

No. 26-164

IN THE
Supreme Court of the United States

A.A. AND F.A.,

Petitioners,

v.

JOSHUA MAST AND STEPHANIE MAST,

Respondents.

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

**BRIEF OF AFGHAN LAW SCHOLARS
AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI*¹

Amici are scholars of Afghan and Islamic law.

Amicus curiae Abed Awad was an adjunct law professor at Rutgers Law School, Newark (2003-2020) and has taught at Pace Law School and Seton Hall Law School, including courses on Matrimonial Litigation, Islamic Banking and Finance, and Islamic Jurisprudence. Professor Awad writes and publishes on the subjects of Afghan and Islamic law, including contributions to treatises on Islamic family law in American courts. He is regularly called upon to testify, write expert reports, and consult concerning the interpretation and application of Shari'a (Islamic law) and the law of Afghanistan and other Muslim countries for courts and attorneys throughout the United States, Canada, and England. He is also a fellow of the International Academy of Family Lawyers, and has given numerous lectures to judges and lawyers on the application of Islamic family law in American legal proceedings.

Amicus curiae Khaled M. Abou El Fadl is one of the world's leading authorities on Islamic law. He is the Omar and Azmeralda Alfi Distinguished Professor of Law at the UCLA School of Law, where he teaches Islamic Jurisprudence, International Human Rights, and many other courses. Professor El Fadl has been qualified as an expert in Islamic law and the law of Middle Eastern countries, including Afghanistan, by

¹ All counsel of record have received timely notice of this *amicus curiae* brief pursuant to Supreme Court Rule 37.2. This brief was not written in whole or in part by counsel for any party, and no person other than *Amici* and their counsel has made a monetary contribution to the preparation and submission of this brief.

American and British courts. Professor El Fadl co-authored the RAND Report on Democracy and Islam in the New Constitution of Afghanistan (2004). He was named a Carnegie Scholar in Islamic Law in 2005, awarded the University of Oslo Human Rights Award (the Leo and Lisl Eitinger Prize) in 2007, and was previously appointed by President George W. Bush to serve on the U.S. Commission for International Religious Freedom.

Amici have an interest in the accurate understanding of Afghan and Islamic law by American courts. The relationship at issue here was formed under Afghan law, and the decision below turns on mistaken premises about that law—most importantly, that a legal guardianship can only be conferred by court order. With the aim of assisting the Court in these matters, *amici* respectfully submit this brief.

SUMMARY OF ARGUMENT

The Virginia Supreme Court held that petitioners had no constitutionally protected interest in their relationship with Baby Doe because they were not her “biological” or “legally adoptive parents.” App. 45a. The Petition explains why that rule cannot be reconciled with the Due Process Clause. *Amici* write to explain why it is also wrong on its own terms. Under Afghan law, petitioners were Baby Doe’s legal guardians. That status conferred the right and duty to raise and support Baby Doe, and petitioners did, acting as her primary “caretakers” and “parent figures” for eighteen months. App. 23a. Afghan law vests no greater authority over a child in anyone, including a biological parent. Even if a formal legal relationship were what mattered, petitioners had one.

The court below disregarded that relationship because it assumed that legal guardianship in Afghanistan must work like it does in Virginia, where a legal guardian can only be appointed “by a[] court.” App. 48a n.27. That was wrong.

Afghan law divides the responsibilities of parenthood in two: guardianship, which covers a child’s person, education, and property; and custody, the daily care of a child too young to care for herself. When a child’s parents die, guardianship over her person and property passes immediately, by operation of law, to the paternal grandfather and, in his absence, down a fixed order of paternal succession—here, to Baby Doe’s paternal uncle. Afghan Civil Code arts. 268, 2015-2016. Custody descends along a corresponding order of female relatives, but where no woman entitled to it comes forward, it passes to the same paternal line. *Id.* arts. 239-41.

