of a parent in the cases referred to apply here. Does entering the country allow them to revisit matters that they had no right to challenge when such occurred. Now they have some constitutional protections as they are in this country, but does it revive any rights that relate back?

Petitioners frame the question as, "at the time the statutory bar was asserted did they have constitutional rights?" They argue that their

constitutional rights should be judged not at the time the time bar passes, but at the time the statutory bar is asserted. So far as the Court is aware, this too is a case of first impression as well (just as the above question about a non-parent's fundamental liberty interest is). The Court is not aware of any case directly on point. The Court ultimately relented and did not rule they had no constitutional rights when the bar was asserted, so the Court ruled that the statute was unconstitutional as applied in this case, despite there being no case that explicitly says this. If they are treated as parties with a fundamental liberty interest in the child, and they are in the United States, then the Court will deem that their constitutional rights come into play. If they had no fundamental liberty interest, this would be moot. So Petitioners had to prevail on both of these points in order for the §63.2-1216 bar not to apply. If Respondents prevail on either of them, the bar would prevent the adoption order from being attacked.

So the Court will deny and overrule the plea in bar. The case will go forward, after the stay is lifted following the interlocutory appeal.

The Court will now address one other issue raised by Petitioners.

Does A Void Order in and of itself Prevent Application of the Statutory Bar?

Petitioners have also focused on the argument that this order is *void ab initio* so it can be of no effect, and such can be raised at any time, thereby preempting and foreclosing the application of §63.2-1216. And if it is a void order, they say, it cannot be a "final order" to receive the benefit of §63.2-1216 even without the above exception. (The Court

believes that stands the statute on its head.) That is a general legal principle--clearly limited somewhat by Bonanno v. Quinn, 299 Va. 722, 736 (2021), discussed further below on another point. We are dealing with a specific statute, concerned only with adoption cases. In interpreting statutes and case law, the specific controls over a statute or rule of more general application.

The Court does not agree with Petitioners on this point. It is obvious that this statute clearly anticipates and assumes adoption orders entered that are defective or deficient and should not have been entered, and are void or voidable because of fraud, duress, lack of required notice, other procedural deficiencies, or lack of jurisdiction. So we are already talking, necessarily, about an order that under normal circumstances (non-adoption) could be attacked more than 21 days after entry, and could and likely would be set aside, virtually at any time, not subject to the §63.2-1216 limitation. But this is an adoption. And this extreme statute drops down the portcullis at six months. Only “parents” whose constitutional rights are violated by the application of the statute get through.

The very purpose, function, and impact of this statute—with regard to the adoption of minors—is to say that all of that does not matter, and the orders are valid and final anyway. That is the only logical and rational interpretation and construction. This statute validates and insulates orders, at a certain point in time—six months after entry—that otherwise would or could be subject to challenge and attack, and possibly facially vulnerable. It validates otherwise invalid orders, or ones that at least could be invalidated. This is all in the interest of finality and

permanency for the child. It is not an accident. It is clearly an intentional decision by the legislature, a policy choice, repeatedly acknowledged and affirmed by the reviewing courts. And the only chink in the armor, the only potential opening or weakness, is when the constitutional rights of a parent who has a fundamental liberty interest in the relationship with their child is violated by application of this statute. The question in this case, then, is does it need to be a natural or biological parent or adoptive parent to trigger that.

So the fact that the order would otherwise be void is not a reason the bar would not apply.

To repeat, the **RED.** are not U.S. citizens and they were not residing in the U.S. when the events occurred. They are here now, and have been provided due process by lengthy hearings. They were at most guardians or custodians when they and the child were in Afghanistan. They are not natural parents or adoptive parents. (Even an aunt or uncle would be a closer family relation, and as noted, above, the Court has no confidence that they are even blood relatives.) That Afghanistan does not (and did not) have anything other than guardianship does not equate them to parents, natural or adoptive. The child was not placed with them by court order, but rather by a purported uncle who has never appeared and is not a party, who only by asserted Afghan tradition is the guardian. Again, to be similar to or “close to” something does not mean it is the same thing.

While the best interest of the child is usually the touchstone in any custody or adoption case, as noted by Petitioners’ counsel and the GAL, this Court cannot get to that factor in this proceeding until it determines that the case is properly before the Court

and that the order should be set aside (although, as noted above, the best interest of the child is inherent and resident in the statute itself).

Nevertheless I find that Va. Code §63.2-1216 would be unconstitutional as applied to the facts of this case. At the time of the custody proceeding, the issuance of a Virginia birth certificate, the entry of the interlocutory adoption order, and the final adoption order, Petitioners were not in the United States, and they were not in the United States six months after the entry of the final order. So at no time during the critical, material proceedings did they have any constitutional rights to be violated. At the time the final order became unassailable under the statute, Petitioners still had no constitutional rights to be violated. But at the time of this proceeding to set aside, and at the time the statutory bar is being asserted, they are U.S. residents and have the right to due process under the constitution. The Court finds that at a minimum this allows them to ask the Court to vacate the final adoption order for the reasons asserted by them, and they are not automatically barred. That is the extent of this ruling. The Court is not this day, in this ruling, setting aside the final order, or indicating what should occur if such is ultimately set aside by the Court. This Court is not making any decision or determination as to the ultimate outcome in this case. It is just denying or overruling the plea in bar and letting the case proceed.

The Court notes that both of these questions—1) Are Petitioners to be treated as parents under the facts of this case, or is the “fundamental liberty interest” exception to application of §63.2-1216 limited to natural or adoptive parents? and 2) Are the

constitutional rights of Petitioners to be judged as of the passing of the 6-month bar or when the statutory bar is asserted—are matters of first impression and there is arguable authority contrary to this ruling. Therefore the Court will grant leave, upon motion, for Respondents to pursue an interlocutory appeal under Va. Code §8.01-675.5, as there is substantial ground for a difference of opinion on both of these points, there is no clear, controlling precedent in Virginia on either of these points, a determination of these questions will be dispositive of a material aspect of this case, and could be dispositive of the entire case, and it is in the parties' interest (and particularly that of the child) to obtain a resolution in this matter as soon as possible.

Subject Matter Jurisdiction—the final issue as to §63.2-1216

Petitioners also argue that this case is different because of lack of subject matter jurisdiction. They argue that because the court lacked subject matter jurisdiction, the order was void from the beginning, so §63.2-1216 does not even apply as it is thus not a final order, so the Court did not need to go through the above §63.2-1216 analysis at all. It is preemptive, so to speak. The Court finds this assertion is not correct for a few reasons, and, as mentioned above, it stands the statutory bar on its head. First, it was in fact entered as a final order, and the statute involved says the order may not be attacked “for any reason” and “in any proceeding”. That is pretty extreme. In addition, the list of reasons that are not sufficient to vacate the order is preceded by “including but not limited to”. It already explicitly mentions lack of

personal jurisdiction and fraud, all reasons that would say the Court did not have proper jurisdiction.

But more to the point, the Virginia Supreme Court in Bonanno v. Quinn, 299 Va. 722 (2021), mentioned above on another point, has simply stated, when a similar argument was made, that Circuit Courts in Virginia do in fact have subject matter jurisdiction over adoptions. Period. Justice Mims makes short-shrift of this argument: “[C]ircuit courts have subject-matter jurisdiction [under 63.2-1201] to adjudicate adoptions, so there is nothing more for us to decide on that question.” 299 Va. at 735. Bonanno involved the Court not fulfilling the procedural requirements for a step-parent adoption, as required by §63.2-1214. So it is analogous to this case, virtually on all fours as to that issue. That did not stop the Court from having jurisdiction. This conclusion just puts this case in the category of the Court not following the normal procedures for an adoption of a foreign-born child.²⁶ Petitioner argues that a foreign-born adoption, under §63.2-1200.1, is not controlled by the Bonanno holding. But the Bonanno Court did not limit this to domestic

²⁶ This raises an issue, as in the unpublished opinion of Cook v. Jensen, 2020 W.L. 543584 (2020), of a matter of “trial error” and not jurisdiction. *8. The reasoning in that case is that misapplication of a statute (or not following a statutory procedure) makes the judgment, at best, voidable, but not void. That is entirely consistent with the terms and interpretation of Va. Code §63.2-1216. Incidentally, it was important in that case that a challenge to a second order was brought within 6 months, which shows the significance of the statutory bar, and procedural deficiencies are not a reason, under this statute, to attack or vacate an order.

adoptions and made no distinction based on domestic or foreign-born adoptees.

So this just raises an issue of procedural defect and trial error, but not jurisdiction. It is not the same as if a Juvenile and Domestic Relations District Court tried to adjudicate a divorce, name change, termination of parental rights, or adoption--there is absolutely no jurisdiction or authority to address such a case--or if a General District Court attempted to hear and adjudicate a civil suit for \$1,000,000, or restore a convicted felon's right to possess a firearm. Va. Code §63.2-1201 establishes the circuit court's jurisdiction over adoptions. The rest of the adoption statutes establish the procedures for bringing and adjudicating such. This is a matter of procedural error; the rules for an adoption of a foreign-born child are treated the same as the rules for adopting a stepchild.

Thus as procedural requirements, if they are not followed or established, we again fall under the express language of §63.2-1216, procedural deficiencies. So it is the Court's view that a procedural deficiency has been proved. So this is not a separate independent reason for denying or overruling the plea in bar.

MERITS ISSUES

The Court is not now making a final decision on these issues, but will briefly address the claims of fraud, lack of notice, and procedural deficiencies that are the basis for Petitioners attacking the order. The parties may present additional evidence, but the Court will summarize and assess some of the evidence and arguments presented thus far. Again, as noted

above, the Court may consider or not consider this as it deems appropriate.

Fraud

Fraud must be proved by clear and convincing evidence. Petitioners have alleged that Respondents, at various points along the way, have made misrepresentations to the court or have omitted critical information, and that such misled the Court and prevented their clients from participating in the proceeding. Some of the allegations do not amount to fraud, in the Court's view.

Petitioners focus mainly on two things: one, representing and maintaining that the child was not Afghan but was a stateless minor (most likely from Turkmenistan), and that her parents, believed to be deceased, were nomadic fighters, and, two, that they concealed information or told the **RED.** lies to keep them away from, and from knowing about, the adoption proceedings.

As to the representation that the child was a stateless minor, the Court believes that is misplaced as to constituting fraud. Regardless of whether the child was in fact stateless and from another unknown nation, and not Afghan, Respondents would have to know what they were saying was not true and that the child was not a stateless minor. The Court cannot find that; it is the Court's view that they not only do not know that, but they believed and still believe that the child was not Afghan but was from another unknown country. If Respondents believed the child was stateless, it cannot be fraud. The Court further finds that the **RED.** had ample reason for believing this.

