

**COMMONWEALTH OF VIRGINIA
IN THE COURT OF APPEALS OF VIRGINIA**

Case No. 0876-23-2, 0953-23-2, 1855-22-2, 0940-23-2

J.M. and S.M., Appellants,

v.

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

**MOTION OF YOUNG CENTER FOR IMMIGRANT CHILDREN'S
RIGHTS AND NATIONAL CENTER FOR YOUTH LAW FOR LEAVE TO
FILE BRIEF OF *AMICUS CURIAE***

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COMES NOW undersigned counsel and submits in accordance with rule 5A:23 of the Rules of Virginia Supreme Court the following Motion for Leave to File a brief as *amicus curiae*.

1. The Young Center for Immigrant Children's Rights (Young Center) and the National Center for Youth Law (NCYL) hereby submit an *amicus curiae* brief in support of Appellees A.A. and F.A., who have consented to this filing.
2. The Young Center for Immigrant Children's Rights is a national non-profit organization with eight offices around the country in Washington, D.C., New York City, Harlingen, Houston, San Antonio, Chicago, Phoenix, and Los Angeles. The mission of the Young Center is to protect and advance the rights and best interests of immigrant children in accordance with state, federal, and international law.
3. Since 2004, the Young Center has been appointed by the U.S. Department of Health and Human Services Office of Refugee Resettlement (ORR) to serve as the independent Child Advocate (akin to a best interests guardian ad litem) for unaccompanied and separated immigrant children in federal immigration custody. The Young Center is appointed as Child Advocate pursuant to the Trafficking Victims Protection Reauthorization Act which authorizes ORR to appoint Child Advocates to victims of child trafficking and other vulnerable children. 8 U.S.C. § 1232(c)(6)(A).
4. The role of the Child Advocate is to represent the best interests of children on matters related to a child's custody, placement, immigration

case, access to services, and repatriation, where appropriate. Child Advocates submit best interests determinations to various federal agencies including the Executive Office for Immigration Review within the Department of Justice, Immigration and Customs Enforcement within the Department of Homeland Security, and ORR.

5. The Young Center has served as Child Advocate for thousands of unaccompanied and separated immigrant children, including over 130 Afghan children who arrived in the United States after the evacuation of Kabul in 2022.
6. The Young Center also maintains a Technical Assistance Program (TAP) that supports children caught between the federal immigration system and state child welfare systems by offering multidisciplinary case consultations and trainings to children's state court advocates and direct service providers. TAP engages on a variety of situations involving immigrant children caught in multiple legal systems, such as children and youth who are involved in child welfare (dependency, custody, and adoption) proceedings in state court systems and those navigating complex family reunification in the United States or abroad after separation.
7. The Young Center's unique perspective, cultivated over nearly two decades of working with thousands of immigrant children from dozens of countries around the world, may assist the Court in deciding the issues before it.
8. The National Center for Youth Law ("NCYL") is a private, non-profit law firm that uses the law to help children and youth grow and thrive. For more than 50 years, NCYL has worked to protect the rights of children,

promote their healthy development, and ensure that they have the knowledge, skills, resources, agency, and decision-making power to achieve their goals.

9. Part of NCYL's work focuses on the rights of immigrant children and youth. NCYL works to ensure that immigrant children are able to live in communities and with their families rather than in government custody, and that they have access to the resources and opportunities they need to heal and thrive. NCYL uses a combination of federal litigation, state and federal policy advocacy, stakeholder education, and coalition building to uphold and expand the rights of detained immigrant youth as well as immigrant children in the community.
10. NCYL serves as a co-class counsel on *Flores v. Garland*, *Lucas R. v. Becerra*, and *Duchitanga v. Chapman* and represents classes that include all immigrant children in federal custody.
11. In this role, NCYL regularly meets with detained immigrant youth to identify and redress violations of their rights by the federal government. Following the United States' exit from Afghanistan, NCYL interviewed dozens of Afghan youth held at multiple facilities throughout the country. NCYL has been deeply attuned to the distinct experience of Afghan youth in federal custody.
12. NCYL seeks leave to file on its own and The Young Center's behalf an amicus brief in the manner of Rule 5A:23 of the Rules of Virginia Supreme Court.
13. Appellants oppose the filing of this brief.

The Young Center and NCYL respectfully request that the Court grant leave to file the brief of *amicus curiae*.

