

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The Masts try to dodge and distort the sobering account of their misconduct offered by the United States government—and the seasoned U.S. military and diplomatic officials who “lived it” firsthand. Ambassador Bass Amicus Br.4, 6-17; Pet.App.136a-37a, 166a-78a. But the Masts do not dispute anything that actually matters here: While raising Baby Doe from infancy in Afghanistan, petitioners received no notice or opportunity to be heard before a Virginia court granted the Masts’ adoption petition based on misrepresented facts and errors of Virginia law. That procedural due process violation is obvious and undeniable. It should not stand.

The Masts do not seriously question that the Due Process Clause protects caretakers raising a child and intending to provide a permanent home, with the blessing of their sovereign government. Instead, the Masts play games with this case’s chronology, raise meritless (and irrelevant) factual disputes, deny clear splits of authority, and take the absurd position that foreign nationals abroad can be deprived of life, liberty, and property by U.S. courts without due process of law.

The Masts are also wrong to argue that a footnote in the decision below provides an adequate and independent state ground depriving this Court of jurisdiction. That footnote did not address petitioners’ procedural due process claim, which was fully preserved at every stage. And the Masts’ assertion that review would be “inequitable” is equally baseless: Equity does not favor adoption orders obtained by deception and fraud.

This case reflects a total breakdown of the rule of law, in one of the most sensitive contexts imaginable. The Court should vindicate due process and confirm that families cannot be torn apart without notice or an opportunity to be heard. The petition should be granted.

ARGUMENT

I. The Procedural Due Process Violation Here Is Obvious And Scarcely Disputed

1. The Masts do not dispute that Baby Doe was placed in petitioners' care following a joint decision by the Afghan government and the United States. Pet.9. They do not dispute that when a Virginia court issued the final adoption order on December 3, 2020, petitioners had physical custody of Baby Doe in Afghanistan, where they had been raising her as part of their family for nine months and counting. *Id.* at 10. They do not dispute that petitioners never received notice or an opportunity to be heard in the Virginia proceedings. *Id.* Nor do they dispute deliberately misleading Judge Moore about crucial facts—most notably, that the Afghan and U.S. governments had already transferred Baby Doe to her Afghan next-of-kin. *Id.* at 27-28.

That is all the Court needs to know to decide this case. Not even the Masts seriously question that the Due Process Clause protects caretakers lawfully raising a child with every intention of loving and supporting her for the rest of their lives.

The Masts observe that, to date, “[i]n every case in which this Court has recognized due process protection in the parent-child context, the claimant has been an actual parent—biological or adoptive.” BIO.30. That statement is literally true, but the

Court has never suggested that due process is *limited* to parents. And the Masts do not actually argue that procedural due process could defensibly be denied to caretakers of the “millions of children” who are “being raised by a non-parent,” often “informally” and without being “[r]elated by blood.” Young Center Amicus Br.22. In that circumstance, too, “failure” to provide “notice of [a] pending adoption proceeding[] violate[s] the most rudimentary demands of due process of law.” *Armstrong v. Manzo*, 380 U.S. 545, 549-50 (1965).

2. Rather than grappling with petitioners’ due process argument, the Masts raise a series of baseless or misleading assertions to distract the Court and dissuade it from correcting the obvious constitutional violation here. The Court should not be fooled.

First, the Masts say that petitioners “lack standing” to invoke the Due Process Clause because, “when [the] adoption proceedings began” in Virginia in November 2019, Baby Doe was still in U.S. custody in Afghanistan. BIO.19, 27, 33 n.12. That careful wording—emphasizing when the proceedings “began”—hides the relevant facts. The Masts did not request a final adoption order until October 2020. Pet.9-10. At that time, petitioners had already been raising Baby Doe as their own daughter for eight months, since late February 2020. *Id.* Baby Doe was still in petitioners’ custody in Afghanistan when Judge Moore issued the final adoption order in December 2020. *Id.* Petitioners had due process rights at every relevant moment in the final adoption proceeding, which is what matters.

