

No. 26-164

In The
Supreme Court of the United States

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

v.

JOSHUA MAST AND STEPHANIE MAST,
Respondents.

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

**BRIEF OF THE KARAMAH INSTITUTE
AS *AMICUS CURIAE* IN SUPPORT OF
PETITIONERS**

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INTEREST OF *AMICUS CURIAE*

Karamah Institute is a 501(c)(3) organization, formerly known as KARAMAH: Muslim Women Lawyers for Human Rights. Karamah Institute was established in the Commonwealth of Virginia in 1993 and has provided expertise in issues related to Islamic jurisprudence, international law, human rights, and the interaction between Islamic law and U.S. constitutional law.¹ Karamah Institute can assist the Supreme Court on a point distinct from Petitioner's merits briefing—namely, how the Virginia Supreme Court erred in conducting its due process analysis by failing to consider family relationships that arise under foreign legal systems.

SUMMARY OF ARGUMENT

A foreign family relationship does not cease to exist because the legal system that created it uses different institutions, terminology, or procedures. The Virginia Supreme Court erred in deciding that an individual recognized to be the guardian, physical custodian, and/or caretaker of a child under Afghan law has no due process rights in domestic adoption proceedings. Domestic state courts should not allow adoption proceedings to permanently extinguish a legal family relationship established under the laws

¹ Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus, its members, or counsel made such an authorship or monetary contribution.

Counsel of record for all parties received timely notice of amicus's intention to file this brief pursuant to Rule 37.2.

of a foreign jurisdiction without providing the family notice and an opportunity to be heard.

Foreign legal systems can recognize familial and guardianship relationships differently than domestic courts. Family relationships under foreign legal systems may be established in a variety of ways, including by statute, custom, religion, jurisprudence, administrative action, or judicial decree. In determining the existence and nature of those relationships, domestic courts should look to the law of the place where the foreign family relationship arose. For example, the federal intercountry-adoption framework that governs foreign child adoptions in the United States requires that the foreign child's status, foreign custody, guardianship, consent, and family-of-origin relationships are recognized.

The Virginia Supreme Court failed to appropriately defer to Afghanistan's determination that Petitioners and Baby Doe had a legally recognized relationship under Afghan law. Due process is necessary before such relationships can be permanently severed through domestic adoption proceedings. And a domestic state court adoption order cannot circumvent the federal adoption process when adoption concerns a child born and residing in a foreign country.

This Court's review is warranted because the Virginia Supreme Court committed legal error on an important question of Constitutional law. Review is necessary because the issue presented affects not just adoptions of foreign children sought by U.S. citizens, but also laws governing refugees, displaced children, immigrants, military-connected adoption and custody

cases, and transnational families. Inconsistent state treatment of how parent, guardian, custodian and/or caretaker relationships with children are defined threaten the federal adoption process and due process rights of individuals whose relationship to a child is recognized under a foreign legal system.

ARGUMENT

I. American law looks to foreign law and custom to determine whether foreign family relationships exist.

In the United States, our fundamental human values are reflected in our Constitution. Respect for the liberty rights of a guardian, custodian and/or caretaker in their relationship with a child for whom they have a legal or cognizable interest is an important mutually shared value. The Constitution mandates certain minimal procedural protections, such as proper notice and an opportunity to be heard, when such relationship is legally threatened.

U.S. courts determining the existence of foreign family relationships look to the law that created them. *Kaho v. Ilchert*, 765 F.2d 877, 881 (9th Cir. 1985). The *Kaho* case involved children adopted through customary law in Tonga, rather than through a formal judicial adoption. The Ninth Circuit affirmed the district court's determination that Tongan customary adoptions could be legally valid, finding “an adoption need not conform to the [Board of Immigration Appeals’s] or Anglo-American notions of adoption; the adoption need only be recognized under the law of the country where the adoption occurred.” *Id.* at 885. The *Kaho* court likewise recognized that a foreign adoption need not necessarily arise through a

formal “juridical act” to be legally valid. *Id.* Immigration courts have also considered family relationships created under foreign law without requiring proof of a formal juridical act. *E.g.*, *Matter of Lin Lee*, 19 I. & N. Dec. 435, 435–36 (B.I.A. 1987) (accepting Taiwanese household-registration records and corroborating affidavits as evidence of a customary adoption and family relationship).

