No. _____

In The
Supreme Court of the United States

VERONIKA MARCOSKI,

Petitioner,

v.

JAN RATH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case tests the boundaries of the federal harmless-error rule. The substantive dispute arises out of the Hague Convention and turns on whether a newborn child's unmarried parents both intended to make the Czech Republic the child's permanent residence. Expressly relying on certain facts to decide which parent to believe—and calling those facts "highly persuasive"—the district court concluded they shared such an intention.

The Eleventh Circuit rejected those same putative facts as clearly erroneous findings. Instead of remanding the case, the appellate court invoked its "substantial evidence" version of the harmless-error rule and affirmed. It did so on the rationale that, without the factual errors the district court relied on, there was "substantial evidence support[ing] the district court's ultimate finding regarding shared intent." In doing so, the court exacerbated multi-circuit splits over the harmless-error rule and the Hague Convention. The questions presented are:

1. Does the harmless-error rule apply to clearly erroneous findings of fact if a district court expressly based its credibility determinations (and its ultimate conclusion) on those errors?
2. If a fact-finder relies on errors of fact for its conclusion does the presence of other substantial evidence to support that conclusion make the errors legally harmless?
3. Given the requirement of "habitual residence," how does the Hague Convention apply to newborn children?

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JURISDICTION

The court of appeals issued its opinion on December 27, 2017 (App. 1). The Petitioner filed a motion for rehearing, which was denied on February 28, 2018 (App. 72). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Hague Convention on the Civil Aspects of International Child Abduction, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, provides:

> Article 1
>
> The objects of the present Convention are—
>
> a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> b) to ensure that rights of custody and of access under the law of one Contracting State

> are effectively respected in other Contracting States.
>
> Article 3
>
> The removal or the retention of a child is to be considered wrongful where—
>
> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

The relevant portions of the International Child Abduction Remedies Act, 22 U.S.C. § 9001(b)(4), 9003(b), (e), provides:

> (b) Declarations
>
> * * *
>
> (4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and

not the merits of any underlying child custody claims.

The relevant portions of the International Child Abduction Remedies Act, 22 U.S.C. § 9003(b), (e), provides:

> (b) Petitions
>
> Any person seeking to initiate judicial proceedings under the Convention for the return of a child * * * may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.
>
> * * *
>
> (e) Burdens of proof
>
> (1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence—
>
> (A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; * * * .
>
> (2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing—
>
> (A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

> (B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

The relevant portions of Title 28, Judiciary and Judicial Procedure, 28 U.S.C.A. § 2111, provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

The relevant portions of the United States Constitution, Amendment V, provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law* * * *.

STATEMENT

A. The Hague Convention and its Terms: "abduction," "last shared intention," and "habitual residence"

The purpose of the Hague Convention on the Civil Aspects of International Child Abduction—implemented in the United States through the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. §§ 9001-9011—is to "secure the prompt return of children wrongfully removed to or retained in any Contracting State" and to "ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting

States." Hague Convention, art. 1, T.I.A.S. No. 11,670, at 4: *accord Lozano v. Montoya-Alvarez*, 572 U.S. 1, 134 S.Ct. 1224, 1228-29 (2014); *Chafin v. Chafin*, 568 U.S. 165, 168 (2013); *Abbott v. Abbott*, 560 U.S. 1, 8 (2010). It is not, however, a substitute for the adjudication of custodial rights; instead, it protects those rights in signatory states.

To determine if there has been a child abduction from a signatory state, the Hague Convention requires courts to engage in a complex application of law to facts to determine where, if anywhere, a child permanently resides. Such a permanent residence is referred to as a child's "habitual residence," a term of art, but one undefined by the Convention, statute or, yet, this Court.

Circuits have, however, attempted to define the term's meaning in cases involving young children who have not acclimatized to their surroundings—looking to the parents' "last shared intention" as a substitute for an actual habitual residence. Such an intention exists, those courts hold, if there was a meeting of the parental minds—shared intent or settled purpose—as to where the child should permanently reside. *E.g.*, *Nicolson v. Pappalardo*, 605 F.3d 100, 104 (CA1 2010); *Mozes v. Mozes*, 239 F.3d 1067, 1069 (CA9 2001).