Second, the Masts insist that petitioners “have no legal relationship” to Baby Doe, and that she is “not biologically related” to A.A. BIO.2. Both assertions

are wrong. It is undisputed that the Afghan government determined that A.A.’s father is Baby Doe’s “paternal uncle”—and exercised its sovereign authority to transfer Baby Doe to his custody. Pet.App.148a; *see* Pet.25 & n.5; Ambassador Bass Amicus Br.12-15. Given the Afghan government’s kinship determination, guardianship “automatically passed” to Baby Doe’s uncle “[u]nder Afghan law” when her parents were killed, and his decision to “transfer[] guardianship to his son [A.A.]” made petitioners “Baby Doe’s legal guardians.” Afghan Law Scholars Amicus Br.13-15; *see* Karamah Institute Amicus Br.6-16; Pet.9 (citing experts).

Afghanistan’s sovereign judgments on Baby Doe’s next-of-kin and custody—backed in full by the United States—are conclusive on these matters. *See* Pet.25; Pet.App.139a-40a, 156a-65a; Ambassador Bass Amicus Br.12-17. Contrary to the Masts’ account (BIO.26-28), the Virginia Supreme Court *declined* to resolve “disputed factual allegations” about A.A.’s biological ties to Baby Doe. Pet.App.43a; *see* Pet.25 n.5. And the court expressly rejected any potential relevance of Afghan law. Pet.App.40a; *see* Pet.32 n.6. This Court is not bound by the Virginia Supreme Court’s non-decision on the facts or its refusal to respect the decision of a foreign sovereign.¹

More importantly, though, the Masts’ attempts to dispute the Afghan government’s next-of-kin and custody determinations are a legal red herring for

¹ To be clear, A.A. has always “wanted to” take a DNA test that could verify the blood relationship. R.4961-62; *contra* BIO.22. But multiple “different labs” confirmed that a DNA test would be “unreliable” given the nature of A.A. and Baby Doe’s biological link (i.e., “male to a female first cousin”). R.5772-73.

certiorari purposes. Petitioners were entitled to procedural due process “even in the absence of a blood relationship.” *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 844 (1977). It would not matter if they were strangers who found Baby Doe wounded and alone in the rubble. They raised her from infancy, watched her grow from baby to toddler, and fully intended to fill the hole left by her deceased parents. Blood ties or no, those deep “emotional attachments” receive constitutional protection. *Id.*

Third, the Masts suggest that even if the final adoption order violated due process, Virginia’s limitations period bars petitioners’ claim because petitioners filed their Virginia case “on March 28, 2022,”—i.e., “more than six months after the Masts took custody” of Baby Doe in September 2021. BIO.2, 10, 19, 33 n.12. This argument is frivolous. Petitioners “originally filed” their challenge on December 8, 2021—just *three* months after the Masts seized Baby Doe from them on September 3, 2021. Pet.App.117a n.14. Petitioners refiled on March 28, 2022 only because, four days earlier, the “circuit court required [petitioners] to refile their petition as a collateral proceeding” for technical procedural reasons. *Id.*; see R.7865; Pet.App.117a n.14. The Masts fail to mention that Judge Moore expressly told petitioners that this pro forma step “would not have any impact on the merits or the timing” and would not “prejudice” their case. R.7865-66. That all-too-convenient omission speaks volumes.

In any event, the Masts did not make this version of their timeliness argument below, where it would have obviated the need for the Virginia Supreme Court to resolve any other state or federal issue. That

court accordingly did not address it—and in fact expressly acknowledged that petitioners “initially filed” this case in December 2021. Pet.App.13a n.7.

Fourth, the Masts make a drive-by assertion of “equitable estoppel,” which appears to rest on the false suggestion that petitioners knew about the adoption order before fleeing Afghanistan. *See* BIO.8, 33 n.13. The Virginia Supreme Court did not accept that argument. And Joshua Mast admitted that he never told petitioners he was “pursuing this adoption proceeding.” R.5362; *see* Pet.App.232a (circuit court finding that Joshua Mast did *not* “refer to the adoption” in communications with petitioners). This deception was essential to the Masts’ scheme, which likewise included the blatant false statement—undisputed here—that they made to a federal court denying any designs on adopting Baby Doe. *See* Pet.9; Chamberlain Network Amicus Br.15-23 (detailing the Masts’ misrepresentations to courts, agencies, U.S. servicemembers, and petitioners).