Similarly, federal intercountry-adoption law looks to a child’s legal status and custody under the law of the foreign-sending country. INA § 101(b)(1)(F); 8 C.F.R. § 204.3. The federal intercountry-adoption framework therefore treats the legal status of foreign parents, guardians, custodians, and family members as something that must be identified and addressed before a foreign child’s existing family relationships are permanently legally severed. Thus, the ordinary intercountry-adoption process required the Virginia courts to identify and recognize Baby Doe’s existing Afghan family and custodial relationships. INA § 101(b)(1)(F); 8 C.F.R. § 204.3.

As such, the question is not whether Petitioners’ relationship with Baby Doe arose through judicial decree, but whether a guardianship, custodial or caretaking relationship existed between Petitioners and Baby Doe based on Afghan law and events that occurred in Afghanistan.

The federal government’s own actions and findings related to Baby Doe’s familial status and relationships in Afghanistan demonstrate the deference due to Afghan guardianship and custody

law. App. 137a.² The United States accepted the Afghan government's determination that it had identified Baby Doe's family and verified the identity of her relatives. App. 137a–40a, 148a–49a. It thus transferred her to the Afghan government so that custody could be given to her relatives. *Id.* The United States characterized the relevant federal decision as one “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.” App. 162a. And it found that “[o]ther foreign policy considerations underscore the United States' continuing interest in the recognition of the A.s' rightful custody of the child.” App. 162a–63a.

Despite this, the Virginia Supreme Court gave dispositive significance to the absence of an Afghan judicial decree establishing a parental relationship between Petitioners and Baby Doe, ignoring that the government of Afghanistan had determined that Petitioners were the child's biological relatives and the appropriate guardians under Afghan law. As held by the Virginia Circuit Court, the relevant analysis was not whether an Afghan court had named Petitioners as Baby Doe's parents. It was whether, under the sources of law governing family relationships in Afghanistan, Petitioners had a legally cognizable relationship with Baby Doe.

The majority opinion of the Virginia Supreme Court ultimately failed to take into account applicable

² Citations to Petitioners' Appendix are denoted as App. ____.

foreign law in its analysis. The court erroneously concluded that only a judicial decree from an Afghan court naming Petitioners as Baby Doe's adoptive parents could establish a legal relationship affording Petitioners due process rights. And the court did so in the context of domestic adoption proceedings conducted in absentia, while Petitioners had legal and physical custody of Baby Doe in Afghanistan. The court erred in permanently severing Petitioners' legal and physical custody relationship to Baby Doe without affording Petitioners due process rights of notice and an opportunity to be heard in a domestic adoption proceeding.

II. Foreign legal systems recognize protected family relationships through mechanisms that are different than American-style adoptions.

American adoption is but one legal model for creating a framework through which children can be cared for and protected. The Afghan Civil Code utilizes the Hanafi School of Law of Islamic jurisprudence as the basis for establishing family laws. Under this jurisprudence, legal guardianship and custody of an orphaned child arise through operation of law that functions differently from Western-style jurisprudence. Most importantly, these legal and custodial relationships can be created and formalized without a judicial order.

Afghanistan's statutory law establishes the relevance of Hanafi jurisprudence to questions not expressly resolved by the Civil Code. Where the Civil Code leaves a question unresolved, the Code expressly directs resort to Hanafi jurisprudence. *Civil Law of*

the Republic of Afghanistan [Civil Code] art. 1(1)–(2), Official Gazette No. 353 (Jan. 5, 1977) (English translation rev. Afghanistan Rule of Law Project/USAID 2006) (Afg.). Article 1 of the Civil Code provides that where the Code supplies a rule, that rule governs but where no statutory provision exists “the court shall issue a verdict in accordance with the fundamental principles of Hanafi jurisprudence of Islamic shariat to secure justice in the best possible way.” *Id.* Article 130 of the 2004 Constitution similarly directs that, in the absence of an applicable constitutional or statutory provision, to decide according to Hanafi jurisprudence within constitutional limits. *Civil Code* art. 1(1)–(2); *Constitution of the Islamic Republic of Afghanistan* art. 130 (2004) (Afg.). The Constitution of 2004 and Civil Code of 1977 were the operative law of Afghanistan when Baby Doe was orphaned and the Afghan Government determined her guardianship and custody.