There may, of course, be no *actual* evidence of such an intention for a child (particularly for an infant or toddler) to be settled in any particular country, in which case some circuits have concluded that the district courts should not speculate to infer the child is

settled in any particular place. *See Delvoye v. Lee*, 329 F.3d 330, 334 (CA3 2003) ("[W]here the conflict [between the parents] is contemporaneous with the birth of the child, no habitual residence may ever come into existence.") (internal reference omitted); *see also Holder v. Holder*, 392 F.3d 1009, 1020 (CA9 2004) ("The place of birth is not automatically the child's habitual residence."); *accord In re A.L.C.*, 607 F. App'x 658, 662-63 (CA9 2015).

In such circumstances, the Hague Convention does not restrain removal of the child to another country where custody might be determined, because the child has no habitual residence. *See*, *e.g.*, *In re A.L.C.*, 607 F. App'x at 663 ("Because [the child] had no habitual residence, no further analysis of this matter under the Convention and its implementing legislation is possible, as the Convention does not apply to a child who was never wrongfully removed or retained."). This outcome makes sense because the Convention is not a substantive law that determines custodial rights, but an agreement to protect such rights by preventing the abduction of children from signatory states.

B. The Harmless-Error Rule

"The federal 'harmless-error' statute, now codified at 28 U.S.C. § 2111, tells courts to review cases for errors of law 'without regard to errors' that do not affect the parties' 'substantial rights.' That language seeks to prevent appellate courts from becoming 'impregnable citadels of technicality. . . .'" *Shinseki v. Sanders*, 556

U.S. 396, 407-08 (2009) (quoting *Kotteakos v. United States*, 328 U.S. 750, 759-60 (1946) (quoting Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A.J. 217, 222 (1925))).

The statute (commonly referred to as the harmless-error rule) is applied to errors such as the improper admission of evidence,[1] erroneous jury instructions,[2] and other legal errors that an appellate court can correctly say do not affect the parties' substantial rights. *Kotteakos v. U.S.*, 328 U.S. 750, 762 (1946).

Because "factfinding is the basic responsibility of district courts, rather than appellate courts," *DeMarco v. United States*, 415 U.S. 449, 450, n.1 (1974), the rule has limited application to conclusions based on clearly erroneous findings of fact. *Cf. Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985) ("The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise.").

This petition asks whether the harmless-error rule applies to a district court's conclusion if the court expressly relied on clear errors of fact (i) to decide which party was more credible (and, thus, how to

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[1] *E.g.*, *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1456 (CA9 1983).

[2] *E.g.*, *Smith v. Chesapeake & Ohio Ry. Co.*, 778 F.2d 384, 389 (CA7 1985).

determine the other party-disputed facts); and (ii) as a direct foundational basis to reach the court's conclusion.

The Eleventh Circuit acknowledged that the deeply-conflicted factual record in this case was susceptible to different outcomes. *Marcoski v. Rath*, 718 F. App'x 910, 912-13 (CA11 2017). But the court of appeals, relying on its recent harmless-error rule precedent, applied the court's "substantial evidence" version of the rule to affirm, rather than remand the case to the district court for reconsideration without its factual misconceptions. In the court of appeals' words, there was still "substantial evidence support[ing] the district court's ultimate finding regarding shared intent" (*id*. at 912), without the factual errors that the district court expressly relied on to decide which parent to believe and to explain how it reached its conclusion.

C. Underlying Facts

This Hague Convention case is ultimately about where a child should permanently live: in the United States or the Czech Republic. That issue—the habitual residence issue—is very fact-bound. Here is a brief summary of facts distilled from the district court's ruling:

The Petitioner, Veronika Marcoski, is a United States citizen, who went to high school, college, and law school in the United States, and is a lawyer and businesswoman. (App. 13). She was raised in

Florida from the age of 14. (App. 13). Her mother and maternal grandparents, however, live in and near Prague, although her mother has also resided part-time in the United States. (*Id*.).

On one occasion, Veronika was visiting in Prague because her mother was seriously ill and would need her assistance in seeking surgery and chemotherapy treatment. (App. 17). An unplanned pregnancy came about when she spent time with the Respondent, Jan Rath, who she had previously dated there. (App. 29). In the view of the district court, Veronika became pregnant immediately after a "short-lived break" in their relationship. (App. 28).