Finally, the Masts advance the last-ditch backup argument that the Due Process Clause does not protect “foreign citizens outside U.S. territory,” even when their life, liberty, and property are adjudicated in U.S. courts. BIO.32-33. That breathtaking contention is nonsense. For domestic litigation, “there has been no question in this country of excepting foreign nationals from the protection of our Due Process Clause.” *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988). Under the Constitution, *all* “interested parties”—including those located “abroad”—must receive “notice” and “an opportunity to present their objections” before a U.S. court adjudicates their rights. *Id.* So too for petitioners.

II. The Splits Are Real And Meaningful

Lower courts are in disarray on the question presented. Most apply a totality-of-the-circumstances test, but some (including the Virginia Supreme Court) do not. Pet.30-32. Many courts hold that blood relatives with physical custody are entitled to procedural due process in adoption proceedings, but a few (including the Virginia Supreme Court) disagree. Pet.33-34. Both splits are real and warrant review.

The Masts call the first split “largely semantic” but don’t address the significant legal disagreements petitioners identified. BIO.22. While it’s true the cases naturally involved “unique facts,” *id.*, lower courts clearly diverge on the core legal point—i.e., whether nonparent caretakers categorically lack procedural due process rights unless they have a permanent legal relationship with the child or are otherwise close to consummating a formal adoption. *See* Pet.30-32 (citing cases).

The Masts suggest that petitioners would not prevail under the totality-of-circumstances approach but don’t explain why. BIO.22-23. Nor do the Masts seriously try to refute the key facts supporting petitioners’ procedural due process claim, including: (1) petitioners’ physical custody of Baby Doe beginning in late February 2020; (2) the custody and next-of-kin determinations made by the Afghan government, with the U.S. government’s full support; and (3) the deep “emotional attachments” petitioners developed after raising Baby Doe since infancy. *Smith*, 431 U.S. at 844; *see* Pet.24-26. Those

considerations easily trigger procedural due process rights under the totality-of-circumstances approach.²

The Masts do not dispute the second split, claiming it is “irrelevant” given Judge Moore’s doubts about A.A. and Baby Doe’s blood ties. BIO.23. But again, Judge Moore clearly erred on that issue, and the decision below declined to decide it. *Supra* 3-4. Rejecting the Virginia Supreme Court’s uniquely stringent parents-only test would warrant reversal, or at least a remand to definitively resolve the kinship issue. So this undisputed split, too, is implicated by this case and needs resolution.

III. The Masts’ Jurisdictional And Waiver Arguments Are Meritless

1. With nothing persuasive to say on substance, the Masts invent a jurisdictional impediment. They assert that footnote 27 of the Virginia Supreme Court’s opinion “held that petitioners waived any [procedural] due process argument premised on ‘nonparent caretaker’ status.” BIO.20 (citing Pet.App.48a n.27). “That waiver holding,” the Masts continue, “is an adequate and independent state law ground and therefore deprives this Court of jurisdiction.” *Id.*

Here again, the Masts distort the record. Footnote 27 unambiguously addressed only the one-paragraph *substantive* due process argument—rooted in *Troxel*

² The Masts’ assertion that the totality-of-circumstances cases did not “set aside” a time bar is irrelevant. BIO.24. Even the Virginia Supreme Court recognized that a procedural due process violation would render Virginia Code § 63.2-1216 “unconstitutional as applied to [petitioners].” Pet.App.39a; accord *In re Adoption of Knipper*, 507 N.E.2d 436, 438 (Ohio 1986).

v. Granville, 530 U.S. 57 (2000)—that appeared in Section II-B-1 of petitioners’ Virginia Supreme Court brief, on pages 43-44. See Pet.App.48a n.27 (discussing *Troxel* argument, twice citing only “Appellee Br. at 43-44,” and criticizing “paucity” of argument on that issue); Reply.Add.4a-5a (reproducing pages 43-44 of petitioners’ brief).

Footnote 27 said nothing about petitioners’ *procedural* due process claim, which petitioners raised in Section II-B-2 of their Virginia Supreme Court brief, on pages 44-45. See Reply.Add.5a-6a. Because footnote 27 “did not ‘clearly and expressly’ rely on waiver as a ground for rejecting” that separate procedural claim, the footnote cannot possibly constitute “an adequate and independent state ground” depriving this Court of jurisdiction to review the question presented. *Harris v. Reed*, 489 U.S. 255, 265-66 (1989).

