

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 ADOPTION LAW SCHOLARS AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE**

Amici are professors at law schools throughout the country whose scholarship addresses adoption and family law. *Amici* have devoted large parts of their professional careers to the study of adoption and family law. Several *amici* have significant experience representing children and families and some have personal experience with the adoption system in the United States. *Amici* have a substantial interest in ensuring that the adoption system in the United States is just, accurate, and promotes the wellbeing of children and families.

This brief reflects *Amici*'s grave concern over the Virginia Supreme Court's decision in this case, which blessed a one-sided adoption proceeding based on an artificially narrow understanding both of constitutional due process and the interests at stake in adoption proceedings. *Amici* write to highlight the importance of strong procedural safeguards to the proper functioning of our adoption system.

Amici are:

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* Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, *amici* further certify that they timely notified Petitioners, Respondents, and the Guardian *ad litem* of their intent to file this brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Petition presents a question of exceptional importance for adoption law: whether and under what circumstances the Constitution requires notice to a child's existing caregivers before an adoption can proceed.

In deeming notice to Baby Doe's caregivers optional, the Virginia Supreme Court ignored a fundamental principle of adoption: adoption exists to provide permanent families for children who have no existing caregiver fit and willing to care for them. As

¹ Institutional affiliations are listed for identification purposes only. The views of *amici* are their own.

family and adoption law scholars, child-development researchers, and international child-welfare authorities have increasingly emphasized, children's relationships with family members and long-term caregivers should be preserved whenever possible. A substantial body of research demonstrates that children benefit from continuity of care, stability in caregiver relationships, and enduring connections to family, culture, and community. Conversely, the severance of established caregiving relationships may inflict lasting emotional, psychological, and developmental harms on the child. Those concerns are particularly acute where children have already developed meaningful attachments to family caregivers or where the adoption may displace a child from the cultural context in which they have been raised. As a result, adoption law has long recognized that courts must exercise particular care before extinguishing existing bonds between a child and the individuals who have cared for, protected, and raised that child, including by providing to a child's caregivers notice and the opportunity to participate in adoption proceedings.

The necessity for procedural safeguards in adoption proceedings is not limited to extraordinary cases like this one. On the contrary, as *amici* and other scholars have documented, robust notice and consent requirements are broadly necessary to ensure adoption is reserved for those instances where it fulfills its purpose of securing stable, loving care for children who lack it.

Scholars have documented, for example, substantial informational and resource disparities—exacerbated by the structural incentives in often

expensive adoption proceedings—that frequently exist between prospective adoptive parents, and existing caregivers. These disparities make it crucial for existing caregivers to be fully heard before courts enter adoption decrees that permanently alter family relationships. Such concerns are amplified in the context of war or international displacement. Academic analysis has repeatedly documented instances in which children separated from caregivers during armed conflict or humanitarian crises were later discovered to have surviving relatives or others they could reunite with that had not been fully investigated before permanent adoption proceedings occurred. Experiences ranging from postwar Europe to 21st-century Guatemala demonstrate the harms to children when courts make permanent family-placement decisions while information remains incomplete. These concerns have informed the development of widely accepted international adoption safeguards and underscore the importance of ensuring notice to and participation by all relevant parties before courts permanently extinguish nonparent familial caregiving relationships.

This case illustrates these principles in an especially consequential context. After Baby Doe’s parents were killed in Afghanistan, the Afghan government placed Baby Doe with her uncle, Petitioner A.A.’s father. Pet.App.15a–16a. During the following eighteen months, Petitioner A.A. and his wife, F.A., cared for Baby Doe as her sole “custodians,” “caretakers,” and “parent figures.” Pet.App.246a. Yet, unbeknownst to Petitioners, an *ex parte* adoption proceeding on the far side of the world permanently severed their legal relationship with Baby Doe and

left Petitioners with no avenue to challenge that outcome. Pet.App.246a. After Respondents persuaded Petitioners to bring Baby Doe to the United States by promising medical care, they utilized the Virginia adoption order to remove Baby Doe from Petitioners without forewarning or any further judicial process. Pet.App.137a.