Veronika strengthened her ties to the United States (her habitual residence) during her stay in the Czech Republic (App. 32): she took steps to give birth at a particular hospital in Florida, but could not travel there due to medical issues in her last trimester (App. 17-18), and she made specific preparations for the child's residence in the United States. (App. 18).

In keeping with her plans, Veronika wrote to tenants occupying her Florida home that their lease would not be renewed because she was returning to Florida to live with her child and that she "was due to give birth in the end of July and would like to move in the house thereafter." (App. 18). As the district court recognized: "The record does demonstrate that [Veronika] clearly desired to give birth to [the child] in Miami, Florida, as reflected by her pre-registration form for the Miami hospital . . . and her May 1, 2015

letter to her tenants at [her Florida home] informing them when they would need to leave the residence so she could 'arrive from Europe and give birth to my baby.'" (App. 55-56).

Veronika and Jan also jointly executed an official waiver form to delay the standard Czech immunization protocol, which the district court recognized was a "choice to have [the child] later immunized in the United States" (App. 61), and which would allow the child, a boy, to receive the vaccinations necessary for him to move to and grow up in the United States. (App. 19, 61). Contemporaneously, Jan, a lawyer, also executed a sworn and notarized "Declaration of Intent" that their son would be a United States citizen and that Jan desired for the boy to "grow up experiencing American culture. . . ." (App. 19). And shortly after the child's birth, Jan cooperated with Veronika in obtaining documentation for the child as a U.S. citizen born abroad, and the parents obtained only a U.S. passport for the child—never obtaining a Czech passport for him. (App. 19-20).

There was also evidence that the parties lived apart after the child's birth, including that Veronika moved to her grandparents' home with the baby shortly after the child's birth. (App. 29-30). In litigation, however, Jan endeavored to prove that Veronika and the child had been living with him:

Jan contended a property they had purchased in need of renovations[3] was actually intended to become their home in Prague (App. 28), but only initial payments were made for construction work on the property, and it never became their home and was ultimately sold. (App. 38, 41).

The parties frequently communicated by text message and email. (App. 21). Still, Jan could not cite a single document pointing to any shared decision with Veronika to raise the child in the Czech Republic.[4]

D. Proceedings Below

As the court of appeals recognized, "Mr. Rath and Ms. Marcoski (and their witnesses) presented very different accounts of their relationship, and of their plans for L.N.R.'s upbringing." *Marcoski*, 718 F. App'x at 912. The district court's decision thus turned on a question of credibility as to the permanency of the parents' relationship—and the district court found the mother's negative view of their relationship's instability less credible than the father's positive version of the

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[3] Jan pitched multiple real estate and commercial investments to Veronika and her mother. (App. 15).

[4] The closest he came was a text in which Veronika asked him to bring a baby spoon from "home," thus supporting his claim that they had a "home" together and, thus, necessarily a shared intention to raise the newborn in the Czech Republic, and, thus, the child's habitual residence there. (App. 21). As discussed below, the existence of even a true home by married parents with children is not a legally sufficient basis to establish habitual residence under the Hague Convention.

relationship, based largely on findings of fact that misapprehended the record:

As the district court stated: "Again, I find Petitioner's [Jan's] testimony entirely credible and Respondent's [Veronika's] not credible because the documentary and other evidence, as noted above, fully corroborates Petitioner's statements and casts doubt upon Respondent's statements." (App. 37).

The court then continued, explaining why it found the mother "not credible": "The fact that, on May 11, 2016, Petitioner canceled his cable subscription at his Sevcikova apartment, and then a few days later, on May 16, 2015, he opened up a cable subscription for the Maltezske apartment is *highly persuasive* that Petitioner and Respondent were cohabitating and were moving residences in anticipation of [the child's] birth." (App. 37-38) (emphasis added).

But these "highly persuasive" facts affecting the court's determination about which testifying parent to believe were clearly erroneous findings of fact: (1) Jan did not cancel his long-term residence's cable subscription; (2) the documents were not dated a mere five days apart, but actually one year apart; and (3) the documents were both for the same apartment. *Marcoski*, 718 F. App'x at 912.

