No. 18-661

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Must a court utilize a *Shared Parental Intent* standard when making a determination as to Habitual Residence when Habitual Residence is not defined in the Hague Convention and the Sixth Circuit's child focused determination remains congruent with the purposes of the Hague Convention. Furthermore, is the *Shared Parental Intent* standard utilized by the Ninth and other circuits inappropriate as it is not child focused and requires a greater burden of proof than allocated by Congress. If, this court determines that it should utilize some form of Shared Intent, is the initial removal by Respondent mother relevant to a determination of habitual residence when Petitioner agreed to allow the child to remain with her mother in Ecuador.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

There are not additional parties to these proceedings other than those listed in the above caption. Petitioner is Jason Michael Zank. Respondent is Liz Lorena Lopez Moreno.

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INTRODUCTION

The Petitioner requests a uniform interpretation of Habitual Residence of a child, and he further requests that this court uniformly apply the Shared Parental Intent standard across all circuits in Hague Convention cases.

The United States is a signatory of the Hague Convention along with dozens of other countries. The Hague Convention was implemented in order to protect children from re abduction and from litigating child custody matters in a country that is not the child's habitual residence. In 1988, Congress ratified the Hague Convention when it passed the International Child Abduction Remedies Act ("ICARA"). See 22 U.S.C. § 9001, et al. In enacting ICARA, Congress "recognized the international character of the Convention; and the need for uniform international interpretation of the Convention." 22 U.S.C. § 9001(b)(3). ICARA"[establishes the] legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights." 22 U.S.C. § 9001(a)(4). However, courts do not have a choice in following ICARA or the Hague Convention as they must consider both. 22 U.S.C. § 9001(b)(2).

Petitioner has asserted that he should not have to file an action in an Ecuadorian court in order to obtain relief under the Hague Convention. Congress gave concurrent original jurisdiction to federal and state courts to decide Hague cases. 22 U.S.C. § 9003(a). Similarly, in order to obtain relief under the Hague Convention after B.L.Z. was taken to Ecuador in 2009, Petitioner would have had to file a Petition with an

Ecuadorian court in order to seek relief under the Hague Convention within the appropriate time period.

One of the central determinations in a Hague Convention case is the Habitual Residence of the child. The Convention is silent on the definition of Habitual Residence, but not on the burden of proof. A Petitioner must prove by a *preponderance of the evidence* that a child has been wrongfully removed or retained within the meaning of the Convention. 22 U.S.C. § 9003(e)(1)(A) (emphasis added). Other circuits, including the Ninth Circuit, have seemingly increased this burden to an unequivocal evidence standard, a greater standard than allowed by Congress under ICARA. See *Ward v. Holder*, 733 F.3d 601, 605 (6th Cir. 2013) ("The clear, unequivocal, and convincing standard is a more demanding degree of proof than the clear and convincing standard.") (internal quotations omitted).

Furthermore, the Sixth Circuit's determination as to Habitual Residence is focused on the child, while other circuits allow for a Shared Parental Intent standard. In many circuits, in the absence of parental intent, the court will not find a habitual residence has changed unless a Petitioner has met this greater unequivocal evidence standard.

COUNTERSTATEMENT OF THE CASE

Petitioner never filed a Hague Petition with an Ecuadorian court.

Petitioner has attempted to annex Respondent's claim and assert his own request for relief under the Hague Convention. He asserts that this court should consider Respondent's initial removal of B.L.Z. from the United States in 2009 when making a determination as to habitual residence. Petitioner never offered evidence that he had followed through on his own Hague Petition in 2009. He never pursued his Hague Petition through 2010, even though he spoke to attorneys. (Pet. App. 19a.) In fact, Petitioner agreed in 2014 to the entry of the Ecuadorian court order and "waived pursuing further action arising from the arrival of the minor child into Ecuador, in accordance with American laws." (Pet. App. 21a.) He entered into this agreement even though he was represented by an Ecuadorian attorney. (Pet. App. 32a.) The district court apparently believed that Ecuador was not apprised of the Hague Petition, and that it "[s]imply treated the case like an ordinary child custody dispute-not one involving wrongful removal of children across international borders." (Pet. App. 32a.) However, that position ignores one important detail -- Petitioner never filed the Petition with the court of either country. It is baffling why Petitioner would expect relief from a court in either country if he never followed through and filed the Petition.

Petitioner acquiesced to B.L.Z. remaining in Ecuador.

In 2014, the Parties entered into a parenting time agreement that was ratified by the Ecuadorian court. Petitioner entered into this agreement even though he was represented by an Ecuadorian attorney. (Pet. App. 32a.) In 2015, the Parties entered into a similar agreement in Michigan. Both Parties followed the 2014 agreement and court order, and 2015 private agreement that he signed in Michigan until Petitioner wrongfully refused to return B.L.Z. in 2016.

B.L.Z. is a Habitual Resident of Ecuador.

B.L.Z. is a habitual resident of Ecuador as she lived in Ecuador with her mother since she was a toddler. The lower court in this case indicated that B.L.Z. "[h]aving lived in Ecuador from the time she was 3 years old until she was 10, she had been acclimatized to Ecuador and was settled there." (Pet. App. 28a.) However, the court refused to determine that the child's habitual residence was Ecuador, because Respondent "abducted B.L.Z. in violation of Michigan law and brought her there in 2009." (Pet. App. 29a.)

B.L.Z. was wrongfully retained in breach of Respondent's Custody Rights.