The facts of this case implicate fundamental concerns relating to adoptions that procedural due process rights would have mitigated—protecting children’s existing caregiving relationships, safeguarding informed participation in adoption proceedings, and exercising care when adoption occurs against the backdrop of war and other crises. As this Court has recognized, “[f]ew forms of state action are both so severe and so irreversible” as the extinguishment of family ties. *Santosky v. Kramer*, 455 U.S. 745, 759 (1982). That a child’s caregivers are her kin rather than her parents does not erase that principle.

This Court should grant certiorari and hold that, when a child’s nonparent caregivers function as the child’s parents by raising the child as their own, they have a procedural due process right to notice and the opportunity to participate in adoption proceedings that may permanently alter that family relationship. Recognizing the interests of nonparent familial caregivers is vital to ensuring that adoption proceedings are conducted with the care that children and families deserve.

ARGUMENT

I. Adoption Law Seeks to Preserve Extended Family Caregivers' Valuable Connection to and Support of Children Whose Parents Are Unable to Care for Them.

Adoption plays a crucial role in child welfare by providing permanent, loving homes to children who otherwise would lack parental care. But children do not exist in isolation from the broader networks of people who care for them. When parents are unavailable, extended family members often provide the stability, continuity, and emotional support necessary for a child's healthy development. The decision below fails extraordinarily to acknowledge this bedrock principle.

Adoption scholars recognize that children benefit from continuous caregiving relationships. Developmental research consistently demonstrates that children form significant attachments not only with parents, but also with extended family members and other familial caregivers who provide daily care and support. *See, e.g.,* Veronica Longo, Nadereh Saadati & Mehmet Karakus, *Exploring the Role of Extended Family in Child Rearing Practices Across Different Cultures*, J. Psych. Rsch. Fam. & Culture, (Oct. 2024), at 4, 5; Joanne Doyle, *Misguided Kindness: Making the Right Decisions for Children in Emergencies*, Save the Children 14 (2010); Lucy Bonnerjea, *Disasters, Family Tracing and Children's Rights: Some Questions About the Best Interests of Separated Children*, 18 Disasters 277, 277 (1994). These relationships act as a child's first line of defense when things go wrong—whether that means

emergencies, illness, intersocial conflict, or even abuse. *See Doyle, Misguided Kindness, supra*, at 3.

Family members also transmit culture, language, history, and community connection through shared traditions. Longo et al., *Role of Extended Family, supra*, at 6. A child's sense of self frequently develops through this web of relationships. *See Penny Callan Partridge, The Particular Challenges of Being Adopted*, 61 *Smith Coll. Stud. Soc. Work* 197, 199 (1991). Preserving those relationships can benefit children by helping them to maintain confidence in their identity and navigate through life with a sense of comfort and ease. *See Malinda L. Seymore, Openness in International Adoption*, 46 *Colum. Hum. Rts. L. Rev.* 163, 163–77 (2015); *see also Haaland v. Brackeen*, 599 U.S. 255, 333 (2023) (Gorsuch, J., concurring).

The importance of these relationships is well-documented in the setting of kinship-care. Children placed with relatives—even distant ones—often maintain meaningful ties to extended-family networks and community structures that would otherwise be lost through removal. *See, e.g., David M. Rubin et al., Impact of Kinship Care on Behavioral Well-being for Children in Out-of-Home Care*, 162 *Archives of Pediatrics & Adolescent Med.* 550, 552 (2008). And when a child cannot or should not remain with their parents, the continuity in care offered by kinship relationships reduces the disruption to a child's life activities attributed to caregiver loss and helps preserve important aspects of the child's social and cultural identity. *Id.* at 551.

