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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondent Lopez Moreno acknowledges the entrenched circuit split on the question of whether a child's habitual residence can be changed based solely on one parent's unilateral removal of the child plus the passage of time. Lopez Moreno affirmatively identifies that "the Sixth Circuit's determination as to habitual residence is focused on the child while other circuits allow for a shared parental intent standard." (Br. in Opp'n 11 (cleaned up).) And Lopez Moreno cannot contest that the Sixth Circuit's habitual-residence decisions are idiosyncratic and firmly entrenched. That is reason enough for this Court to grant the Petition.

Lopez Moreno also does not contest that the issue presented is important. The need for national uniformity in treaty interpretation is strong in the context of bilateral treaties, where the U.S. judicial decisions affect the negotiated rights of other countries. The importance of uniform interpretation is heightened where the treaty is a multilateral convention, and perhaps at its zenith where the convention addresses a fundamental civil right like a parent's right to raise his or her child.

The importance of the issue presented is underlined by the amicus brief of *Reunite* International Child Abduction Centre. As Amicus explains, "the issues engaged in this appeal are of fundamental importance to the operation and application of the 1980 Hague Convention in the USA and in the rest of the world." (*Reunite* International Child Abduction Centre Amicus Curiae Br. 24–25.) Amicus reaches this result because the question of a child's habitual residence is the cornerstone to determining a country's jurisdiction in relation to children. (*Id.* at 2–3.)

Lopez Moreno extols what she believes to be the merits of the Sixth Circuit's disregard of shared parental intent. But the reality is that all the various circuits that have addressed the issue have rejected the Sixth Circuit's approach because it is rigid and promotes forum shopping, qualities that are inconsistent with the Convention. For that reason, Lopez Moreno identifies no other court, foreign or domestic, that has adopted the Sixth Circuit's approach.

Finally, the circuit split here is outcome determinative. Had the Sixth Circuit applied the shared-parental-intent standard that prevails throughout almost all of the country, Zank would have prevailed because Zank never intended for his daughter to remain in Ecuador.

The Petition should be granted so that this Court may bring uniformity to the analysis of habitual residence in the U.S. courts.

REPLY ARGUMENT

I. The Court's review is warranted to resolve an entrenched circuit split.

Lopez Moreno concedes that there is a circuit split. (Br. in Opp'n 15.) And Lopez Moreno cannot contest that the circuit split is well-developed, encompassing all but two circuits, and unlikely to be resolved by *en banc* decisions. (Cf. Pet. 18 (collecting decisions from all circuits except the District of Columbia and Federal Circuits).)

As discussed in the Petition, the federal circuits have adopted three different tests for determining a child's habitual residence under the Hague Convention and International Child Abduction Remedies Act

(ICARA), Pub. L. No. 100-300, (1988) (codified at 22 U.S.C. §§ 9001–9011). (Pet. 16–18.) Most circuits consider whether there is a shared parental intent as to the child's habitual residence to be the most important fact. Two circuits have adopted a hybrid approach that places less emphasis on shared parental intent. These two approaches are analogous to the approaches applied by other common-law jurisdictions. (See Amicus Br. 17–21.) The Sixth Circuit has adopted an approach that deliberately ignores parental intent except where a child is so young or developmentally disabled that the child cannot be said to acclimatize anywhere. See *Taglieri* v. *Monasky*, 907 F.3d 404, 407 (6th Cir. 2018) (en banc). The Sixth Circuit's approach has not found other adherents.

Lopez Moreno seeks to minimize the scope of the circuit split by suggesting that the Sixth Circuit also considers shared parental intent to determine habitual residence. (Br. in Opp'n 29–30.) And for that reason, she says that the Sixth Circuit's test "is not substantially out of line with the other circuits." (*Id.* at 30.) The Sixth Circuit disagrees.

In the very case Lopez Moreno cites to smooth over the circuit split, the Sixth Circuit rejects the approaches adopted by the Ninth and Eleventh Circuits. *Robert* v. *Tesson*, 507 F.3d 981, 991–92 (6th Cir. 2007). To be sure, the Sixth Circuit will consider shared parental intent, but only as a fallback if the child is developmentally disabled or too young and so cannot be said to become acclimatized. *Taglieri*, 907 F.3d at 407. In the absence of an ability to acclimatize, courts are left with little choice but to consider parental intent. See *Ahmed* v. *Ahmed*, 867 F.2d 682, 688–89 (6th Cir. 2017). But if a child is acclimatized,

the Sixth Circuit will not consider shared parental intent at all. See *Taglieri*, 907 F.3d at 407; *Robert*, 507 F.3d at 993. In contrast, the approach taken by the majority of federal circuits considers shared parental intent to be the most important consideration to determine habitual residence. *E.g.*, *Maxwell* v. *Maxwell*, 588 F.3d 245, 251 (4th Cir. 2009); *Gitter* v. *Gitter*, 396 F.3d 124, 133 (2d Cir. 2005); *Mozes* v. *Mozes*, 239 F.3d 1067, 1078–81 (9th Cir. 2001).