The Court at this stage is not convinced or persuaded. Not only does this Court find a basis for the RED. believing that the child likely was from somewhere other than Afghanistan, it finds that the RED. did in fact believe the child to be the orphaned child of foreign fighters from a country other than Afghanistan. Given this, the RED. cannot be guilty of fraud as to this fact. They can be wrong or incorrect without committing fraud. In addition, the Court does not find fraud on this point proved by clear and convincing evidence.

RED.'s testimony and that of Sgt. RED. and Staff Sgt. RED. corroborate this. Their observations at the scene of the initial breach of the compound—including the dress and appearances of the combatants engaged, and their behavior—and their knowledge of who they were engaging, all supported the idea that they were foreign fighters, that all in the compound where the child was recovered were associated with each other, and they were believed to be affiliated with Al Qaeda. This does not seem unreasonable to the Court. The actions of the RED. testified to by the witnesses were not inconsistent with this. As to RED. RED. being willing to just leave the child or worse, the Court does not believe they would have said or suggested such as to the treatment of the child if they believed they were talking about the child of an Afghan citizen. One can imagine or reason that was because of who they believed the parents of the child and their compatriots to be.

Respondent RED. credibly testified that they had significant doubts when they were later told the petitioners were claiming to be relatives or kin, as

there had already been two or three other similar claims or rumors that certain individuals were relatives, which turned out to be false or were never verified.²⁷ So the Court does not find that Respondents committed fraud by representing the child as a stateless minor. It finds that they truly believed, from all the evidence and circumstances, that the infant was the child of foreign fighters, either Turkmen or Uighur, and that there were facts and circumstances to support this belief, and that belief persists to this day. Further, it appears that Respondents truly believed that the child was severely injured by a self-detonated device triggered by the person believed to be the child's mother. We may never know if that is true, but the Court finds that the RED. believed this. Such circumstances were testified to by RED. and the two soldiers who testified. It is not enough if they are later proved wrong or incorrect (which has not occurred yet).

And the fact that the Afghan government official informed the Americans that they did not want the responsibility for the child is an indication that they, at least early on, did not believe the child to be Afghan.

Respondents did represent later (as evidenced in the final order), or at least did not correct, that the child had no known relatives. As indicated, the Court does not find that Respondents believed the RED. were relatives. It would have been good for the Court to know there were persons claiming to be relatives, as it might have affected how the Court proceeded. But there is no basis to find that they knew the RED.

²⁷ One can imagine they were hoping it was not true.

were relatives. Respondents did not, to the Court's knowledge or recollection, ever say that no one was claiming to be a relative. And there were no photographs of the child taken or sent before this incident. (RED. just testified that he had heard from his uncle that they had had a child born.)

Another thing Petitioners point to in their allegation of fraud is that Mr. Osmani disclosed and shared with RED. certain information that RED. had asked him not to, which was shown to be true. However, this does not, in the Court's view, support or establish any kind of conspiracy, fraud, or violation of their rights. First, the Court does not recall any evidence that there was a promise or agreement not to pass on information to RED. only a request that Osmani not do so. But the information shared was that Petitioner RED. had phone numbers of local Taliban leaders in his cellular telephone. Given that it is undisputed that the Taliban were fighting to take over the country and overthrow the Afghan government (and they were ultimately successful), that the Taliban are recognized as an international terrorist group with no respect for human or civil rights, that the United States was identified with the legitimate government at the time, and that the Taliban are vehemently opposed to the United States, its military, and its Western allies, it could be a matter of life and death that RED. know that the person they were dealing with (RED.) had connections with the Taliban.

This is also consistent with RED. advising RED. (in preparation for his seeking asylum in the U.S.) to delete all American, English, or Western contacts in his phone, as they would be passing through Taliban controlled checkpoints which could

in fact be a matter of life and death for the RED., and could result in prison, torture, retaliation, or worse. This was not disputed, much less contradicted. Petitioners' counsel simply tried to put this in a bad light.

In fact, one can only surmise what we would think of Mr. Osmani if he had not informed RED. of this and at some point RED. was captured or killed by the Taliban, particularly someone listed in RED.'s phone. Everyone would ask why Mr. Osmani did not share this with RED., whom the Court believes Osmani knew before he knew RED., and why Osmani kept some things from the RED. There is no reason the Court is aware of that Osmani should have less obligation to the RED. than to the RED. (And similarly, if RED. had not told RED. to get rid of the American or Western affiliated numbers and RED. was caught and arrested, not only could it be life threatening to RED., but also to anyone associated with him.)

So the fact that Osmani shared with the RED. what RED. asked him not to, is no evidence of fraud or conspiracy. It was about Taliban-related telephone numbers on his cell phone. It would be like someone warning a friend that they are in a business dealing with a gang member or that they are living next door to a pedophile, even though such gang member or pedophile requested they not tell anyone. That does not create an obligation (or reason) not to do so.

Similarly, Petitioners take issue with Respondents' use of a photograph of the child supplied by the RED. and not saying they were using such for a passport, and altering the photo. The Court does not find that they were obligated to inform the RED. of that. Petitioners also imply that the fact that they

photoshopped the clothes onto the picture is an indication of fraud, but **RED.** explained the bath photo was not acceptable to the authorities because the child was not adequately clothed.

However, as the GAL pointed out, there were several matters the Court should have been informed of, but was not. These may or may not actually constitute fraud, but this Court ruled that they make out a prima facie case. The fact that the child was placed by the ICRC with a couple claiming to be relatives, even if the **RED.** did not believe them, and even if they are not shown to be relatives, should have been disclosed to the Court. And when, prior to entry of the final adoption order, Respondents knew that the Afghan government had changed its position and was not waiving jurisdiction, this should have been reported to the Court, even if they continued to hope this would change.

This Court also should have been made aware that a related proceeding in February 2020 took place in U.S. District Court regarding the transfer of physical custody to the **RED.** and the legal action seeking to prevent or enjoin such (by injunction or TRO). Petitioners did mention in at least one hearing a “TRO” and relayed difficulties with arranging for the child to leave Afghanistan. This Court either did not notice or did not focus on the TRO when it was mentioned. This Court assumed that such was largely administrative disputes between the U.S. and Afghanistan or among U.S. government agencies. If another court proceeding was mentioned, this Court has no recollection of it, or any court ruling, or that such court addressed the Juvenile Court’s custody order or this Court’s birth certificate proceeding. This Court is not certain that in the adoption proceeding

the Respondents had an explicit legal duty to inform the court of the other proceeding in the Western District of Virginia, as in a juvenile custody proceeding. But this Court would have preferred that they had, and that they should have.

These allegations of fraud go to the very foundation of our court system, of procedural fairness and due process. Much depends on when certain things happened, what was known, and when certain things were known. There will have to be continued proceedings on the fraud allegations.

It also is not clear that, when the RED. failed to inform the Court fully, they believed that the RED. were entitled to any notice or had a right to be involved in the adoption proceeding. Keeping someone unaware of an action which they did not have a right to be involved in, or keeping them away from the court proceeding, would not necessarily be extrinsic fraud if they did not have a right to appear, intervene, and participate. The RED. may have been concerned the RED. would be upset and might try to resist or cause trouble, but the Court does not find that Respondents truly believed the petitioners had any legitimate legal interest, and do not to this day.

RED. testified that RED. knew the RED. planned to treat the child as their own, but not telling them that they planned to adopt or get a passport would not necessarily equate to fraud.²⁸

²⁸ It seems plausible that RED. knew of the RED. taking responsibility for the child, and was okay with it, but that it was kept from RED. and that when she found out she was opposed and was more upset. This seems consistent with some of the evidence given, and is consistent with RED.'s bargaining to get passage to the U.S. for him and family members. On more

Nevertheless, the Court believes and finds that the RED. should have made the Court aware that parties taking care of the child were claiming to be family.

Petitioners, in the context of the fraud allegations have painted the RED. in a negative light throughout, including their motivations and intentions. The Court believes that from the beginning Respondents were concerned about the child foremost, and they acted for her welfare or what they believed to be her welfare when no one else was. The Court finds from the evidence it has heard so far that Respondents main concern, from the beginning, was the life, health, safety, and welfare of the child. Their failing to inform the Court appears to have been a misguided effort to hasten the child's transport to the U.S. where she could receive necessary medical care and be a part of their family.

There are really only two possible overarching narratives the Court can see. One is that the RED. with no obligation, stepped up and stepped in early on when literally no one else did or would, to help a child in severe need who had no one, to save her life and procure her safety, to spend their time and money to try to help this child. They sought to get her medical care, a home, and a future, when no one else was, and they did what it took. When an Afghan government official said in effect, "we can't handle this" or "you take her and take care of her," the RED. believed this, took the official at their word, acted on it, and followed through. RED. testified that he and his wife were willing to do whatever it took, just as he

than one occasion it seemed that he was seeing what benefit he could get out of the arrangement.

also did helping others trying to leave Afghanistan. Of course they got emotionally committed to the child. They believed early on that if she was left in Afghanistan she was going to be placed in an orphanage or worse. It is the Court's view that anything they did improper grew out of this.

The other narrative, championed by Petitioners, is that the RED., with bad motives from the beginning, decided to steal a child, to take her for their own benefit and gratification,²⁹ knowing or believing that there were actual family members who were essentially in the place of parents available. The Court rejects that interpretation and narrative. The RED. appear to have been skeptical when they later heard reports of relatives being found, and the Court so finds. The Court believes them when say they understood an unmarried Afghan girl was keeping the child, like babysitter or daycare provider. RED. appears not to have been in the picture in the beginning. (When Osmani found Taliban phone numbers on RED.'s phone, this clearly affected their perception of the RED.) The RED.' knowledge and belief regarding the RED. and the timing of such may need to be the focus of the further proceedings.

Credibility Issues

As to credibility, there were portions of both the RED.' and the RED.' testimony that raised questions in the Court's mind. But overall, the Court had more confidence in the RED. and found them more believable, particularly with regard to the child, and the Court resolved any credibility conflicts in

²⁹ Petitioners' counsel accuses them of child trafficking, and focuses on their religious motivation.

their favor. **RED.** and **RED.**, respectively, admitted in their testimony that on at least three different occasions one or the other of them misrepresented certain facts and lied (to either the **RED.** or the authorities) for their own purposes.

There were at least two occasions where **RED.** acknowledged having lied or made a false statement, one of which was when he said he had to get permission from the Taliban to go (or send the child) to the U.S., or was waiting for such permission, or that his father was going to speak with a local Taliban leader. His explanation for this did not make sense to the Court. (The Court recalls he may have said he was putting **RED.** off, to buy time, but is not sure about that.) It seemed to the Court just as likely that he was in fact waiting to hear back from the Taliban for permission, and that his father was indeed communicating with them. This is corroborated by his having Taliban telephone numbers in his phone, and their statement during these proceedings that they could not return to Afghanistan because they came to the U.S. without the Taliban's permission or against their wishes. There was at least one other incident where he admitted having made a false statement but the Court cannot recall what that was.³⁰

Similarly, as to **RED.**, she made a false application to obtain a teskera (national identification card), stating her date of birth was two years earlier than it actually was, so she could get into a school program she desired to enroll in. Apparently it was

³⁰ Whether to satisfy the Taliban, or to make things easier for the child to get medical care, or easier for them to get to the U.S., it is not clear.

also against the law, according to Petitioners' evidence, to have more than one teskera. This would normally be a collateral matter, except that here their true identity and relation to the child was a central issue in this case.

