NO. _____

IN THE

Supreme Court of the United States

JASON MICHAEL ZANK, *Petitioner*,
v.

LIZ LORENA LOPEZ MORENO, *Respondent*.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Hague Convention on the Civil Aspect of International Child Abduction, and its enabling legislation, the International Child Abduction Remedies Act ("ICARA"), prohibit a child's wrongful removal to or retention in a country that is not the child's habitual residence. This Petition presents the following question:

Whether a child's habitual residence can be changed based on one parent's unilateral removal of a child to or retention of the child in another country plus the passage of time.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

There are no parties to the proceedings other than those listed in the caption. Petitioner is Jason Michael Zank. Respondent is Liz Lorena Lopez Moreno.

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The United States Court of Appeals for the Sixth Circuit's opinion, App. 1a–16a, is reported at 895 F.3d 917. The United States District Court for the Western District of Michigan's opinion, App. 17a–35a, is reported at 280 F. Supp. 3d 1019.

JURISDICTION

The district court had federal-question jurisdiction under 28 U.S.C. § 1331, and the court of appeals had jurisdiction under 28 U.S.C. § 1291. The court of appeals filed its opinion on July 19, 2018. On August 2, 2018, petitioner timely filed a petition for rehearing and rehearing en banc. The Sixth Circuit denied the petition on August 23, 2018. App. 36a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTE & TREATY PROVISIONS INVOLVED

This case arises under the Convention on Civil Aspects of International Child Abduction and its U.S. enabling legislation, the International Child Abduction Remedies Act. The questions presented require consideration of the following statutory provisions and articles of that Hague Convention:

22 U.S.C. § 9003:

> **(a) Jurisdiction of courts**
>
> The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

> **(b) Petitions**
>
> Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to 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.
>
> * * *
>
> **(d) Determination of case**
>
> The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention. . . .

Convention on Civil Aspects of International Child Abduction:

> **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.

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

* * *

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

* * *

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State

and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

INTRODUCTION

More than 30 years ago, the United States ratified the Hague Convention on the Civil Aspects of International Child Abduction. The Convention is intended to ensure the prompt return of children who have been wrongfully removed from or retained outside of their country of habitual residence. The determination of the child's country of habitual residence frequently determines the outcome of petitions under the Convention filed in U.S. courts—if the United States is the country of habitual residence, then the child has not been wrongfully removed or retained here. If another country is the country of habitual residence, then the child must be returned to that country unless the defendant can prove certain limited affirmative defenses. But neither the Convention nor its enabling legislation, the International Child Abduction Remedies Act ("ICARA"), define "habitual residence," leading to considerable confusion as to how courts should interpret and apply the term.

Courts in the United States differ regarding whether and to what extent habitual residence should be determined from the perspective of the child versus the perspective of the parents. The Sixth Circuit has staked out a position that the parents' intentions as to the child's country of residence are almost entirely irrelevant, and that the only consideration is the child's acclimatization to the country from which the child was removed or to which the child was not returned. In the Sixth Circuit, the parents' intent only matters if the child is too young to have been acclimatized—less than two-years old. The Third and Eighth Circuits have eschewed consideration of parents' intent to a lesser degree. In contrast, the

majority of circuits consider the parents' shared intent to be the primary consideration.

The Sixth Circuit's decision here exacerbates this confusion. The Sixth Circuit determined that because Jason Zank did not initiate an action in Ecuadorian courts after his ex-wife, Liz Lorena Lopez Moreno, absconded there with their daughter in violation of an established Michigan state divorce judgment,[1] the child acclimatized to Ecuador. As a result, the Sixth Circuit concluded that Ecuador was the country of habitual residence, and reversed the district court's ruling in favor of Zank. The Sixth Circuit's ruling is unprecedented—no other court has required that a child be returned to the admitted initial child abductor. Application of the parental-intent standard should prevent such a perverse result.

This case presents the Court with the opportunity to resolve an entrenched and recognized conflict among the courts of appeals. It cannot be that whether a child returns to an admitted abductor should depend on where in the United States a parent resides. Because only this Court can resolve the mature circuit conflict with respect to the recurring issue presented, the petition for certiorari should be granted.

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[1] The district court found that Zank did complete a Hague petition with the U.S. embassy in Ecuador.