A substantial body of research demonstrates that, all else equal, children who remain connected to relatives and familial caregivers typically experience better social outcomes than similarly situated children placed with strangers. One nationally representative study found that children placed with relatives were significantly less likely to develop behavioral problems. *Id.* Children placed with relatives were also more likely to remain connected to siblings, birth parents, neighborhoods, and other familiar sources of support, all of which made children more resilient against the potentially negative effects of removal. *See id.*

Congress and numerous States have legislated in recognition of that principle. For example, statutes around the country (including in Virginia) governing foster care placements require that States make efforts to identify a family member who may be fit and willing to care for the child before placing a child with a stranger. *E.g.*, 42 U.S.C. § 671(a)(19) (requiring States to consider giving foster placement preference to “adult relative[s] over . . . non-related caregiver[s]” as a condition of federal funding); Tex. Fam. Code § 262.114(d); 42 Pa. Cons. Stat. § 6351(f.1)(5)(iii); Ohio Rev. Code § 2151.412(H)(2); Va. Code § 63.2-900.1 (preference statutes).

On the other side of the coin, research demonstrates that removing children from familial caregivers may lead to negative outcomes. Researchers have observed that family separation may ignite in children persistent feelings of ambiguity regarding their identity, family membership, and personal history, while depriving them of meaningful connections to relatives, communities, and cultural

backgrounds. See Jamie C. Cooper, *The Assimilation Matrix: Dismantling Families and Assimilating the Children Left Behind*, 56 Seton Hall L. Rev. 425, 468–74, 479 (2025). Under some circumstances, separation from familial caregivers may deprive children of the structures that help them to function effectively within a community—grandparents, neighbors, educational institutions, healthcare facilities, and other significant adults who promote the child’s growth and development. In other words, children removed from existing social and family settings lose much of the security, stability and access to welfare that familial relationships provide. See Doyle, *Misguided Kindness*, *supra*, at 10.

These concerns are far from abstract; they are squarely presented by the circumstances of this case. According to the United States, U.S. and Afghan authorities, in concert with the International Committee of the Red Cross, placed Baby Doe with her uncle, Petitioner A.A.’s father, after the deaths of her parents. Petitioners then raised her for eighteen months. Pet.App.136a–37a. The caregiving relationship and kinship connection described in the Petition is precisely the type of relationship that adoption scholars understand as significant for supporting child development. Petitioners are Baby Doe’s first cousins, part of an extended family and community network with shared culture, language, and history—features researchers recognize are vital to informing a child’s sense of self.

Because disrupting existing caregiving relationships can have detrimental consequences for children, courts should proceed cautiously in adoption proceedings. Before permanently extinguishing

established familial caregiving relationships, courts should assure themselves that a child's existing caregivers are unwilling or unfit, which in turn requires ensuring that existing caregivers have notice of the adoption proceedings and an opportunity to participate.

II. Courts Should Exercise Particular Caution in One-Sided Adoption Proceedings to Assure Such Proceedings Involve Consent and Notice to Caregivers.

Separate and apart from the need to preserve caregiver relationships is the importance of consent. Caregiver consent—whether by birth parents, adoptive parents, or de facto parents—is required in voluntary adoption proceedings, as a way to separate adoption from involuntary removal based on unfitness. *See Caban v. Mohammed*, 441 U.S. 380, 385 (1979). In most voluntary adoptions, caregivers consent to a total relinquishment of their rights, including their rights to custody, decision making, and other caregiving responsibilities. Such consent is a necessary component of ensuring that adoption is appropriate. For the adoption system to function properly, that consent must be informed and freely given. *See Malinda L. Seymore, Sixteen and Pregnant: Minors' Consent in Abortion and Adoption*, 25 Yale J.L. & Feminism 99, 129 (2013).

Notwithstanding its fundamental role in adoption, consent is too often obtained through a system that overlooks the interests of birth parents and familial caregivers. Courts therefore must carefully consider whether consent is impaired by duress, coercion, or undue influence, including whether the parent or

caregiver had an opportunity to carefully consider their decision, whether they received impartial advice, whether they were threatened, and whether they received false promises. *See, e.g., Vela v. Marywood*, 17 S.W.3d 750, 762 (Tex. App. 2000) (consent invalid where agency's promise of open adoption was unenforceable and thus illusory); *Sorentino v. Fam. & Children's Soc. of Elizabeth*, 367 A.2d 1168, 1169 (N.J. 1976) (consent invalid when adoption agency threatened harassment and litigation if mother did not give up child for adoption).