Yet the district court relied on these erroneous putative facts to disbelieve Veronika as a witness (branding her "not credible"). (App. 37). The court then used its same mistaken belief as foundational facts signaling that Veronika and Jan were living

together in Prague with the child—despite copious evidence that Veronika was actually living with the child apart from Jan and with her grandparents. (App. 30, 37).

The district court's factual conflation about cohabitation thus served as the foundation for its finding of the parents' "shared intention" to establish the infant child's Czech habitual residence—a shared intention premised on the (factually shaky) narrative that Jan and Veronika were at one time cohabiting and thereby starting a new life in the Czech Republic. (App. 37-38).

The Eleventh Circuit recognized that the facts regarding the apartment were clearly erroneous, *Marcoski*, 718 F. App'x at 912, and though the district court had expressly relied on those clearly erroneous facts (which it found "highly persuasive") to decide which parent to believe, the court of appeals deferred to that credibility determination: "The district court, however, found that [Jan] was credible and [Veronika was] not credible." *Id*. at 911-12.

The Eleventh Circuit then relied on a recent decision from the court, *Bobo v. Tenn. Valley Auth.*, 855 F.3d 1294, 1300 (CA11 2017), to apply the circuit's "substantial evidence" version of the harmless-error rule—rationalizing that there was still "substantial evidence support[ing] the district court's ultimate finding regarding shared intent" without the factual errors that the district court had been influenced by in reaching

its credibility determinations and its ultimate finding. *Marcoski*, 718 F. App'x at 912. The court thus reasoned: "any error made by the district court 'was harmless because there was plenty of other evidence proving the same [ultimate] fact.'" *Id*. (quoting *Bobo*, 855 F.3d at 1300).

REASONS FOR GRANTING THE PETITION

I. The Harmless-Error Rule

A. The Courts of Appeals are in Disarray Over Application of the Harmless-Error Rule, and the Eleventh Circuit's Decision Exacerbates their Existing Conflict

The Eleventh Circuit ruled that facts the district court expressly relied on in this case (both to determine the parties' credibility and as a foundation for its ultimate conclusion) were clearly erroneous findings. *Marcoski*, 718 F. App'x at 912. Invoking the harmless-error rule (and relying on its 2017 decision in *Bobo v. Tenn. Valley Authority*, 855 F.3d at 1300), the appellate court nonetheless decided it did not need to remand the case for reconsideration without those factual errors because they "do not change the fact that substantial evidence supports the district court's

ultimate finding regarding shared intent." *Marcoski*, 718 F. App'x at 912.[5]

The Eleventh Circuit's "substantial evidence" approach to harmless-error not only denies district court judges their proper role, it also exacerbates the current disarray in the circuits over what to do when a district court's judgment involves clear errors:

The First Circuit applies an exacting, "no other resolution . . . sustainable" approach that is akin to a directed verdict standard. *See Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 463 (CA1 1992) ("appellate factfinding is only permissible where no other resolution of a factbound question would, on the compiled record, be sustainable").

The Third Circuit's "highly probable" approach is almost as stringent: the court will not affirm in the face of a clear error unless it is highly probable that the error did not affect the ultimate conclusion. *See Yuan v. Att'y Gen.*, 642 F.3d 420, 427 (CA3 2011) (error is harmless where it is "highly probable that the error did not affect the outcome of the case"); *Forrest v. Beloit Corp.*, 424 F.3d 344, 349 (CA3 2005) ("An error will be deemed harmless only if it is 'highly probable' that the error did not affect the outcome of the case."); *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 924-27 (CA3 1985)

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[5] The court relied on an earlier published decision from the same circuit, *Bobo v. Tenn. Valley Auth.*, 855 F.3d at 1300, which justified a harmless-error affirmance on the basis there was "plenty of other evidence"—a difference in terminology though not in substance.

(errors "are not harmless unless it is 'highly probable' that they did not affect a party's substantial rights").