Petitioner retained B.L.Z. in breach of Respondent's custody rights awarded pursuant to an Ecuadorian court order, Ecuadorian law, and the Parties' private agreement. Petitioner was following the Ecuadorian court order and the Parties' private agreement at the time of B.L.Z.'s wrongful retention; and she is under the age of 16.

Respondent's Petition for Return of B.L.Z.

When Petitioner wrongfully retained B.L.Z., Respondent was required not only to submit her application to the proper authorities, but she was also required to file her Petition in a court within the United States in order to request relief under the Hague Convention. This court could not grant her relief unless she properly presented her Petition before the court. Petitioner complains that the Appellate court found that he should have filed a Petition with an Ecuadorian court rather than resort to re-kidnapping the child. However, Petitioner had not availed himself of the relief available to him under the Hague Convention when the child was removed to Ecuador in 2009. He should have filed a Petition under the Hague Convention with the proper Ecuadorian court pursuant to Ecuadorian law in order to obtain relief under the Convention. Respondent would have had the opportunity to present her own defenses to that petition.

Petitioner has not allowed Respondent to see or speak to B.L.Z. since absconding with her in 2016.

Respondent took B.L.Z. to Ecuador in 2009. Petitioner chose not to file a Hague Petition in an Ecuadorian court. Petitioner entered into an agreement and court order in Ecuador in 2014 allowing B.L.Z. to remain with her mother. He also signed a similar agreement in Michigan the following year. Petitioner chose to follow the agreements, to allow B.L.Z. to remain in Ecuador with her mother. Petitioner's own actions ensured a change in B.L.Z.'s habitual residence to Ecuador. Respondent determined not to return B.L.Z. sometime during the summer of 2016 visit. He

then refused to allow B.L.Z. to have any contact with her mother for over two and a half years.

The District Court erroneously decided to deny Respondent's Petition.

The District Court was under the impression that B.L.Z. could not develop a habitual residence in Ecuador due to Respondent's initial removal of B.L.Z. to Ecuador in 2009. However, Respondent's initial removal of B.L.Z. was immaterial as Petitioner never followed through on his Petition under the Hague Convention. He never raised the issue in an Ecuadorian court after B.L.Z. was taken, not even in 2014 when the parties presented their agreement to the Ecuadorian court for ratification, even though he was represented by counsel and was provided with an English language interpreter at the proceedings. Petitioner's inaction essentially barred Respondent from seeking her affirmative defenses. The initial removal by Respondent is immaterial, as it is the Respondent to a Petition that cannot create a habitual residence by virtue of a wrongful removal or retention. Furthermore, as stated previously, Petitioner acquiesced to B.L.Z. remaining in Ecuador with her mother. He also acquiesced to B.L.Z. developing a habitual residence with mother as he was only granted school break parenting time in the 2014 Ecuadorian court order and the 2015 private agreement. The district court's decision that Petitioner was under duress when signing the Ecuadorian agreement in 2014 was also without merit. Petitioner was represented by counsel, and provided with an English language interpreter. Furthermore, he entered into an identical private agreement in Michigan the following year.

The Sixth Circuit correctly held that B.L.Z.'s habitual residence was Ecuador, and it remanded for a determination on Petitioner's affirmative defenses.

The lower court in this case had indicated that B.L.Z. "[h]aving lived in Ecuador from the time she was 3 years old until she was 10, she had been acclimatized to Ecuador and was settled there." (Pet. App. 28a.) However, the court refused to determine that B.L.Z.'s habitual residence was Ecuador, because "[L]iz abducted BLZ in violation of Michigan law and brought her there in 2009." (Pet. App. 29a.) The Sixth Circuit reversed the district court, holding that "the proper remedy for the initial kidnapping to Ecuador was a Hague Convention petition filed in Ecuador, subject to applicable limitations and defenses, rather than the self-help remedy of (in effect) later re-kidnapping back to the United States." (Pet. App. 2a.) The court also remanded for the various treaty base defenses. (Pet. App. 2a.)

Petitioner alleges that at all times he acted consistently with Michigan court orders. (Pet. 14.) However, he did not obey the Ecuadorian court order, nor did he abide by the Parties' private agreement. Petitioner complains that the Sixth Circuit "did not consider the absence of any settled joint intent by the parents that the daughter would reside in Ecuador." (Pet. 14.)

One of the purposes of the Hague Convention is to prevent "the use of force to establish 'artificial jurisdictional links on an international level, with a view to obtaining custody of a child." *Koch v. Koch*, 450 F.3d 703, 711 (7th Cir. 2006). Petitioner should have

filed a Petition to seek return of B.L.Z. He chose not to and chose the self help remedy of abducting B.L.Z. to the United States.

REASONS FOR DENYING THE WRIT

Petitioner has not presented a compelling reason for this court to review the Sixth Circuit's decision to reverse the district court. Petitioner complains that there is a lack of uniformity in the lower courts regarding the method of defining habitual residence. (Pet. 15.) Specifically, he complains that the Sixth Circuit application of a child focused approach directly conflicts with other Circuits.

I. HABITUAL RESIDENCE IS NOT DEFINED IN THE HAGUE CONVENTION, AND CIRCUITS ARE FREE TO TAILOR THEIR OWN DEFINITION AS LONG AS IT FALLS WITHIN CONFINES OF ICARA.