In our adversarial system, the only way to obtain that assurance is through complete party presentation. *See United States v. Sineneng-Smith*, 590 U.S. 371, 375–76 (2020) (“[O]ur system is designed around the premise that parties represented by competent counsel know what is best for them and are responsible for advancing the facts and argument entitling them to relief.” (citation modified)). Sufficient party presentation, in turn, requires that existing caregivers be provided with notice of the proceedings and accurate information about the consequences of placing a child for adoption. Courts cannot rely solely on information provided by prospective adoptive parents or their counsel.

Yet, in practice, adoption proceedings frequently involve unequal voice between existing caregivers and prospective adoptive parents. To place things into context, typically, prospective adoptive parents are represented by legal counsel. In some instances, that same counsel may also represent the birth parents or existing caregivers as well. Rarely, however, do existing caregivers hire their own counsel. Malinda L. Seymore, *Ethical Blind Spots in Adoption*

Lawyering, 54 U. Rich. L. Rev. 461, 470–71 (2020). When existing caregivers do have separate counsel, their representation is often procured by an adoption agency and paid for by the prospective adoptive parents. *Id.* at 488.

Under traditional client-centered professional ethics, a lawyer representing prospective adoptive parents must represent the interests of those would-be parents—whose goal is typically to adopt a child. *Id.* at 471. For the lawyer, that goal takes precedence over the best interests of the child or their existing caregivers. See Model Rules of Pro. Conduct r. 1.2(a) & cmt. 1 (A.B.A. 2019); *id.* r. 1.3 cmt. 1. Meanwhile, an attorney hired by prospective parents or by an agency to represent both parties or the existing caregivers may experience divided loyalties. Lawyers who represent both parties, or who are paid by prospective adoptive parents or adoption agencies, are ill-suited to provide independent representation to non-paying caregivers. See, e.g., *id.* r. 1.7 cmt. 13 (third-party payment may “compromise the lawyer’s duty of loyalty or independent judgment to the client”). Conflicts thus frequently arise where the potential adoptive parents’ interests are not aligned with those of the existing caregivers. Seymore, *Ethical Blind Spots*, *supra*, at 471. When they do, lawyers will often cease representing the non-paying party—i.e., the existing caregivers. *Id.* at 496. Even in the absence of disqualification, a lawyer paid by an adoption agency or prospective parent may “be more supportive of the interests of the adoptive parents or agency in ensuring the adoption is finalized.” *Id.* at 490.

One result of this web of conflicts and economic realities is that typically only one position is vigorously and fully represented in adoption proceedings—that of the prospective adoptive parents. And a court cannot always rely on lawyers’ duty of candor to ensure it hears the full story. See Model Rules of Pro. Conduct r. 3.3 cmt. 5, 8 (A.B.A. 2019) (discussing duty of candor). In adoption proceedings, although “lawyers may be well aware of the obligation of candor, sometimes they seek to skirt as close to the line as they can because they feel an obligation to present the most favorable case possible in the interests of their clients.” Seymore, *Ethical Blind Spots, supra*, at 483. For example, in a case not unlike this one, an attorney for the potential adoptive parents extracted false and misleading testimony from the birth mother that the birth father was not interested in maintaining a relationship with his child, when in fact, the birth father was unaware that the child had been born. *In re Kriegel*, 480 S.W.3d 294, 299 (Mo. 2016); see also Seymore, *Ethical Blind Spots, supra*, at 479–80. Ultimately, the father learned of the proceeding and was able to intervene before it was too late. *Kriegel*, 480 S.W.3d at 298. In another example, a lawyer for an adoption agency failed to inform the court that the lawyer knew the birth father had filed for custody. State Bar News, *Attorney Discipline*, 32 Utah B.J. 57, 57 (2019); see also Seymore, *Ethical Blind Spots, supra*, at 481–82. In that case, because the father was not represented in the proceeding, the lawyer’s omission went uncorrected until after an adoption was granted.