2. More generally, the Masts contend that petitioners “did not fully air their procedural due process theory below,” leaving “no well-developed record to review.” BIO.25. Wrong again. “At every level of [the] proceedings in state court,” petitioners claimed that issuing the final adoption order without notice or an opportunity to be heard violated procedural due process. *Hemphill v. New York*, 595 U.S. 140, 148-49 (2022); see Pet.12-20.

The Masts themselves repeatedly acknowledged that petitioners had raised “[a]lternative [d]ue [p]rocess [t]heories,” including a procedural due process claim asserting a “separate notice-based constitutional violation.” Masts’ COA Reply 10-11, 13-15; see Pet.App.296a (circuit court objection). And their reply brief in the Virginia Supreme Court included a whole section directly responding to

petitioners’ “Due-Process Notice Rights” claim. *See* Masts’ VSC Reply 11-12.

All this was more than enough to bring petitioners’ procedural due process claim “to the attention of the state court with fair precision.” *Hemphill*, 595 U.S. at 148. Indeed, Justice Mann’s dissent embraced it, finding that petitioners “were constitutionally entitled to notice and an opportunity to object” but “received neither.” Pet.App.105a. And in their rehearing petition, petitioners *again* reiterated their procedural due process claim and notice arguments, emphasizing that these points “did not turn” on whether petitioners were substantively “equivalent to parents.” Petrs.’ VSC Reh’g Pet. 2-5.

Even the Masts concede that petitioners raised a “procedural due process” claim below. BIO.16-18. That concession refutes their waiver theory. Whatever daylight the Masts perceive between the “precise arguments” about procedural due process that petitioners made below and in this Court, this indisputably preserved “federal claim” is “properly presented.” *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). The clear-cut constitutional violation petitioners suffered—and emphasized throughout this case—warrants review.

IV. The Equities Strongly Support Review

1. This Court is the ultimate guardian of our Constitution and the basic due process protections it affords anyone whose rights are adjudicated in American judicial proceedings. The Court should hear this case to reaffirm the importance of these bedrock principles, especially in cases implicating parental rights. Review here would show the world that American courts insist on basic fairness even in

contentious disputes between U.S. citizens and foreign nationals.

Certiorari would also let the Court reaffirm that international adoptions—like all adoptions—must proceed according to law, following appropriate procedures. When done properly, such adoptions ensure that even the neediest children can grow up in a loving home. *See* Intercountry Adoptee Voices Amicus Br.17; Adoption Law Scholars Amicus Br.15. But they also raise uniquely sensitive concerns, especially in cases—like this one—arising in a war zone and implicating national security and international comity interests. When the stakes are high, following the rule of law is especially important.

2. The Masts do not deny that the Virginia Supreme Court’s decision undermines our Nation’s global standing, erodes confidence in U.S. military and diplomatic assurances, and invites future abuses. *See* Pet.34-37; Pet.App.162a-65a; Ambassador Bass Amicus Br.18-22. Instead, they urge petitioners to “turn the page” and “start the next chapter of their lives.” BIO.35. Those are bold words to tell a family after wrenching a two-year-old girl from their arms as they pleaded for their “daughter.” Pet.App.117a.

The Masts say further review would be “inequitable” given the need for “finality” and “stability.” BIO.33-34. Finality and stability are important, but the Masts themselves betrayed those principles by seizing Baby Doe after she had been living with petitioners for *eighteen months*. Time limits for challenging adoptions are meant to ensure that, once settled in a long-term adoptive home, children can expect to stay there. That interest is not served by shielding from scrutiny an adoption order that was secretly obtained—illegally and by “fraud on

the court”—while the child was being raised by her loving family thousands of miles away. Pet.App.166a.

As for the Masts’ claim that Baby Doe is now “happ[y]” and “thriving” in their home, BIO.33—who can really know? No record evidence supports that claim, and no court has ever adjudicated the Masts’ fitness as parents in a fair proceeding untainted by fraud. Given their track record of deception, this Court should treat the Masts’ self-serving assurances with appropriate skepticism. And even if the Masts are good parents, that is not a compelling basis to cast aside due process or to disregard petitioners’—and Baby Doe’s—interest in being reunited as a family.

3. Review by this Court would be an important first step towards fairly resolving this tragic case. If the Court vacates the unlawful adoption order, future state-court proceedings will likely be needed to adjudicate Baby Doe’s status. Those proceedings may pose hard questions for all sides, given the Masts’ misconduct and the passage of time. But those questions should be answered by an appropriate court, in a fair process, with all sides represented—precisely the opposite of what happened here. Ultimately, the only way to protect Baby Doe’s best interests is to trust the rule of law—and enforce it.