STATEMENT

The Hague Convention on Civil Aspects of International Child Abduction

The Convention is an anti-abduction treaty. *Redmond* v. *Redmond,* 724 F.3d 729, 739 (7th Cir. 2013). It was adopted by the signatory nations "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence . . ." Convention, Preamble. Ninety-nine countries, including the United States and Ecuador, have signed the Convention.

Under the Convention's Article 3, the removal of a child from one country to another is wrongful when:

> *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.

Where an abduction or retention is wrongful, several affirmative defenses may justify not returning the child to the country of a habitual residence. *Id.*, Arts. 12, 14.

The Convention effects the return of abducted or wrongfully retained children through a "Central Authority." Each signatory is required to designate "a Central Authority to discharge the duties which are

imposed by the Convention." *Id.*, Art. 6. Central Authorities are required to cooperate "to secure the prompt return of children" by, among other acts, "initiating or facilitating the institution of judicial or administrative proceedings with a view to obtaining the return of the child." *Id.*, Art. 7 (cleaned up). In appropriate circumstances, a Central Authority may need "to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers." *Id.*, Art. 7(g).

A person claiming "that a child has been removed or retained in breach of custody rights may apply to the Central Authority of the child's habitual residence or the Central Authority of any other Contracting State for assistance in securing the return of the child." *Id.*, Art. 8. After a Central Authority receives a claim, it is obligated to transmit the application to the Central Authority of the country where the child is believed to be located. *Id.*, Art. 9. And the latter country's Central Authority is required to take or cause to be taken all appropriate measures, including initiating judicial or administrative proceedings. *Id.*, Arts. 7(f), 10. Nothing in the Convention requires a person claiming that a child has been abducted or wrongfully retained to initiate an action or file a petition with the courts or administrative agencies of any country. See generally, *id.* Nor does the Convention preclude a person from doing so. *Id.*, Art. 29.

The Convention is enforced in the United States through the ICARA, 22 U.S.C. §§ 9001-9011. The latter does not codify all the terms of the Convention, but requires courts to decide Hague Convention petitions "in accordance with the Convention." 22 U.S.C. § 9003(d).

The parties' divorce

Zank is an apprentice lineperson with an electrical utility. (R.6-1, Friend of the Ct. Recommendation 4, Pg.ID 59.) Zank was previously married to Lopez Moreno, an Ecuadorian citizen who came to the United States on a student visa. (App. 18a.) They had a daughter. (*Ibid.*) But by July 2009, Zank and Lopez Moreno's relationship had deteriorated to the point that they divorced. (*Ibid.*)

The Judgment of Divorce granted Zank and Lopez Moreno joint custody of their daughter. It prohibited either parent from taking their daughter out of Michigan without the court's approval. (See *ibid.*) Lopez Moreno could visit Ecuador with their daughter, but only after giving Zank 60-days' notice. (*Ibid.*)

Lopez Moreno abducts Zank's daughter

In December 2009, after their daughter had lived in Michigan for more than three years, Lopez Moreno abducted her and absconded to Ecuador. (See *ibid.*) Zank called the police, and then the Montcalm County Friend of the Court, but there was nothing they could do. Days later, the Montcalm County Circuit Court issued an *ex parte* order granting Zank sole legal and physical custody of the parties' daughter until a full hearing could be held. (App. 18a-19a.) Meanwhile, Lopez Moreno obtained an Ecuadorian court order barring the daughter from leaving the country. (App. 19a.)

Eventually, Lopez Moreno told Zank she had abducted his daughter and taken her to Ecuador. (R.12, Hr'g Tr., Pg.ID 134-35.) Moreno admitted that

she violated the terms of the court's Judgment of Divorce.[2] (*Id.* at Pg.ID 242.)

Zank turned to the U.S. Department of State's Office of Children's Issues, filing an application under the Convention seeking his daughter's return. (App. 19a; R.12, Hr'g Tr., Pg.ID 150-53.) But Zank felt like he got the runaround, and his application went nowhere. (App. 19a; *see also* R.12, Hr'g Tr., Pg.ID 137-38.)