Respectfully submitted,

//s// Rebecca R. Wolozin

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Young Center for Immigrant Children's Rights (Young Center) is a national non-profit organization whose mission is to protect and advance the rights and best interests of immigrant children in accordance with state, federal, and international law. The Young Center has eight offices around the country in Washington, D.C., New York City, Harlingen, Houston, San Antonio, Chicago, Phoenix, and Los Angeles. Since 2004, the Young Center has been appointed by the U.S. Department of Health and Human Services Office of Refugee Resettlement (ORR) to serve as the independent Child Advocate (akin to a best interests guardian ad litem) for unaccompanied and separated immigrant children in federal immigration custody. The Young Center has served as Child Advocate for thousands of unaccompanied and separated immigrant children, including over 130 Afghan children who arrived in the United States after the evacuation of Kabul.

The Young Center is appointed as Child Advocate pursuant to the Trafficking Victims Protection Reauthorization Act, which authorizes ORR to appoint Child Advocates to victims of child trafficking and other vulnerable children. 8 U.S.C. § 1232(c)(6)(A). The role of the Child Advocate is to represent the best interests of children on matters related to a child's custody, placement, immigration case, access to services, and repatriation, where appropriate. Child

Advocates submit best interests determinations to various federal agencies including the Executive Office for Immigration Review within the Department of Justice, Immigration and Customs Enforcement within the Department of Homeland Security, and ORR.

The Young Center also maintains a Technical Assistance Program (TAP) that supports children caught between the federal immigration system and state child welfare systems by offering multidisciplinary case consultations and trainings to children's state court advocates and direct service providers. TAP engages on a variety of situations involving immigrant children caught in multiple legal systems, such as children and youth who are involved in child welfare (dependency, custody, and adoption) proceedings in state court systems and those navigating complex family reunification in the U.S. or abroad after separation.

In addition, the Young Center has a policy program that advances changes in immigration policy and practice that center immigrant children's rights and best interests in all decisions. The Young Center's unique perspective, cultivated over nearly two decades of working with thousands of immigrant children from dozens of countries around the world, may assist the Court in deciding the issues before it.

The National Center for Youth Law ("NCYL") is a private, non-profit law firm that uses the law to help children and youth grow and thrive. For more than 50 years, NCYL has worked to protect the rights of children, promote their healthy

development, and ensure that they have the knowledge, skills, resources, agency, and decision-making power to achieve their goals.

Part of NCYL's work focuses on the rights of immigrant children and youth. NCYL works to ensure that immigrant children are able to live in communities and with their families rather than in government custody, and that they have access to the resources and opportunities they need to heal and thrive. NCYL uses a combination of federal litigation, state and federal policy advocacy, stakeholder education, and coalition building to uphold and expand the rights of detained immigrant youth as well as immigrant children in the community.

NCYL serves as a co-class counsel on *Flores v. Garland*, *Lucas R. v. Becerra*, and *Duchitanga v. Chapman* and represents classes that include all immigrant children in federal custody.

In this role, NCYL regularly meets with detained immigrant youth to identify and redress violations of their rights by the federal government. Following the United States' exit from Afghanistan, NCYL interviewed dozens of Afghan youth held at multiple facilities throughout the country. NCYL has been deeply attuned to the distinct experience of Afghan youth in federal custody.

INTRODUCTION

The "best interests of the child" is a foundational principle of child protection in both U.S. child welfare law and international law. In the United

States, every state, including Virginia, has laws requiring courts to consider the best interests of children when making decisions about a child who is separated from their parents or legal guardian. Children’s Bureau, Admin. for Children for Families, U.S. Dep’t of Health & Human Servs., *Determining the Best Interests of the Child*, (Mar. 2016).¹ While the “best interests of the child” principle has no single definition, widely-accepted elements include: a child’s safety and well-being; a child’s expressed interests; a child’s health; a child’s right to family integrity; a child’s right to liberty; a child’s right to development; and a child’s right to identity. *Id.*; see also Comm. on the Rights of the Child, *General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1)*, ¶¶ 52-78, U.N. Doc. CRC/C/GC/14 (May 29, 2013) [hereinafter General Comment No. 14].² Likewise, a consideration of the child’s important relationships—including parents and extended family members—is reflected in Virginia’s best interest considerations, as codified in Va. Code § 63.2-1205 and Va. Code § 20-124.3.

In this brief, the Young Center and NCYL argue that the lower court’s vacatur of the adoption order, and Baby Doe’s swift reunification with Appellees, is in Baby Doe’s best interests. State, federal, and international law recognize a

¹ Available at https://www.childwelfare.gov/pubpdfs/best_interest.pdf.