Afghan and Islamic jurisprudence recognize two forms of legal relationships for orphans that are relevant here. *Wilayah* is similar to guardianship as commonly understood in the U.S, and *kafalah*³ is similar to foster care as commonly understood in the U.S. Under these precepts, family relationships and custody for orphaned children can be established without the involvement of Afghan courts. As such, the absence of such an order is not determinative of whether a legal relationship exists.

³ This is the proper transliteration of the concept which has been spelled informally in formal documents as “kafala.”

Like all legal systems, *wilayah* and *kafalah* derive from the cultural history and beliefs of the societies in which they were developed. Like the law of adoption in U.S. states, *wilayah* and *kafalah* were developed with the best interest of the child in mind. Both *wilayah* and *kafalah* emphasize ensuring that the child knows his or her biological lineage. This ensures that: (1) children have the ability to honor their parents (and thus biological families) and fulfill their obligations towards them, and (2) children are protected from unwittingly violating a major taboo, namely that of incest.

A. The *Kafalah* framework.

“*Kafalah*” is an Arabic word with literal meaning of, among other things, “to guarantee.”⁴ In the context of caring for orphans, it also has a derivative meaning of “guardianship,” such as to “ensure, secure, sponsor, support, maintain, or provide for.”⁵

In the context of orphaned children, *kafalah* refers to a legal system that permits qualified individuals or couples to take in a child, usually as part of their family, and ensure the child’s maintenance, health, education, security and upkeep, as well as their emotional and psychological

⁴ Wahbah al-Zuhaili, 6 *Al-Fiqh al-Islami wa adillatuh* [Islamic Jurisprudence and its Evidence] p. 4141, Dar al-Fikr al-Mu’asser (Syria, 1984) (revised 4th prt.).

⁵ Ibn Manthur, 12 *Lisan al-‘Arab* [The Tongue of Arabs] 129, Dar Ihya’ al-Turath al-‘Arabi (Beirut, rpt, 1992). This is an ancient Arabic language lexicon authored by Ibn Manthur, (1232–1312 AD).

wellbeing, until adulthood.⁶ The child retains their original legal identity and family name, whenever known, which may not be changed to match that of the *kafeel* (the one who provides the *kafalah*).⁷

The concept of *kafalah* describes a legal caretaking relationship, which is often custodial, where the *kafeel* (the one who has the *kafalah*) voluntarily undertakes to care for all the needs of the child.⁸ As such, it is somewhat akin to foster parenting, or an “open adoption” in the U.S. system, where the *kafeel* takes legal responsibility for the child, but the child remains aware of his or her biological family and lineage.

European courts, including the European Court of Justice and the Court of Justice of the European Union, Grand Chamber, have recognized *kafalah* status under the laws of a non-European country in determining whether a legal relationship exists between an adult and a child for purposes of conferring rights to the parties under the laws of a

⁶ See, e.g., the rules and regulations in *Al-Mabadi’ al-Tawjihyyah li ‘Amal al-Lijan al-Mahaliyyah lil Usar al-Badilah al-Kafilah* [Guiding Principles for the Work of Local Committees for Alternative Families Who are *Kafeels*,] 15–16 entitled “Standards (Conditions) for the Choice of Alternative Families.”

⁷ *Id.* at 16.

⁸ *Id.*; see also Ahmad al-Khamlishi, 2 *Al-Ta’liq ‘Ala Qanun al-Ahwal al-Shakhsiyyah* [Commentary on Personal Status Law] 296, Dar Nashr al-Ma’rifah (Rabat, n.d.) discussing Moroccan *kafalah* laws and the procedures followed for approving a request for *kafalah*.