Lopez Moreno extorts Zank

Months after the abduction, Lopez Moreno first allowed Zank to talk to his daughter by phone and Skype. (See App. 20a.) About a year after the abduction, Lopez Moreno let Zank's parents visit their granddaughter in Ecuador, but only if they surrendered their passports. (*Ibid.*) Later, Zank was allowed to visit his daughter, but only if he traveled to Ecuador at his own expense and visited under the surveillance of Lopez Moreno's family. (R.12, Hr'g Tr., Pg.ID 184.) Zank continued to live in Montcalm County. (See *id.* at Pg.ID 129.)

In 2014, Lopez Moreno gave Zank an ultimatum: give up custody of his daughter or be cut out of her life entirely. (See *id.* at Pg.ID 87, 143; App. 32a (crediting Zank's "account of the 'negotiations'").) Zank signed an agreement purporting to repeal the terms of the Montcalm County Judgment of Divorce by

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[2] Parental abduction of a child is a felony under Michigan law. Mich. Comp. Laws § 750.350a(1) ("An adoptive or natural parent of a child shall not take that child . . . with the intent to detain or conceal the child from any other parent . . . who has custody or parenting time rights under a lawful court order at the time of the taking or retention.").

transferring jurisdiction of the custody matter to the Ecuadorian courts, granting Lopez Moreno sole custody, *increasing* Zank's child-support payments, and barring Zank from "pursuing further action arising from the arrival of the minor child into Ecuador, in accordance with American laws." (App. 21a (quotation omitted).)

The agreement was entered by an Ecuadorian court. That court was seemingly not apprised of Lopez Moreno's abduction of the daughter, the 2009 Montcalm court order granting Zank sole custody, or Zank's Hague petition. (*Ibid*.)

The parties' daughter returns to Michigan, wants to stay

The parties' daughter returned to Michigan in the summer of 2016, and was going to return to Ecuador in August. (App. 23a.) But while staying with Zank, his daughter told him that she wanted to stay with him. (R.12, Hr'g Tr., Pg.ID 89-91.) Zank returned to the Montcalm County Circuit Court and sought a permanent order granting him sole custody. (R.12, Hr'g Tr., Pg.ID 146.) The court investigated the situations and concluded that it was in the daughter's best interests that Zank exercise full custody in part because the daughter wished to remain with her father. (R.6-1, Friend of the Ct. Recommendation, Pg.ID 59-61.) The Montcalm County Circuit Court gave Zank full custody of his daughter. (See R.12, Hr'g Tr., Pg.ID 145-46.)

The district court denies Lopez Moreno's Hague petition

More than a year after the daughter did not return to Ecuador, Lopez Moreno filed her own petition

under the Convention in the district court. (See App. 17a.) After holding a two-day evidentiary hearing, the district court denied Lopez Moreno's petition. (App. 17a-18a.)

The district court noted that Lopez Moreno had the burden of proving that the daughter was habitually resident in another country at the time of the allegedly wrongful retention. (App. 26a.) The district court noted that the Sixth Circuit and other circuits agree that "'a parent cannot create a new habitual residence by wrongfully removing and sequestering a child.'" (App. 28a-29a (quoting *Miller* v. *Miller*, 240 F.3d 392 (4th Cir. 2001)).) And the court identified that "the removal of a child without the knowledge or consent of the other parent cannot alter the child's habitual residence." (App. 28a.) Because Lopez Moreno had wrongfully removed and sequestered the daughter, the district court concluded that, despite living in Ecuador for years, the United States remained the daughter's country of habitual residence. (App. 29a.) And for that reason, Lopez Moreno could not establish that the daughter's remaining in Michigan was a wrongful retention. (See App. 29a, 33a-34a.)

Based on the evidence presented during the evidentiary hearing, the district court made the following factual findings:

- The Montcalm County Circuit Court's divorce decree ordered Lopez Moreno and Zank "to share joint legal and physical custody of" their daughter. (App. 18a.)
- Lopez Moreno "absconded with [the daughter] and returned to Ecuador in violation of the

Montcalm County divorce decree and child custody order." (*Ibid.*)

- The parties' daughter "was born and raised" in the United States, "until she was kidnapped by [Lopez Moreno] in 2009." (App. 29a.)
- Zank "completed a Hague petition with the United States Embassy in Ecuador." (App. 19a.)
- In 2014, Lopez Moreno "coerced" Zank "into making the [custody] agreement when [Moreno] threatened to cut off all access to [their daughter] if he did not submit to her demands." (App. 32a.)
- In 2016, after the daughter returned to the United States, the Montcalm County court "granted [Zank] full custody" in a permanent order. (App. 24a.)