The Tenth Circuit's approach looks to whether the fact-finder's conclusion was "strongly and clearly supported by the record"—a standard that, unlike the Eleventh Circuit, precludes use of the harmless-error rule on the basis that there was legally sufficient evidence to support that conclusion. *See Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 531 (CA10 1987) ("Sunward argues that any error was harmless since it probably did not affect the jury's verdict and in any event *the evidence was sufficient* to satisfy any standard of recklessness. We disagree. If properly instructed, the *jury may very well have found* that Dun & Bradstreet did not abuse its qualified privilege in this case." (emphasis added; citations omitted)); *see also Asbill v. Hous. Auth. of Choctaw Nation of Oklahoma*, 726 F.2d 1499, 1504 (CA10 1984) (unless "strongly and clearly supported by the record" harmless-error rule does not apply).

In conflict with those three circuits, the Eighth Circuit and the Ninth Circuit apply a mere-preponderance approach, asking only whether the error more probably than not affected the outcome. *See Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1459 (CA9 1983) ("The civil litigant's lessened entitlement to veracity continues when the litigant becomes an appellant. We conclude that a proper harmless error standard for civil cases should reflect the burden of proof. Just as the verdict in a civil case need only be more probably than not true, so an error in a civil trial need

only be more probably than not harmless." (citing Saltzburg, *The Harm of Harmless Error*, 59 VA.L.REV. 988, 1018-21 (1973)); *accord Obrey v. Johnson*, 400 F.3d 691, 699 (CA9 2005); *see also McIlroy v. Dittmer*, 732 F.2d 98, 105 (CA8 1984) ("when an appellate court ponders the probable effect of an error in a civil trial, it need only find that the jury's verdict is more probably than not untainted by the error" (quoting *Haddad*, 720 F.2d at 1459)).

The Federal Circuit takes a right-for-the-wrong-reasons, visceral approach in which the appellate court asks itself if it feels the result the district court reached on the essential facts was correct regardless of how the district court got to that result: "Affirmance does not require that we and the trial court reach the conclusion in precisely the same fashion.[6] If, on the essential facts, arrived at through proper application of the relevant law, we agree with the trial court's conclusion, any error concerning nonessential facts ascribed

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[6] This different path, right-for-the-wrong reasons approach to appellate review is also known as the "tipsy coachman doctrine," and—outside of the Federal Circuit—has been applied in U.S. military courts and the state courts of Florida and Georgia. *United States v. Carista*, 76 M.J. 511, 515 (A. Ct. Crim. App. 2017), *review denied* (C.A.A.F. June 7, 2017) (citations omitted); *Lee v. Porter*, 63 Ga. 345, 346 (1879); *Carraway v. Armour & Co.*, 156 So. 2d 494, 497 (Fla. 1963). The name of the doctrine comes from Oliver Goldsmith's 1774 poem, *Retaliation*:

> The pupil of impulse, it forc'd him along,
> His conduct still right, with his argument wrong;
> Still aiming at honour, yet fearing to roam,
> The coachman was tipsy, the chariot drove home;
> * * *.

to the trial court in reaching that conclusion is harmless and not a basis for reversal." *Gardner v. TEC Sys., Inc.*, 725 F.2d 1338, 1345 (CA Fed. 1984); *accord Wallace Computer Services, Inc. v. Uarco Inc.*, 824 F.2d 977 (CA Fed. 1987). The Federal Circuit thus discounts all "nonessential facts" (without apparent regard for how such facts may have impacted the district court's gestalt of the case, including assessment of party credibility) and simply asks itself if it agrees with the district court's ultimate conclusion.

The Federal Circuit's approach may not conflict with the Eleventh Circuit's, but it is in direct conflict with the Second Circuit, which holds that "[e]rror cannot be regarded as harmless merely because [an] appellate court thinks that the result that has been reached is correct." *Matusick v. Erie County Water Auth.*, 757 F.3d 31, 50 (CA2 2014) (quoting Wright & Miller, *The Meaning of "Harmless Error*," 11 FED. PRAC. & PROC. CIV. § 2883 (3d ed.)); *see also Lin v. Gonzales*, 163 F. App'x 33, 34 (CA2 2006) ("because the IJ made clear errors in the course of finding Lin not credible with respect to serious claims of a forced abortion and an involuntary sterilization, the case must be remanded so that, after a new hearing, new findings can be made to resolve the asylum application.").

Courts must have sufficient flexibility to apply the harmless-error rule appropriately for each case based

on its unique circumstances.[7] But the circuits should not have rules that are both materially and irreconcilably different. They do now. The Court should grant certiorari to resolve the clear conflict in the circuits.