In fairness, it appeared that **RED.** also gave or included some information that was not true on an application for a passport for the child. The Court viewed this as clearly an act of desperation to try to get the child out of the country (along with the **RED.**) before the country fell to the Taliban. This does not justify it, but it puts it in context and in a different light.

Also, **RED.**'s testimony about her loving the child more than her own child she had recently given birth to (and more than she loved her husband) just did not have the ring of truth to it, but seemed to the Court designed for its effect on the Court. It did not engender confidence that she was being candid and truthful with the Court.

The Court did not ever have confidence that this child is the child of **RED.**, **RED.**'s purported uncle, and there was no basis in the case to find this beyond the **RED.**' testimony.

Lack of Notice

Petitioners argue that they were entitled to notice of the adoption proceedings and did not receive any. It is still not clear to the Court that they were entitled by statute to notice of the adoption proceedings.³¹

³¹ Clearly they would have been entitled, as custodians or guardians, to notice in the custody proceedings if they had legal custody. But they were not in the picture at that point. At the time of the custody proceeding, the issuance of the birth certificate, and entry of the interlocutory adoption order,

The Court is not convinced at this point that they were. They are not natural parents or adoptive parents, or the equivalent thereof. The child's natural parents were deceased so no notice was necessary to them, nor was there any court-ordered custody to the **RED**. The Court is not sure, even if they had had notice, they would have been allowed to intervene or participate in the adoption case. It is unclear under this evidence that they would be necessary parties to the adoption, as they are not parents (natural or adoptive) and do not have legal custody, and did not have a parent's right of consent. There is no evidence Petitioners were ever given legal custody; their witness Mr. Sadat said that custody could only be granted by court order.

But having found that the **RED** have a fundamental liberty interest in their relationship with the child, even if the Court questions that physical custodians and guardians would otherwise be entitled to notice in an adoption, in this case, it seems they would. But this still needs to be further heard by the Court.

Procedural Defects

There clearly is a procedural irregularity, defect, or deficiency in this case. The child is foreign born. This case did not meet the procedural requirements for a normal foreign adoption, under the statute. The child was not formally adopted in Afghanistan, and it was not presented here as a confirmation or

Petitioners did not have custody and were not guardians. They were thus not entitled to any notice at that time or for those proceedings. The Court has also been informed that the Juvenile Court custody order has been challenged and attacked collaterally and such challenge was denied.

validation of that adoption. Likewise the child was not placed with the **RED.** by an agency in Afghanistan, with permission to adopt in the U.S. In addition, the child was not in Virginia or the United States when any of the legal actions were taken. This is highly irregular, albeit for emergency and medical reasons. Petitioners also argue that since the child was not placed by an entity listed in §63.2-1200, this is a fatal defect, but §63.2-1213 says this is not so.

ROLE OF THE UNITED STATES AND EFFECT OF THE SUPREMACY CLAUSE

Effect of U.S. position or actions in these proceedings

There also are questions as to what weight or consideration the Court should give in this case to the position and arguments of the United States, presented by the Department of Justice, and what weight or effect the court should assign to the U.S. approval or acquiescence in the International Committee for the Red Cross placing the child with the **RED.**, who were believed by the Red Cross to be the “next of kin”.

The United States is not a party to this case. It never sought to intervene — until two days before the Court’s ruling on the plea in bar, knowing the Court was about to rule. The motion to intervene was denied as untimely. It had sought, and been granted, permission to be present in this closed, confidential proceeding, for the purpose of monitoring certain evidence that might be offered that the U.S. would say is not proper, and to interpose an objection to such evidence, if it is classified or sensitive. At the outset the U.S. indicated it was not weighing in on the merits of the case but was only concerned with the information, exhibits, and other evidence (and it has

participated in the hearings for months). But that position changed. The Department of Justice representative found herself arguing and championing certain positions that really did not have to do with the propriety of the evidence, but went to the merits. The U.S. has an expressed interest in this case, and so do the parties. It is in the discretion of the Court to consider the positions of the U.S. and determine the weight to assign such.

To this Court's understanding, under the Supremacy Clause when a specific law is in direct conflict, a state law has to give way. It also means that when the federal government has "occupied the field", it preempts any law in conflict with it. Adoptions, custody, and domestic relations law are matters of particular state concern. Counsel for the Department of Justice has argued that the U.S. has occupied the field of foreign policy, and that its expressed position controls and trumps all issues in this case, including the agency determination that the **RED.** are "next of kin". The Court is not persuaded and does not see it that way. The Court's view is that the U.S.'s position is to be considered, but is not dispositive. The fact that physical custody short of legal custody may have been given to someone believed to be next of kin, with the approval or acquiescence of the United States (DOD), does not equate that to parenthood or legal custody and does not establish that they are in fact related. That has to be proved in court. The U.S. does not usurp this Court's duty and obligation and authority to decide the case on the evidence, and such does not determine the outcome in an adoption case.

The Court has agreed that as to matters of official information of the U.S. government, the United

States can control whether such is used. The statement of interest is received in the nature of an amicus curiae brief, and the attachments are not just received as evidence automatically over objection. They explain the basis of the U.S.'s position but do not supplant other evidence.

This was not a decision the United States initiated, but rather consented to or acquiesced in. It seems the ICRC was the main or principal determinant, and the Afghan government agreed. There were numerous factors cited above causing this Court not to be convinced that Petitioners are actually relatives. It is not clear that these were considered by the ICRC.

It is also of note that Afghan government the Court is being asked to defer to in vacating this order no longer exists, and the successor government is not recognized by the U.S.

CONCLUSION

While the Court considered and considers this a close question, it will not grant or sustain Respondents' Plea in Bar, based on Va. Code §63.2-1216.

The Court, having determined that Va. Code §63.2-1216 does not bar an attack on the final adoption order in this case, and the Court will now have to resolve the allegations of fraud, lack of notice, or procedural deficiencies, which were the subject of much of the evidentiary hearings.

To reiterate, the Court finds that Petitioners have not proved to the Court's satisfaction that they are in fact kin to the child, for the reasons set forth above. However, the Court does find that they were caring for the child, and were guardians, custodians, or

foster care for the child, for a significant period of time. While it is not clear that this confers standing to intervene in the adoption, nevertheless, I am not granting or sustaining the plea in bar because of lack of standing, finding that they do have standing to bring this issue before the Court.

The Court is not make a finding of fraud at this point in the case. Petitioners have taken the position the Court has heard enough evidence to find fraud. While on the evidence the Court has heard it has not been proved by clear and convincing evidence, a prima facie case of fraud has been made out, and further evidence may be presented.

It also is not clear that Petitioners were entitled to notice of the adoption proceedings. They are not parents, and it has not been proved that they had legal custody. Nevertheless, given the Court's ruling on fundamental liberty interest, they probably would be entitled to notice. This too can be further addressed by the Court.

There clearly is a procedural irregularity or deficiency in the case, in that a final adoption was entered for a foreign-born child where the adoption was not finalized in the other country, and the child was not placed with the adoptive family in the other country. Also the child was not resident in Virginia or the U.S. at the time, though legal custody of the child was given to the **RED.** by the Fluvanna Juvenile and Domestic Relations District Court while she was in Afghanistan.

This order entered over the objection of Respondents, and their exception to the ruling as to the plea in bar (standing and both aspects of the exceptions to the §63.2-1216 statutory bar) is noted.

273a

Petitioner's exception the ruling on subject matter jurisdiction is also noted.

The Court stayed these proceedings until Nov. 30, 2022, while the matter is on interlocutory appeal, pursuant to Va. Code §8.01-675.5 C., as the appeal could be dispositive of the entire case, and given the purpose of Va. Code §63.2-1216. and may extend the stay further after receiving further information on the appeal schedule.

Enter: s/ Richard E. Moore

Date: 11/18/22

VIRGINIA: IN THE CIRCUIT COURT OF THE
COUNTY OF FLUVANNA

RED. RED. and
RED. RED.
Petitioners

Case No.:
CL22000186-00

v.
RED. RED. and
RED. RED.
Respondents.

**ORDER DENYING PLEAS IN BAR AND
CERTIFYING FOR INTERLOCUTORY
APPEAL PURSUANT TO VA. CODE
§ 8.01-675.5(A)**

THIS CAUSE CAME TO BE HEARD upon the Petitioners' Petition to Vacate Adoption and upon pleas in bar raised *sua sponte* by the Court regarding standing and §63.2-1216 of the Code of Virginia¹, after denying Respondents' demurrers, and agreed to be considered by the parties and the Court², upon the appearance of the parties, counsel for both parties, and the guardian *ad litem* for the child;

AND UPON CONSIDERATION of the evidence and argument presented over at least twelve hearings (and possibly fourteen) held between December 21, 2021, and November 11, 2022, the testimony of the witnesses, the exhibits admitted

¹ These issues were first raised by Respondents in two demurrers.

² See note 11 at page 10 of this Court's "Findings and Rulings" order entered November 18, 2022.

into evidence, and the argument of counsel herein, and incorporating the Court's comments, findings, and rulings from the bench November 11, 2022, and the supplemental written Findings and Rulings of this Court dated November 18, 2022 (hereinafter, the "Findings and Rulings");

UPON CONSIDERATION WHEREOF, the Court finds that Petitioners have made a sufficient showing that they have standing to challenge this Court's December 3, 2020 final Adoption Order ("the Adoption Order") for the reasons stated in the record and in the Court's Findings and Rulings, and the plea in bar is not granted based on lack of standing. The Court finds that while Petitioners are not parents (natural or adoptive), and they have not proved they are legal custodians, they were caretakers and physical custodians for a significant period of time, sufficient to allow them to bring this issue before the Court. Findings and Rulings at 37-38.

Further, for the reasons stated in the record and in the Court's Findings and Rulings the Court also finds that Va. Code §63.2-1216 does not bar Petitioners' suit to vacate the final Adoption Order, and the plea in bar is not granted on this point. The Court found, despite their not being parents or legal custodians, a "fundamental liberty interest" in Petitioners' relationship with the child, requiring due process. Findings and Rulings at 21, 25, 37, and cases cited therein.

Further, for the reasons stated in the record and in the Court's Findings and Rulings, the Court also finds that while Petitioners did not have any rights under the U.S. Constitution at the time the final adoption order was entered, or when the six-month

time bar of §63.2-1216 passed, they have acquired some U.S. constitutional protections since that time, and that these rights “relate back” or can be asserted at the time the time-bar is raised, and the statute would be unconstitutional as applied; therefore, the Petitioners may continue their asserted cause to attempt to vacate the Final Order of Adoption.