As these examples illustrate, one-sided proceedings lack the assurances a court has that

misrepresentations or omissions will be corrected as they would be through an adversarial presentation. *Id.* at 478. One antidote—and an “elementary and fundamental requirement of due process”—is ensuring that all those with an interest in the adoption proceeding are adequately informed of adoption proceedings and given a full and fair opportunity to appear. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Another related tool is carefully scrutinizing consent in such proceedings, including whether parents and other existing caregivers sufficiently understand the facts and consequences of the adoption.

The adoption proceeding in this case was an extreme deviation from the objectives that notice and complete party presentation are meant to serve. With the Masts represented through much of the proceeding by Mr. Mast’s own brother, Pet.App.71a, and no effort made to notify Petitioners of the adoption, Pet.App.115a, the lower court never learned that Baby Doe was (and had been for the better part of a year), in the custody of relatives, Pet.App.114a. So, it had no knowledge their consent was necessary. Nor did the court learn that Afghanistan never consented to the adoption, as would ordinarily be required. Pet.App.114a; *see* Section III *infra*. As the judge who presided over the initial adoption proceedings later observed, “clearly there were procedural irregularities and deficiencies in this case,” in part because “there[] [was] nobody on the other side.” Pet.App.210a–11a. The judge’s initial decision, he admitted, “was based on fraud.” Pet.App.211a.

If allowed to stand uncorrected, the decision below threatens to degrade the functioning of the adoption system by insulating adoptions secured through one-sided procedures from later scrutiny—even when a slanted proceeding leads a court to grant a permanent adoption based on falsehoods. Procedural rules should not reward, and thus encourage, unscrupulous practices. Adoption proceedings are no exception. As *amici* are keenly aware, structural features of the nation’s adoption system mean the problem of one-sided presentation in such proceedings is more persistent than the extreme facts of this case may suggest.

III. International Adoptions Pose Unique Challenges That Can Be Mitigated by Robust Procedural Requirements, Including Notice.

Cross-border adoptions, particularly in times of war or disaster, pose significant and unique challenges to the proper functioning of adoption. In appropriate circumstances, such adoptions can serve the fundamental needs of some of the world’s neediest children. See Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 Buff. Hum. Rts. L. Rev. 151, 153 (2007). But historical experience shows that, in practice, international adoption in the absence of appropriate safeguards also sometimes results in tragic outcomes. Children who are separated from their families may be mistakenly assumed to be orphans. Relatives may be difficult to locate. Because of cultural or legal differences, parents or extended family caregivers may not understand the consequences of consenting to an adoption. When governance breaks down, children

may even be trafficked. And the consequences of severing family and cultural ties can be especially profound for children already experiencing trauma from war, disaster or displacement.

In response to these challenges, the United States and the international community have adopted detailed procedures governing international adoptions that emphasize involving all parties, establishing consent, and deferring to the determinations of a child's home nation. The decision below blew past even those incomplete safeguards and failed to acknowledge a global consensus on the procedures necessary in international adoptions.

In the United States, the prevalence of international adoptions is traceable to the aftermath of the Second World War, whose destructive impact included orphaning millions of children around the world. Malinda L. Seymore, *Adoption Ouroboros: Repeating the Cycle of Adoption as Rescue*, 50 Pepp. L.R. 229, 238 (2023). In the years that followed, Congress enacted statutes to facilitate the adoption of thousands of orphaned children from other countries. See Displaced Persons Act of 1948, Pub. L. 80-774 § 3(b), 62 Stat. 1009, 1010; Refugee Relief Act of 1953, Pub. L. 83-203 § 5(a), 67 Stat. 400, 402. Those statutes reflected an important humanitarian goal: providing for children in the aftermath of a global cataclysm. But as is now more fully understood, some “orphaned” children were in fact separated from living parents or family members. Seymore, *Ouroboros* at 238–39 & n.47. Others had parents who allowed their children to travel to the United States but did not appreciate that they were terminating their relationships to their children and would be unable to

emigrate to the United States to be reunited as families. Tara Zahra, *The Lost Children: Reconstructing Europe's Families After World War II* 237 (2015).