Because no woman claimed custody of Baby Doe, her paternal uncle held both guardianship and custody, and placed Baby Doe with his son and daughter-in-law, petitioners here. As a result, petitioners became Baby Doe’s *de jure* and *de facto* guardians, with the full bundle of parental rights and duties available under Afghan law. Petitioners’ guardianship was not—as the Virginia Supreme Court put it—“self-identif[ied].” App. 48a n.27. It was their recognized status under the law of the sovereign state where they lived with Baby Doe.

The lower court’s insistence on a “legally adoptive” relationship was also illogical. Afghanistan, like most Muslim countries, recognizes no formal adoption or termination of parental rights in the American sense. That difference is a matter of widely shared principle. In legal systems like Afghanistan’s that incorporate

Islamic law, a child cannot be legally detached from the family she was born into—by a court or otherwise. Guardianship is what those systems provide instead. It is not a lesser substitute for adoption, but an equally significant relationship carrying the full rights and duties of a parent. The majority thus required petitioners to produce an instrument—a formal adoption decree—that does not exist under Afghan law. That rule will affect not just petitioners, but every caretaker of a child whose home country provides for guardianship rather than Western-style adoption, leaving their ties to the children they raise ignored by default in American courts. Left uncorrected, the rule invites its mirror-image—a foreign court telling an American couple that they have no protected relationship with their adopted child because their adoption papers are not the kind that court issues.

ARGUMENT

I. Afghan Law Recognizes Guardianship, Not American-Style Adoption

Afghan law provides for an orphaned child in a way that differs from American law in two key respects: it provides guardianship, rather than adoption, and it assigns that guardianship automatically and by operation of law, rather than through a court order. Both features follow from principles of Islamic law that Afghanistan shares with many other countries, and neither makes the resulting relationship any less parental.

A. The Afghan Legal System Combines Civil Law, Islamic Jurisprudence, And Customary Law

The Constitution of Afghanistan, adopted in 2004, created a legal system that combines civil law, customary law, and Islamic law.² The Constitution instructs Afghan judges to first apply the Constitution and civil law; when those sources of law are silent, judges are to “rule in a way that attains justice in the best manner” according to the principles of Islamic jurisprudence.³

The primary source of Afghanistan’s civil law is its comprehensive Civil Code. The code’s 2,416 articles “encompass[] all areas of civil law,” from contracts to real property to family law.⁴ The rules of family law—including marriage, divorce, custody, and guardianship—are primarily laid out in articles 56 through 336 of the code.⁵ These provisions largely

² See Siavash Rahbari, *From Normative Pluralism to a Unified Legal System in Afghanistan?*, 5 Asian J. of L. and Soc’y 289, 291 (2018); Kabeh Rastin-Tehrani & Nadjma Yassari, *Max Planck Manual on Family Law in Afghanistan* 2 (2d ed. July 2012), https://www.mpipriv.de/1187062/max_planck_manual_on_afghan_family_law_english.pdf.

This brief explains the law of Afghanistan as it existed in 2020, at the time of Baby Doe’s placement with petitioners—in other words, the law prior to the Taliban’s 2021 takeover.

³ Constitution of Afghanistan, Jan. 26, 2004, art. 130.

⁴ Nadjma Yassari, *Legal Pluralism and Family Law: An Assessment of the Current Situation in Afghanistan*, in THE SHARIA IN THE CONSTITUTIONS OF AFGHANISTAN, IRAN AND EGYPT – IMPLICATIONS FOR PRIVATE LAW 45, 56 (Nadjma Yassari ed., 2005), https://pure.mpg.de/rest/items/item_831982/component/file_3550984/content.