Further, for the reasons stated in the record and in the Court’s Findings and Rulings, the Court finds that it had and has subject matter jurisdiction over the underlying adoption.

WHEREFORE, the Court does hereby ORDER that the pleas in bar are denied.

WHEREFORE Respondents moved orally, unopposed, to certify this Order for interlocutory appeal, and the Court finds it in the parties’ and the child’s best interest that this matter be resolved expeditiously and to grant said Motion, the parties agreeing there is no need for a written motion since the motion was made in open court and not objected to, it is therefore further ORDERED that this Order denying Respondents’ plea in bar as to § 63.2-1216 is certified for interlocutory appeal pursuant to § 8.01-675.5 for the reasons set forth at the November 11, 2022, hearing and in the Court’s Findings and Rulings. The Court finds pursuant to Va. Code § 8.01-675.5(A) that whether § 63.2-1216 bars Petitioners’ claims is a question of law as to which (i) there is substantial ground for difference of opinion; (ii) there is no clear, controlling precedent on point in the decisions of the Supreme Court of Virginia or the Court of Appeals of Virginia; (iii) determination of these issues will be dispositive of a material aspect of the proceeding currently pending before the court, and

possibly the entire matter; and (iv) it is in the parties' (and the child's) best interest to seek an interlocutory appeal. The time to file any such appeal begins on the date that the Court signs and enters this ORDER. The standing issue would be preserved for a regular appeal at the end of the case, but not for interlocutory appeal.

It is further ORDERED, pursuant to § 8.01-675.5(C)(i), that (except for entry by the Court of several orders) further proceedings in this Court are stayed until November 30, 2022, or further order of the Court, as the interlocutory appeal could be dispositive of the entire civil action. The Court will determine whether to further extend the stay on or before November 30, 2022. The Clerk of Court is directed to send this Order to all counsel of record.

As this decision was announced from the bench, with findings, rulings, and rationale there stated, and was further supplemented by the written Findings and Rulings augmenting the Court's bench comments, endorsements by Counsel are waived by the Court.

ENTERED THIS 30th DAY OF November, 2022.

s/ Richard E. Moore
Hon. Richard E. Moore,
JUDGE

Seen and Objected to: for the reasons stated on the record and in all the papers filed by Respondents, including but not limited to Petitioners' lack of standing and the bar of § 63.2-1216.

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Counsel for Respondents

Seen and Objected to: Petitioners note objections to the following elements of the Order:

- (1) The statement that Petitioners did not have constitutional rights when the final adoption order was entered or the time bar had passed;
- (2) The implication that Petitioners' constitutional rights must "relate back" to a time six months after the final order was entered in order to bring an as-applied challenge to § 63.2-1216's six-month time bar;
- (3) The conclusion that the court had subject matter jurisdiction over the underlying adoption;

- (4) The omission of other dispositive issues such as lack of personal jurisdiction and fraud both of which independently constitute due process violations;
- (5) The procedural implication that the pleas in bar were properly raised *sua sponte* by the Court rather than as an affirmative defense pursuant to the requirements of Code § 8.01-235.

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[clerk's seal and signature]

**VIRGINIA: IN THE CIRCUIT COURT OF
FLUVANNA COUNTY**

A.A. and F.A.,	)	
Petitioners	)	No.: CL22000186-00
v.	)	
J.M. and S.M.,	)	<u>FILED UNDER</u>
Respondents.	)	<u>SEAL</u>

DECLARATION OF LTC ROSEMARY M. REED

I, LTC Rosemary M. Reed, hereby state as follows:

1. I am a Lieutenant Colonel with the U.S. Army, having served 22 years after being commissioned in 2001. I have a Master of Arts degree in International Relations and a Master in Military Art and Science (MMAS) degree from the Army's Command and General Staff College. I am currently assigned to the Plans, Policy, Operations and Training Section of NATO's Civil-Military Cooperation (CIMIC) at Allied Joint Forces Command-Naples. I serve as the Director of CIMC exercise and training, with responsibility for policy, operations and training missions in Iraq, the Balkans, Kosovo, among others.
2. From July 2019 to June 2020, I led and managed the US Forces-Afghanistan (USFOR-

A) J9 Chief of Civil Military Operations (CMO) section. In that position, I was responsible for integration and synchronization of USFOR-A with interagency, intergovernmental, and non-governmental activities (NGO) within the Combined Joint Operations Area. I advised USFOR-A and Resolute Support Commanders on all aspects of CMO, including the moral responsibility of civilians during military operations, in accordance with International Humanitarian Law (IHL) and the Geneva Conventions and coordinated routinely with other components of USFOR-A, as well as with US Central Command (CENTCOM), service and functional components, the United States Embassy-Kabul (USEK), and other United States Government and international interagency partners. Through my education, training, and experience, I am very familiar with the international humanitarian principles involving protection of civilians and DoD policies related to children injured or separated from family members during armed conflicts.

3. In my role as J9 Director, I was extensively involved in matters related to the child at issue in this case throughout the entirety of her time in Department of Defense (DoD) custody between September 2019 and her transfer to the Afghan Government for reunification with Afghan family members in February 2020. I make the following statements based upon my personal knowledge gained through engaging in my official duties and official DoD records I received in the ordinary course of said duties. This statement describes activities of the

Department of Defense and matters observed within the scope of my official duties.

4. On September 7, 2019, I learned that an injured infant was found by U.S. forces in the aftermath of a military operation and had been transported to a U.S. military field clinic in **RED.** for treatment. As J9 Director, I was responsible for civil-military coordination, including as liaison with Afghan Government institutions, USEK, the United Nations organizations, International Organizations including the ICRC, and Non-Government Organizations. In that role, over the next few days, I communicated with the UN Office of Coordination of Humanitarian Affairs (UN OCHA) officials regarding possible organizations that could help with family reunification. I then began communication with ICRC regarding family reunification efforts. Over the next months, I was the primary contact in DoD for ICRC, the Afghan Government's Ministry of Labor and Social Affairs (MOLSA), the State Department, and for elements within DoD with respect to efforts to locate the child's surviving family members, as well as interim care arrangements for the child. Due to the nature of my responsibilities, I was kept informed of the child's medical status and continued to be involved in decision-making regarding interim care options and official steps within DoD regarding disposition of the child. I provided updates to USFOR-A Commanding General Matlock and other U.S. military officials, as well as USEK personnel, on ICRC and MOLSA efforts on family

reunification until late December 2019, when the State Department took the lead on the final steps for reunification.

5. On September 17, 2019, the treating physician in the U.S. military field clinic in RED. advised that the infant was medically stable and could be discharged in 7 days. At this time, I was engaged in trying to identify other facilities in RED. that might take over the child's care while family reunification efforts continued. However, the need to move the child from the field clinic was pressing because the field clinic lacked resources to continue caring for the child while also fulfilling its mission to treat U.S. and Afghan forces. A mass casualty event in RED. required the clinic's bed space before an appropriate alternative care facility in RED. had been identified. The decision was made to transfer the child to Craig Joint Theater Hospital (CJTH) at Bagram Air Base near Kabul.
6. The infant was moved to CJTH on September 26, 2019. J9 continued to be the DoD component responsible for coordinating with the Afghan Government and ICRC in regard to family reunification efforts and determining a long-term solution for the child's custody and care. As J9 Director, I was tasked to meet with General Matlock to update him regarding developments on these issues. The Air Force Colonel who served as Commander with administrative oversight over CJTH, had responsibility for the short-term care of the infant, as did her treating physicians, but these

individuals' responsibilities did not encompass family reunification efforts, beyond granting access to relevant information and to the child in order to facilitate those efforts. Ex. A at 3. As the officer responsible for providing updates to General Matlock regarding family reunification efforts, I did not typically include the Commander on those updates, nor was he included in my communications with ICRC or MOLSA.

7. On September 26, 2019, the treating physician at Craig Joint Theater Hospital circulated an assessment of the infant to various DoD personnel with responsibilities relating to her care and disposition, including the Commander and myself. The physician reported that, pending the results of her **RED** x-rays, "there will be no medical issues necessitating hospitalization for this infant" and that "she's a healthy healing infant who needs normal infant care at this point." *Id.*
8. Based on the interactions and discussions I had within the scope of my official responsibilities, it was well understood by all concerned components with whom I had contact, including those within DoD, the State Department, MOLSA, and ICRC, that the infant had been found in a military operation targeting foreign fighters. However, it was also understood that that fact was not conclusive in regard to the child's origin, and that the efforts to identify and verify surviving relatives would have to be completed before any final determination on that issue could be made. It

was also understood that, regardless of the child's origin, the Government of Afghanistan, as the host government, would have primary responsibility for the child. By late September 2019, I was already aware that ICRC had found information through its family trace investigation that suggested an Afghan origin. In mid-October, ICRC was contacted by potential relatives from the area where the child had been found and began vetting them. Ex. B at 3.

9. Because the infant was deemed to be healthy and not in need of continuous medical care, there was concern that CJTH was not an ideal location for her to stay for an extended period, due to the risk of exposure to illness or infection from sick people at the hospital. I continued to look into whether there were alternative facilities where the child might be placed while family tracking efforts continued, and some of those with whom I consulted identified orphanages as options. However, no firm plan was ever made to transfer the infant out of CJTH prior to the February 2020 family reunification. Because, prior to February 27, 2020, family reunification efforts were ongoing, and potential relatives had been identified by mid-October, the child was never considered or declared to be an orphan, and at no time was there any plan to transfer her to an orphanage. At the October 23, 2019 meeting with MOLSA, ICRC, and State Department officials, which I attended, ICRC again indicated it was in contact with potential relatives. At that meeting, MOLSA indicated its preference that

the child would remain at CJTH until the family reunification effort was completed. This was deemed the best and safest option for the child's care under the circumstances. CJTH had no representative at the meeting but later agreed to MOLSA's request that the child remain at the hospital.

10. On November 12, 2019, I was among those who received an inquiry from the Consul General at the U.S. Embassy-Kabul regarding information the Embassy had received from USCIS, suggesting that a U.S. court had issued a custody order for the child. I had been unaware of any such custody order. Rather, I was continuing to coordinate with the Government of Afghanistan and ICRC in regard to their efforts to reunite the child with her family, consistent with the guidance from command. In response to the inquiry, an officer in USFOR-A LEGAD stated that the custody order "was not intended to interfere with the family trace currently being conducted by MoLSA and ICRC, but to create a path to the U.S. if GIRoA decides to waive jurisdiction of [the child] following an unsuccessful family trace."¹
11. On December 7, 2019, the Consul General and I received an update from ICRC and a MOLSA representative on their efforts to verify the child's potential relatives. There was no

¹ The email attached as Exhibit 2 to the Declaration of Colonel Joseph M. Fairfield (Aug. 22, 2022) is a true and accurate copy (with some redactions) of the e-mail I received and continue to maintain in my files.

suggestion in this or any other communication that I received from ICRC or MOLSA that the potential relatives of the child wished to remain anonymous.