The district court reasoned that because "the removal of a child without the knowledge or consent of the other parent cannot alter the child's habitual residence," Lopez Moreno could not establish that the daughter's habitual residence is in Ecuador. (App. 28a-29a.) Because the daughter was not retained in the United States in violation of U.S. law, the district court denied Lopez Moreno's petition. (App. 33a-34a.) She appealed.

The Sixth Circuit reverses

The Sixth Circuit's decision starts by noting that relief is available under the Convention only if Ecuador is the habitual residence of the child. (App. 2a.) The decision then provides that the district court should not have considered Lopez Moreno's kidnapping because Zank "had not followed through

with Hague Convention procedures in Ecuador following the original abduction." (*Ibid.*) The Sixth Circuit characterizes Zank as "re-kidnapping" his daughter back to the United States (*ibid.*), even though (unlike Lopez Moreno) he acted at all times consistent with the Michigan court's orders (see App. 18a-19a, 24a).

The Sixth Circuit correctly recognized that the "central issue in this case is whether *Lopez Moreno's* questionable removal of [the daughter] from Michigan to Ecuador *in 2009* precluded the possibility that [the daughter] had become habitually resident in Ecuador for purposes of Lopez Moreno's Hague Convention challenge to *Zank's* retention of [the daughter] in Michigan *in 2016*." (App. 8a.) The court proceeded to emphasize that Zank "did not complete the Hague Convention process . . . in that he did not file the petition *with the Ecuadorian courts*, or otherwise attempt to secure the return of BLZ *through procedures in Ecuador*."[3] (App. 3a (emphasis added); see also App. 4a, 10a, 14a.) But consistent with Sixth Circuit authority, the Court did not consider the absence of any settled joint intent by the parents that the daughter would reside in Ecuador.

The decision concludes that because the daughter acclimatized to Ecuador after the initial kidnapping, Ecuador is her country of habitual residence. (App. 10a.) The Sixth Circuit remanded the case to the

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[3] The decision nowhere cites any authority for the proposition that a parent is required to file a petition in the abducted-to country, nor does it reference the actual Convention language identifying the process for implementing the signatory states' obligations. (See generally, App. 1a-16a (not referencing Convention Arts. 6-20 except in a parenthetical to a case referenced in footnote 2).)

district court to address Zank's affirmative defenses under the Convention. (App. 9a-10a, 15a.)

REASONS FOR GRANTING THE PETITION

This case presents a foundational question regarding the Convention's application—a question that has divided the lower courts since at least 2001. "'Habitual residence' is the central—often outcome-determinative—concept on which the entire system is founded." *Mozes* v. *Mozes*, 239 F.3d 1067, 1072 (9th Cir. 2001). "Every Hague Convention petition turns on the threshold determination of the child's habitual residence; all other Hague determinations flow from that decision." *Redmond* v. *Redmond*, 724 F.3d 729, 742 (7th Cir. 2013) (cleaned up). But on this central, threshold issue, the lower courts have adopted various formulations with the result that cases with the same or similar facts reach different results. As one court noted, "it is cold comfort" for parents "to be told only that habitual residence is a question of fact to be decided by reference to all the circumstances of any particular case." *Mozes*, 239 F.3d at 1072 (cleaned up). And colder still to learn that in which country one's child will live also depends upon where in this country the case is litigated.

The lack of uniformity in the lower courts provides reason enough for further review. What is more, the Sixth Circuit's decision is difficult to rectify with the text of the Convention itself. The decision imposes on Americans an obligation to initiate litigation in foreign countries to protect their child-custody rights. The Convention recognizes that litigating claims in foreign courts is daunting for even the most sophisticated parents and provides instead that the government of each signatory state identify a Central Authority to pursue such claims. Under the Sixth

Circuit's decision, Americans whose children are abducted to or retained in foreign countries rely on central authorities at their peril. For both these reasons, the Court should grant the petition for certiorari.