⁵ *Id.*

restate traditional Islamic family law, with some influence from the French civil code.⁶

In addition to its role in shaping Afghanistan's codified law, Islamic law also acts as a gap-filler in cases where the Constitution and Civil Code are silent.⁷ Traditionally, Islamic judges and legal scholars interpret law according to the precepts and methods of a historical "school" of jurisprudence.⁸ Today, there are four principal schools of Sunni Islamic jurisprudence: *Ḥanafī*, *Shāfi'ī*, *Mālikī*, and *Ḥanbalī*.⁹ Afghanistan follows the *Ḥanafī* school.¹⁰

Customary law completes the picture. Under the Civil Code, "common custom" is a tertiary source of law to be applied when both the code and Islamic law are silent.¹¹ In practice, and particularly in family matters, the tribal and traditional nature of Afghan society leads most Afghans to resort to customary,

⁶ *Id.*

⁷ See Afg. Civ. Code art. 1(2) (1977), *translated in* Civil Code of the Republic of Afghanistan (Stan. Law Sch., Afg. Legal Educ. Project, 2014), <https://law.stanford.edu/index.php?webauth-document=publication/737834/doc/slspublic/Afghan%20Civil%20Code%20%20English%20translation%20ALEP%20Sept%202014.pdf>; Constitution of Afghanistan, Jan. 26, 2004, art. 130.

⁸ See, e.g., Nesrine Badawi, *Introduction to Islamic Law* 8 (Harvard Univ. Program on Humanitarian Policy and Conflict Research 2009), https://landwise-production.s3.us-west-2.amazonaws.com/2022/03/Badawi_Introduction-to-Islamic-Law_2009.pdf.

⁹ *Id.* at 8-10.

¹⁰ See Constitution of Afghanistan, Jan. 26, 2004, art. 130; Afg. Civ. Code art. 1(2).

¹¹ Afg. Civ. Code art. 2.

informal dispute resolution—rather than court orders—to determine their rights and obligations.¹²

B. Afghan Law Divides The Care Of A Child Into Two Guardianships

Afghan law recognizes two distinct forms of legal guardianship over a child: *hedanat* (custody) and *velayat* (guardianship).¹³

Hedanat (custody) is the day-to-day care and nurturing of a young child.¹⁴ It includes raising the child, supervising her, and protecting her from harm. Afghan law refers to a child’s tender years in gendered terms—“the period in which [the] child needs [the] care and nurture of [a] woman”—and accordingly women have a greater degree of entitlement to *hedanat*.¹⁵

Velayat (guardianship) is the right and obligation to direct the child’s person, education, and property. Unlike *hedanat*, *velayat* is initially assigned to men. Afghan law divides the concept of *velayat* into three further categories: *velayat-e nafs*, or guardianship of the person; *velayat-e tarbiyat*, or guardianship of education; and *velayat-e amval*, or guardianship of property.¹⁶ Only the third category is specifically

¹² Yassari, *supra* note 4, at 52-54.

¹³ See Afg. Civ. Code arts. 236, 268; Rastin-Tehrani & Yassari, *supra* note 2, at 103.

¹⁴ See Afg. Civ. Code art. 236.

¹⁵ Afg. Civ. Code art. 236; see also *id.* arts. 231, 239. In this respect, Afghan law is similar to the common law, which once recognized a “presumption that small children are better off with their mother.” *Boone v. Boone*, 150 F.2d 153, 155 (D.C. Cir. 1945).

¹⁶ Rastin-Tehrani & Yassari, *supra* note 2, at 103.

addressed in the Civil Code;¹⁷ the others are governed by Islamic law.¹⁸

Guardianship of the person and of education—*velayat-e nafs* and *velayat-e tarbiyat*, respectively—concern the child’s upbringing and welfare. Islamic law obliges a child’s guardian to provide for her health, welfare, education, and security.¹⁹ That duty includes the authority to discipline the child, to provide for her medical care, to educate her, to assist her in choosing a vocation, and to attend to all other matters concerning the care of her person. These rights and duties run from the child’s birth until the age of majority.

Guardianship of property—*velayat-e amval*—is the authority to manage the child’s financial affairs and property. The guardian may invest, settle, lease, mortgage, sell, or transfer the child’s property on her behalf. This form of *velayat* is addressed specifically in the Civil Code, which vests the authority in the first instance with the child’s father.²⁰

Together, *hedanat* and *velayat* comprise the entire set of rights and duties that Afghan law recognizes in the care of a child.

¹⁷ Afg. Civ. Code art. 268.

¹⁸ Rastin-Tehrani & Yassari, *supra* note 2, at 106.