² Available at <http://www.refworld.org/docid/51a84b5e4.html>.

child's right to family, culture, and identity as critical components of a best interests analysis.

Amici further highlight the particular importance of maintaining a child's familial bonds and their ties to their ethnic heritage, language, and culture, as well as the necessity of considering these factors, when making decisions about custody of a child. Countless voices from the medical and mental health fields have documented lasting harm children experience when they are separated from their family of origin and raised without deep, meaningful connection to their cultural heritage. Thankfully, social science has also demonstrated that, with appropriate therapeutic intervention, a ruptured bond between a child and a caregiver can be repaired and can support a child's long-term development and well-being.

We therefore urge the Court to uphold the vacatur of the adoption and to grant physical and legal custody of Baby Doe to her “*de facto*” Afghan parents, who raised her for the 18 months prior to the effectuation of lower court's erroneous custody and adoption orders, and with whom she traveled to the United States to live. Va. Code § 20.124.2; Claire Galofaro, Juliet Linderman, and Martha Mendoza, *U.S. Marine's Adoption of Afghan War Orphan Voided*, Associated Press, (Mar. 31, 2023).³ In the alternative, we urge the Court to uphold the vacatur

³ Available at <https://apnews.com/article/afghanistan-baby-marine-adoption-joshua-mast-295673fb358cf30abd243995cd846c99>.

of the adoption and to direct the lower court to grant physical and legal custody of Baby Doe to her Afghan family. *Id.* In either instance, Baby Doe's return to her Afghan family should take place in a timely manner that supports her developmental and mental health needs during this necessary transition.

I. Placing children with family and maintaining kinship bonds serve the best interests of children.

The principle that when a parent is unable to care for a child, the child is best served by placement with family is deeply embedded in child welfare law—and with good reason. Children learn about the world in the context of their families. A family helps a child learn and come to understand love, belonging, community, and safety. Indeed, there is widespread recognition among child welfare agencies, experts, and advocates that placement with kin is preferable to placement with strangers as it strengthens family bonds, lowers risk of abuse, improves mental health, and promotes permanency. *See, e.g. Casey Family Programs, Why Should Child Protection Agencies Adopt a Kin-First Approach*, 1 (Sept. 2019).⁴

Virginia child welfare law recognizes that placing children with family and maintaining a child's bonds with relatives serve the best interests of children. In Virginia, where consent is not given for an adoption, as here, an analysis of the best interests of the child requires consideration of the child's custodial

⁴ Available at https://caseyfamilypro-wpengine.netdna-ssl.com/media/SF_Kin-First-Approach.pdf.

environment prior to the adoption and the effect of a change of physical custody on the child, among other things. Va. Code § 63.2-1205. In determining a child's best interests in custody or visitation decisions, Virginia courts are required to "giv[e] due consideration to other important relationships of the child, including but not limited to siblings, peers, and extended family members." Va. Code Ann. § 20-124.3. Similarly, in court proceedings to decide whether to terminate parental rights for a child deemed to have been abandoned on account of abuse or neglect, Virginia law requires the party seeking termination to establish by clear and convincing evidence that "[d]iligent efforts have been made to locate the child's parent or parents, guardian, or relatives without avail." Va. Code Ann. § 16.1-283(D)(3). In *Logan v. Fairfax Cnty. Dep't of Hum. Dev.*, 13 Va. App. 123, 131, 409 S.E.2d 460, 465 (1991), the Virginia Court of Appeals held that this statute imposes a duty on parties seeking termination "to produce sufficient evidence so that the court may properly determine whether there are relatives willing and suitable to take custody of the child, and to consider such relatives in comparison to other placement options."

Virginia's commitment to placing children with relatives and maintaining family bonds is further evidenced by its Kinship Guardianship Assistance programs, which were established to "facilitate placements with relatives and ensure permanency for children in foster care." Va. Code Ann. §§ 63.2-1305, 63.2-

1306. Indeed, materials promoting these programs note that “[k]inship care can reduce trauma, promote stability, and maintain family and cultural connections.”