This Court should grant review, vacate the unconstitutional adoption order, and let any future proceedings move forward in accordance with our Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

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ADDENDUM

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IN THE
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J.M. and S.M.,
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v.

A.A. and F.A.,
Appellees.

Appellee Brief

Record No. 240707

From the Circuit Court for Fluvanna County
(No. CL22000186-00) & From the Court of Appeals
of Virginia

(Nos. 0876-23-2, 0953-23-2, 1855-22-2, 0940-23-2)

* * *

December 30, 2024 *Counsel for Appellees A.A. and F.A.*

* * *

[The images reproduced below (at 2a-7a) show pages 41 through 46 of petitioners' merits brief in the Virginia Supreme Court. Petitioners have reproduced images of these pages, so that the Court can more easily follow the discussion of footnote 27 of the decision below (Pet.App.48a n.27) in respondents' opposition brief (at 16-20, 31-32) and petitioners' reply (at 8-9). The text of those pages has also been reproduced in standard Supreme Court typographic format on pages 8a-13a.]

II. APPLYING SECTION 1216 TO BAR THE A.s' CHALLENGE WOULD ALSO BE UNCONSTITUTIONAL

The Virginia and U.S. Constitutions also render the final adoption order void and prohibit applying Section 1216 to the A.s' challenge for several reasons. As the Court of Appeals correctly recognized, Section 1216 would be federally preempted if applied here. *A.A.*, 81 Va. App. at 239 n.24. Validating the order would also violate the A.s' due process rights in at least three independent ways: The order (1) interfered with the A.s' parental rights; (2) was issued without constitutionally sufficient notice to the A.s; and (3) was issued without personal jurisdiction. The decision below can be affirmed on any of these grounds.

A. The U.S. Supremacy Clause Voids The Final Adoption Order And Preempts Section 1216

As the Court of Appeals recognized, the order is void because the U.S. government exercised "federal executive authority by turning over custody of a child found on Afghan soil, during a military engagement, to Afghanistan." *Id.* State court orders that conflict with a lawful exercise of federal power are void. *See* U.S. Const. art. VI, cl. 2; *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413, 421 (2003) (exercises of state power in "clear conflict with" a federal decision "must yield to" federal law). That approach avoids "the dangers" of "each State" "establish[ing] its own foreign policy." *Zschemig v. Miller*, 389 U.S. 429, 440-41 (1968).

The "President has unique responsibility" for "foreign and military affairs."

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Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993); *see also Hernandez v. Mesa*, 589 U.S. 93, 104 (2020) (“foreign relations” is “largely immune from judicial inquiry or interference”); R.1277:17-22 (federal court finding State Department speaks for U.S. in foreign affairs). A foreign child’s disposition in a foreign war zone following her parents’ deaths in a foreign military action is “well within the Executive’s responsibility for foreign affairs.” *Garamendi*, 539 U.S. at 420. The U.S. formally recognized Afghanistan’s jurisdiction over Baby Doe by concluding she was an Afghan citizen. R.1757-65, 2383-87, 2405-07; 0876-23-2 R.681-94. Senior Executive Branch officials made that decision pursuant to the U.S.’s international agreement with Afghanistan and “the law of war.” R.2385, 1759. The M.s’ order and Section 1216 directly conflict with and must “give way” to this decision. 0876-23-2 R.692; *see also Garamendi*, 539 U.S. at 413-14, 421.²⁸

²⁸ The M.s (at 26 n.24) breeze past these weighty issues, and their responses lack force. There is no need for “implementing legislation” for Executive Branch officials’ determinations implementing the “law of war” and the U.S.’s international agreements concerning private rights of foreign persons in foreign war zones; those decisions have independent legal force here. *See Garamendi*, 539 U.S. at 415-16. A contrary understanding would impair the President’s constitutional authority as Commander-in-Chief. *Medellin v. Texas* is distinguishable because it concerned executive action absent any congressional authorization. 552 U.S. 491, 524-25 (2008). Here, Congress expressly authorized the President to make decisions about the war in Afghanistan. *See* Pub. L. No. 107-40, 115 Stat. 224 (2001). Furthermore, federal preemption of state family law is not unusual. *See Haaland v. Brackeen*, 599 U.S. 255, 275-77 (2023). Far more unusual is the M.s’ suggestion that Virginia law should reach onto foreign battlefields and override Executive Branch officials’