The *Robert* decision also demonstrates that the Sixth Circuit's disregard of shared parental intent can be outcome determinative. As discussed in the Petition, application of the Sixth Circuit's child-focused approach would have flipped the result in *Ruiz* v. *Tenorio*, 392 F.3d 1247 (11th Cir. 2004). (Pet. 19.) There, the children were born in the United States and lived there for about seven years. *Ruiz*, 392 F.3d at 1249. The children then lived in Mexico for almost three years. *Id.* at 1250. The Eleventh Circuit affirmed that the children's habitual residence remained the United States because the parents never had a shared intent that Mexico would become the children's habitual residence. *Id.* at 1254. As the Sixth Circuit itself highlighted, application of the Sixth Circuit's approach would have required the opposite result.[1] See *Robert*, 507 F.3d at 991–92.

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[1] As previously noted, the same is true here. (Pet. 19.) Respondent says that the parties had a shared parental intent based on the agreement Respondent extracted from Petitioner on pain of not being allowed to see his daughter ever again. (Br. in Opp'n 3–4.) The district court determined that there was no shared intent because this "agreement" was the product of duress. (App. 32a.) That finding was adopted by the Sixth Circuit. (App. 5a.)

Lopez Moreno implies that the Sixth Circuit's test is consistent with the hybrid approach adopted by the Third and Eighth Circuits, suggesting that it looks to parental intent "from the child's point of view." (Br. in Opp'n 30.) Not so. Lopez Moreno cannot cite any Sixth Circuit decision considering parental intent from the child's perspective. The federal circuits that have adopted the hybrid approach cite to the Sixth Circuit's decision in *Friedrich* v. *Friedrich*, 983 F.2d 1396 (6th Cir. 1993). *Silverman* v. *Silverman*, 338 F.3d 886, 898 (8th Cir. 2003); *Feder* v. *Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995). But the Sixth Circuit has specifically complained that the hybrid approach adulterates the Sixth Circuit's habitual-residence analysis by adding consideration of the parents' shared intentions. *Robert*, 507 F.3d at 989. The Sixth Circuit thus recognizes that its analysis of habitual residence differs from the hybrid approach because the Sixth Circuit does not assess parental intent.

The Sixth Circuit's test not only places it at odds with the other circuit courts, it deepens the division between American courts and tribunals of other Hague Convention member states. As Amicus explains, other common-law countries including the United Kingdom, Canada, Australia, and New Zealand apply a hybrid approach akin to the Third and Eighth Circuits. (Amicus Br. 21.) Those countries generally consider both the child's perspective and the shared intent of the parents in setting habitual residence. (*Id.* at 8–17.)

This Court should grant review to clarify for parents, children, and the district courts throughout the country that determination of a child's habitual residence requires, at the very least, consideration of

whether there is shared parental intent on where their child is habitually resident.

II. The Court should review the issue presented to ensure uniform application of federal law and to promote compliance with U.S. treaty obligations.

It is inequitable to children and parents for federal cases raising the same facts and issues to be decided differently based solely on the judicial circuit in which they reside. As is true of federal statutes generally, "uniformity is an important goal of treaty interpretation." *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 383 (2006). That interest is even greater where there is a multilateral convention because judicial interpretation affects international law. See Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049, 1057 (2005) ("[A] judge hearing a Hague case is pronouncing national law because the treaty is an aspect of the domestic law of that country. At the same time, the national judge is engaged in the exercise and development of international law because the treaty itself is an embodiment of international law."). And this interest is most important where the treaty at issue affects fundamental rights such as the right to raise one's children. Cf. *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972) (recognizing the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"). Perhaps for that reason, the legislation implementing the Convention emphasizes "the need for uniform international interpretation of the Convention." 22 U.S.C. § 9001(b)(3)(B).

As Amicus emphasizes, uniformity in the American courts' standard for determining habitual residence is crucial to the functioning of the Hague Convention. (See Amicus Br. 4.) Data from an international group responsible for monitoring Hague Convention petitions shows that habitual-residence determinations are the sole or a reason cited for 20% of all the rejections of removal petitions by courts. International Centre for Missing & Exploited Children, *The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention—October 2017* (*2017 Hague Convention Operation Report*), at 15–16. In a study of 76 Hague Convention signatories, the International Centre for Missing & Exploited Children determined that in 2015 alone, 307 of 2,002 return applications were rejected by central authorities or courts. *Id.* at 11. Of those, more than 45 were rejected based on the habitual-residence determination. *Id.* at 15. No other factor was so frequently cited as the sole reason for rejecting a removal petition.[2] *Id.*

A review of Hague Petition cases filed in federal district courts in 2016, 2017, and 2018 showed that habitual residence played a role in the determination of Hague petitions in 42% of cases. At present, a child who may have been allowed to remain in the United States in Florida, California, or New York because of

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[2] Uniformity in American courts is particularly important in this context where the International Centre for Missing & Exploited Children's survey found that, among responding countries, the United States received 14% of all return petitions under the Hague Convention in 2015. 2017 Hague Convention Report, at 6. That is more than any other central authority. *Id.*

the parents' shared intent may be subject to a return order because of the fortuity that the child is in Ohio or Tennessee.