Va. Dept. Of Social Servs., Div. of Family Servs, *Kinship Care: Exploring Options for Relatives of Children in Foster Care*.⁵

Virginia’s preference for kinship care aligns with its legal obligations as a recipient of federal funding for adoption and foster care programming pursuant to federal child welfare law which preferences a child’s placement with family members. Under Title IV-E of the Social Security Act, if a state seeks federal funding for its adoption and foster care programming, it must “consider giving preference to an adult relative over a nonrelated caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant state child protection standards.” 42 U.S.C. § 671(a)(19). Likewise, the Family First Prevention Services Act, signed into law under the last administration, further “reinforces long-standing federal and state law prioritizing family-based care, preferably within a child’s own family network.” Children’s Defense Fund *et al.*, *Implementing the Family First Prevention Services Act: A Technical Guide for Agencies, Policymakers and Other Stakeholder*, 4 (Feb. 2020).⁶ Similarly, the

⁵ Available at https://www.dss.virginia.gov/nam/downloads/kinship_care_brochure_web.pdf.

⁶ Available at <https://www.childrensdefense.org/wp-content/uploads/2020/07/FFPSA-Guide.pdf>.

Indian Child Welfare Act explicitly establishes that for foster and adoptive placement of a Native American child, the child's extended family is the preferred placement. 25 U.S.C. § 1915(a). In the absence of a tribal law definition, the ICWA defines "extended family member" as a person who has reached the age of eighteen and who is the child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent. 25 U.S.C. § 1903(2).

The federal government further promotes the value of kinship placement through the public pronouncements of the Children's Bureau, a sub-agency which advises the federal government's Administration for Children and Families on matters related to child welfare, including adoption. The Children's Bureau also provides guidance to states, tribes, child welfare agencies, and others on federal child welfare laws. Kinship placement is defined as "the full-time care, nurturing, and protection of a child by relatives, members of their Tribe or clan, godparents, stepparents, or other adults who have a family relationship to a child." Children's Bureau, Admin. for Children and Families, U.S. Dep't of Health & Human Servs., *About Kinship Care*.⁷ According to educational materials published by the Bureau, "kinship care is the preferred option because it can reduce trauma and help children maintain family bonds, a sense of belonging, and their identity." Children's

⁷ Available at <https://www.childwelfare.gov/topics/outofhome/kinship/about/>.

Bureau, Admin. for Children and Families, U.S. Dep’t of Health & Human Servs., *Working with Kinship Caregivers*, 1 (Jun. 2018).⁸ Research has shown that placing children with kin can benefit children by minimizing trauma, preserving cultural identity, offering greater placement stability, and improving behavioral outcomes. *Id.* at 3-4. “Placing children with relatives helps to maintain family connections and cultural traditions that can minimize the trauma of family separation and relieve the anxieties that come with traditional foster placements.” Children’s Bureau, Admin. for Children and Families, U.S. Dep’t of Health & Human Servs., *Partnering with Relatives to Promote Reunification*, 2 (Jan. 2020).⁹

International law, like Virginia and federal law, also establishes the centrality of familial bonds in evaluating the best interests of children. As stated in the Preamble to the Convention on the Rights of the Child (“Convention”): “[T]he family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.”¹⁰ Convention on the Rights of the Child,

⁸ Available at https://www.childwelfare.gov/pubPDFs/f_kinshi.pdf.

⁹ Available at

https://www.childwelfare.gov/pubPDFs/factsheets_families_partner_relatives.pdf.

¹⁰ Though the United States is a signatory to the Convention on the Rights of Child, and therefore precluded from taking any action in contravention of it, it remains the only country in the world that has not yet ratified the Convention.

art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; *see also* International Covenant on Civil and Political Rights, Art. 23, Dec. 19, 1966, 61 I.L.M. 368, 999 U.N.T.S. 171 (“[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State”). Article 8 of the Convention demands that parties “respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.” *Id.* at art. 8. The United Nations Committee on the Rights of the Child has explained further that “[p]reservation of the family environment encompasses the preservation of the ties of the child in a wider sense. These ties apply to the extended family, such as grandparents, uncles/aunts as well friends, school and the wider environment.” General Comment No. 14 ¶ 70; *see also id.* at ¶ 59 (“[t]he term “family” must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom (art. 5)”).