12. In late December 2019, responsibility over the child's disposition was transferred from USFOR-A to the U.S. Embassy-Kabul. USEK therefore communicated directly with MOLSA from that point forward regarding further steps in the family reunification process, but I continued to receive updates.
13. On February 27, 2020, I was present at CJTH, along with Assistant Chief of Mission Donna Welton, General Matlock, and the Commander with administrative oversight of the hospital, and witnessed the child's transfer to two MOLSA officials, accompanied by ICRC personnel including an ICRC pediatrician.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

REED.ROSEMARY.M
ELISSA.1175978611

Digitally signed by
REED.ROSEMARY.

MELISSA.1175978611

Executed on: March 24,
2023

Date: 2023.03.24
18:07:29 +01'00'

LTC Rosemary M. Reed

VIRGINIA: IN THE CIRCUIT COURT OF THE
COUNTY OF FLUVANNA

A.A., and

F.A.,

Petitioners,

v.

Case No.:

CL22000186-00

J.M., and

S.M.,

Respondents.

ORDER GRANTING SUMMARY JUDGMENT

THIS CAUSE came to be heard on the 30th day of March, 2023, upon Petitioners' Motion for Summary Judgment, Respondents' and the guardian *ad litem*'s Joint Motion to Reconsider Pleas in Bar Regarding Standing and Virginia Code § 63.2-1216, Respondents' Motion for Partial Summary Judgment; upon appearance of the parties with their respective counsel, upon appearance of the guardian *ad litem*, and was argued by counsel for the respective parties.

UPON CONSIDERATION of the written motions and their responses, as well as the record in this case, the arguments of counsel, and for the reasons stated on the record in this hearing and in previous hearings and in the Court's written rulings and opinions, and as stated during the March 30, 2023 hearing, the Court finds as follows:

There has never ever been a case that the Court can find that is like this case. I have looked as far and as wide as I could to find some legal precedent that might assist me in dealing with this case. And there is a certain attraction to the Respondents' view of the code sections with regard to the finality of the order

of adoption, that are attractive in the sense that it eliminates quite a lot of after-action, second guessing, and other things - and for permanency in the best interest of the child. Because all of the things that we do in court with regard to adoption, custody, and visitation and other, is presumably for the best interest of the child. We generally don't engage in determinations based on the best interests of the adults involved.

And in many respects the court really is not concerned about the adults involved. Assuming that the adults are generally in good working order. We are not all that concerned about them. But we are always concerned about what happens to children. This case began because a child was exposed to violent military action on the ground and a war zone, and was found to be in that war zone by U.S. service personnel along with Afghan service personnel.

And there was a discussion at the time about what needed to be done with regard to this child. Ultimately, the child became or was transferred to the hospital at the Bagram Air Force base in Kabul, Afghanistan. There, Respondent becomes aware of this child and, I suppose to a degree nobly asserts an interest in making sure this child survives and has options in future life; that the child is provided with appropriate medical care; that whatever developmental delays existed at the time would be improved, and the child's life improved, and the child's life expectancy improved.

At the time that the child was found it was unclear to anybody in an official capacity what the child's status was with regard to citizenship. There is some thought that the child might have been something else. And there is some thought that the child might

have been yet something else. And there is another thought that the child might have been something else, too. But in the end, it was determined that the child was an Afghan child. And this is important to the court. It is also clear that at the time all of this began this child was in the custody of the United States and the United States maintained custody of this child, until the child's custody was transferred to the government of Afghanistan, and thereby to Petitioner A.A.'s uncle, and thereby to them later on.

The court finds for purposes of this ruling that the United States' determination with regard to its foreign policy imperatives have been met. And this order does not run afoul of any finding or any foreign policy determination of the United States. But I do think it is worth noting that the United States was aware of what was happening in Fluvanna County and chose to do nothing about it. They come now and complain that the foreign policy imperatives of the United States need to be obeyed and the order issued by the Fluvanna County Circuit Court at the time should be void *ab initio*. Why didn't they do that during the six-month period when they had the ability to say something when they were the custodians of this child? I don't know. And no answer has been provided other than the fact that perhaps they did not think that they needed to.

Based on the testimony that the Court has read, it seems pretty clear that Respondent J. M. has talked openly about what he was trying to accomplish on behalf of this child. The Court has very little doubt that there are people within the United States government that knew and did nothing. But here we are in Fluvanna County and the Court is being told certain things about the status of this child. And

this Court is beginning to act. And this Court does certain things. And the district Court did certain things in light of this.

Fluvanna County Department of Social Services was notified, and all of the workings of the adoption process began in Fluvanna County. Generally, when dealing with foreign adoptions, this Court usually does not do much of anything and will not enter an order regarding adoption until that child is present in the United States. That is the usual process. Here, that usual process was not followed. The exigencies of the circumstances presented to the Court suggested that another course needed to be followed for the best interest of this child. And that is almost always the overriding imperative of a court acting in an adoption: what is in the best interest of this child.

We were presented with certain information about the status of this young person in Afghanistan. This Court in the end of December of 2020 entered a final order of adoption granting the adoption of this child to respondents. Virginia Code § 63.2-1216 provides the Court with some direction as to what kinds of things one needs to look at when one confronts an adoption order and that adoption order is challenged in some way, shape, or form.

Section 63.2-1216 is pretty clear about what it outlines and what it allows and what it does not allow. In six months from the date of entry of the final order, there is no way of challenging that order pursuant to any statutory objection in Virginia. The only way you can get around that or deal with it in some other circumstance is if there is some violation of the Constitution of the United States and somebody's rights in due process. The first time that the Court really started to think about due process

was when it read *Stanley v. Illinois*, 405 U.S. 645 (1972) and some of the other adoption cases in Virginia. *Stanley* discusses what rights an unwed father had under circumstances where his children were going to be adopted. If you follow *Stanley* through, you cannot help but come to the conclusion that there is a due process right found in the Constitution's Fourteenth Amendment that is applicable to parents of children subject to adoption. It has been argued here that the Petitioner As are not parents within the meaning of that language.

This Court finds, however, that they were de facto parents of this child at the time that they arrived in the United States. The Court cannot point to any actual determination of law that was made in Afghanistan or elsewhere, because none was made. No court in Afghanistan made any final ruling or anything else. The Ministry of Labor and Social Affairs gave this child to A.A.'s father, and he in turn a few days later gave that child to A.A. But for not quite 18 months, that is where the child remained. The child came to the United States, was brought into the United States. They arrived on August 29. And on September 3, the Ms took custody of the child.

This Court finds that the As were entitled to some process that they did not receive. And as a result, the order issued by this court on December 3, 2020, is void. What this means is that the Court needs to make a finding on the petition for final adoption filed by the Ms, where the Court will make a final determination as to the best interest of this child.

Not only were there some things that were due. There are some things that the Court should have been made aware of from Respondents in this process that the Court was never made aware of. There is an

argument to be made. There is evidence of some extrinsic fraud as it relates to this process and what was happening in Afghanistan at the same time the Court was issuing its final order. And so the Court finds that there is a due process basis to avoid § 63.2-1216. The Court also finds that there is evidence of extrinsic fraud, not extrinsic fraud in a tortious conduct way. The Court is not sure that the evidence will show that there was an intentional hiding of anything by Respondents. But the fact of the matter is the Court did not have all of the information known to the Respondents at the time the order was entered. For example, that there was no waiver coming and the United States made a determination to surrender or give the child to the Afghan government.

It is hereby ORDERED that the order issued by this court on December 3, 2020, is void; it is further

ORDERED that the interlocutory adoption order previously entered by this Court and the custody Order entered by the Fluvanna County Juvenile Court remain valid and the child is to remain with the Ms; it is further

ORDERED that the joint motion of the Guardian *ad Litem* and Respondents to reconsider is denied; it is further

ORDERED that Petitioners' Motion for Summary Judgment is GRANTED IN PART and Respondents' final order of adoption of the Child, which was entered on December 3, 2020, is void; it is further

ORDERED that this Court shall enter a separate Order reinstating the cause concerning the underlying final adoption petition of the minor child, and that the case shall be stayed for the pendency of the appeal of this Order; it is further

295a

ORDERED that Petitioners' Motion to Recognize
Petitioners' Rights to Legal and Physical Custody and
Order Respondents to Return the Child is DENIED.

SO ORDERED this 3rd day of May, 2023.

s/ Claude V. Worrell Jr.
Hon. Claude V. Worrell Jr., Presiding Judge

Seen and _____

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Seen and objected to for the reasons stated on the record and in the papers filed, including but not limited to the Court's granting a motion for summary judgment when material issues of fact such as those regarding notice, jurisdiction, and fraud are disputed; not imposing the statutory bar of § 63.2-1216; and not finding Respondents' lacked standing and were not entitled to notice,

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Guardian ad Litem

ORDERED that the joint motion of the Guardian *ad Litem* and Respondents to reconsider is denied; it is further

ORDERED that Petitioners' Motion for Summary Judgment is GRANTED IN PART and Respondents' final order of adoption of the Child, which was entered on December 3, 2020, is void; it is further

ORDERED that this Court shall enter a separate Order reinstating the cause concerning the underlying final adoption petition of the minor child, and that the case shall be stayed for the pendency of the appeal of this Order; it is further

ORDERED that Petitioners' Motion to Recognize Petitioners' Rights to Legal and Physical Custody and Order Respondents to Return the Child is DENIED.

SO ORDERED this 3rd day of May, 2023.

s/ Claude V. Worrell Jr.
Hon. Claude V. Worrell Jr., Presiding Judge

[*Handwritten*: Signature pg. w/ objections filed
5-5-23 at 10:03 am

TT, Clerk]

Seen and [*Handwritten*: objected to. For the reasons set forth in the record and the papers filed, including in particular: that the court considered the interlocutory and adoption orders valid while their own terms show these orders are not valid and are also independently void for the reasons expressed in Petitioners' papers; that the court is conducting subsequent adoption proceedings when the child is

not up for adoption and Respondents have no basis to adopt her; that the court denied Petitioners' motion for immediate reunification with their child in spite of Petitioners' rights to legal and physical custody; that the court concluded the United States' "foreign policy imperatives have been met" which is error as explained in Petitioners' and the United States' filings, and the interlocutory adoption and custody orders were entered while the child was in U.S. custody in Afghanistan and directly contravene a U.S. foreign policy decision; that the court concluded Respondent J.M. "talked openly" about his intentions for the child when the record clearly establishes his lack of candor with the U.S. government; that the court made a finding that "[n]o court in Afghanistan made any final ruling or anything else" where unrebutted testimony from Minister Sadat of the Afghan Ministry of Labor and Social Affairs stated that an Afghan court approved the transfer of the child; and that the court's decision prolongs the separation of the child from her family and is not in the best interests of the child.]

s/ Timothy Snyder

Timothy M. Snyder (VSB 93782)

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Seen and objected to for the reasons stated on the record and in the papers filed, including but not limited to the Court's granting a motion for summary judgment when material issues of fact such as those regarding notice, jurisdiction, and fraud are disputed; not imposing the statutory bar of § 63.2-1216; and not finding Respondents' lacked standing and were not entitled to notice,

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[seal omitted]

U.S. Department of Justice
Civil Division
950 Pennsylvania Ave. N.W.
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Tel.: 202-514-3425

A. John Vollino
Clerk of Court
Court of Appeals of Virginia
109 North Eighth Street
Richmond, VA 23219-2321

December 21, 2023

RE: A.A. and F.A. v. J.M. and S.M., No. 0876-23-2
J.M. and S.M. v. A.A. and F.A., No. 0953-23-2
J.M. and S.M. v. A.A. and F.A., No. 0940-23-2
J.M. and S.M. v. A.A. and F.A., No. 1855-22-2

Dear Mr. Vollino,

As discussed with Chief Deputy Clerk Megan Scanlon, the United States today files a document containing additional proposed redactions to the September 6, 2023 addendum to the circuit court record. The document contains only those those pages of the addendum on which the United States proposes additional redactions. The additional redactions are indicated by blue redaction markings. The A.s previously added the fully redacted text on those pages.

