No. 18-935

IN THE
Supreme Court of the United States

MICHELLE MONASKY,

Petitioner,

v.

DOMENICO TAGLIERI,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

The Hague Convention on the Civil Aspects of International Child Abduction requires that any child wrongfully removed from her country of "habitual residence" be returned to that country. A.M.T. was eight weeks old when she traveled with her mother, Michelle Monasky, from a domestic-violence safe house in Italy to her grandparents' home in Ohio. Monasky's husband, from whom she had fled, filed a petition under the Hague Convention seeking A.M.T.'s return to Italy. The district court found that A.M.T. had not acclimated to living in Italy and made no finding that her parents had ever agreed that she would be raised in Italy. The court nevertheless ruled that the existence of a "matrimonial home" presumptively established Italy as A.M.T.'s habitual residence. In a fractured 10-8 opinion, the en banc Sixth Circuit affirmed after reviewing the district court's determination of habitual residence only for clear error and holding that a "subjective agreement" between the parents to raise A.M.T. in Italy was not necessary to establish that A.M.T. was habitually resident in Italy.

The questions presented are:

1. Whether a district court's determination of habitual residence under the Hague Convention should be reviewed *de novo*, as seven circuits have held, under a deferential version of *de novo* review, as the First Circuit has held, or under clear-error review, as the Fourth and Sixth Circuits have held.

2. Where an infant is too young to acclimate to her surroundings, whether a subjective agreement between the infant's parents is necessary to establish her habitual residence under the Hague Convention.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

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BRIEF FOR PETITIONER

Petitioner Michelle Monasky respectfully submits that the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

OPINIONS BELOW

The court of appeals' en banc opinion is reported at 907 F.3d 404. Pet. App. 1a–41a. The vacated panel opinion is reported at 876 F.3d 868. Pet. App. 42a–72a. The district court's opinion is available at 2016 WL 10951269. Pet. App. 73a–107a.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 2018. The petition for a writ of certiorari was filed on January 15, 2019, and granted on June 10, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89, and its enabling statute, the International Child Abduction Remedies Act, 22 U.S.C. § 9001 *et seq.*, are reproduced in the Addendum to this brief.

STATEMENT

The Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention") provides that a child wrongfully removed from a country in which she was "habitually resident" must be returned to that country for an adjudication of custody rights. Convention, arts. 1, 4. A.M.T. was eight weeks old when her American mother, Michelle

Monasky, fled with A.M.T. from Italy to the United States to escape her abusive husband. In the ensuing Hague Convention litigation, the district court determined that A.M.T. was habitually resident in Italy and issued an order directing her return. Pet. App. 107a. The en banc Sixth Circuit affirmed in a sharply divided 10-8 opinion based on its belief that the district court had found that Monasky and her husband "intended to raise A.M.T. in Italy," which the court of appeals considered sufficient to uphold the district court's decision under deferential clear-error review. Pet. App. 12a.

In so ruling, the Sixth Circuit committed two distinct legal errors. First, it erred by failing to undertake *de novo* review of the district court's habitual-residence determination. Pet. App. 9a. While a district court's underlying findings of historical fact are properly reviewed for clear error, *de novo* review of the district court's ultimate determination of habitual residence is required to secure the "uniform international interpretation" that Congress deemed essential when implementing the Hague Convention, 22 U.S.C. § 9001(b)(3)(B), and to facilitate the formulation and clarification of guiding "legal principles" to inform future habitual-residence determinations, *Ornelas* v. *United States*, 517 U.S. 690, 697 (1996).