¹⁹ *Id.* at 106-07.

²⁰ Afg. Civ. Code art. 268 (“Guardianship of properties of minor children . . . in the first place, shall rest with their father and, in the second place, with their full grandfather . . .”).

C. Under Afghan Law, Guardianship Vests Automatically And May Be Delegated With No Court Order

Both forms of guardianship recognized by Afghan law—*velayat* and *hedanat*—are transferred automatically and without any judicial act upon a parent's death.

Velayat is held in the first instance by the child's father. If the father dies, *velayat* does not lapse, but passes to his male relatives along a line of succession specified by Islamic law, and mirrored in the Civil Code—first to the paternal grandfather, then the child's brother, then her paternal uncle, then the uncle's son, and so on.²¹

Hedanat is held in the first instance by the child's mother. If the mother dies, *hedanat* likewise does not lapse, but passes to her female relatives along a line of succession also specified by the Civil Code—first to the maternal grandmother, then the paternal grandmother, then the child's sisters, and so on.²² If no woman on that list survives, or if none is available and willing to take on custody, *hedanat* transfers to the child's paternal relatives in the order of inheritance, just as *velayat* does.²³

Because *hedanat* and *velayat* ordinarily descend along different gender lines, a male guardian who comes to hold both may select a woman to undertake

²¹ Afg. Civ. Code arts. 268, 2015-2016; see Rastin-Tehrani & Yassari, *supra* note 2, at 106-07.

²² Afg. Civ. Code arts. 239-241.

²³ Afg. Civ. Code art. 240; see *id.* arts. 2015-2016.

the young child's daily care.²⁴ Often, he will choose a female family member; this is customarily accomplished by familial agreement and without formalities. A male guardian may commit the child to a willing male relative, thereby passing both *hedanat* and *velayat* and affording the relative the same authority to secure a female caretaker, such as his wife.²⁵ The resulting bundle of parental rights is the same as Afghan law contemplates for a child's biological parents.

Afghan courts play only a secondary role in this process. A judge becomes the guardian of a child only when no relative survives to assume guardianship;²⁶ the judge may also resolve a guardianship dispute when the issue is contested.²⁷ Absent one of these circumstances, an Afghan court has no occasion to involve itself in the transfer of guardianship. Guardianship arrangements are not memorialized in Afghan court proceedings unless contested.

The absence of a court order therefore says nothing about whether a guardianship exists. A guardian's obligations to the child are enforceable legal obligations, and a relative who abandons them faces legal consequences in Afghanistan. The appointment of a guardian should not be misconstrued as informal simply because it occurs outside the state judicial apparatus. A guardian in Afghanistan holds his authority from the law itself—not a court order.

²⁴ Afg. Civ. Code arts. 236, 240; *see* Rastin-Tehrani & Yassari, *supra* note 2, at 103 (custody “is provided by the mother or by another woman assigned for this purpose”).

²⁵ Afg. Civ. Code arts. 268, 2015-2016; *see* Rastin-Tehrani & Yassari, *supra* note 2, at 103, 106-07.

²⁶ Afg. Civ. Code art. 78.

²⁷ *See* Rastin-Tehrani & Yassari, *supra* note 2, at 114-15.

D. Afghan Law Does Not Recognize Western-Style Adoption

Islamic law does not permit the termination of parental rights.²⁸ For this reason, Afghanistan, like the majority of Muslim countries,²⁹ does not provide for an American-style adoption.³⁰ But that does not mean that there is no equivalent. Afghan law instead presumes that the child's nearest paternal relative, or his delegate, becomes an orphaned child's guardian.³¹

The bundle of rights and duties the guardian takes on is tantamount to parental rights. A child's guardian is responsible for the child's support, upbringing, education, health, and property, and the child may enforce those obligations against him. *Supra* Part I.B. Guardianship is not a lesser alternative to adoption in Afghan law. It is what Afghan law provides instead, vesting the guardian with all the authority and responsibility of parenthood.