B. The Eleventh Circuit's Error Regarding the Harmless-Error Rule

The harmless-error rule has an important role to play. After all, appellate courts are not to be "'impregnable citadels of technicality.'"[8] At the same time, the rule should not be used to sweep away errors that deny a party a fair trial. That is what happened in this fact-bound case, which came down to a question of which party to believe.

The district court staked its decision to believe the father over the mother—calling her "not credible"—expressly based on corroborating facts that, as the Eleventh Circuit later concluded, were simply not true: they were, instead, clearly erroneous findings of fact. According to the district court, those same putative facts were "highly persuasive," and the district court used them as foundational facts for its ultimate factual conclusion. *Marcoski*, 718 F. App'x at 912.

The Eleventh Circuit affirmed on the basis that the district court had found the father more credible than the mother and that, without those factual errors,

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[7] *Shinseki*, 556 U.S. at 407-08.

[8] *Shinseki*, 556 U.S. at 407-08 (quoting *Kotteakos*, 328 U.S.at 759-60 (quoting *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A.J. at 222)).

there was still "substantial evidence" to support the district court's ultimate conclusion. *Id.* (citing *Bobo*, 855 F.3d at 1300). That was a mistake in two distinct ways:

First, where errors "deprive the complaining party of a fair trial by an impartial [factfinder], a new trial should be ordered regardless of the quantum of evidence." *See* Note, *The Harmless Error Rule Reviewed*, 47 COL.L.REV. 450, 462 (1947). The harmless-error rule should have no role, and its application would violate due process, U.S. CONST. amend. V, where a district court's clear errors of foundational fact undermined a party's credibility in the eyes of that fact-finding court and, thus, denied the party a fair trial.

The district court's clear errors of fact in this case denied the mother a fair trial because the fact-finder expressly found her "not credible" based on those same putative facts. Since the case hinged on which party to believe, the errors affecting that credibility determination were permeating errors that "infect[ed] the entire trial process," *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), and "necessarily render[ed the] trial fundamentally unfair," *Rose v. Clark*, 478 U.S. 570, 577 (1986); *see also Lin*, 163 F. App'x at 34 (clear errors in the course of finding a testifying party not credible required remand).

Second, "[t]here is a striking difference between appellate review to determine whether an error affected a judgment and the usual appellate review to determine whether there is substantial evidence to

support a judgment." Roger Traynor, *The Riddle of Harmless Error* (1970); *accord Standen v. Whitley*, 994 F.2d 1417, 1423 (CA9 1993). Despite this striking difference, the Eleventh Circuit (citing its recent *Bobo* decision) conflated harmless-error review with "substantial evidence" review. *Marcoski*, 718 F. App'x at 912 (citing *Bobo*, 855 F.3d at 1300). Doing so not only conflated two distinct types of review; it also conflated the distinct roles of the courts of appeals with the distinct roles of the district courts.

An appellate court should not affirm a district court's conclusion on altered legal circumstances unless it is "highly probable" that the alteration would not have affected the outcome. *Forrest*, 424 F.3d at 349; *McQueeney*, 779 F.2d at 924-27. But where the alteration is one of facts a district court expressly relied on to reach its conclusion, the appellate court should not *guess* at what a reasonable fact-finder would have done on those altered facts unless the outcome is legally certain. That is because "appellate factfinding is only permissible where no other resolution of a factbound question would, on the compiled record, be sustainable." *Dedham Water*, 972 F.2d at 463.

The Eleventh Circuit nonetheless relied on the harmless-error rule to affirm because, in its view, the fact-finder-district court could have appropriately reached the same conclusion on the appellate-corrected facts, since there would have still been legally sufficient evidence to support such an outcome. That approach to harmless-error erroneously placed the court of the appeals in the role of a fact-finder.

C. The Harmless-Error Questions Are Important

The questions this case presents regarding the harmless-error rule are important because they address the limit of the rule—a breach of which recasts the roles of the courts of appeals and the district courts. So that those distinct tiers of federal courts may fulfill their envisioned roles, the Court should grant certiorari.