I. The Sixth Circuit's decision implicates and deepens a conflict among the courts of appeals.

Neither the Convention nor ICARA define the phrase "habitual residence." Nor has the term been interpreted by this Court. *Jenkins* v. *Jenkins,* 569 F.3d 549, 556 (6th Cir. 2009). The absence of guidance "has led to many difficulties in the U.S. federal appellate courts—most notably a split in how individual circuits define and interpret "habitual residence." Tristan Medlin, Comment, *Habitually Problematic: The Hague Convention and the Many Definitions of Habitual Residence in the United States*, 30 J. Am. Acad. Matrim. Law. 241, 242 (2017). There is a "stark divide between the federal circuit courts that emphasize parental intent in determining "habitual residence" and those that focus on the child's acclimatization. *Ibid.* The decision below squarely implicates a conflict in the lower courts, and the Court should grant review to resolve it.

1. The Sixth Circuit has adopted an approach to habitual residence that focuses almost exclusively on the interests of the child. Only when the child is too young—less than two or three years old—will the court allow the consideration of shared parental intent. See *Robert* v. *Tesson*, 507 F.3d 981, 991–92 & n.4 (6th Cir. 2007); *Taglieri* v. *Monasky*, 907 F.3d 404, 407–08 (6th Cir. 2018) (en banc).

The Sixth Circuit decided one of the earliest American applications of the Convention, holding that "to determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions." *Friedrich* v. *Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993). The court said that parents' future intentions "*are irrelevant* to our inquiry." *Ibid.* (emphasis added). Instead, "habitual residence can be 'altered' only by a change in geography and the passage of time." *Id.* at 1402.

2. Two other circuits have adopted interpretations of "habitual residence," that focus on the child's perspective, but do not treat the parents' shared intent as irrelevant.

The Eighth Circuit considers whether the child has a "settled purpose" to stay in a new location, albeit "parental intent is also taken into account." *Silverman* v. *Silverman*, 338 F.3d 886, 898 (8th Cir. 2003); *Barzilay* v. *Barzilay*, 600 F.3d 912, 918 (8th Cir. 2010). In *Silverman*, the Eighth Circuit also noted that a questionable removal does not change the habitual residence. 338 F.3d at 892 n.13.

The Third Circuit too primarily determines the country of habitual residence by looking to where the child "has been physically present for an amount of time sufficient to acclimatization and which has a 'degree of settled purpose' from the child's perspective." *Feder* v. *Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995). The standard "must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there." *Ibid.*

3. The majority of the circuits have adopted an approach to habitual residence based on the parents' intent. In *Mozes*, the Ninth Circuit explained that the concept of habitual residence is based on the settled purpose "of the person or persons entitled to fix the place of the child's residence"—typically, the parents. 293 F.3d at 1076 (cleaned up). When parents jointly decide to raise a child in a country and then do so, that is the child's country of habitual residence. When the parents intend to abandon one location and then move to another, the habitual residence is altered. But the intent must be shared—the unilateral intent of one parent will not suffice. *Id.* at 1075–77.

The *Mozes* framework does not entirely exclude the child's perspective. The Ninth Circuit recognized that "given enough time and positive experience, a child's life may become so firmly embedded in the new country as to make it habitually resident even though there be lingering parental intentions to the contrary." *Id.* at 1078. But, the court cautioned, "in the absence of settled parental intent, courts should be slow to infer from such contacts [as whether a child is doing well in school, has friends, and so on] that an earlier habitual residence has been abandoned." *Id.* at 1079.

Almost all of the other circuits have adopted the *Mozes* framework. *Larbie* v. *Larbie*, 690 F.3d 295 (5th Cir. 2012); *Nicholson* v. *Pappalardo*, 605 F.3d 100 (1st Cir. 2010); *Maxwell* v. *Maxwell*, 588 F.3d 245 (4th Cir. 2009); *Koch* v. *Koch*, 450 F.3d 703 (7th Cir. 2006); *Gitter* v. *Gitter*, 396 F.3d 124 (2d Cir. 2005); *Ruiz* v. *Tenorro*, 392 F.3d 1247 (11th Cir. 2004); see *Kanth* v. *Kanth*, 232 F.3d 901 (Table), 2000 WL 1644099 (10th Cir. 2000).