Second, the Sixth Circuit applied a "shared parental intent" standard in name alone. As that court recognized, "[e]very circuit to consider the question" has concluded that habitual residence may be established either through a child's acclimation to a country or through a "'shared parental intent'" to raise the child in that country. Pet. App. 7a (citation omitted). Because eight-week-old A.M.T. was indisputably too young to have acclimated to her surroundings, the

parties agree that the question of habitual residence "turns on 'shared parental intent.'" Br. in Opp. 1. The district court found that Monasky's "intent" was "to return to the United States with A.M.T. as soon as possible," Pet. App. 94a, which should have ended the inquiry by definitively establishing that A.M.T. was not habitually resident in Italy. The Sixth Circuit nevertheless held that parents can "share" an intent to raise a child in a country even when they do not actually "agree[ ]" on where the child will be raised and went on to conclude that the district court had found the requisite shared intent. Pet. App. 12a. That counterintuitive approach to "shared parental intent" cannot be reconciled with the text and purpose of the Convention, or with common sense.

Ultimately, under any of the competing standards of review and definitions of "habitual residence," A.M.T.'s temporary ties to Italy—which were limited to eight weeks in the care of a mother who intended to return to the United States as soon as she was physically able and had obtained her child's U.S. passport—did not have a sufficiently settled quality for her residence to be deemed "habitual." Because A.M.T. was not "habitually resident" in Italy, the court of appeals' judgment should be reversed and the case remanded with instructions to issue an order directing A.M.T.'s return to the United States.

1. The United States and the other member states of the Hague Conference on Private International Law unanimously adopted the Convention on the Civil Aspects of International Child Abduction in 1980. *See* U.S. Dep't of State, *Hague Int'l Child Abduction Convention; Text & Legal Analysis*, Letter of Submittal from George P. Schultz to Pres. Ronald Reagan (Oct. 4, 1985), 51 Fed. Reg. 10,494, 10,496

(Mar. 26, 1986); *see also* S. Treaty Doc. No. 99-11, at 3. The Convention's limited purpose was "to secure the prompt return of children who have been abducted from their country of habitual residence or wrongfully retained outside that country." Letter of Transmittal from Pres. Ronald Reagan (Oct. 30, 1985), 51 Fed. Reg. at 10,495; *see also* Convention, pmbl.; S. Treaty Doc. No. 99-11, at 1.

The Convention's "central operating feature" is the remedy of sending a child back across international borders. *Abbott* v. *Abbott*, 560 U.S. 1, 9 (2010). Because the Convention aims to preserve "the stability which is so vital to [children]," Elisa Pérez-Vera, *Explanatory Report on 1980 Hague Child Abduction Convention*, *in* 3 Acts and Documents of the Fourteenth Session, Child Abduction 426, ¶ 72 (1982) ("*Explanatory Report*"), this return remedy only "appl[ies]" if a child was "habitually resident" in the country to which her return is sought, Convention, art. 4.[1] Although habitual residence was not defined in the Convention, it was considered a "well-established concept" at the time of the Convention's adoption. *Explanatory Report* ¶ 66.

The return remedy does not represent a determination of custody rights, but instead "lays venue for the ultimate custody determination in the child's country of habitual residence rather than the country to which the child is abducted." *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 5 (2014). Where the Convention does not apply, other remedies "under other laws or

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[1] The *Explanatory Report* is the "official history" of the Convention and "a source of background on the meaning of the provisions of the Convention." 51 Fed. Reg. at 10,503, 10,506.

international agreements" are available. 22 U.S.C. § 9003(h); *see also* Convention, art. 34.

In 1988, Congress passed the Hague Convention's enabling statute, the International Child Abduction Remedies Act ("ICARA"). *See* Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified at 22 U.S.C. §§ 9001–9011). Congress emphasized in its findings "the need for uniform international interpretation of the Convention," 22 U.S.C. § 9001(b)(3)(B), but left the term "habitual residence" undefined. Consistent with the Convention's limited scope, Congress empowered "courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claim." *Id.* § 9001(b)(4).