The uniformity of international interpretation of the Hague Convention that Congress seeks cannot be attained while the federal circuits remain divided about how to address the cornerstone question of a child's habitual residence. That uniformity is not possible without this Court's intervention.

III. The Court should grant the Petition because the Sixth Circuit's approach is erroneous.

The Sixth Circuit's *Friedrich* decision has been criticized by its sister circuit. Rightfully so. As the Ninth Circuit noted in *Mozes*, "[t]he facts of *Friedrich* . . . provided no legitimate occasion for a broad pronouncement that parental intent is irrelevant to the question of habitual residence." *Mozes*, 239 F.3d at 1080. As a matter of substance, the Ninth Circuit recognized that eschewing consideration of parental intent "is unsound" and "runs counter to the idea that determinations of habitual residence should take into account 'all the circumstances of any particular case.' " *Id.* (citing *Y.D.* v. *J.B.*, (Droit de la famille), [1996] R.J.Q. at 2523).

Moreover, the Sixth Circuit's approach runs counter to the Hague Convention's intent that "habitual residence" offer a holistic, fact-intensive approach. As Amicus points out, additional rules that categorically exclude consideration of certain facts—such as parental intent—risk converting "habitual residence" into a legal term of art. Doing so undermines the Convention's purpose. (See Amicus Br. 6.)

The Hague Convention adopted the phrase "habitual residence" to capture a factual notion unconnected to any one legal system. (*Id.* (quoting *Nationality or Domicile? The Present State of Affairs, 3 Recueil des Cours de L'Academie de Droit International de la Haye*, 1969 at 428).) But that does not suggest the Convention meant to promote a patchwork of tests with unique categorical rules to determine habitual residence. Rather, the intent was to create a more holistic, fact-based test. (See *ibid.*) Lopez Moreno condemns the shared-parental-intent analysis as a "rigid" test, (Br. in Opp'n 17), but it is the Sixth Circuit that determines habitual residence through a rigid, categorical rule excluding shared parental intent. That is the type of test the framers of the Hague Convention sought to avoid. (Amicus Br. 6.) Each categorical rule courts adopt brings "habitual residence" closer to a legal term of art that means different things in different courts.

The Sixth Circuit's outlier approach is thus contrary to the purposes of the Hague Convention.

IV. This case presents an ideal vehicle for review.

This case presents an ideal vehicle for review by this Court. The need for a uniform national standard is key when considering a multilateral treaty and its enabling legislation. That need is particularly acute where, as here, the standard applied will in many cases ultimately determine the child's habitual residence.

Lopez Moreno suggests that the facts giving rise to the dispute here are unlikely to recur. (Br. in Opp'n 31.) But the facts of the child's initial abduction to Ecuador and subsequent retention in the United

States do not drive the issue presented. The question whether the parents' shared intent should play a role in determining habitual residence is a legal question that occurs in the mine run Hague Convention case.

Lopez Moreno also reiterates the Sixth Circuit's errors that (1) Zank never filed a Hague petition of his own, and (2) that Zank was required to file a Hague petition in the foreign courts. (*Id.* at 20, 26.) But the district court found that Zank filed his own Hague petition with the central authority designated by the United States as the Convention requires, and that Zank never agreed to give Lopez Moreno custody of the daughter in Ecuador. (App. 19a.) There was never a shared parental intent to change the daughter's habitual residence to Ecuador.

Moreover, the Sixth Circuit's criticism of Zank, a utility worker with no experience with international litigation, for failing to litigate his claims in the Ecuadoran courts is contrary to the Convention. Notably, neither Lopez Moreno nor the Sixth Circuit panel have identified any basis in the Convention, ICARA, or Ecuadoran law for the purported requirement that a party to litigate a Hague petition in foreign courts to preserve his objection to an earlier parental abduction. To the contrary, the Convention provides that the aggrieved parent "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." Hague Convention, art. 8. The central authorities have the responsibility to "initiate or facilitate the institution of judicial or administration proceedings with a view to obtained the return of the child." *Id.* art. 7(f). The Convention thus requires the aggrieved parent to file an application

with a central authority and imposes on the central authorities the obligation to pursue foreign legal action where appropriate. Nowhere in the Convention is there a requirement that a party defending against a Hague petition must have *litigated in foreign courts* to demonstrate that he did not intend for his abducted child to become habitually resident in another country.

Finally, this case is not moot because the parties' daughter remains in the United States. A decision by this Court can be efficaciously applied on remand.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 22, 2018