²⁸ See, e.g., Andrea Buchler & Eveline Schneider Kayasseh, *Fostering and Adoption in Islamic Law – Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates*, 6 Elec. J. Islamic & Middle Eastern L. 31, 37 (2018) (“Muslim legal scholars agreed generally and without delay that creating a new legal and permanent parent-child relationship by terminating existing legal bonds through adoption is not permissible in Islam.”).

²⁹ Afra Jalabi et al., *Wise Up About Adoption and Care of Orphans*, GLOBAL MUSLIM WOMEN'S SHURA COUNCIL, 4 (2017) (“With the exception of Indonesia, Malaysia, Somalia, Tunisia, and Turkey, the laws of most Muslim-majority states do not currently permit legal adoption.”), <https://www.wisemuslimwomen.org/wp-content/uploads/2017/10/WISE-UP-Adoption.pdf>.

³⁰ See Rastin-Tehrani & Yassari, *supra* note 2, at 117.

³¹ See *id.* at 106-08; *supra* Part I.C.

II. Under Afghan Law, Petitioners Were Baby Doe's Legal Guardians

The principles set out above apply straightforwardly to the facts of this case. When Baby Doe's parents were killed, guardianship over her passed by operation of Afghan law to her paternal uncle. He delegated it, as Afghan law permits, to his son and daughter-in-law—petitioners A.A. and F.A. They exercised that authority for eighteen months, as her guardians in law and caretakers in fact. No court order was required at any step, and none was entered. The Virginia Supreme Court incorrectly determined that petitioners lacked a legal relationship with Baby Doe because no court had appointed them and no adoption decree existed. Afghan law requires neither.

A. When Baby Doe's Parents Were Killed, Guardianship Vested In Her Paternal Uncle

Baby Doe's parents were killed during a military operation in Afghanistan on September 6, 2019. App. 111a. Once she no longer required medical care, the United States worked with Afghanistan and the Red Cross to reunite her with her next of kin. App. 139a.

The Afghan government identified Baby Doe's relatives—paternal and maternal uncles—by the end of 2019. App. 113a; *id.* at 199a. Together with the United States and the Red Cross, the Afghan government concluded that she was an Afghan national and that her paternal uncle (her father's brother) was her next of kin. App. 113a. In January 2020, Afghanistan formally asked the United States to transfer Baby Doe so she could be reunited with her family, who Afghan officials confirmed had been “granted custody” under Afghan law. *Id.* After

determining that Afghanistan “had properly verified the identity of the child’s relatives,” the Secretary of State agreed to the transfer on behalf of the United States. App. 140a; *see also id.* at 113a. On February 27, 2020, the United States transferred Baby Doe to the Afghan government, which “then placed the child with her new guardian.” App. 113a-14a.

Under Afghan law, Baby Doe’s uncle was already her guardian when she was placed with him. The death of a child’s father does not suspend guardianship over her but transfers it. *Supra* Part I.C. When Baby Doe’s father died, *velayat* (guardianship) automatically passed to the nearest relative in her paternal line—her paternal uncle. *See id.* No one contested the uncle’s status, and no woman came forward to claim custody of Baby Doe. Both forms of guardianship therefore rested with him, and with them the legal obligation to provide for her support, upbringing, education, health, and property. *Supra* Parts I.B, I.C.

No Afghan court proceeding was necessary to bring about this result. The Afghan government did not confer guardianship on Baby Doe’s uncle. It instead determined under its own law who her guardian already was, and reunited Baby Doe with him. Nor did the Masts ever ask an Afghan court to disturb that arrangement. Afghan law commits the guardianship of an orphaned child to her relatives in a fixed order, and a contest arises only when someone within that order asserts a competing claim. *Supra* Part I.C. Strangers to the child’s family have no place in that scheme. Baby Doe’s guardianship was settled under Afghan law, and it did not, and should not, become unsettled by the Masts’ decision to challenge it in a foreign forum.