The redactions to the addendum that the United States proposes include redaction of J.M.'s statements that an official from U.S. Customs and Border Protection told J.M. that A.A. was on a

terrorist watchlist. The United States generally does not disclose a particular person's watchlist status or lack thereof either publicly or under seal because that information is law-enforcement privileged and in some contexts is sensitive security information. Here, however, to avoid any possibility that the Court may make an incorrect inference from the requested redactions, the United States informs the Court that, despite the apparent unauthorized disclosure to J.M., A.A. was not, in fact, the subject of the terrorism watchlist information to which J.M. referred. There is nothing in the record to suggest that A.A. is or ever was on a terrorist watchlist.

Please let me know if the Court has any questions about this submissions.

Sincerely,

s/ Lewis S. Yelin

Senior Counsel

Appellate Staff, Civil Division

U.S. Department of Justice

cc: counsel of record via email

VIRGINIA:

***In the Supreme Court of Virginia held at the
Supreme Court Building in the City of Richmond
on Monday the 3rd day of September, 2024.***

J.M., ET AL.,	APPELLANTS,
against	Record No. 240707, Court of Appeals Nos. 1855-22-2, 0876- 23-2, 0940-23-2, and 0953-23-2

A.A., ET AL.,	APPELLEES.

FROM THE COURT OF APPEALS OF VIRGINIA

On August 30, 2024, came the appellants, by counsel, and filed an “Emergency Joint Motion for Stay Pending Appeal or Petition for Writ of Prohibition” in this case.

Upon consideration whereof, the Court grants a stay of the circuit court proceedings until further order of this Court.

This order shall be certified to the Circuit Court of Fluvanna County.

Chief Justice Goodwyn took no part in the resolution of this motion.

A Copy,

Teste:

s/ [illegible]

Clerk

305a

[seal omitted]

U.S. Department of Justice
Civil Division
950 Pennsylvania Ave. N.W.
Washington, D.C. 20530

Tel.: 202-514-4015

Muriel-Theresa Pitney
Clerk of Court
Supreme Court of Virginia
100 North Ninth Street, 5th Floor
Richmond, VA 23219-1315

March 5, 2025

RE: *J.M., et al. v. A.A., et al.*, Record No. 240707

Dear Ms. Pitney,

Following the change of administrations, the United States has now had an opportunity to reevaluate its position in this case. The United States has determined, in light of current U.S. foreign-policy interests and intervening foreign-policy developments, including developments in Afghanistan, to respectfully withdraw its amicus curiae brief filed in the above-referenced case. I would be grateful if you would circulate this letter to the Court.

Sincerely,

s/ Yaakov M. Roth
Acting Assistant Attorney General
Civil Division
U.S. Department of Justice

cc: counsel of record via email

VIRGINIA:

***In the Supreme Court of Virginia held at the
Supreme Court Building in the City of Richmond
on Wednesday the 22nd day of April, 2026.***

JOSHUA MAST, ET AL., APPELLANTS,

against Record No. 240707,
Court of Appeals
Nos. 1855-22-2, 0876-
23-2, 0940-23-2, and
0953-23-2

A.A., ET AL., APPELLEES

UPON A PETITION FOR REHEARING

On consideration of the petition of the appellees to set aside the judgment rendered herein on February 12, 2026, and grant a rehearing thereof, the prayer of the said petition is denied.

Upon consideration of the appellants' February 26, 2026 motion for fees and costs incurred from the guardian ad litem, and the appellees' response in opposition, the Court denies the motion and all relief requested therein.

Justice Fulton took no part in the resolution of this matter.

A Copy,

Teste:

s/ [illegible]

Clerk

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

“BABY L.”, a minor, by
and through her legal
guardians and next
friends, DOE 1 and DOE
2, et al.,

Plaintiffs,

vs.

DR. MARK ESPER, in
his official capacity as
Secretary for the United
States Department of
Defense, et al.,

Defendants.

CIVIL NO.: 3:20-CV-
00009

February 26, 2020
Lynchburg, Virginia

SEALED TRO

HEARING

(Conference Call)

Before:

HONORABLE

NORMAN K. MOON

UNITED STATES

DISTRICT JUDGE

WESTERN DISTRICT

OF VIRGINIA

APPEARANCES:

For the Plaintiffs:

RICHARD L. MAST, ESQUIRE

Liberty Counsel

* * *

For the Defendants (By Telephone):

KATHRYN L. WYER, ESQUIRE

ALEXANDER K. HAAS, ESQUIRE

US Department of Justice - Civil Division

* * *

LAURA DAY ROTTENBORN, ESQUIRE
DANIEL P. BUBAR, ESQUIRE
US Attorneys Office

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THE COURT: Was there any legal proceeding he should have gone through? That's what I'm sort of getting at. Was there some sort of administrative proceeding that your client needed to go through with the Army?

MR. MAST: He did, Your Honor. He sought -- so after getting clearance from his direct supervisor who is in the JAG shop in RED., in RED., he sought custody here in RED.. They granted that. He sought a record of [7] foreign birth. And then when he received these, whenever he received these, he notified DoD, notified RED. and notified RED. at the time. And so they have all had notice that this was a pathway to treatment in the US was being sought by our Doe client.

And so RED. was on board after the Vice President's office had made every effort to intervene to get her here to the United States.

THE COURT: The Court -- I'm interested in whether it was an administrative process, not so much who knew -- who shot John, who knew whom. I want to be sure that he's done everything, if there would be any procedure that he should have gone through legally.

MR. MAST: He did, Your Honor. And so in seeking -- so he would otherwise be a stranger to her except that he had met with her, sought to establish

a relationship, sought approval of the direct RED. RED., and everyone was on board at that point of bringing her to the United States.

And so in order to act on her behalf legally he had to -- to have standing to do that. The RED. courts found that standing under UCCJEA and that it was appropriate. I believe we have a copy of the order there.

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THE COURT: Well, it seems, though, that the emergency here is caused by your delay. I mean, you could have -- you knew this day was coming .

MR. MAST: Respectfully, Your Honor, I would disagree. We have had -- we've just been given no information.

THE COURT: Well, that's enough. I mean, when you're told -- you were told that on the 10th, you got negative information then which would have indicated --

MR. MAST: We were still under the impression that DoD was working and that they had initiated a parole Visa request. Up until last night we were still -- we were still hopeful that DoD was on our side, but we came to the conclusion --

THE COURT: Well, just like in any other case, you can't hope you're going to settle the case and let the statute run. I mean, this is not a -- it's not that type of case, but, I mean, I have had people working on this all morning long. We had other stuff to do. You picked a crucial time in court. You filed hundreds of pages of documents and expect us to read them in

an hour. I mean, that's not very respectful of the Court's time. I mean, you can't just walk in anywhere that I know of and demand that type of attention. I mean, there is responsibility, and it's not ...

[14] Who would like to respond right now? I would like to let Mr. Mast off the hook right now and see what objections there are to the TRO.

MS. WYER: Yes, Your Honor. This is Kathryn Wyer with the Department of Justice for the defendants.

The situation from our perspective is that the RED. did get this custody order in the state court. But as plaintiffs' counsel just acknowledged, that was premised on the understanding that the government of RED. would issue a waiver of its jurisdiction, and that has never happened.

This child is in -- has been under medical care in RED. RED., because she was found on the RED. there, but she is in RED., and it's really the government of RED. that has the authority over her. And at this point it has requested that the United States return her to them because they have identified a relative that they want to reunite her with and that transfer -- you know, it's important for the United States to meet its international obligations, and so that is what the United States was planning to do here.

THE COURT: Well, Mr. Mast says that what his client is interested in is being sure that this person who is seeking custody of the child is a proper person for the child to be returned to.

[15] MS. WYER: And that's really something that's within RED. authority to determine. We can't under international law impose that -- we

can't tell the government of the RED. how to go about doing that, and it has gone through its process to determine that.

The International Red Cross has been involved in this determination, and our understanding is that it has -- it made a final determination on that point and it made a request to us based on that to return the child to them.

THE COURT: What did the International Red Cross do?

MS. WYER: Well, their role, one of their major missions is to reunite families that are separated during wartime, so that has played a role as it normally does in assisting and identifying relatives. And, you know, it has been involved throughout the process.

THE COURT: Okay. All right. Anything else?

MS. WYER: Well, we -- I mean, I could mention that, for example, there's no -- there's no proper habeas jurisdiction here because the child is in RED., and there's no habeas jurisdiction at RED.. Under RED. RED. DC circuit decision, the Court --

THE COURT: Well, do you have any authority, I mean, like this where you have a state custody order? I would think this would be rather unique situation.

MS. WYER: It is unique because under -- usually [16] these kinds of international custody or adoption issues are handled under the Uniform Custody Act that states have enacted which kind of take into account international law, and they are between foreign governments and private individuals in the United States. But here I guess the complicated

factor is that DoD happened to be -- have custody of the child because it was providing medical treatment.

But at the same time, under that uniform law, the state court is not supposed to exercise jurisdiction over a child unless the foreign government has authorized it. And here that's what that jurisdictional waiver means. Since the government of RED. did not waive its jurisdiction, the state -- the RED. state court did not really have proper jurisdiction as the home state of a child to issue a custody order.

And in any event, because it doesn't have jurisdiction over the United States, our obligations, the United States' obligations towards RED. can't really be impacted by what -- by that order. So I -- the DoD is in the position of having to fulfill its international obligations here, and so that -- it's really kind of -- it's trying to do that because it's very important that we meet our obligations. The State Department thinks that this is a proper course of action, and that's what the government here wants to do.

THE COURT: Have you examined the state court [17] proceedings?

MS. WYER: Well, we are aware of the order. It's a sealed proceeding so we -- we don't have access to it.