II. Adoptions resulting from fraud and coercion are not in the best interests of children.

In the context of adoption, both Virginia and international law mandate strict safeguards and adherence to standards to ensure that an adoption is lawful and occurs only when it is properly established that the child is in a position to be adopted. Virginia has established adoption laws, regulations, and standards to

ensure that adoptions in Virginia are authorized, that informed consent is obtained when necessary, and that information provided to the court to support a petition for adoption is truthful. *See* § 63.2-1200 *et seq.* Any adoption founded upon incomplete information, fraud, or coercion¹¹ cannot have been made based on a proper or complete consideration of a child’s best interest. Nor can any agency or local director properly evaluate a proposed adoption or produce a reliable report under Va. Code § 63.2-1208 without complete information about the child’s background, family, and “the circumstances under which the child came to live . . . in the physical custody of the petitioner.” Indeed, fraud and/or coercion serve as the basis to deny or revoke an adoption. *See, e.g.* Va. Code § 63.2-1204; Va. Code § 63.2-1221. Moreover, Virginia law specifically classifies the act of “knowingly

¹¹ Both the federal government and the Virginia Circuit Court have raised concerns that the adoption order may have been fraudulently obtained. *See* Claire Galofaro, Juliet Linderman, and Martha Mendoza, *U.S. Marine’s Adoption of Afghan War Orphan Voided*, Associated Press (Mar. 31, 2023) <https://apnews.com/article/afghanistan-baby-marine-adoption-joshua-mast-295673fb358cf30abd243995cd846c99> (citing the circuit court judge’s statement, in vacating the adoption order, that “the Masts knew things that they never told the court, particularly about what was happening in Afghanistan at the same time the judge in Virginia was granting the adoption.”); Claire Galofaro, Juliet Linderman, and Martha Mendoza, *Secret records: Government Says Marine’s Adoption of Afghan Orphan Seen as Abduction, Must Be Undone*, Associated Press (Sept. 14, 2023), <https://apnews.com/article/afghan-war-orphan-marine-baby-abduct-adoption-8a0411f16067d73ad0d86b706f5ae46d> (stating U.S. Department of Justice filings in the case argue that the lower court’s adoption order was based on “a litany of ‘falsehoods’” and “‘intentional misrepresentations’” put forth by Appellants).

and intentionally provid[ing] false information in writing and under oath” when the information is material to an adoptive placement” as a felony. Va. Code § 63.2-1217.

Likewise, international law requires governments implementing systems of adoption to “[e]nsure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.” CRC at art. 21(a). Governments should “[e]nsure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption.” *Id.* at art. 21(c). The United Nations Committee on the Rights of the Child has explained:

Adoption of unaccompanied or separated children should only be considered once it has been established that the child is in a position to be adopted. In practice, this means, inter alia, that efforts with regard to tracing and family reunification have failed, or that the parents have consented to the adoption. The consent of parents and the consent of other persons, institutions and authorities that are necessary for adoption must be free and informed.

General Comment No. 6 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 91, U.N. Doc. CRC/GC/2005/6

(Sept. 1, 2005) [hereinafter General Comment No. 6].¹² The Committee further states: “Priority must be given to adoption by relatives in their country of residence” and that “[a]doption should not be considered...[u]nless a reasonable time has passed during which all feasible steps to trace the parents or other surviving family members has been carried out.” *Id.*

In 2016, the United Nations Special Rapporteur on the sale of children, child prostitution, and child pornography conducted a study of the issue of illegal adoptions and published a report of the Special Rapporteur’s findings. In the report, the Special Rapporteur concluded that “[i]llegal adoptions violate multiple child rights norms and principles, including the best interests of the child.” Human Rights Council, *Report of the Special Rapporteur on the sale of children, child prostitution and child pornography*, ¶ 26, U.N. Doc. A/HRC/34/55 (Dec. 2016).¹³ The report stated that “adoptions resulting from crimes such as abduction and sale of and trafficking in children, fraud in the declaration of adoptability, falsification of official documents or coercion, and any illicit activity or practice, such as lack of proper consent by biological parents, improper financial gain by intermediaries and related corruption, constitute illegal adoptions and must be prohibited, criminalized and sanctioned as such.” *Id.* ¶ 25. The Special Rapporteur identified

¹² Available at <https://www.refworld.org/docid/42dd174b4.html>.

¹³ Available at https://digitallibrary.un.org/record/861191/files/A_HRC_34_55-EN.pdf?ln=en.

war and conflict among a number of push and pull factors that affect illegal adoptions and increase their risk: “In the context of conflicts or following a natural disaster, children are often separated from their families and the national infrastructure is weakened or rendered incapable of functioning. In such situations, adoption processes are particularly open to abuse[.]” *Id.* ¶ 56.