4. Lest the Court think that the different approaches are not outcome determinative, *cf. Redmond*, 724 F.3d at 746 ("all circuits . . . consider *both* parental intent *and* the child's acclimatization, differing only in their emphasis"), consider the Eleventh Circuit's decision in *Ruiz*. There, the court determined that even though the two children had lived in Mexico for almost three years before their removal to Florida, their habitual residence remained the United States. 392 F.3d 1250, 1254. Why? Because the parents "never had a shared intention to abandon the prior United States habitual residence and to make Mexico the habitual residence of the children." *Id.* at 1254. Application of the child-focused approach would have required the opposite result. *Robert*, 507 F.3d at 991–92.

So too in the decision under review here. In considering whether the district court correctly held that Lopez Moreno's admittedly wrongful abduction of the daughter in 2009 prevented her from becoming habitually resident in Ecuador in 2016, the Sixth Circuit entirely ignored whether Zank and Lopez Moreno ever had a shared intent that the daughter would remain in Ecuador. Had the *Mozes* framework been applied, the court would necessarily have had to focus on how the daughter got to Ecuador and been confronted with the district court's findings that any purported agreement by Zank to the daughter living in Ecuador was void because it was the result of coercion. (App. 32a.) Under the parent-focused framework, it would be impossible to conclude that the daughter habitually resided in Ecuador.

II. The Court should grant the petition and reverse because the Sixth Circuit's ruling is erroneous.

The Sixth Circuit's decision is profoundly flawed and inconsistent with the Convention itself. Further review is warranted for that reason as well.

First, ignoring parental intent promotes the international forum shopping in custody cases that is anathema to the Convention. See *e.g.*, *Didon* v. *Castillo*, 838 F.3d 313, 320 (3d Cir. 2016); *Redmond*, 724 F.3d at 739. As the Ninth Circuit explained, "The greater the ease with which habitual residence may be shifted without the consent of both parents, the greater the incentive to try." *Mozes*, 239 F.3d at 1079. The same court later characterized forum shopping as the "main incentive for international abduction." *Cuellar* v. *Joyce*, 596 F.3d 505, 508 (9th Cir. 2010). The Fourth Circuit has recognized the same concern and stated the rule somewhat more directly: "[A] parent cannot create a new habitual residence by wrongfully removing and sequestering a child." See *Miller* v. *Miller*, 240 F.3d 392, 400 (4th Cir. 2001) (citations omitted).

In *Friedrich*, the Sixth Circuit recognized that the risk posed by its child-focused approach to determining habitual residence. To forestall twisting the Convention into a shield for abducting parents, the court determined that although a child's "habitual residence can be 'altered' only by a change in geography and the passage of time . . . . The change in geography must occur before the questionable removal." 983 F.2d at 1401–02. *Friedrich* therefore established a simple rule: an unlawful removal cannot alter habitual residence. See *ibid.* A contrary rule creates "an open invitation for all parents who abduct

their children to characterize their wrongful removals as alterations of habitual residence." *Id.* at 1402. And that would render the Convention's protections meaningless. *Ibid.*

The decision under review jettisons the rule of *Friedrich* to hold that a parent may create a new habitual residence by wrongfully removing and sequestering a child so long as the time is sufficient to say that the child is acclimatized. To be sure, the decision focuses on Zank's purported failure to avail himself of the Hague Convention—which will be addressed below—but Zank's need to file a Hague petition is only important if Lopez Moreno's wrongful removal of the daughter changed the daughter's habitual residence. No other case subordinates the Convention's primary concern for preventing international foreign shopping in custody cases to exhaustion of all Convention remedies. And in so doing, the Sixth Circuit makes it easier to shift habitual residence without the consent of both parents, enhancing the incentive to try.

An approach to determining habitual residence that focuses primarily on the shared intent of the parents largely avoids this issue. The initial abduction demonstrates the absence of shared intent, resolving the habitual-residence question. The effect of any subsequent self-help is then subject to analysis under various defenses provided by the Convention and in any subsequent custody proceedings. See, e.g., Convention, art. 13. Both cases on which the Sixth Circuit relied for its exhaustion-of-remedies analysis addressed the issue only because the parents did not have a shared intent regarding where the child would live. *Ovalle* v. *Perez*, 681 F. App'x 777, 783 (11th Cir. 2017); *Kijowska* v. *Haines*, 463 F.3d 583, 588–89 (7th

Cir. 2006). Here, there is no question that the parties had a settled intent that the daughter would habitually reside in the United States before Lopez Moreno abducted the child in 2009. Accordingly, the Sixth Circuit's minority approach to determining habitual residence directly affected its decision below.