Habitual Residence is not defined in the Convention, and for good reason, as it is a fact based inquiry. *Friedrich v. Friedrich*, 983 F.2d 1396, 1400–01 (6th Cir. 1993). Hague Convention cases are a unique hybrid of international treaty, federal law, and the complexities of different cultures. There is great harm in tailoring a rigid policy defining habitual residence across all circuits, when nearly every case contains a unique set of circumstances, and involves a broad spectrum of cultures. Furthermore, these cases involve an international treaty that must be applied by all signatory countries. Habitual Residence is not defined in the Hague Convention, nor should it be, as leaving it undefined "has been a matter of deliberate policy, the aim being to leave the notion free from technical rules

which can produce rigidity and inconsistencies as between different legal systems." *Mozes v. Mozes*, 239 F.3d 1067, 1071 (9th Cir. 2001) (quoting commentary from J.H.C. Morris, Dicey and Morris on the Conflict of Laws 144 (10th ed. 1980) ["Dicey & Morris"]).

Furthermore, Petitioner indirectly complains that he should not have to bring his Hague case in Ecuador because he is an American, and that he is relying on central authorities to his peril. (Pet. 15-16.) In 1981, the United States government signed the Hague Convention in an effort to combat child abduction. In 1988, Congress passed the International Child Abduction Remedies Act. See 22 U.S.C. § 9001, et al. The United States is a signatory of the Hague Convention along with dozens of other countries in order to protect children from re-abduction and from litigating child custody matters in a country that is not the child's habitual residence. A petitioning party's only recourse for return of a child wrongfully removed or retained is not to re-abduct a child but to proceed through the Hague Convention.

1. The Sixth Circuit's Standard Determining Habitual Residence Based on Acclimatization is Proper and Should Remain Undisturbed.

The Sixth Circuit has chosen to utilize an *Acclimatization* standard in making a determination as to a child's habitual residence. It reserves the *Shared Intent* standard for cases involving small or disabled children.

The Sixth Circuit has held that a habitual residence determination "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 Sixth Circuit has chosen a child-centered approach because it serves the main purpose of the Hague Convention: "ensuring a child is not kept from her family and social environment." *Ahmed v. Ahmed*, 867 F.3d 682, 688 (6th Cir. 2017), *reh'g denied* (Sept. 1, 2017). The *Acclimatization* standard or the *Primary Approach* focuses on the "[p]lace in which the child has become acclimatized." *Taglieri v. Monasky*, 907 F.3d 404, 407 (6th Cir. 2018).

When making a determination as to whether a child has acclimatized to his or her surroundings, the Sixth Circuit determines whether that child "[h]as been physically present in the country for an amount of time sufficient for acclimatization and whether the place has a degree of settled purpose from the child's perspective." *Taglieri supra* at 408. "[W]hat a child does in a country and how she feels about it are as important as the length of her stay there." *Ahmed v. Ahmed*, 867 F.3d 682, 689 (6th Cir. 2017), *reh'g denied* (Sept. 1, 2017).

The Sixth Circuit recognizes that the *Acclimatization* standard would not be fortuitous in cases involving children that are too young or unable to acclimate. Some children are unable to form impressions and attachments to the culture and the people around them. Those children "lack cognizance of their surroundings [and] are *unable* to acclimate, making the standard generally unworkable." *Id*. However, it refuses to extend that standard to cases not involving young or disabled children and prefers to utilize a child focused approach.

In *Robert v. Tesson*, 507 F.3d 981, 994 (6th Cir. 2007), the court identified another reason that it refused to utilize the *Shared Intent* method, namely that the other circuits were utilizing an incorrect burden of proof. In *Robert*, the court indicated that ICARA "expressly states that courts should apply a preponderance of the evidence standard, 42 U.S.C. § 11603(e)(1), not the unequivocal evidence standard adopted by Scotland and the Ninth Circuit." *Robert supra* at 994.

The Sixth Circuit also recognizes a truth within the application of the Hague Convention, namely that each case is unique and it is therefore impractical to apply one standard to all cases. "This is not a bright-line rule, and the determination of when the *Acclimatization* standard is impracticable must largely be made by the lower courts, which are best positioned to discern the unique facts and circumstances of each case." *Ahmed supr*a at 690. Furthermore, it recognizes that in every Petition filed under the Hague Convention for return of a child, "[s]ometimes the only way to resolve a complicated problem is to recognize that there is no single solution." *Taglieri v. Monasky*, 907 F.3d 404, 411 (6th Cir. 2018).

B.L.Z. was eleven years old at the time of the hearing, and she does not lack cognizance of her surroundings. Therefore, the *Shared Intent* standard does not apply, and the *Acclimatization* standard was properly applied by the district court. The district court admitted that B.L.Z. was a habitual resident of Ecuador "having lived in Ecuador from the time she was 3 years old until she was 10 . . . had been acclimatized to Ecuador and was settled there." (Pet.

App. 28a.) The district court should have then made a determination that Petitioner had wrongfully retained B.L.Z. in violation of Respondent's custodial rights pursuant to Ecuadorian law. This was rectified by the Sixth Court of Appeals when it reversed the district court. (Pet. App. 2a.) It further noted that Petitioner did not "challenge the facts underlying this conclusion . . . ." (Pet. App. 10a.)

Petitioner desires a second bite of the apple, essentially he desires to hijack Respondent's Hague case because he did not properly file his own case in an Ecuadorian court in 2009. He desires a uniform definition of Habitual Residence, even though the term was left undefined in the Hague Convention for a very good reason, that every Hague Convention case is different. Furthermore, this court should not apply the Mozes test, as that case includes a greater burden of proof than allowed by Congress.