The Special Rapporteur also found that “[o]f the different stages involved in an adoption process, those leading to a determination of the adoptability of the child are the most vulnerable to illegal acts and illicit practices and are often linked to weaknesses in national child protection systems.” *Id.* ¶ 31. “The designation of children as having been abandoned or the relinquishment of parental rights on the child can be irregularly or illegally obtained.” *Id.* ¶ 33. In the report, the Rapporteur advised governments to “[a]dopt adequate regulation on procedures and safeguards in relation to domestic and intercountry adoptions, including in relation to the determination of adoptability, and establish effective and well-resourced mechanisms for overseeing adoption processes, especially with respect to strictly verifying the background of any child who is declared an orphan and his or her documents.” *Id.*, para. 95(f). The Rapporteur also highlighted existing international authority requiring governments to undertake “efforts to keep children in, or *return them to*, the care of their family.” *Id.* ¶ 21 (emphasis added).

III. Viewed through both a legal and a social science lens, maintaining ties to ethnic heritage, language, and culture furthers a child’s best interests by helping them understand their identity, feel a sense of belonging, and connect with community.

- a. The best interests of the child standard as set forth in state, federal, and international law gives significant weight to a child’s connection to their cultural identity.*

Legal frameworks under domestic and international law dictate that it is in a child’s best interests to be placed with members of their family of origin in a home where they maintain connections with their cultural heritage. Indeed, placement with family and connection to culture are inextricably linked. “[T]he first and best way to preserve cultural connections is to preserve the child’s connections with the child’s biological family, including extended family, whenever possible”

Corinne Wolf Center for Child and Family Justice, Univ. of New Mexico, *Preserving Cultural Connections*, 2 (2011).¹⁴ A child’s placement with family members serves not only to nurture foundational, familial bonds, but also to connect the child to a sense of identity and to a broader community through ethnic heritage, language, and culture. Indeed, a handful of states explicitly recognize a foster child’s right to connect with their culture or impose a duty on foster families to facilitate a foster child’s connection to culture. Ariella Hope Stafanson,

¹⁴ Available at <https://childlaw.unm.edu/assets/docs/best-practices/Cultural-Connections-2011.pdf>.

Supporting Cultural Identity for Children in Foster Care, Ctr. on Children and the Law, Am. Bar Assoc. (Nov. 20, 2019).¹⁵ The Virginia Department of Social Services itself demonstrates an understanding of the value of cultural identity when it observes that “[f]amily members are the experts about their own families” and that it is the “responsibility [of the Department] to understand children, youth, and families within the context of their own family rules, traditions, history, and culture.” Va. Dep’t of Soc. Servs., *Child and Family Servs. Manual: Section 17- Managing Foster Care Services*, 2 (July 2021).¹⁶

Federal law also imposes obligations on decision-makers to preserve a child’s cultural identity when they are at risk of placement outside their parents’ care. The Indian Child Welfare Act (ICWA) has been called the “gold standard” in child welfare law in large part because of the law’s intent not only to keep children with their families, but to keep them in their communities and connected with their ethnic heritage, language, and culture. The law is explicitly designed to preserve the cultural identity of Native America children, and “[t]he best way to achieve this is for the child to remain with their respective tribe, family or extended family to

¹⁵ Available at https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/supporting-cultural-identity-for-children-in-foster-care/.

¹⁶ Available at https://www.dss.virginia.gov/files/division/dfs/fc/intro_page/guidance_manuals/fc/07_2021/section_17_managing_foster_care_services.pdf.

ensure a healthy sense of cultural identity is experienced and nurtured.” Kathy D. LaPlante, *The Indian Child Welfare Act and Fostering Youth Cultural Identity*, Am. Psych. Assoc. (Dec. 2017).¹⁷ ICWA further serves to protect a Native American child’s cultural identity by requiring that, when the child cannot remain with their family, priority for placement goes first to the child’s tribe and second to any other Native American family. 25 U.S.C. § 1915(a). In prioritizing other tribal placements before traditional foster care, Congress took protective measures to help ensure that Native American children do not grow up estranged from their families, ethnic heritage, language, and culture.

The importance of fostering a child’s sense of self through development of a strong cultural identity is also enshrined in the Convention on the Rights of the Child, which demands that “due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background ... and the decision-maker must take into consideration this specific context when assessing and determining the child's best interests.” *General Comment No. 14* ¶ 56 (citing the CRC at art. 20). “A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the

¹⁷ Available at <https://www.apa.org/pi/families/resources/newsletter/2017/12/indian-child-welfare#:~:text=The%20underlying%20intent%20of%20the,identity%20is%20experienced%20and%20nurtured.>

child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs." *General Comment No. 6* ¶ 20. "All unaccompanied and separated children have the right to maintain their cultural identity and values, including the maintenance and development of their native language." *Id.* ¶ 42.

b. Social science has documented the long-term negative impact of denying a child their cultural identity and conversely, the benefits of fostering their connection to culture and heritage.