II. The Hague Convention

A. Court of Appeals' Decision Regarding the Hague Convention Directly Conflicts with the Decisions of the Third Circuit and the Ninth Circuit

The courts of appeals are in a conflict as to how best to determine the Hague Convention "habitual residence" issue in cases involving newborns and other young children; indeed, the Third and Ninth Circuits hold that the Convention does not apply when a child does not have an actual habitual residence.

The Ninth Circuit holds that no such habitual residence may ever come into existence if the parents of the newborn disagree as to where the child should live, *In re A.L.C.*, 607 F. App'x 658, 662-63 (CA9 2015) (nine-month-old child born and always living in the United States, not habitually resident there or anywhere because parents did not have a shared intent to raise him there; an infant's contacts with the place where he lives are necessarily irrelevant since it is

"practically impossible" for the infant to acclimatize separately from his immediate home environment). That recent decision of the Ninth Circuit rests on the court's *Holder* decision, which aligned with the Third Circuit's *Delvoye v. Lee* decision: "When and how does a newborn child acquire a habitual residence? The place of birth is not automatically the child's habitual residence." *Holder*, 392 F.3d at 1020 (citing *Delvoye v. Lee*, 329 F.3d 330, 334 (CA3 2003)).

The Third Circuit, in *Didon v. Castillo*, 838 F.3d 313, 324-25 (CA3 2016), has categorically rejected that a child can have a habitual residence "in a country in which she has not 'lived,'" essentially imposing a physical presence requirement, nonetheless believing it had squared this conclusion with the previous reasoning of that court in *Delvoye*, that a "child will normally have no habitual residence until living in a country on a footing of some stability." 329 F.3d at 334; *see also Delvoye*, 329 F.3d at 333 (when a "conflict [of parental intent] is contemporaneous with the birth of the child, no habitual residence may ever come into existence").

The Seventh Circuit disregards shared intent of unmarried parents *entirely*, unless both parents have court-ordered custodial rights. *Martinez v. Cahue*, 826 F.3d 983, 990-91 (CA7 2016) (shared intent of unmarried father not possessing court-ordered custodial rights not considered in determining habitual residence).

The Eleventh Circuit's approach aggravates this conflict—indeed, after having otherwise adopted the shared intent approach to habitual residence in *Ruiz v. Tenorio*, 392 F.3d 1247, 1253-55 (CA11 2004)—its decision looks to the mere past physical presence of a child's parents in a signatory country because (purportedly) those parents cohabited briefly there.

In sum, there are decisions on one end of the spectrum that discount the shared intent of parents in favor of a physical presence rule. That approach reverses the approach taken by other circuits, in which the inquiry into the habitual residence question begins with the parents' shared intent (or settled purpose) regarding their child's residence, and as "a secondary factor," looks to the child's acclimatization to its place of residence. *Mauvais v. Herisse*, 772 F.3d 6, 11 (CA1 2014).

In the view of these circuits, a very young child lacks the material and psychological means to acclimatize; thus, the court will "look specifically to the latest moment of the parents' shared intent. . . ." *Id.* at 12; *accord Holder*, 392 F.3d at 1020 ("We cannot conclude that the older son's mere eight months in Germany were sufficient to overcome the lack of shared parental intent to abandon the United States as the children's habitual residence."); *Delvoye*, 329 F.3d at 333 ("Of course, the mere fact that conflict has developed between the parents does not *ipso facto* disestablish a child's habitual residence, once it has come into existence. But when the conflict is contemporaneous with the birth of the child, no habitual residence may ever come into existence."); *Larbie v. Larbie*, 690 F.3d 295,

311 (CA5 2012) ("Regardless of the ties that [the child] unavoidably developed in the U.K., moreover, the above authorities demonstrate that his young age requires [the parents'] shared intentions be the primary focus in the habitual residence inquiry here.").

In *Redmond v. Redmond*, 724 F.3d 729, 734 (CA7 2013), the court pushed back against "[c]onventional wisdom [which] recognizes a split between the circuits that follow [the last shared parental intent approach] and those that use a more child-centric approach," expressing the Seventh Circuit's (non-conventional) view that "the differences are not as great as they might seem." While the conflict may arguably be milder in cases with older children, the sharpness of the conflict is inarguable when it comes to the youngest of children.