Second, the Sixth Circuit's decision errs in imposing an exhaustion-of-remedies requirement not found in the Convention or ICARA. Under the Convention, a parent need only file an application with the parent's Central Authority to obtain the benefits of the Convention. Convention, Art. 9. Filing an application with the central authority of the state of habitual residence or another contracting state's central authority is the full extent of a parent's obligations to invoke the protections of the Convention. See Convention, Art. 8. Under ICARA, Congress authorized a parent seeking return of a child in the United States to file an action in state or federal court. 22 U.S.C. § 9003(b). But neither the Convention nor ICARA require a U.S. parent to file an action in a foreign country's courts to avoid acquiescing to the unlawful removal or retention of his or her child. Indeed, the Convention intentionally created two means to obtain the return of a child: direct application by the left-behind parent to the courts of the country to which the child has been taken or in which the child is being kept, or application to the central authorities. Hague International Child Abduction Convention; State Department Legal Analysis, 51 FR 10494-01. The Sixth Circuit's erroneous imposition of an exhaustion-of-all-foreign-judicial-remedies requirement actually serves to make the Convention's protections and remedies largely unavailable to all but the rich, sophisticated,

and well-connected—those with the wherewithal to institute litigation in foreign countries.

The petition should be granted, and the Court should reject the analyses of the Sixth Circuit including its acclimatization standard.

III. This case is of substantial importance and presents an ideal vehicle for resolving the questions presented.

The numerous conflicting circuit decisions show that the issue presented is recurring and creating unwarranted differences in how international child abduction is treated. The Court should grant the petition and resolve that conflict now.

First, the intra-circuit conflict undermines international interest in uniform treat enforcement. The Hague Convention's protections pivot on the habitual residence of the child. *Talieri*, 907 F.3d at 408. And the parties to a treaty should be presumed to intend a uniform interpretation in all jurisdictions in which the treaty may apply. *Olympic Airways* v. *Hustin*, 540 U.S. 644, 660 (2004) (Scalia, J. dissenting). Here, the divergence among the lower courts in how to determine a child's habitual residence undermines uniform application of the Convention within the United States, and necessarily frustrates international uniformity.

Second, the circuit split is deep and mature. It is unlikely to heal with additional time—it has only calcified over the past decades with the Sixth Circuit continuing the eschew any consideration of shared parental intent except for very young children, two other circuits focusing primarily on the child's acclimatization, and the rest favoring the shared intent of the parents. Nor are *en banc* proceedings

likely to resolve the conflict. The Sixth Circuit recently had an opportunity to do just that, but modified its approach only to consider the shared intent of the parents where a child is too young to be acclimatized. *Talieri*, 907 F.3d at 408–09.

Third, the issue presented is of vital interest to the increasing number of people who parent with a citizen of another country. "Without intelligibility and consistency in its application, parents are deprived of crucial information they need to make decisions, and children are more likely to suffer the harms the Convention seeks to prevent." *Mozes*, 239 F.3d at 1072. Not only does the issue affect decisions about whether to travel to meet with an estranged spouse in another country, but also whether to allow in-laws from another country to meet with a child in the United States. *Cf. ibid.* And the question is of paramount important to state courts throughout the country who must navigate custody disputes involving parents whose citizenship is abroad.

Finally, the issues presented are of sufficient legal and public importance that they should be resolved immediately, notwithstanding the case's interlocutory posture. Accord, *e.g.*, *Star Athletica, LLC* v. *Varsity Brands, Inc.*, 136 S. Ct. 1823 (2016) (granting interlocutory petition); *American Broadcasting Cos.* v. *Aereo, Inc.*, 134 S. Ct. 896 (2014) (same); *Sebelius* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 678 (2013); *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 822 (2013) (same); *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 636 (2013) (same); *Michigan* v. *Bay Mills Indian Cmty.*, 133 S. Ct. 2850 (2013) (same). Given the disparate approaches to determining habitual residence being applied by the various circuits and the outcome-determinative nature of the inquiry here, the

Court should use this case as the vehicle to determine this long-standing circuit split.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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