Even if this court would determine that it should apply a *Shared Intent* standard, Petitioner's own testimony proves that he had knowledge of and agreed to B.L.Z. remaining in Ecuador with her mother. Furthermore, the Sixth Circuit's measure of habitual residence is not remarkably different from other circuits in that it focuses on the parents when the children are very young or disabled. It only places the emphasis on acclimatization when the child is capable of it. *Taglieri supra at* 408 (6th Cir. 2018).

2. This Court Should Not Apply a Rigid *Shared Intent* Standard Across All Circuits.

The focus of the Eighth and Third Circuits on the children gives less weight to parental intent except in the cases of young children.

The Eighth Circuit determination of habitual residence does not focus on parental intent, nor is it dispositive under its decisions. *Stern v. Stern*, 639 F.3d 449, 452 (8th Cir. 2011) Therefore, it was not unexpected when it refused to follow the Ninth Circuit's decision in *Mozes*. The Eighth Circuit criticized the decision in *Mozes* as it "[undervalued] the perceptions and acclimatization of the child, who is the very focus of the Convention's attention and the intended beneficiary of the Convention's protections." *Stern supra at* 452. (internal citations omitted). A focus on the children "should be paramount in construing this convention whose very purpose is to protect children by preventing their removal from the family and social environment in which [their lives have] developed." *Stern supra at* 452 (internal citations omitted).

In making a determination as to the habitual residence of the child, the Eighth Circuit considers settled intent from the child's perspective, parental intent, the change in geography, the passage of time, and the child's acclimatization to the new country. *Cohen v. Cohen*, 858 F.3d 1150, 1153 (8th Cir. 2017) (internal citations omitted). In order for a family to have a settled purpose to obtain a new habitual residence, they must "[h]ave a sufficient degree of continuity to be properly described as settled." *Id*. The

family does not need to possess an intent to stay in a new location forever. *Id*. Additionally, parental intent does not need to be clear. *Id*. One spouse's reluctance to move "does not eliminate the settled purpose from the [child's] perspective[.]" *Id*.

In *Cohen v. Cohen*, 858 F.3d 1150 (8th Cir. 2017), the minor child had been living in the United States for two years, and the court determined that it was a sufficient period of time to become acclimated to the United States. The court opined that from the point of view of the child, he moved to the United States on an indefinite bases, "established a home there, and he maintained considerable connections to his environment." *Cohen supra* at 1154. The court determined that little evidence existed establishing that child's connection to his former country. *Id*. The court held that the child experienced "[a] clear change in geography and had acclimated to life in the United States." *Id*. The court found the parents' intent mirrored the child's change of habitual residence, to move to the U.S. for three to five years and perhaps on an indefinite basis. *Id*.

The Third Circuit also focuses on *Child Acclimatization* and parental intent, giving more weight to parental intent when the child is younger. *Karkkainen v. Kovalchuk*, 445 F.3d 280, 296 (3d Cir. 2006), *Blackledge v. Blackledge*, 866 F.3d 169, 180-181 (3d Cir. 2017), *cert. denied*, 138 S. Ct. 1449 (2018). The court in *Karkkainen* decided not to adopt *Mozes*. *Karkkainen supra* at 297. It determined that the *Shared Parental Intent* and *Acclimatization* should be considered, however it neglected to determine how it

"would weigh these factors against each other . . . .". *Karkkainen supra* 297.

In the case at hand, the district court found that B.L.Z. established a home and was acclimatized to Ecuador. (Pet. App. 28a.). If this court would apply the decisions in *Cohen* or *Karkkainen*, parental intent is given less weight because the child is able to acclimate. Even if this court would consider parental intent, Petitioner's own testimony proves that he had knowledge of and agreed to B.L.Z. remaining in Ecuador with her mother. Therefore, the Parties' intent "mirrored" the child's change of habitual residence.

3. This Court Should Not Apply the Rigid Framework of the Ninth Circuit *Shared Intent* Test, and Other Circuits, as It Allows for a Greater Burden of Proof Than Contemplated By ICARA.

Other circuits have adopted an approach to habitual residence solely based on parental intent. However, those cases typically utilize a greater burden of proof than allowed for by Congress through ICARA. The *Shared Intent* approach can be overcome by a child's acclimatization under that greater burden. This court should not adopt the *Shared Intent* standard of *Mozes* and its adopting circuits, as the higher unequivocal evidence standard exceeds the lower preponderance of the evidence standard required by ICARA.

In *Mozes v. Mozes*, 239 F.3d 1067, 1081 (9th Cir. 2001), the court attempted to determine whether an indefinite stay for one year in the United States resulted in a modification of the children's habitual residence. The district court determined that the

children's former habitual residence had shifted to the United States. *Mozes supra* at 1081. The Ninth Circuit held that the district court "[gave] insufficient weight to the importance of shared parental intent under the Convention." *Mozes supra* at 1084. The district never found an intent to abandon the prior residence, therefore the Ninth Circuit remanded the case to determine "whether the United States had supplanted [the children's former habitual residence] as the locus of the children's family and social development." *Id*.