B. The Final Adoption Order And Section 1216 Violate The A.s’ Due Process Rights

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides that no person shall be deprived “of life, liberty, or property, without due process.” *Walker v. Commonwealth*, 302 Va. 304, 313-14 (2023).²⁹ The adoption order is void because it violated the A.s’ substantive and procedural due process rights. And, as applied, Section 1216 cannot shield it from judicial review.

1. The Final Adoption Order Is Void Because It Interferes With The A.s’ Parental Rights

The Due Process Clauses of the U.S. and Virginia Constitutions protect the A.s’ parental rights. Parental rights extend to both “parents and guardians.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000). It is “the relationship of love and duty in a recognized family unit [that] is an interest in liberty entitled to constitutional

decisions. Yet reversing the judgment below would require this Court to reach that troubling result.

²⁹ Below, the M.s argued the A.s were not entitled to due process because they were not U.S. citizens upon entry of the final adoption order. But due process applies to foreigners overseas whenever U.S. courts purport to adjudicate their rights. *See Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 233 (5th Cir. 2022) (en banc) (collecting U.S. Supreme Court cases). And due process indisputably protected them *after* they entered the U.S. and *before* Baby Doe was taken or Section 1216 was invoked. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

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protection.” *Lehr v. Robertson*, 463 U.S. 248, 258 (1983).³⁰ Because Baby Doe was lawfully placed with H.I., who delegated guardianship to A.A., the circuit court correctly recognized that the A.s are adoptive parents, R.3675, 14910; *see* R.11669:21-11671:6 (Afghan minister verifying diplomatic communications)—a fact entitled to the weight of a jury finding, *Hawthorne*, 279 Va. at 577. Further, Section 1216 cannot be constitutionally applied to deprive the A.s of these rights. *Shelby County v. Holder*, 570 U.S. 529, 542 (2013). Section 1216’s application here is thus not “sufficiently narrowly tailored to achieve the goal of stability while . . . preserving [the A.s’] fundamental right to continue the pre-existing relationship with [their] . . . child.” *F.E.*, 35 Va. App. at 664.

2. The Final Adoption Order Is Void Because The A.s Did Not Receive Constitutionally Sufficient Notice

“The fundamental requisite of due process” “is the opportunity to be heard.” *Greene v. Lindsey*, 456 U.S. 444, 449 (1982). Thus, due process “requires notice reasonably calculated . . . to apprise interested parties of the . . . action.” *F.E.*, 35 Va. App. at 665. It is undisputed that neither the U.S. government, the A.s, H.I., nor Baby Doe received legal notice of the adoption proceedings. That “failure to give

³⁰ *See also, e.g., Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 n.51 (1977) (“Adoption . . . is . . . the legal equivalent of biological parenthood.”); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (placing unwed natural fathers and adoptive parents in the same category for Equal Protection purposes); *cf. Hawkins v. Grese*, 68 Va. App. 462, 472-77 (2018) (recognizing that the definition of “parent” encompasses parents through “legal adoption”).

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... notice ... violated the most rudimentary demands of due process of law.” *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).³¹ And though Section 1216 purports to shield an order attacked for failures of notice, it cannot be constitutionally applied here because *no* relevant person received notice. *See, e.g., id.* (due process requires notice when “the judicial proceeding was permanently to deprive a legitimate parent of . . . parenthood”). Holding otherwise would impermissibly permit Section 1216 to preempt federal law. *See Button v. Day*, 208 Va. 494, 503 (1968).