Regrettably, the postwar example has been repeated. Following the Korean War, both orphaned children and children who were merely lost or separated from caregivers overwhelmed refugee centers and orphanages. Seymore, *Ouroboros* at 240. In the decades that followed, some unscrupulous Korean adoption agencies—which received significant payments for placing children with Western families—deliberately falsified records indicating that children with living parents were orphans, sometimes without the parents' knowledge. See, e.g., Daniel A. Edelson, *For the World's More Full of Weeping: Retroactively Abolishing South Korea's Civil and Criminal Statutes of Limitations for Illegal International Adoptions*, 5 Yonsei L.J. 117, 126–128 (2014). Toward the end of the Vietnam War, the evacuation of children assumed to be orphans (without any search for parents) spurred litigation in federal courts by parents and caregivers whose children had been spirited to the United States. Seymore, *Ouroboros* at 244. In the most prominent of the ensuing lawsuits, the Ninth Circuit observed that “documentation accompanying some of the children is insufficient on its face to establish the child's status as an orphan, abandoned, or irrevocably released child, [or] the validity of the private agency's custody of such a child under Vietnamese child custody law[.]” *Nguyen v. Kissinger*, 528 F.2d 1194, 1197 (9th Cir. 1975). And in fact, “some of the children have a living parent” who “may or may not know the child is alive,

or where it is.” *Id.* Still other children were released by parents under the impression they “would be reunited with the child” or because of “fear that the child would be murdered by the approaching [North Vietnamese] forces.” *Id.*

More recently, following decades of civil war and political violence, Guatemala emerged as a focal point for concerns over international adoptions. By 2007, fully one percent of children in Guatemala were adopted to other countries—primarily the United States. Kelley McCreery Bunkers & Victor Groza, *Intercountry Adoption and Child Welfare in Guatemala: Lessons Learned Pre- and Post-Ratification of the 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption*, in *Intercountry Adoption: Policies, Practices and Outcomes* 119, 121 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012). Allegations of corruption and child kidnapping arose that were sufficiently severe to lead the United States to halt adoptions from the country. *Id.* at 127; *see also*, e.g., Marc Lacey, *Guatemala: U.S. Adoptions to Go Through*, N.Y. Times (Dec. 12, 2007) (describing concerns, including of “unregulated business in which poor mothers were paid to turn over their children to American couples” at the behest of “lawyers who charge as much as \$30,000 per child.”).

The ultimate impact of practices like these on adoptees can be severe. One American adoptee from Guatemala learned in her thirties that she had been stolen at birth from her mother, who had been falsely told her child died during birth and the body buried. Nicole Acevedo, *A Painful Truth: Guatemalan Adoptees Learn They Were Fraudulently Given Away*,

NBC News (Dec. 8, 2019). Another spent years replaying in his head the day when, at the age of seven, he was taken away from his mother and falsely deemed “abandoned.” *Id.*

Beyond anecdotal evidence, extensive research documents the traumatic impact that family separation may have on children’s sense of security, identity, and their long-term wellbeing. *See* Seymore, *Ouroboros* at 263–67 & notes. The consequences of disrupting caregiver relationships are often even greater in cases of war, emergency, or natural disaster. *See* Doyle, *Misguided Kindness*, *supra*, at 1–3, 10–11. Although temporary separation may sometimes be necessary in emergencies, prolonged separation is disruptive for children if familial relationships are not preserved or restored. Bonnerjea, *Disasters, Family Tracing*, *supra*, at 277. During war, emergency, or natural disaster, familial relationships often act as a child’s principal source of safety, protection, and comfort. *See id.* at 277–79.

To help prevent scenarios like these, more than 100 nations, including the United States, have adopted detailed procedures governing international adoptions. In 2008, the United States joined the Hague Adoption Convention. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, T.I.A.S. No. 08-401 (“Convention”). Under the Convention, a child cannot be adopted unless the “State of origin” has, among other things, “established that the child is adoptable,” and “given due consideration” to a domestic adoption. *Id.* Ch. II, art. 4, §§ a, b. In addition, the convention requires that before any adoption occur, all “persons . . . whose consent is

necessary for adoption, have been counselled . . . and duly informed of the effects of their consent.” *Id.* § c(1). “[C]onsideration” must be “given to the child’s wishes and opinions” as well as her “upbringing and . . . ethnic, religious and cultural background.” *Id.* § d(2), Ch. IV, art. 16, § 1(b). Prospective parents may not communicate with the child’s existing caregivers until after these determinations are made. *Id.* Ch. VI, art. 29. And when “an adoption granted in the State of origin does not have the effect of terminating” existing parental relationships, the Convention provides that such a form of adoption may be recognized in the “receiving State.” *Id.* Ch. V, art. 27, § 1.