European country.⁹ Therefore, *kafalah* is a concept that has been recognized in comparative international law contexts.

B. The *Wilayah* framework.

Under the *wilayah* framework, Afghan law seeks to preserve the child’s lineage, identity, and family ties, while providing for care, maintenance, education protection, and decision-making responsibilities. The

⁹ In *Harroudj v. France*, App. No. 43631/09, Eur. Ct. H.R. (2012), an applicant living in France was granted *kafalah* by an Algerian court of a female baby. The applicant later applied to adopt the baby in French court. Ultimately, the European Court of Human Rights (Fifth Section) held that “*kafala* falls expressly within the scope of the Hague Convention of 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children.” *Id.* The Court added that “the recognition of *kafala* by international law is a decisive factor in assessing how States deal with it in their national laws and envisage any choice-of-law issues that may arise.” *Id.* Another European case involved the refusal of an immigration officer to grant entry clearance into the United Kingdom to a child who was accompanied by his Algerian *kafeel*. The Supreme Court of the United Kingdom requested the Court of Justice of the European Union, Grand Chamber, to rule on the matter. The Court of Justice stated, “[i]n the event that it is established . . . that the child and its guardian, who is a citizen of the Union, are called to lead a genuine family life and that that child is dependent on its guardian, the requirements relating to the fundamental right to respect for family life, combined with the obligation to take account of the best interests of the child, demand, in principle, that that child be granted a right of entry and residence in order to enable it to live with its guardian in his or her host Member State.” *See Case C-129/18, SM v. Entry Clearance Officer*, ECLI:EU:C:2019:248, ¶¶ 54, 68–70 (Mar. 26, 2019).

word “*wilayah*” is derived from the Arabic tri-literal root “w.l.y” (pronounced “*wali*”).¹⁰ Many words derived from this root share the common root meaning of “to help and support.”¹¹ Thus, a head of state is a *wali* over his people, charged with serving them, supporting them, and protecting their best interests. In the context of the orphan, the *wali* is defined as someone who *yansur* (helps, supports, and advocates for) the orphan, and is in charge of and provides all the child’s needs, including financial and personal ones.¹² This means that the *wali* can make important long-term decisions in the best interest of the child, such as long-term educational plans, health, protection, and preservation of the child’s financial and other interests.¹³

In Hanafi-based family law, a *wali* must satisfy certain qualifications, such as being a mature and sensible adult. If the *wali* fails to meet any one of these conditions, he can be removed from

¹⁰ Ibn Manthur, *supra* note 5, v. 15, 401, reprinted by *Dar Itha’ al-Turath al-Islami* (Beirut, Lebanon, 1992).

¹¹ *Id.*; see also Wahbah al-Zuhaili, 9 *Al-Fiqh al-Islami wa Adilatuh* [Islamic Jurisprudence and Its Evidence], Dar al-Fikr 6690 (Beirut, 1997) (here “affection and support”). In the legal context, Hanafis define it as “implementing one’s decision upon another.” Al-Zuhaili defines it as being in charge, having the power and ability to take action without permission from another (6690–91); see Ibn Abidin, 4 *Radd Al-Muhtar ‘Ala Al-Durr Al-Mukhtar* [Response to the Perplexed regarding Select Gems], 154 Dar al-Kutub al-‘Ilmiyyah (Beirut, 1994) (in this case by virtue of family relationship).

¹² Al-Zuhaili, *supra* note 4, v. 10, 7327.