Petitioner points out that the *Mozes* court concluded that "in the absence of settled parental intent, courts should be slow to infer from such contacts that an earlier habitual residence has been abandoned." *Mozes supra* at 1079. However, while the Mozes court indicates that the habitual residence can change regardless of parental intent, it applies the incorrect standard. When the parents lack a settled intent to abandon a previous habitual residence, the court should find that the habitual residence has changed only where "the objective facts point unequivocally to a person's ordinary or habitual residence being in a particular place." *Mozes v. Mozes*, 239 F.3d 1067, 1081 (9th Cir. 2001), *quoting Zenel v. Haddow,* 1993 S.L.T. 975, 979 (Scot. 1st Div.). The Ninth Circuit asserts a habitual residence determination should expand beyond an inquiry as to whether the child's life in the new country reveal some "minimal degree of settled purpose . . . but whether [it] can say with confidence that the child's relative attachments to the two countries have changed to the point where requiring return to the original forum would now be tantamount to taking the child out of the family and social

environment in which its life has developed." *Mozes supra* at 1081 (internal citations omitted).

The *Shared Intent* test in *Mozes* is too forced and rigid, attempting to group cases together regardless of their factual differences. Furthermore, it raises the burden of proof for the Petitioner, and will likely make it difficult for children to return to their true place of habitual residence. This type of rigid framework is not feasible across the wide variety of Hague Convention cases, and runs contrary to the purposes of the Hague Convention.

However, even applying the *Mozes* standard to the case at hand, B.L.Z.'s habitual residence would be Ecuador. Among the three categories of cases that *Mozes* considers includes the following:

> The petitioning parent had earlier consented to let the child stay abroad for some period of ambiguous duration . . . [and sometimes] the circumstances surrounding the child's stay are such that, despite the lack of perfect consensus, the court finds the parents to have shared a settled mutual intent that the stay last indefinitely. When this is the case, we can reasonably infer a mutual abandonment of the child's prior habitual residence.

Mozes supra at 1077. There simply was not an agreement that B.L.Z. would return to the United States other than for school vacations, and the Parties followed not only the agreement of the Parties in Ecuador and the Ecuadorian court order, but also their private 2015 agreement. Therefore, by virtue of the Parties' agreements and their adherence to those

agreements, they both formed a parental intent that the B.L.Z.'s habitual residence would remain in Ecuador. Furthermore, B.L.Z. was acclimatized to Ecuador. She attended school, participated in extracurricular activities, formed bonds with friends and family, and spoke the Spanish language. (Pet. App. 28a.) Therefore, Ecuador had supplanted the United States as the locus of B.L.Z.'s family and social development.

Ironically, the *Mozes* court included a stark warning in its findings about allowing a child to return to one parent's native country. "It is entirely natural and foreseeable that, if a child goes to live with a parent in that parent's native land on an open-ended basis, the child will soon begin to lose its habitual ties to any prior residence. A parent who agrees to such an arrangement without any clear limitations may well be held to have accepted this eventuality." *Mozes supra* at 1082.

Other circuits have decided to adopt the Ninth Circuit's habitual residence test from *Mozes*. See *Koch supra* at 717, see also *Maxwell v. Maxwell*, 588 F.3d 245, 253–54 (4th Cir. 2009). They have determined that the *Shared Intent* of the standard normally controls the habitual residence of the child.

Many of the Circuits have affirmed the higher unequivocal evidence burden of proof as set forth in *Mozes*, namely that the habitual residence of a child can change if the evidence unequivocally shows that the child has acclimatized to its new location. See *Mauvais v. Herisse*, 772 F.3d 6, 11–12 (1st Cir. 2014), *Gitter v. Gitter*, 396 F.3d 124, 132 (2d Cir. 2005), *Berezowsky v. Ojeda*, 765 F.3d 456, 467 (5th Cir. 2014),

and *Ruiz v. Tenorio*, 392 F.3d 1247, 1255 (11th Cir. 2004).

However, the adoption of this decision was not without concerns expressed by those circuits. The Seventh Circuit recognized the inherent difficulty in trusting the testimony of the parties when attempting to establish the existence of a *Shared Intent*. A court should determine "from all available evidence whether the parent petitioning for return of a child has already agreed to the child's taking up habitual residence where it is." *Koch supra* at 713 (internal citations omitted).

Furthermore, application of the shared parental intent standard can be rendered meaningless if a child has truly acclimated to his or her new surroundings. Even applying the shared parental standard, it is possible that the child's acclimatization to the location abroad will be so complete that serious harm to the child can be expected to result from compelling his return to the family's intended residence." *Glitter supra* at 134. However, those courts should apply the lower preponderance of the evidence standard when making that decision.

4. A Child Centered Approach is Proper and Not Outcome Determinative.

The Sixth Circuit's Child Centered approach is proper and in line with ICARA and the Hague Convention.

Petitioner cites *Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir. 2004) for the proposition that even though two children had lived in Mexico for almost three years before their removal to Florida, the habitual residence

remained the United States. However, in *Ruiz*, the mother had moved to Mexico with the children temporarily to try and save her marriage. The Mother had intended to move back to the United States, and there was evidence of that intent. The court noted that "the child's knowledge of these intentions is likely to color its attitude toward the contacts it is making." *Ruiz supra* at 1254. Thereby, if the children knew that the move to Mexico was temporary, regardless of their length of stay in Mexico, the children's habitual residence would never change. The *Ruiz* court applied the Mozes shared intent test and unequivocal evidence standard when it determined that the lower court correctly found that Petitioner "failed to prove that the children's prior [habitual residence] was abandoned and a new habitual residence . . . established." *Ruiz supra* at 1254 (citing *Mozes supra* at 1079-1080).