Even in cases not governed by the Convention, federal law governing “the immigration classification of alien orphans” requires a prospective adoptive parent prove either “adoption abroad”—as relevant here, in accordance with Afghan law—or that they or their agent have “custody of the orphan for emigration and adoption in accordance with the laws of the foreign-sending country.” 8 C.F.R. § 204.3(a), (d)(1)(iv). Neither happened here.

Although far from perfect, these overlapping provisions erect barriers against many of the worst abuses that have marred international adoptions.²

² In recent years, following the Convention has also been crucial to the United States’ standing to advocate against forced relocation of children in war. Recently, Russia has engaged in a program of “coerced adoption” of Ukrainian children, who have been involuntarily separated from their families “with the intent to ‘Russify’ children from Ukraine.” Nathaniel Raymond et al.,

Such safeguards could have prevented many of the abuses that took place in this case. Had the principles of the Convention been followed here, the Masts would have had no opportunity to lure Petitioners to the United States based on false promises. *Compare* Pet.App.145a–46a *with* Convention, Ch. VI, art. 29. Many of the determinations of the Virginia court were made—in its own words—without “all of the information,” including that “there was no waiver coming” from Afghanistan. Pet.App.294a. Under the Convention, it would have fallen to Afghanistan, rather than a Virginia court operating with scant information, to determine Baby Doe was adoptable. Convention, Ch. II, art. 4, § a; *see also id.* Ch. I, art. 2, § 1 (“State of origin” for purposes of Convention is wherever the “child [is] habitually resident”). The Masts would also have been unable to proceed without “the irrevocable consent(s) signed by” Baby Doe’s “legal custodian(s),” and approvals by United States Citizenship and Immigration Services, the Afghan government, and the State Department. U.S. Dep’t of State, *Convention Adoption Process* (Sep. 30, 2025), <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Adoption-Process/how-to-adopt/hague-adoption-process.html> [https://perma.cc/M32C-US6H]. And although the Virginia courts repeatedly faulted Petitioners for not being “adoptive parents” to Baby Doe, *e.g.*, Pet.App.40a–41a, 48a & n.27, under

Intentional, Systematic, & Widespread: Russia’s Program of Coerced Adoption and Fostering of Ukraine’s Children, Yale Sch. of Pub. Health (Dec. 3, 2024), <https://medicine.yale.edu/download-file/59b9c214-853e-48be-9dd6-59f021776b82/> [https://perma.cc/NPH4-2357].

the Convention, Ch. II, art. 4, § a, Afghanistan would have determined Petitioners' custodial status with respect to Baby Doe with reference to its *own* laws and traditions—which generally do not include engaging in Western-style adoption as a precondition to acting as a child's parent. See Malinda L. Seymore, *Separation and Connectedness: Global Norms of Open versus Closed Adoption*, in *Exploring Norms and Family Laws Across the Globe* 107, 111–12. (Melissa L. Breger ed., 2022).

To be sure, Afghanistan is not a party to the Convention. But even with respect to non-parties, the position of the United States is that state courts should “apply the Convention’s principles” in adjudicating adoption proceedings. Pet.App.163a. Here, the Masts engineered an adoption that lacked the procedures that ordinarily govern international adoptions. By greenlighting it, the Virginia Supreme Court diverged from the Convention’s principles and undercut decades of progress toward ensuring international adoptions are conducted ethically and in the best interests of children. And it overlooked a comprehensive international framework, championed by the United States, that would have illuminated the risks of allowing an intercountry adoption to proceed without the participation of all affected parties.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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