THE COURT: But my question is: Did the judge take up whether RED. had waived its rights in the situation?

MS. WYER: Yes. I think what happened there is that the RED. believed that the government of RED. was going to waive jurisdiction, and that's what they told the Court, and the Court kind of prematurely issued an order based on the

understanding that was going to happen. And that's what it says in the order, that it anticipates the government is going to do that.

As the plaintiffs' counsel just explained, they thought that this was going to happen after the RED. [REDACTED], but then, ultimately, it never did happen. So that order, that state court order, was issued based on a false premise that has never happened. And now the government has -- of RED. [REDACTED] has determined that it's not going to waive jurisdiction because it has located that relative and now it intends to reunite the family.

THE COURT: I'm looking at the order.

It says, "Evidence was provided that through the RED. [REDACTED] after consultation with the RED. [REDACTED] has indicated that it will issue a medical/responsibility/jurisdiction [18] waiver to consent to the US acting in the best interest of the child as a refugee requesting asylum."

That's the finding of the court in that case.

MS. WYER: Really, under international law, the home state -- I mean, the RED. [REDACTED] court did not have jurisdiction to issue any order unless it properly qualified as the home state or an exception applied. And, I mean, it shouldn't really have acted prematurely based on that understanding unless the waiver had actually been issued. It was still, we think, improper for it to go ahead with that order.

MR. HAAS: And its findings said it will issue, not that it had issued.

THE COURT: Right.

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THE COURT: How do you perceive -- I mean, what -- [23] what are you asking for, ultimately? Your client is not asking to adopt the child.

MR. MAST: No, sir. He wants to get her medical treatment in the United States because we dispute that this is a family member. We believe that this is RED. . If it were family, RED. knows how to immediately go and get their children back from US custody. It happens all the time. We have a doctor who is the RED. in RED. , RED. , who can testify to this. They routinely run children through there that fall temporarily into US custody. What they will do is use children as human shields. They get injured, they get picked up, they get patched up, and then RED. knows how to immediately seek custody of them.

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THE COURT: For the government, you said several times international law requires that the Department of State turn this child back to RED. . Can you cite to me chapter and verse what you're relying upon?

MS. WYER: I don't -- I don't have a cite that I can provide right now, but that's from the State Department's view of our international obligations. I mean, stemming from, for one thing, the fact that we are in RED. at all by the consent of the government of RED. , and it's really up to them

what happens to a child found in their territory. All of these -- by the same token, what legal authority would allow the United States to impose these requirements on the government of RED. since that's not the way it handles its vetting? It did its own vetting process. We can't dictate to the government of RED. how it needs to go about vetting an individual as the relative of the child. And the UCCJEA recognizes that in the first instance by designating one jurisdiction as -- as the proper jurisdiction to make a determination, and here that would have been [27] RED., not RED.

MR. HAAS: Your Honor, this is Alexander Haas.

I would just like to add there is a RED. RED. between the United States and RED. that was concluded in RED. with the consent of their government and ours, and it reflects an expectation that our Armed Forces will conduct themselves in a manner consistent with RED. law. In particular, RED.

Now, this is a case that concerns the foreign affairs and military interests of the United States, and you had asked Counsel for the Plaintiff what specifically he was asking for. Initially he said that he wanted two weeks to brief this, but it is also clear that he apparently wants the Court to order the United States to take a citizen of another country and return that person to the United States for medical

treatment. That would have potentially profound implications on our military and foreign affairs interests and is something that we would urge you not to do.

[28] You also asked plaintiff how much notice that he had had, and I would remind the Court that he was aware two weeks ago of what he referred to as the writing on the wall and could have filed this motion then. We don't think given the shortness of time here that it is appropriate for the Court to enter an order enjoining the United States, particularly on the basis of a state court order to which we -- the United States was not provided formal notice under **RED.** law.

Counsel for the plaintiff said that DoD acquiesced in the order, but we were not given legal notice of that order as is required under **RED.** law since we had physical and constructive custody of the child. That would have required the serving of legal process on the Department of Defense, among others, and we have searched and not found any evidence that formal notice was provided.

And the notion that a state court order obtained on the basis of what appears to be false or incomplete information would then be used to constrain the foreign policy and military affairs decisions of the United States is deeply concerning.

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THE COURT: Does the government have anything else?

MS. WYER: Your Honor, we cannot -- the Court just can't require the United States to impose

obligations on RED. that are not in accord with RED. law. I mean, we --

THE COURT: I gather he's asking this Court to impose --

MS. WYER: The plaintiffs are essentially --

THE COURT: -- United States.

MS. WYER: Well, plaintiffs are essentially demanding that the United States impose conditions on the government of RED. to return a child that the government of RED. is saying is their citizen and that they have identified this child's family member. They want to reunify the child. This is putting the United States in a very difficult position.

THE COURT: Is there any law that requires the United States to do the vetting that Mr. Mast is speaking of?

MS. WYER: No, Your Honor. I'm not aware of any law that would require that or even allow it.

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MR. HAAS: Your Honor, this is Alexander Haas again. If I could just say one or two more things.

Plaintiffs' counsel says -- has gotten into a lot of, you know, twists and turns here, but sort of circling back to the legal principles. You asked were there things that the [35] plaintiffs could have done. Yes, we know of two now that have not occurred.

First, that they requested and did not obtain the consent of the government of RED. to bring the child here, and plaintiffs' counsel conceded that that was required but has not been obtained.

Second, that they have submitted an application for parole of this child to the United States. And again, plaintiff has conceded that has not been granted.

There are procedures that have -- that they have attempted to take that have not -- not occurred. And so in the face of that, we don't think there is any legal basis for them to attempt to bring this child here, particularly when the government of a foreign country where our military is present by their consent has requested the repatriation of their citizen.

And to ask the Court in a matter of a few hours when they have had notice of this for months and had notice that something was up for several weeks to put a hold on a transfer and order the United States to not -- to halt is a very -- a very stark thing to ask this Court to do on such short notice, given that this involves core Article II powers of the executive branch to conduct our military and foreign affairs.

We're deeply concerned about what a message -- what such an order would be saying given the separation of powers. [36] And to do all of this on the basis of what we believe is a deeply flawed and incorrect state court order that could not bind the United States in any event would be -- would be in error, Your Honor.

THE COURT: Does the government know or either party know of any citations, particularly in the Fourth Circuit, where a state court were not acting -- the federal court had a situation where the state court were not acting or were acting in excess of their jurisdiction? I assume there probably are situations.

MS. WYER: Well, there are certainly cases that make clear that a state court order cannot bind the

United States in any event, even if it were a valid order.

THE COURT: Well, if the state court though made a decision that -- or gave the plaintiff in this case, allowed the plaintiff to adopt the child even though he's still in **RED.**, you would have a -- I'm saying the state court did it would be probably in excess of its jurisdiction to do it. Maybe not, I don't know, but ...

(Interruption by the court reporter.)

MR. MAST: Rooker-Feldman Doctrine addresses state court decisions, Your Honor.

MR. HAAS: Your Honor, Rooker-Feldman Doctrine is an abstention doctrine that would require the Court to abstain.

There are several lines of cases, though, that [37] relate specifically to the -- of the power of state courts to try to bind the United States. And it's been clear since the civil war. There's, you know, the famous case that we all learned in law school, *Tarble's* case -- that's 80 U.S. 397 in 1871 -- that explained that state courts cannot issue, for example, writs of habeas corpus when someone is -- quote, Is in the custody under the authority of the United States.

And then there's the ordinary sovereign immunity principles that apply. And I direct you to a case called *Smith v. Cromer*. And I acknowledge it is in a different context, it's not a custody issue, but that's 159 F.3d 875, fourth Circuit from 1998. And it held that state court orders seeking to compel action by a federal official was, quote, An action against the United States subject to the governmental privilege of sovereign immunity. And that the -- so that would be another one.

THE COURT: Okay, thank you.

Does the Department of Justice take the position that the orders of the RED. courts were unlawful?

MS. WYER: Yes, Your Honor. We think they were unlawful for a number of reasons. One of them because the government of RED. did not waive jurisdiction. And so under the Uniform Custody Law, RED. should not have been exercising jurisdiction.

And I think if you look at the RED. state law [38] decision RED. that discusses the proper jurisdiction of a RED. court to exercise jurisdiction over a custody proceeding. And under -- under the home state definition, because RED. did not qualify as the home state, RED. should not have been exercising jurisdiction at all here.

And also the fact that the RED. court did not provide notice to DoD when DoD had custody of the child, I mean, if the United States had been involved in that proceeding as it should have been since it had custody, we imagine things would not have gone the same way because we would have been able to correct some of these factual errors that were happening there. So but anyway, in any case, a lack of notice is another basis that we think it is an erroneous decision and can't be binding on the United States.

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THE COURT: All right. This is Judge Moon. First I want to thank counsel for your arguments today and for appearing on very short notice.

This matter is before the Court on the plaintiffs' motion for a temporary restraining order. Plaintiffs are the one seeking the emergency relief from the Court, and they have to meet the standard articulated by the Supreme Court in *Winter v. Natural Resources Defense Counsel* applicable to motions for preliminary injunctions and TROs.

Plaintiffs must show, one, a likelihood of success on the merits that plaintiffs are likely to suffer irreparable harm absent the TRO, the balance of equity is tipped in [40] favor -- plaintiffs' favor, and that issuing the TRO is in the public interest.

I've considered plaintiffs' filings today and the argument of counsel. Plaintiffs filed this action and their request for a TRO and dozens of exhibits at 1 o'clock today. The Court heard argument in the case from 3:30 to 4:30. At 5 o'clock -- or at 5:06 or 7 now, I think -- the Court is rendering this oral decision.

Given the urgent time considerations plaintiffs have described that Baby L would be put on the plane today from [REDACTED] RED. [REDACTED] Eastern Standard Time tonight, after consideration of the governing law, arguments, and submissions, I will deny plaintiffs' request for a temporary restraining order. I do not find that plaintiffs have established a likelihood of success on the merits, and, also, I find that the balance of equities do not tip -- as I said, do not tip in favor of the plaintiff, or that the TRO is necessarily in the public interest.

Plaintiffs' asserted rights to care for Baby L arise from two [REDACTED] court orders from the Juvenile and Domestic Relations Court of [REDACTED] and the [REDACTED] Circuit Court. But as the government has articulated, these [REDACTED] court orders by their

express terms reflect an assumption that the government of the [REDACTED] RED. will issue a waiver of jurisdiction. The order from the [REDACTED] RED. Juvenile [41] and Domestic Relations Court states, quote: Evidence was provided that [REDACTED] RED. through the [REDACTED] RED. after after consultation with the [REDACTED] RED. [REDACTED] RED. [REDACTED] has indicated that it will issue a medical/responsibility/jurisdiction waiver to consent to the US acting in the best interest of the child as a refugee requesting asylum. The written copy of the waiver is to be provided in a matter of days.