In the case at hand, Petitioner failed to prove that B.L.Z.'s habitual residence in Ecuador was abandoned, or that there was a shared intention that she remain in Ecuador on a temporary basis. Petitioner never pursued his possible Hague remedies with the proper authorities, and never raised the issue of B.L.Z.'s arrival in Ecuador with that court in 2014 even though he was represented by Ecuadorian counsel and was provided with an English language interpreter. He further agreed to the entry of a Ecuadorian court order in 2014, and signed a private agreement in Michigan in 2015. He was well aware that he was granted parenting time during B.L.Z.'s school breaks, and he exercised parenting time pursuant to the court order and private agreement.

Petitioner also claims that under the parent-focused framework, it would have been impossible to determine that B.L.Z. was a habitual resident of Ecuador because the Ecuadorian order was void due to coercion.

First, a parental intent standard is not a parent-focused framework. Even if the parents lack intent, a child's habitual residence can still change.

Second, Petitioner claims that he was under duress when he signed the Ecuadorian stipulation that led to the Ecuadorian court order in 2014. Due to that alleged duress or coercion, B.L.Z.'s habitual residence could never be Ecuador. Respondent disputes Petitioner's claim that he was under duress when he signed the stipulation. Petitioner fully participated in the Ecuadorian proceedings, was represented by counsel in Ecuador, and was provided with an English language interpreter. Petitioner never testified that the Ecuadorian court did not allow him to challenge the agreement, that it did not allow him to file his own Petition under the Hague Convention, or that it violated one of his fundamental human rights. He is simply unhappy with the current parenting time arrangement. His recourse is to return to the Ecuadorian courts to challenge the order, and resolve this dispute.

The district court stated that "[e]ven if [Ecuador] had subject matter jurisdiction, the Court credits [Petitioner's] account of the negotiations that led to the 2014 Ecuadorian Order. The court concluded that he was coerced into making the agreement when [Respondent] threatened to cut of all access to B.L.Z. if he did not submit to her demands. (Pet. App. 32a.)

> [T]o render an agreement unenforceable for coercion or duress, a party "must establish that (1) it involuntarily accepted [the other party's] terms, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of [the other party's] coercive acts.

Waverley View Investors, LLC v. United States, 135 Fed.Cl. 750 (Fed.Cl., 2018). The district court never made a finding that the 2014 Ecuadorian court order nor the Parties' private agreement were void due to coercion or duress. Again, Petitioner failed to bring these issues to the attention of the Ecuadorian court. Even accepting Petitioner's position as true, a threat does not qualify as duress under Michigan law. "[A] threat to break a contract does not in itself constitute duress." *Hartsville Oil Mill v. U.S.*, 271 U.S. 43, 49, 46 S. Ct. 389, 391 (1926). "Duress exists when one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will . . ." *Norton v. Michigan State Hwy. Dept.*, 315 Mich. 313, 320, 24 N.W.2d 132, 135 (1946).

Respondent also questions the court's motivation to make this finding, as it appears that the court was also under the false impression that Respondent's counsel represented Petitioner in the drafting and execution of the 2015 agreement for custody and parenting time. (R.12, Hr'g Tr., Pg.ID 154, 79:9-14.) Respondent's counsel represented Respondent in the drafting of the informal private agreement. Petitioner testified in the trial in the district court that he was not represented by Respondent's counsel. (R.12, Hr'g Tr., Pg.ID 158, 83:3-7.)

Furthermore, Petitioner claimed that he was under duress when he signed the 2014 agreement. However, he also signed the 2015 agreement, and he had exercised parenting time with B.L.Z. in the United States for nearly two years at the time of her wrongful retention.

If this court were to adopt a *Shared Intent* standard, B.L.Z.'s habitual residence would remain in Ecuador. Petitioner desires that the court reward his wrongful behavior, and allow him to bypass the Hague Convention, take matters into his own hands, and forcefully abduct B.L.Z. from her mother. This is the exact type of scenario that the Hague Convention was written to prevent. "The Convention's mission is basic: to return children "to the State of their habitual residence," to require any custody disputes to be resolved in that country, and to discourage parents from taking matters into their own hands by abducting a child." *Taglieri v. Monasky*, 907 F.3d 404, 407 (6th Cir. 2018) quoting Hague Convention pmbl.

II. THE COURT SHOULD DENY THE PETITION BECAUSE THE SIXTH CIRCUIT'S RULING IS NOT ERRONEOUS.

Petitioner claims that the Sixth Circuit's *child focused* test ignores parental intent and promotes international forum shopping. (Pet. 18.) It is ironic that Petitioner accuses Respondent of forum shopping when he has done the exact same thing. He has wrongfully kept B.L.Z. in the United States for over two and a half years, forcing Respondent's hand to file a Petition in his home jurisdiction, and he refuses to return her to the home of her habitual residence.

The U.S. Embassy and Consulate in Ecuador has instructive advice on its website directed towards parents contemplating re-abducting children.

> Measures to forcibly obtain physical custody of your children could be illegal. Attempts to re-abduct your child may:
> - Endanger your child and others;
> - Prejudice any future judicial efforts you might wish to make; and
> - Result in your arrest and imprisonment.[1]

Petitioner has taken matters into his own hands by wrongfully keeping B.L.Z. in violation of Ecuadorian law and contrary to the purpose of the Hague Convention. He effectively bypassed the relief he may have qualified for had he filed his own Petition under the Hague Convention with an Ecuadorian court when he had an opportunity to do so.