**B. Baby Doe’s Uncle Validly Delegated
Guardianship To Petitioners Without A
Court Order**

After his reunion with Baby Doe, her uncle transferred guardianship to his son, petitioner A.A.—Baby Doe’s first cousin—and his wife, petitioner F.A. App. 113a-114a. As explained above, Afghan law permits a guardian to delegate his status; such a transfer is typically accomplished by mutual agreement and without court involvement. *Supra* Part I.C.

Together, petitioners held exactly what Afghan law gives a biological mother and father: the legally enforceable right and obligation to raise Baby Doe, to educate her, to care for her health, to help her choose a vocation, and to manage her affairs. That is what they did: for eighteen months petitioners raised Baby Doe as her primary “caretakers,” financial supporters, and “parent figures.” *See* App. 23a, 246a, 293a.

Under Afghan law, petitioners were Baby Doe’s guardians in every sense. They held that status *de jure*—by delegation from the relative automatically vested with guardianship—and *de facto*, as the couple who raised her. Nothing about their authority was unofficial or “self-identified.” It was the authority Afghan law confers on a parent, held by the people her family chose.

**C. The Decision Below Disregards The
Legal Interests Of Guardians Caring
For Children In Islamic Legal Systems**

The courts below failed to recognize petitioners’ legal status under Afghan law and jeopardized the integrity of foreign family structures in American courts in the process. The state circuit court declared that petitioners lacked “legal custody,” and doubted

whether “Afghan law even gave [Baby Doe’s uncle] the authority to give the child to [A.A.]” App. 41a, 42a. The Virginia Supreme Court described petitioners as “self-identifying ‘guardian[s],’ not legally appointed by any court.” App. 48a n.27. Those conclusions were wrong for the reasons explained above: Afghan law made A.A. and F.A. Baby Doe’s legal guardians without any court order. If uncorrected, those errors will mean that families like petitioners’—legally recognized nuclear families in countries that do not have the same Western-style adoption concept the lower court demanded—lose their parental rights in American courts. Such a ruling creates perverse outcomes antithetical to basic principles of comity.

The premise that produced the lower courts’ mistake—that a caretaker’s authority must come from a court—disregards not just Afghan law but the law of much of the world. As detailed above, Islamic law does not permit the termination of parental rights, and Afghanistan is one of many Muslim-majority countries that do not provide for adoption in the American sense. *Supra* Part I.D. A search for an adoption decree in such a system is doomed to fail—and means that the child’s family will always lose. The consequence is that a caretaker’s standing in an American court turns not on what they have done for the child or their recognized legal status in the country where they live, but rather on whether that foreign sovereign’s internal laws happen to mimic American law.

This Court’s decisions demand that our courts respect the acts and laws of foreign sovereigns—not disregard them as the lower courts did here. “Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the

government of another, done within its own territory.” *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). Few exercises of sovereign authority are more clearly a nation’s own than deciding who will raise a child born and orphaned within its borders. And Afghanistan fully exercised that authority here: it conducted a family trace, interviewed Baby Doe’s relatives, verified their accounts in the manner Afghan law prescribes, and determined who her guardian was. App. 198a-200a. The United States asked Afghanistan to make that determination and accepted it. App. 113a-14a, 140a. Only the Virginia Supreme Court treated it as though it had not happened.

The approach adopted below is repugnant to our law’s respect for family relationships. “[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.” *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality op.). “Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.” *Id.*

Baby Doe’s family is entitled to respect under that tradition no less than any other. When her parents were killed, Afghan law turned to her father’s brother, and her uncle turned to his son and daughter-in-law. From that moment forward they were her legal guardians, holding every right and duty Afghan law confers on a parent. *Supra* Part II.B. They came to hold that status the way countless Afghan families do,

and the way families across much of the Muslim world have long done—through a law that passes custody for orphaned children automatically and to family members, rather than through courts.

Under the decision below, families formed that way will have no comfort that their familial status will be honored by American courts. People like petitioners—relatives who take in an orphaned child, support her, and raise her as their own—will arrive in an American court with no adoption order to show, because their law issues none. And as happened here, they will lose their invaluable parental rights not because of anything they did or failed to do, but because courts in the United States did not recognize the legal system that governed them.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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