¹³ *Id.*

consideration.¹⁴ *Wilayah* usually terminates when the child reaches majority, barring such impediments as mental incapacity.¹⁵ A wali is therefore an adult who may perform functions that include the care, protection, and support of a child associated with *kafalah* and who is also biologically related to the child. A *wali* may transfer his *wilayah* authority to another qualified individual through offer and acceptance of the parties.¹⁶

Like the family laws of most U.S. states, which seek to protect and preserve biological family relationships, the concept of *wilayah* seeks to preserve lineage and family ties. As such, usually, the *wali* of the child is the father. If the father is deceased, as in this case, the *wali* is the male family member closest to the orphan in terms of his/her bloodline, i.e. his next of kin from the paternal bloodline (*‘asabat*). So, if the father is deceased, the order of *wilayah* over a child in Hanafi jurisprudence is determined in the following preferential order:

- (a) To the paternal grandfather of the child. If that is not possible, then to the great grandfather; then
- (b) To the child’s adult brother, then an adult son of the brother, and so on; then
- (c) To the paternal uncle, the paternal cousins, and so on.

¹⁴ *Id.* v. 4, 2994.

¹⁵ *Id.* v. 4, 2970.

¹⁶ Al-Zuhaili, *supra* note 4, 2995–2997

- (d) If no one in the above categories is available and qualified, then other relatives will be considered, taking into account as much as possible their closeness to the paternal bloodline of the child.¹⁷
- (e) If none exist or are qualified, then under Hanafi jurisprudence, the maternal relatives will be considered (*thawi al-arhaam*), again in the order of closeness to the child.¹⁸ This is also the view of the Afghan 2014 Child Guardianship Law.
- (f) If none are qualified or available, the state becomes the *wali* of the child.

This last step in this process, namely determining that the state is the *wali*, is based on the rule that the state is the *wali* (i.e. father figure) of

¹⁷ The mother, and mother's bloodline, has the right of "*hadanah*" (similar to physical custody under U.S. law) of the child, which also addresses the needs of the child, including upbringing, protection, health, and education, among other things. *Hadanah* under Afghan law provides that the child is physically with his/her mother to age seven if a boy child, and to age nine if a girl child. Depending on availability of the mother's bloodline or determination through an investigation by the MoLSA or decision of an Afghan court, *hadanah* can be granted to the father's bloodline. During the *hadanah* period, the *wilayah* (or guardianship) authority still remains with the individual determined to be the *wali* under Afghan law.

¹⁸ Ibn Abidin, *supra* note 11, 195.

anyone who does not have a *wali*.¹⁹ In such a case, the state is charged with making alternative arrangements in the best interest of the child.²⁰ In the case at hand, the Ministry of Labor and Social Affairs (MoLSA) of the former Afghan government, which was officially recognized by the U.S. government, did exactly that. App. 139a–141a.

III. State courts should not ignore a foreign government's determination of a foreign child's legal status.

The Virginia Supreme Court failed to appropriately consider A.A.'s rights as *wali* and Petitioners' rights as custodians and caretakers, as determined under Afghan law, in holding that only a court-decreed parental relationship could confer due process rights on Petitioners before their relationship with Baby Doe could be permanently severed.

After her parents were sadly killed as civilians caught in the crossfire of a military battle in Afghanistan, MoLSA investigated Baby Doe's next of kin over more than a month, in accordance with Afghan law. App. 139a–141a. MoLSA determined that, as her uncle, A.A.'s father was the designated *wali* for Baby Doe. App. 145a. The Afghan

¹⁹ This rule is based on a prophetic hadith that states: "The sultan is the *wali* of the one who has no *wali*." Imam Ahmad bin Hanbal, 16 Musnad Ahmad, 155 (Dar al-Shahab: Cairo n.d.).

²⁰ This rule is based on the principle that the ruler is the *wali* of those who have no *walis*. More recently, governments, such as Egypt, established regulations on how to handle the search for alternative families, as part of the responsibility of its Ministry of Social Solidarity.

government communicated this to the U.S. government, and the U.S. government transferred Baby Doe from the U.S. military base in Afghanistan to the Afghan government, in coordination with the International Red Cross. *Id.*

MoLSA then granted both legal guardianship and physical custody of Baby Doe to A.A.'s father. *Id.* After A.A.'s father transferred responsibility for Baby Doe to his son, A.A. served as her guardian and A.A. and his wife F.A. served as Baby Doe's custodians and caretakers for the next eighteen months of her life. App. 146a.²¹

Importantly, Afghan law does not require that Petitioners obtain a court order formalizing their relationship as *wali* and *kafeel* to Baby Doe. *See id.* In her Declaration in this case, expert Havva Guney-Ruckenacker stated:

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.