Petitioner's argument that ignoring parental intent promotes forum shopping ignores one important detail of Hague Convention cases, namely that a parent cannot change the habitual residence of the child by a Respondent's wrongful removal or retention. See *Kijowska v. Haines*, 463 F.3d 583, 588 (7th Cir. 2006) Furthermore, that parent must file his or her Petition within one year of the alleged abduction or wrongful removal, or the other parent is free to initiate that parent's affirmative defenses.

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[1] U.S. Embassy and Consulate in Ecuador, International Child Abduction. https://ec.usembassy.gov/u-s-citizen-services/child-family-matters/international-parental-child-abduction/ Last Accessed February 6, 2019.

The question here is whether the Sixth Circuit's child focused test would somehow encourage forum shopping. It is important to note that the other circuits that consider parental intent, hyper focus on parental intent only in the cases of small children. Furthermore, it appears that one of the important reasons for considering parental intent was to decipher between an intent for long term versus short term stays in a new country. See *Blackledge v. Blackledge*, 866 F.3d 169 (3d Cir. 2017), *cert. denied*, 138 S. Ct. 1449 (2018), and *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001).

In any regard, when the parents lack parental intent, the court will determine whether the new habitual residence had supplanted [the children's former habitual residence] as the locus of the children's family and social development." *Mozes supra* at 1081. Parental intent is then rendered meaningless if the a parent meets the unequivocal evidence standard and the child's habitual residence actually changed. Therefore, it is understandable that the Sixth Circuit Court eliminates an unnecessary step and considers parental conduct from the child's perspective, and utilizes a shared parental intent standard with only young and disabled children.

Petitioner further alleges that if this court were to adopt a *Shared Intent* standard, it would allow a court to consider Respondent's alleged wrongful removal of B.L.Z. to Ecuador in 2009 when determining the habitual residence of B.L.Z. It is Petitioner's belief that this would somehow result in a finding that B.L.Z. was not a habitual resident of Ecuador. However, Petitioner is attempting to force the Sixth Circuit to accept a

change of standard and burden of proof based on the unique factual scenario of the case it hand.

Petitioner never filed a Hague Petition in any court, and thus any initial wrongful removal by Respondent is immaterial. Respondent was not able to assert her own defenses to the Hague Petition that Petitioner never filed. Furthermore, any wrongful removal by Respondent was rectified by the Parties' 2014 Ecuadorian court order, the 2015 private agreement, and Petitioner's actions in adhering to the order and agreement and in returning B.L.Z. to Ecuador on multiple occasions. In any regard, Petitioner has kept B.L.Z. from her mother and has not allowed any type of contact, including phone contact. He has essentially secreted B.L.Z. away from her mother, cutting off all contact with her.

Petitioner cites *Friedrich supra* at 1401-1402, alleging that "an unlawful removal cannot alter habitual residence." It is true that if Petitioner had filed a Petition under the Hague Convention in Ecuador within the time allotted by the convention, that the Respondent could not have established a habitual residence for B.L.Z. in Ecuador solely based on the removal. See *Kijowska v. Haines*, 463 F.3d 583, 588 (7th Cir. 2006). "To give a legal advantage to an abductor who has a perfectly good legal remedy in lieu of abduction yet failed to pursue it would be contrary to the Hague Convention's goal of discouraging abductions by denying to the abductor any legal advantage from the abduction." *Kijowska at 588-589*. On the same token, a habitual residence of B.L.Z. cannot be established within the United States solely

based on Petitioner's wrongful retention of B.L.Z. In this country.

Additionally, Petitioner indicates that the "Sixth Circuit's decision errs in imposing an exhaustion of remedies requirement not found in the Convention of ICARA." (Pet. 22.) The Sixth Circuit faulted Petitioner for not filing a Hague Petition with an Ecuadorian court. Petitioner's position fundamentally ignores that the Hague Convention is a treaty signed by a multitude of nations, each with its own set of governing bodies and rules. It would be ridiculous to impose a requirement that every country establish an identical governing body that can dispose of Hague Convention claims or that only United States citizens should receive preferential treatment in the application of a Hague case. Thankfully, most countries possess a system of courts that can adjudicate such cases.

Furthermore, Petitioner's assertion that he should not have to file a Petition within an Ecuadorian court is without merit. The U.S. Embassy in Ecuador gives directions to parents that desire to initiate a Hague Case in Ecuador.

> To initiate a Hague case for return or for access to a child abducted to Ecuador, the left-behind parent must submit a Hague application to the ECA, either directly or through the USCA. The USCA is available to answer questions about the Hague application process, to forward a completed application to ECA, and to

> subsequently monitor its progress through the foreign administrative AND legal processes.[2]

If Petitioner desired to file a Petition under the Hague Convention to challenge Mother's taking of B.L.Z. to Ecuador in 2009, then he should have taken such action in an Ecuadorian court. Mother would have been granted the opportunity to challenge Father's Petition by asserting her affirmative defenses, including her reasons for taking B.L.Z. to Ecuador in the first place. However, he not only failed to file his petition, he also failed to address it when he was last before the Ecuadorian court in 2014.

III. THIS CASE PRESENTS A UNIQUE FACTUAL SCENARIO UNLIKELY TO REPEAT, AND THIS COURT SHOULD MAINTAIN THE INTENT OF THE DRAFTERS AND ALLOW COURTS TO MAKE THEIR OWN HABITUAL RESIDENCE DETERMINATION.