3. The Final Adoption Order Is Void For Lack Of Personal Jurisdiction Over Baby Doe And The A.s

“[A] court has no power” to adjudicate a person’s rights without personal jurisdiction over them. *McCulley v. Brooks & Co. Gen. Contractors, Inc.*, 295 Va. 583, 589 (2018). Personal jurisdiction in the family law context is unique and somewhat unsettled, *see, e.g.*, Joan M. Shaughnessy, *The Other Side of the Rabbit Hole: Reconciling Recent Supreme Court Personal Jurisprudence with Jurisdiction to Terminate Parental Rights*, 19 Lewis & Clark L. Rev. 811, 812, 820 (2015), but one takeaway from the case law is crystal clear: Personal jurisdiction in adoption cases requires *at least* minimum contacts between the child’s custodian and the

³¹ The M.s have claimed the A.s had no right to notice. That is incorrect and disingenuous. *See* R.13316 (J.M. April 2020 text: “[W]e obviously have to have the consent and cooperation of the family to get [Baby Doe] medical care . . .”). As Baby Doe’s “de facto” parents, the A.s were plainly entitled to due process of the Virginia adoption proceedings before entry of the final order.

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forum state *or* a connection between the child and the forum state. *See, e.g.*, Restatement (Second) of Conflict of Laws § 78 (1988) (a court must have personal jurisdiction over “the adoptive parent and either the adopted child or the person having legal custody of the child” to issue an adoption order); *cf. Falco v. Grills*, 209 Va. 115, 121 (1968) (stating that Virginia could adjudicate a child’s status “within its borders” within its capacity “as *parens patriae*”); *In re John Doe*, 926 P.2d 1290, 1298-300 (Haw. 1996) (even “fortuitous and transitory presence” of a child in a state could not give it personal jurisdiction over his foreign national mother to terminate her parental rights and permit adoption). Even if the adoption code reaches beyond these limits (it does not), the Constitution prohibits courts from entering adoption orders over children with no connection to the Commonwealth—and thus cutting off the rights of “parents by previous adoption,” Code § 63.2-1215.

Neither the A.s—her de facto parents when the order was entered, R.3535—nor Baby Doe had *any* relevant contacts with Virginia, R.12877:6-8. Thus, the circuit court lacked personal jurisdiction. And although Section 1216 purports to shield an order attacked for lack of personal jurisdiction, it cannot be constitutionally applied here. *See In re John Doe*, 926 P.2d at 1298-1300 (lack of minimum contacts over foreign parent or child prevented court from exercising personal jurisdiction).

III. THE FINAL ADOPTION ORDER IS ALSO VOID FOR EXTRINSIC FRAUD

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**[41] II. APPLYING SECTION 1216 TO BAR THE
A.s' CHALLENGE WOULD ALSO BE
UNCONSTITUTIONAL**

The Virginia and U.S. Constitutions also render the final adoption order void and prohibit applying Section 1216 to the A.s' challenge for several reasons. As the Court of Appeals correctly recognized, Section 1216 would be federally preempted if applied here. A.A., 81 Va. App. at 239 n.24. Validating the order would also violate the A.s' due process rights in at least three independent ways: The order (1) interfered with the A.s' parental rights; (2) was issued without constitutionally sufficient notice to the A.s; and (3) was issued without personal jurisdiction. The decision below can be affirmed on any of these grounds.

**A. The U.S. Supremacy Clause Voids The
Final Adoption Order And Preempts
Section 1216**

As the Court of Appeals recognized, the order is void because the U.S. government exercised "federal executive authority by turning over custody of a child found on Afghan soil, during a military engagement, to Afghanistan." *Id.* State court orders that conflict with a lawful exercise of federal power are void. *See* U.S. Const. art. VI, cl. 2; *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413, 421 (2003) (exercises of state power in "clear conflict with" a federal decision "must yield to" federal law). That approach avoids "the dangers" of "each State" "establish[ing] its own foreign policy." *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968).

The "President has unique responsibility" for "foreign and military affairs." [42] *Sale v. Haitian*

Ctrs. Council, Inc., 509 U.S. 155, 188 (1993); *see also Hernandez v. Mesa*, 589 U.S. 93, 104 (2020) (“foreign relations” is “largely immune from judicial inquiry or interference”); R.1277:17-22 (federal court finding State Department speaks for U.S. in foreign affairs). A foreign child’s disposition in a foreign war zone following her parents’ deaths in a foreign military action is “well within the Executive’s responsibility for foreign affairs.” *Garamendi*, 539 U.S. at 420. The U.S. formally recognized Afghanistan’s jurisdiction over Baby Doe by concluding she was an Afghan citizen. R.1757-65, 2383-87, 2405-07; 0876-23-2 R.681-94. Senior Executive Branch officials made that decision pursuant to the U.S.’s international agreement with Afghanistan and “the law of war.” R.2385, 1759. The M.s’ order and Section 1216 directly conflict with and must “give way” to this decision. 0876-23-2 R.692; *see also Garamendi*, 539 U.S. at 413-14, 421.²⁸