Looking beyond the law, countless social science studies and the lived experience of children denied familial and culturally appropriate placements demonstrate that children benefit from placement with their family of origin and connection to culture. The absence of these foundational developmental pillars from children's lives often leads to mental health challenges, social isolation, a sense of loss, and behavioral eruptions. The separation from one's cultural identity that often goes hand in hand with a child's separation from family of origin can lead to emotional and psychological difficulties later in life. *See, e.g.,* Larissa MacFarquhar, *Living in Adoption's Emotional Aftermath*, *The New Yorker* (Apr. 3, 2023)¹⁸ (discussing, *inter alia*, the mental health impact of international adoptions). In one study of Native American children raised in white families, as

¹⁸ Available at <https://www.newyorker.com/magazine/2023/04/10/living-in-adoptions-emotional-aftermath>

adults, participants experienced higher rates of mental health challenges, substance abuse, learning disabilities, and social isolation. Carol Locust, *Split Feathers: Adult American Indians Who Were Placed in Non-Indian Families as Children*, Ontario Assoc. of Children's Aid Soc. 44(3), 11-16 (2000).¹⁹ "As a direct result of the loss of cultural experiences and the transmission of a cultural identity, their psychological and emotional wounding had lifetime consequences." Kathy D. LaPlante, *The Indian Child Welfare Act and Fostering Youth Cultural Identity*, Am. Psych. Assoc. (Dec. 2017).²⁰

On the other hand, children who remain part of their family and community of origin, and therefore connected to their ethnic heritage, language, and culture, tend to experience healthier development and fewer mental health challenges. The improved psychosocial functioning of children in kinship foster homes is usually explained by "the protective effect of cultural and family preservation" because "living with relatives may reinforce the sense of identity and self-esteem that flows from knowing the family history and culture." *Femke Vanschoonlandt et al., Kinship and Non-Kinship Foster Care: Differences in Contact with Parents and*

¹⁹ Available at http://www.nativecanadian.ca/Native_Reflections/split_feather_syndrome.htm.

²⁰ Available at <https://www.apa.org/pi/families/resources/newsletter/2017/12/indian-child-welfare#:~:text=The%20underlying%20intent%20of%20the,identity%20is%20experienced%20and%20nurtured>.

Foster Child's Mental Health Problems, 34 Child. & Youth Servs. Rev. 1533 (2012) (emphasis in original) (quoting Holtan, A., Ronning, J. A., Handegard, B. H., & Sourander, A., *A comparison of mental health problems in kinship and nonkinship foster care*, European Journal of Child and Adolescent Psychiatry, 14, 200–207 (2005)). Social scientists have reported that adolescents who hold high regard for their ethnicity may draw upon that feeling to cope with stress and anxiety. Lisa Kiang et al., *Ethnic Identity and the Daily Psychological Well-Being of Adolescents from Mexican and Chinese Backgrounds*, 77 Child Dev. 1338, 1348 (2007). “Strong cultural identity is tied to lower rates of depression, anxiety, isolation, and other mental health challenges” as it “helps the child deal with adverse experiences and transitions and can reduce depression and anxiety.” Ariella Hope Stafanson, *Supporting Cultural Identity for Children in Foster Care*, Ctr. on Children and the Law, Am. Bar Assoc., (Nov. 2019) (citing McMillen, C. et al., *Psychiatric Symptoms and Substance Use Disorders in a Nationally Representative Sample of American Adolescents Involved with Foster Care*, J. of Adolescent Health 38(4), 351-358 (2007)).²¹ Thus, “family connections are critical to healthy child development and a sense of belonging.” Heidi Redlic Epstein,

²¹ Available at https://www.americanbar.org/groups/public_interest/child_law/resources/child_lawpracticeonline/january---december-2019/supporting-cultural-identity-for-children-in-foster-care/.

Kinship Care Is Better for Children and Families, Ctr. on Children and the Law, Am. Bar Assoc., (July 2017).²²

IV. Baby Doe had developed an attachment to Appellees, who cared for her for 18 months, and that attachment—though ruptured by an illegitimate adoption—can be re-established to advance Baby Doe’s long-term health and well-being.