Declaration of Havva Gune-Ruckenacker, *A.A. v. J.M.*, No. CL22000186-00, 7329, (Va. Cir. Ct. Mar. 27, 2023) [Redacted].

The Virginia Supreme Court's finding to the contrary ignored the significance of Petitioners' legal

²¹ Although a *kafeel* has fewer rights and assumes fewer legal responsibilities than that of a *wali*, it is still a recognized legal relationship under Hanafi jurisprudence. *See supra* Part. II.

relationships to Baby Doe under Afghan law. The Court erroneously found that Petitioners had no due process rights with respect to their relationship to Baby Doe, despite the fact that a foreign government with the power and authority to determine those relationships under its own law had awarded custody and guardianship to Baby Doe's family consistent with Afghan law.

The Virginia Supreme Court reversed the underlying Circuit Court, which correctly found that Baby Doe's legal relationship to Petitioners, as her guardians, custodians, and caretakers should not be permanently terminated in a domestic adoption proceeding, without notice and an opportunity to be heard. It did so despite the fact that the adoption proceeding took place while Baby Doe and her guardian, custodian, and caretakers resided in Afghanistan, and despite the fact that Respondents did not have custody of Baby Doe, which would have been necessary to bring her into the United State under U.S. immigration law.²² This was legal error.

This case presents a very troubling scenario and precedent. Under the Virginia Supreme Court's

²² Because of this, Petitioners were not aware that their relationship to Baby Doe was in legal jeopardy in the United States until after the adoption order had been issued, and after the six-month statute of limitations period for challenging the adoption elapsed. They did not become aware until they arrived in the United States with Baby Doe. Indeed, Respondents did not dispute or contest Petitioners' guardianship, and custody until after Petitioners' departure with Baby Doe from Afghanistan during the chaos of the evacuation of American troops from the country. App. 146a–147a.

ruling, a party in the United States could seek to obtain legal and physical custody of a foreign child, without going through the proper legal process in the country where the child resides. Through utilizing a domestic adoption proceeding in a state court, the party could permanently terminate legal relationships recognized by the government in the country in which the child lives, with no notice to the child or their family, guardians, custodians, or caretakers and no opportunity to be heard by the individuals whose lives would be directly impacted by such decision.

The particular circumstances of this case only heighten the broader concerns with eliminating due process protections for guardians, custodians, or caretakers of children. Baby Doe was seriously wounded on a battlefield in Afghanistan. Her parents and many of her siblings were killed. The house in which Baby Doe lived was in a battle zone. Baby Doe's extended family was going through the trauma of losing multiple family members. Baby Doe was finally reunited with her biological family, who agreed to and did care for her.

Shortly after being reunited, the Taliban began taking over more districts in the country. By August of 2021, people were hanging from airplanes trying to flee the country due to fear, chaos, and panic. Allowing a state court to terminate a legal and biological relationship between Petitioners and Baby Doe, which had been recognized by both the Afghan and U.S. governments, through the chaos of an

evacuation that led Petitioners to seek safety with Baby Doe in the United States, is simply wrong.

The Court should find that Petitioners as Baby Doe's guardians, custodians, and caretakers, and Baby Doe herself, as a foreign child with rights to her familial relationships and identity, have due process rights that must be protected. Baby Doe was an infant orphan incapable of appearing in court or protecting her own legal interests. At the time she was orphaned in September of 2019 until she departed Afghanistan with Petitioners in August of 2021, responsibility for protecting her interests rested with the persons or institutions who possessed lawful guardianship or custodial care for her. Petitioners had legal responsibility and custody for Baby Doe when the Virginia adoption proceedings were commenced by the Respondents, without knowledge of Petitioners or agreement of the Afghan Government to waive jurisdiction.

The Virginia Supreme Court decision permanently terminated an existing relationship under foreign law, that included guardianship, actual physical custody, and sustained parental-type care to a child, without first allowing the persons occupying those roles to establish their status and be heard. This Court should take this case to remedy this wrong.