B. The Decision of the Court of Appeals Is Erroneous Regarding the Hague Convention

The minority approach to habitual residence—mere physical presence of child in a signatory county—lacks logic when, as is often the case, a child is born away from the epicenter of a parent's life, such as when a travelling mother gives birth outside the country, even by choice. *Delvoye*, 329 F.3d at 334.

A significant purpose of the Convention is to deter a parent from removing a child to another signatory country in order to forum shop a more advantageous

locale for resolving a custody dispute. *Didon*, 838 F.3d at 320. So, it is an error to premise habitual residence wholly on whether unmarried parents cohabit around the time a child is born without regard for their *actual* future plans. Such a fiction does not serve the focused purpose of the Hague Convention.

Even when married parents live together with their children as a family unit in a committed relationship, such cohabitation is legally inadequate to establish shared parental intent for the foreseeable future. *See Gitter v. Gitter*, 396 F.3d 124 (CA2 2005) (married parents moved to Israel with their newborn; mother returned with him to the U.S. after approximately 15 months of family life in Israel; child was not habitual resident of Israel); *see also Maxwell v. Maxwell*, 588 F.3d 245, 252 (CA4 2009) (children's habitual residence did not change when mother in U.S. reconciled with husband living in Australia and relocated with their children to join him but then returned with children to U.S.); *Holder*, 392 F.3d at 1014 (children who moved with parents to Germany to live as family for eight months were not habitually resident there).

Prior cohabitation, particularly in the context of an indisputably tumultuous (and concluded) relationship cannot be wished into the fiction of a shared intention to establish a settled purpose to raise a child permanently in a particular country. *Gitter*, 396 F.3d at 134; *Papakosmas v. Papakosmas*, 483 F.3d 617, 622 (CA9 2007); *see also Ruiz*, 392 F.3d at 1257-59 (married parents moved with their children and most family possessions to Mexico, lived there as a family unit for

almost three years; children were not habitually resident there).

Yet the Eleventh Circuit's decision is precedent for the legally incorrect proposition—not established by any other circuit—that a mere finding of cohabitation legally establishes shared parental intention and, thus, a child's future habitual residence, no matter the differing *actual* intentions of his parents regarding the child. The decision is also incongruent with a fundamental Hague Convention point the Fourth Circuit made in *Maxwell*: contradictory "representations of the parties cannot be accepted at face value, and courts must determine [habitual residence] from all available evidence." 588 F.3d at 252; *accord Berezowsky v. Ojeda*, 765 F.3d 456, 471 (CA5 2014).

The Eleventh Circuit has now issued a decision that would allow one parent (under the guise of the Convention) to unilaterally establish the child's place of habitual residence without regard to any actual "shared intention" of both parents—in effect confining the other parent to the country where the child was temporarily residing, at the peril of otherwise being permanently labeled an international child abductor. Such a label carries with it serious consequences, including future custody arrangements, the child's disallowed ties to the "abductor's" home in the United States, and that parent's payment of damages.

This is a result the Hague Convention should prevent, not secure—particularly when the petitioning father never established any custody rights before

the respondent mother (at that time the child's only caretaker) departed with the newborn child for her home in the United States. The oddity of that result is exacerbated by the fact that the petitioning parent knew that the departing parent had every intention, from pregnancy on, to raise their child in the United States. Despite his awareness, he made no legal effort to obtain custody rights before the mother and child's departure or otherwise prevent their departure from the Czech Republic.

C. The Hague Convention Question Is Important

This case involves an especially vexing application of the "last shared intention" formulation for determining a child's "habitual residence" in the case of an infant. Courts have allowed parents' last shared intention (if it ever existed) to serve as a proxy for such habitual residence. But there is no set formulation to determine habitual residence; worse, in cases in which a young child's parents share no intention for where to raise the newborn, the circuits have come to fundamentally different results.

But the Eleventh Circuit's decision in this case makes that conflict worse. A finding of mere cohabitation may now be used as a *substitute* for the parents' shared intention to raise their child in a signatory country. So cohabitation = shared parental intent = a newborn's habitual residence. The Eleventh Circuit applied this math even though one parent, the mother,

had announced her intention during pregnancy to maintain her habitual residence in the United States and took obvious steps to establish a home for the parents' child in the United States. Nonetheless, unless this Court grants review, she will remain labeled a child abductor.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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