Appellees were the psychological parents of Baby Doe at a critical stage of her early childhood development. They cared for her from the time she was roughly seven months old until after her second birthday. Claire Galofaro, Juliet Linderman, and Martha Mendoza, *Afghan Couple Accuse U.S. Marine of Abducting Their Baby*, Associated Press (Oct. 20, 2022).²³ The foundation of their bond had already been laid by the time they were separated, and it can be rebuilt. The attachment relationship between a child and caregiver “begins in infancy and is critical to the child’s inherent sense of safety and protection. Neurologically, attachment relationships drive the brain development foundational for subsequent physical, emotional, social and cognitive maturation.” Laura C.N. Wood, *Impact of*

²²Available at https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/july-aug-2017/kinship-care-is-better-for-children-and-families/.

²³ Available at <https://apnews.com/article/afghan-baby-us-marine-custody-battle-b157557538b84b288a0a8415735e24ab>.

punitive immigration policies, parent-child separation and child detention on the mental health and development of children, 2 *BMJ Pediatrics Open* 1, 3 (2018).²⁴

Between the ages of six months and 36 months, “children develop strong preferences for care by their primary attachment figures.” Wendy L. Haight et al., *Understanding and supporting parent-child relationships during foster care visits: Attachment theory and research*, 48 *Social Work* 196, 199 (2003).²⁵ An attachment relationship between a child and their primary caregiver is typically formed by the time the child is about 7 months old. *Id.* By the age of 24 months, the child seeks to balance their need to explore with their need to seek proximity with the caregiver, moving away from the caregiver to explore but also returning to the caregiver for comfort and support. Charles H. Zeanah et al., *Practitioner review: Clinical applications of attachment theory and research for infants and young children*, 52 *J. of Child Psychology and Psychiatry* 819, 820 (2011).²⁶ Indeed, the Circuit Court recognized the well-established caregiving relationship Baby Doe had with the Appellees when, in vacating the adoption order, it identified them as her “de facto parents.” *See* Claire Galofaro, Juliet Linderman, and Martha Mendoza, *U.S.*

²⁴ Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6173255/>.

²⁵ Available at <https://pubmed.ncbi.nlm.nih.gov/12718415/>.

²⁶ Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3670111/>.

Marine's Adoption of Afghan War Orphan Voided, Associated Press, (Mar. 31, 2023).²⁷

Despite the fact that Baby Doe's bond with Appellees was subsequently ruptured, it can be repaired. With appropriate therapeutic intervention, a caregiver and a child can work through trauma and repair an attachment bond. *See, e.g.,* Sarah Stauffer, *Trauma and Disorganized Attachment in Refugee Children: Integrating Theories and Exploring Treatment Options*, *Refugee Survey Quarterly*, Vol. 27, No. 4, 160 (Dec. 2008) (describing how a parent and therapist can "help the child to overcome his or her trauma and move toward construction of meaning and renewal of the attachment bond with the caregiver"); *see also* Claire Mellenthin, *Introduction to Attachment Centered Play Therapy*, 163-165, 169 (Routledge 2019) (discussing strategies where a parent and child have experienced injured attachments but, through attachment-centered play therapy, can work to "develop stronger skills in attunement, compassion, and attachment."). Though her separation from her rightful caregivers undoubtedly caused harm to Baby Doe, their bond can be restored, and that process should begin as quickly as therapeutic intervention dictates to minimize the risk of additional harm.

²⁷ Available at <https://apnews.com/article/afghanistan-baby-marine-adoption-joshua-mast-295673fb358cf30abd243995cd846c99>.

CONCLUSION

A child's right to placement with family and to connection to culture are foundational aspects of a best interests analysis under both domestic and international child welfare law. But beyond the legal constructs, there is no avoiding the sense of loss a child, and eventually a young adult, will experience growing up knowing they were removed from family members who loved them and wanted to care for them and that they lost the chance to identify with their ethnic heritage, language, and culture. Connection to family and a strong cultural identity are protective factors that build resiliency in children, imbue a sense of belonging, and lead to better outcomes in mental health and development. Especially as immigrant children resettle in the United States and navigate the complexities of an inevitably bicultural childhood, placement with their family of origin and connection to culture is a grounding and stabilizing force that helps to support their overall health and well-being.

For the foregoing reasons, this Court should affirm the lower court's decision vacating the adoption order.

Respectfully Submitted,

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5. The Young Center and NCYL do not request leave to participate in any oral argument.
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