[REDACTED] RED. has not issued any waiver of jurisdiction. Instead, as Counsel for the government has asserted today, [REDACTED] RED. is expressly requesting that Baby L be returned under [REDACTED] RED. authority and care.

The government has also asserted that as custodian of Baby L Department of Defense should have been formally served with and provided notice of the proceedings in [REDACTED] RED. County Circuit Court. That was not done.

The [REDACTED] RED. orders were foundational to plaintiffs' asserted authority to care for Baby L. Given the plain terms of the [REDACTED] RED. court orders and the lack of service and notice upon DoD, I find that plaintiffs have not met their burden of establishing a likelihood of success on the merits.

Plaintiffs' likelihood of success on the merits is further diminished by their failure to proceed through proper channels. As the government articulated, plaintiffs' counsel had two alternative avenues to pursuing this 11th hour TRO.

[42] First, they should have obtained the consent of the RED. government to the transfer of Baby L. While plaintiffs' counsel conceded both that it was required and they sought it, it ultimately was not obtained.

Second, plaintiffs' counsel also submitted an application for a Visa for this child to enter the US, which, again, plaintiff conceded was not granted.

Plaintiffs' failure to succeed under the two avenues demonstrate there's no legal basis to bring Baby L to the United States.

Lastly, I cannot overlook the international ramifications of the Court granting the request for temporary restraining order. The State Department has ably articulated the US government's foreign policy interest and has argued relations with RED. are significantly implicated by this case.

Plaintiffs' counsel suggested that if only the State Department would, quote, get out of the way, end of quote, everything would proceed in an orderly fashion and RED. would respect human rights law. But it is the role of the State Department and not private litigants or the Court to determine the foreign policy interest of the United States.

For these reasons, I deny plaintiffs' motion for a TRO.

And that's the decision. And anything else?

[43] MR. HAAS: Nothing from United States, Your Honor. Thank you very much.

(Interruption by court reporter.)

MR. MAST: Clarification is that it was a DoD initiated parole Visa. We did not initiate the Visa.

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THE COURT: Okay. With that correction then,
we'll adjourn. Thank you all.

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U.S. Const. amend. XIV

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Va. Code § 20-146.16

Article 2. Jurisdiction.

§ 20-146.16. Notice; opportunity to be heard; joinder.

A. Before a child's custody determination is made under this act, notice and an opportunity to be heard in accordance with the standards of § 20-146.7 must be given to all persons entitled to notice under the laws of this Commonwealth as in child custody proceedings between residents of this Commonwealth, any parent whose parental rights have not been previously terminated, and any person having physical custody of the child.

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Va. Code § 63.2-1202

Article 1. General Provisions.

**§ 63.2-1202. Parental, or agency, consent
required; exceptions.**

* * *

L. A legal custodian of a child being placed for adoption, and any other named parties in pending cases in which the custody or visitation of such child is at issue, whether such case is in a circuit or district court, shall be entitled to proper notice of any adoption proceeding and an opportunity to be heard.

Va. Code § 63.2-1216

Article 1. General Provisions.

**§ 63.2-1216. Final order not subject to attack
after six months.**

After the expiration of six months from the date of entry of any final order of adoption from which no appeal has been taken to the Court of Appeals, the validity thereof shall not be subject to attack in any proceedings, collateral or direct, for any reason, including but not limited to fraud, duress, failure to give any required notice, failure of any procedural requirement, or lack of jurisdiction over any person, and such order shall be final for all purposes.

Va. Code § 63.2-1221**Article 2. Agency Adoptions.****§ 63.2-1221. Placement of children for adoption
by agency or local board.**

A licensed child-placing agency or local board may place for adoption, and is empowered to consent to the adoption of, any child who is properly committed or entrusted to its care, in accordance with the provisions of §§ 63.2-900, 63.2-903, 63.2-1817 or this section, when the order of commitment or the entrustment agreement between the birth parent(s) and the agency or board provides for the termination of all parental rights and responsibilities with respect to the child for the purpose of placing and consenting to the adoption of such child.

The entrustment agreement shall divest the birth parent(s) of all legal rights and obligations with respect to the child, and the child shall be free from all legal obligations of obedience and maintenance with respect to them, provided that such rights and obligations may be restored to the birth parent(s) and the child by circuit court order prior to the entry of a final order of adoption upon proof of fraud or duress. An entrustment agreement for the termination of all parental rights and responsibilities shall be executed in writing and notarized, and shall be revocable prior to entry of an order finalizing the agreement (i) upon proof of fraud or duress, or (ii) after the placement of the child in an adoptive home upon written mutual consent of the birth parents and prospective adoptive parents.

Va. Code § 63.2-1230**Article 3. Parental Placement Adoptions.****§ 63.2-1230. Placement of children by parent or guardian.**

The birth parent, legal guardian, or adoptive parent of a child may place his child for adoption directly with the prospective adoptive parents of his choice. Such parent or legal guardian may execute a power of attorney to the prospective adoptive parent for discharge of a newborn infant from a hospital or for the initial physical placement of a child with a prospective adoptive parent pursuant to subsection B of § 20-166 and subsection A of § 54.1-2969. Consent to the proposed adoption shall be executed upon compliance with the provisions of this chapter before a juvenile and domestic relations district court or, if the birth parent or legal guardian does not reside in Virginia, before a court having jurisdiction over child custody matters in the jurisdiction where the birth parent or legal guardian resides when requested by a juvenile and domestic relations district court of this Commonwealth, pursuant to § 20-146.11. Consent proceedings shall be advanced on the juvenile and domestic relations district court docket so as to be heard by the court within 10 days of filing of the petition, or as soon thereafter as practicable so as to provide the earliest possible disposition.

Va. Code § 63.2-1241**Article 4. Stepparent Adoption.****§ 63.2-1241. Adoption of child by spouse of birth or adoptive parent or other person with legitimate interest.**

A. In cases in which the spouse of a birth parent or parent by adoption or a person with a legitimate interest who is not the birth parent of a child wishes to adopt the child, the birth parent or parent by adoption and such parent's spouse or other person with a legitimate interest may file a petition for adoption in the circuit court of the county or city where the birth parent or parent by adoption and such parent's spouse or other person with a legitimate interest reside or the county or city where the child resides. The petition shall be the joint petition of the birth parent or parent by adoption and such parent's spouse or other person with a legitimate interest, but the birth parent or parent by adoption shall unite in the petition for the purpose of indicating consent to the prayer thereof only. The petition shall also state whether the petitioners seek to change the name of the child.

B. The court may order the proposed adoption and change of name without referring the matter to the local director if (i) the birth parent or parent by adoption, other than the birth parent or parent by adoption joining in the petition for adoption, is deceased; (ii) the birth parent or parent by adoption, other than the birth parent or parent by adoption joining in the petition for adoption, consents to the adoption in writing and under oath; (iii) the acknowledged, adjudicated, presumed, or putative father denies paternity of the child; (iv) the birth

mother swears under oath and in writing that the identity of the father is not reasonably ascertainable; (v) the child is the result of surrogacy and the birth parent, other than the birth parent joining in the petition, consents to the adoption in writing; (vi) the parent by adoption joining in the petition was not married at the time the child was adopted; or (vii) the child is 14 years of age or older and has lived in the home of the person desiring to adopt the child for at least five years. However, if the court in its discretion determines that there should be an investigation before a final order of adoption is entered, the court shall refer the matter to the local director for an investigation and report to be completed within such time as the circuit court designates. If an investigation is ordered, the circuit court shall forward a copy of the petition and all exhibits thereto to the local director and the provisions of § 63.2-1208 shall apply.

C. If an acknowledged, adjudicated, presumed, or putative birth parent or parent by adoption of a child refuses to consent to the adoption of a child by the spouse of the other birth parent or parent by adoption of the child or other person with a legitimate interest, the court shall determine whether consent to the adoption is withheld contrary to the best interests of the child. If the court determines that consent to the adoption is withheld contrary to the best interests of the child, the court may order the adoption and change of name without referring the matter to the local director. However, if the court in its discretion determines that there should be an investigation before a final order of adoption is entered, the circuit court shall refer the matter to the local director for an investigation and report to be completed within such

time as the circuit court designates. The order of reference may include a requirement that the local director investigate factors relevant to determining whether consent of a birth parent is withheld contrary to the best interests of the child, including factors set forth in § 63.2-1205. If an investigation is ordered, the circuit court shall forward a copy of the petition and all exhibits thereto to the local director and the provisions of § 63.2-1208 shall apply.

D. In any case involving adoption of a child by a stepparent or other person with a legitimate interest pursuant to this section, the court may waive appointment of a guardian ad litem for the child.

E. In cases in which both petitioners are listed as the child's parents on the child's birth certificate, the court shall permit the petitioners to obtain an adoption order under this section in order to secure the child's legal parentage.

F. For the purposes of this section, "person with a legitimate interest" means the same as that term is defined in § 20-124.1.

Va. Code § 63.2-1242.1

Article 4.1. Close Relative Adoption.

§ 63.2-1242.1. Relative adoption.

A. For the purposes of this chapter, a “close relative placement” shall be an adoption by the child’s grandparent, great-grandparent, adult nephew or niece, adult brother or sister, adult uncle or aunt, adult great uncle or great aunt, stepparent, adult stepbrother or stepsisters, or other adult relatives of the child by marriage or adoption.

B. In a close relative placement the court may accept the written and signed consent of the birth parent(s) that is signed under oath and acknowledged by an officer authorized by law to take such acknowledgments.

Va. Code § 63.2-1243**Article 5. Adult Adoption.****§ 63.2-1243. Adoption of certain persons
eighteen years of age or over.**

A petition may be filed in circuit court by any natural person who is a resident of this Commonwealth (i) for the adoption of a stepchild eighteen years of age or over to whom he has stood in loco parentis for a period of at least three months; (ii) for the adoption of a close relative, as defined in § 63.2-1242.1, eighteen years of age or older; (iii) for the adoption of any person eighteen years of age or older who is the birth child of the petitioner or who had resided in the home of the petitioner for a period of at least three months prior to becoming eighteen years of age; or (iv) for the adoption of any person eighteen years of age or older, for good cause shown, provided that the person to be adopted is at least fifteen years younger than the petitioner and the petitioner and the person to be adopted have known each other for at least one year prior to the filing of the petition for adoption. Proceedings in any such case shall conform as near as may be to proceedings for the adoption of a minor child under this chapter except that:

(a) No consent of either parent shall be required; and

(b) The consent of the person to be adopted shall be required in all cases.

Any interlocutory or final order issued in any case under this section shall have the same effect as other orders issued under this chapter; and in any such case the word "child" in any other section of this chapter shall be construed to refer to the person whose

adoption is petitioned for under this section. The entry of a final order of adoption pursuant to this section which incorporates a change of name shall be deemed to meet the requirements of § 8.01-217.

The provisions of this section shall apply to any person who would have been eligible for adoption hereunder prior to July 1, 1972.