Petitioner argues that "intra-circuit conflict undermines international interest in uniform treat[sic] enforcement." (Pet. 23.) However, not only was habitual residence left undefined within the Convention for obvious reasons, that argument presupposes that the Ninth Circuit's parental intent test is the correct manner for making that finding. See *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993). Furthermore, adopting the *Shared Intent* standard

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[2] U.S. Embassy and Consulate in Ecuador, International Child Abduction, https://ec.usembassy.gov/u-s-citizen-services/child-family-matters/international-parental-child-abduction/ (emphasis added). Last Accessed February 6, 2019.

would subject Petitioners to a higher burden of proof than is called for by Congress. This may make it more difficult to determine a child's true habitual residence and to return children to the country of their habitual residence.

The Ninth Circuit court in *Mozes* applies a heightened standard for determination of a new habitual residence, *unequivocal* versus *preponderance of the evidence*, that exceeds the ICARA requirements. ICARA "expressly states that courts should apply a preponderance of the evidence standard, 42 U.S.C. § 11603(e)(1), not the unequivocal evidence standard adopted by Scotland and the Ninth Circuit." *Robert v. Tesson*, 507 F.3d 981, 994 (6th Cir. 2007).

The argument against a child focused determination also presupposes that the Sixth Circuit ignores parental conduct in making a habitual residence determination. In *Robert v. Tesson*, 507 F.3d 981, 996 (6th Cir. 2007), the court determined that parental conduct is important, but only from the child's point of view. The court looked to the Third Circuit's decision in *Karkkainen v. Kovalchuk*, 445 F.3d 280, 294 (3d Cir. 2006) for guidance on a determination of habitual residence. The court looked to how a parent's intentions color a child's attitude towards establishing a habitual residence, by "communicating to her that she would be permitted to choose where she would live." *Robert v. Tesson*, 507 F.3d 981, 996 (6th Cir. 2007) (internal citations omitted). The court then determined that this child centered approach was consistent with the Sixth Circuit's habitual residence standard that the courts must "focus on the child, not the parents, and examine past experience, not future intentions." *Id*. The Sixth

Circuit's child centered approach utilizes a habitual residence test that focuses on the child, but is also in line with ICARA.

Petitioner next argues that the circuit split is "deep and mature". (Pet. 24.) However, as stated previously, the Sixth Circuit considers parental intent in the case of small or disabled children. Furthermore, many other circuits give greater weight to *shared parental intent* in very young children. This does not mean the circuit ignores parental conduct. It simply chooses to focus on that from the child's point of view. This is not substantially out of line with the other circuits. Irregardless of parental intent, "the court will determine whether the new habitual residence had supplanted [the children's former habitual residence] as the locus of the children's family and social development.." *Mozes supra* at 1081. Furthermore, the Sixth Circuit has chosen not to adopt the higher unequivocal evidence standard of *Mozes* as only the lower preponderance of the evidence standard is required by ICARA.

Petitioner also argues that the "issue presented is of vital interest to the increasing number of people who parent with a citizen of another country." (Pet. 24.) Yet, parents are afforded protection under the Hague Convention as long as the other country is a signatory of that treaty. Ignorance of the law is not a defense to a parent's failure to file a Petition under the Hague Convention. It is up to the parent to obtain knowledge of the respective laws of his or her respective country and their respective districts. It is also a parent's responsibility to file a proper Hague application with

the proper authorities, and a Petition with the proper court.

Petitioner finally argues that the "issues presented are of sufficient legal and public importance that they should be resolved immediately, notwithstanding the case's interlocutory posture." (Pet. 24.) Petitioner has not submitted an issue for review by this court, and even if he has, there is no need for an expeditious decision. ICARA was adopted nearly thirty years before. The cases interpreting the Hague Convention and ICARA are in the early stages of developing a body of law. This case presents the court with a unique set of factual circumstances that would rarely repeat in future cases. It is simply not an appropriate vehicle for a determination as to whether this Court should adopt a new standard applicable to all cases within the country.

CONCLUSION

B.L.Z.'s habitual residence is in Ecuador. This court should not apply a *Shared Intent* standard as the Convention deliberately left *Habitual Residence* undefined. Furthermore, the *Shared Intent* standard contemplated by the Ninth Circuit's decision in *Mozes* exceeds the bounds of ICARA as it requires the court to apply a higher burden of proof than allowed by Congress. Additionally, even if this court determines to utilize the *Shared Intent* standard of *Mozes* or other circuits, B.L.Z. would still be considered a Habitual Resident of Ecuador. Petitioner was not coerced into agreeing to the Ecuadorian stipulation that led to the Ecuadorian court order. He was represented by counsel throughout the proceedings, and was provided with an English language interpreter. Furthermore, Petitioner

signed and agreed to the 2015 private agreement in Michigan. Petitioner allowed B.L.Z. to remain in Ecuador with her mother, and to develop a Habitual Residence in Ecuador. Furthermore, Petitioner neglected to file his own Petition under the Hague Convention in an Ecuadorian court, and it would be unfair to hold that he has fulfilled his duties under the Hague Convention in 2009 when he failed to file an action in an Ecuadorian court. Finally, Petitioner has kept B.L.Z. from her mother for more than two and a half years. He has purposefully delayed these proceedings, and caused a distance between mother and child that is not in the child's best interests.

If the court determines that the circuits should apply a habitual residence standard, then it should do so with extreme caution. The Hague Convention purposefully left habitual residence undefined. A decision to adopt a uniform standard based on the facts of the case at hand could run contrary to the intent of the Hague Convention, and result in far reaching effects on the applicability of habitual residence in other nations.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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