IV. Due Process should not turn on whether a foreign family relationship resembles an American-style adoption

Petitioners' due-process authorities establish the gravity of permanently severing a child from guardians, custodians, and caretakers and the liberty interests of such guardians, custodians, and

caretakers. The Virginia Supreme Court's ruling that a foreign judicial decree of parentage is required in order for Petitioners to assert due process rights imposed a heightened legal requirement that does not exist in Afghan law. If *wiliyah* and *kafalah* are recognized relationships under a foreign country's law, the *wali* and *kafeel* must be provided due process before their relationship to a child may be permanently severed. This is particularly so where, as here, the persons seeking to terminate the relationship had no contact with the child, did not have legal or physical custody over the child, and had no relationship to the child recognized by the county where the child resided.

Like in the United States, family law in Afghanistan can be rooted in religious and customary law. Under Afghan law, a *wali* (guardian) and *kafeel* (caretaker) can be an organic part of a child's family unit that not only grants Petitioners certain rights but obligates them to care and provide for the best interests of a child entrusted to their care. At minimum, *walis* (guardians) and *kafeels* (caretakers), as recognized under foreign law, should be entitled to adequate notice and due process to properly protect their relationship with their children. As a matter of constitutional rights, their liberty interest should be protected as enthusiastically as those of guardianship, custodial, and caretaker relationships to children formed under U.S. law, so that family units are respected and family members have the chance to remain together and be emotionally and psychologically healthy.

The Virginia Supreme Court failed to take these important legal relationships into account, instead imposing a Western judicial requirement on Petitioners where none exists under the laws of the country where their relationship to Baby Doe arose. Regardless, the Afghan government's formal recognition of Petitioners' family as *wali* should be sufficient for due process rights to attach. Baby Doe and Petitioners have a fundamental right and liberty interest in the preservation of their familial and legal relationships, and thus had a right to notice before a domestic state court terminated those ties.

V. The question presented is exceptionally important and warrants granting certiorari.

The question presented in this case is exceptionally important and warrants the writ of certiorari to be granted by this Court. First, foreign legal definitions of family and child relationships arise not just in the context of international adoptions, but also in determining the rights of refugees, immigrants, displaced children, and transnational families. Allowing domestic state courts to ignore foreign law governing family relationships would seriously threaten important rights in all of these contexts.

Second, the United States has a strong interest in predictable and reciprocal treatment of foreign family relationships and in maintaining the integrity of intercountry-adoption safeguards. Allowing a U.S. state court to issue an adoption order for a foreign child residing in a foreign country, without providing for due process rights to the child's guardians, custodians, and caretakers as recognized under the

law of the country of the child's nationality, signals to foreign governments that foreign citizens can forcibly adopt American children through the foreign citizen's domestic process, without taking into account rights afforded to the American child, or her guardians, custodians, and caretakers under U.S. law.

Furthermore, this case is a strong vehicle for a decision on this issue because the conflict between an American state adoption order and an existing foreign guardianship decision is concrete, fully litigated, and outcome-determinative.

CONCLUSION

Based on an analysis of the record in this case, Petitioners had a recognized guardianship, custodial, and caretaking relationship with Baby Doe under Afghan law. Afghan family law is based on Hanafi jurisprudence, which is also utilized in the legal systems of Egypt, Jordan, Pakistan, Bangladesh, Albania, Kosova, and many Central Asian countries. The implications of ignoring family relationships arising under such a foreign legal system is therefore not limited to the U.S. relationship with one country, but a broader number of countries in the world.

Family relationships are a foundation for the pursuit of happiness not just for Americans, but for all human beings. Karamah Institute respectfully contends that Supreme Court review of the case at hand would provide for clarity in an important area of Constitutional law. Specifically, the Court should find that domestic adoption proceedings cannot permanently extinguish a guardianship, custodian, or caretaker relationship with a foreign-born child,

recognized by a foreign legal system, without adequate notice and an opportunity to be heard.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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