²⁸ The M.s (at 26 n.24) breeze past these weighty issues, and their responses lack force. There is no need for “implementing legislation” for Executive Branch officials’ determinations implementing the “law of war” and the U.S.’s international agreements concerning private rights of foreign persons in foreign war zones; those decisions have independent legal force here. *See Garamendi*, 539 U.S. at 415-16. A contrary understanding would impair the President’s constitutional authority as Commander-in-Chief. *Medellín v. Texas* is distinguishable because it concerned executive action absent any congressional authorization. 552 U.S. 491, 524-25 (2008). Here, Congress expressly authorized the President to make decisions about the war in Afghanistan. *See* Pub. L. No. 107-40, 115 Stat. 224 (2001). Furthermore, federal preemption of state family law is not unusual. *See Haaland v. Brackeen*, 599 U.S. 255, 275-77 (2023). Far more unusual is the M.s’ suggestion that Virginia law should reach onto foreign battlefields and override Executive

**[43] B. The Final Adoption Order And
Section 1216 Violate The A.s’ Due Process
Rights**

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides that no person shall be deprived “of life, liberty, or property, without due process.” *Walker v. Commonwealth*, 302 Va. 304, 313-14 (2023).²⁹ The adoption order is void because it violated the A.s’ substantive and procedural due process rights. And, as applied, Section 1216 cannot shield it from judicial review.

**1. The Final Adoption Order Is Void
Because It Interferes With The A.s’
Parental Rights**

The Due Process Clauses of the U.S. and Virginia Constitutions protect the A.s’ parental rights. Parental rights extend to both “parents and guardians.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000). It is “the relationship of love and duty in a recognized family unit [that] is an interest in liberty entitled to constitutional [44] protection.” *Lehr v. Robertson*, 463 U.S. 248, 258 (1983).³⁰ Because Baby

Branch officials’ [43] decisions. Yet reversing the judgment below would require this Court to reach that troubling result.

²⁹ Below, the M.s argued the A.s were not entitled to due process because they were not U.S. citizens upon entry of the final adoption order. But due process applies to foreigners overseas whenever U.S. courts purport to adjudicate their rights. See *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 233 (5th Cir. 2022) (en banc) (collecting U.S. Supreme Court cases). And due process indisputably protected them *after* they entered the U.S. and *before* Baby Doe was taken or Section 1216 was invoked. See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

[44] ³⁰ See also, e.g., *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 n.51 (1977) (“Adoption . . . is . . . the

Doe was lawfully placed with H.I., who delegated guardianship to A.A., the circuit court correctly recognized that the A.s are adoptive parents, R.3675, 14910; *see* R.11669:21-11671:6 (Afghan minister verifying diplomatic communications)—a fact entitled to the weight of a jury finding, *Hawthorne*, 279 Va. at 577. Further, Section 1216 cannot be constitutionally applied to deprive the A.s of these rights. *Shelby County v. Holder*, 570 U.S. 529, 542 (2013). Section 1216’s application here is thus not “sufficiently narrowly tailored to achieve the goal of stability while . . . preserving [the A.s’] fundamental right to continue the pre-existing relationship with [their] . . . child.” *F.E.*, 35 Va. App. at 664.

2. The Final Adoption Order Is Void Because The A.s Did Not Receive Constitutionally Sufficient Notice

“The fundamental requisite of due process” “is the opportunity to be heard.” *Greene v. Lindsey*, 456 U.S. 444, 449 (1982). Thus, due process “requires notice reasonably calculated . . . to apprise interested parties of the . . . action.” *F.E.*, 35 Va. App. at 665. It is undisputed that neither the U.S. government, the A.s, H.I., nor Baby Doe received legal notice of the adoption proceedings. That “failure to give [45] . . . notice . . . violated the most rudimentary demands of due process of law.” *Armstrong v. Manzo*, 380 U.S.

legal equivalent of biological parenthood.”); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (placing unwed natural fathers and adoptive parents in the same category for Equal Protection purposes); *cf. Hawkins v. Grese*, 68 Va. App. 462, 472-77 (2018) (recognizing that the definition of “parent” encompasses parents through “legal adoption”).

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