2. Petitioner Michelle Monasky, an American citizen, met respondent Domenico Taglieri, an Italian citizen, while they were conducting medical research at a university in Illinois. They married in September 2011. Pet. App. 73a–74a. After Taglieri was unable to find further employment in the United States as a researcher, he returned to Italy in January 2013, and Monasky joined him in July 2013. JA222. Even before leaving for Italy, Monasky made clear to Taglieri that she planned to return to live in the United States in the future. *See* JA209 ("don't think that means we are done with the US"). Indeed, Monasky had no relatives in Italy, she did not speak Italian, and she "made little attempt to learn." Pet. App. 75a. Taglieri later acknowledged that, "in retrospect," he "believe[d] [Monasky] was never happy in Italy, and that she planned to leave from the start." JA114.

Soon after the couple moved to Italy, the marriage began to deteriorate. By March 2014, Taglieri had begun to physically abuse Monasky, striking her on the

face in an episode that Taglieri later described dismissively as "a not welcome touch." JA106; *see also* Pet. App. 75a. His slapping continued and "got harder" over time. JA130; *see also* Pet. App. 75a. Taglieri told Monasky's parents that he would "smack [her] in the face" because of her acne and that he was "not ashamed of it" because he "d[id] it for her own good." JA97; JA124–25.

Taglieri's abuse also escalated into sexual assault. Pet. App. 103a–105a. He "'forced himself upon [Monasky] multiple times'" and "'forced [her] to have sex that he knew [she] didn't want to have.'" Pet. App. 104a n.3 (quoting JA152). During one assault, he climbed on top of Monasky and told her: "'spread your legs, or I will spread them for you.'" Pet. App. 104a n.3 (quoting JA152). Despite Monasky's express unwillingness to have a child with him, Taglieri's sexual assaults resulted in her becoming pregnant in May 2014. Pet. App. 75a; JA28.[2]

The following month, Taglieri decided to move, without Monasky, to Lugo, a town more than 165 miles away from the couple's apartment in Milan. JA28. He returned to Milan only occasionally to visit

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[2] The district court found Monasky's testimony about the physical and sexual abuse to be credible. Pet. App. 105a. As the Sixth Circuit explained in a related assault-and-battery case, there was "plenty of evidence" of abuse: Taglieri hit Monasky because of her acne "so much that Monasky came to expect that Taglieri would physically abuse her for any perceived flaw in her appearance." *Taglieri* v. *Monasky*, 767 F. App'x 597, 603 (6th Cir. 2019) (affirming jury verdict for Monasky). "Sometimes, Taglieri would get so violent that Monasky felt compelled to perform sexual acts on him to calm him down because she 'didn't want to get hit anymore.'" *Id.* (citation omitted).

his pregnant wife, Pet. App. 75a, and the "long-distance arrangement further strained the parties' marriage," JA28. In August 2014, Monasky began to "contact[ ] American divorce lawyers," "inquire[ ] about American health care and child care options," and "appl[y] for jobs in the United States." JA28–29; *see also* JA189–90 (August 6, 2014 e-mail from Monasky to her mother stating "I'd like to look into getting a U.S. divorce. . . . I want to go home."). She also insisted that a lease for a new apartment include a provision authorizing her to terminate the lease with three months' notice. JA199.

Yet, complications with Monasky's pregnancy made it impossible for her to return to the United States at that time. After a near-miscarriage during her first trimester, Monasky's physicians had placed her under travel restrictions. Pet. App. 76a. The couple subsequently made a last-minute decision to travel to the United States for the wedding of Monasky's sister in July 2014—based in part on Taglieri's assurances after reviewing Monasky's ultrasound, JA132—but Monasky's physicians thereafter reiterated those travel restrictions, JA132–33. Although Monasky had experienced an improvement in the physical condition that had initially prompted the travel restrictions, *id.*, Monasky's physicians barred her from traveling for the remainder of her pregnancy due to the risk of premature labor, Pet. App. 76a.

As the pregnancy progressed, Taglieri began "slapping [Monasky] more frequently" during his visits to Milan, JA130, and "control[ling] every dollar [Monasky] spen[t]," JA189. In response, Monasky repeatedly raised the prospect of divorce with Taglieri and told him that she intended to return to the United

States with the baby after she was born. *See* JA111; JA116; JA133–34; JA138.

On February 10, 2015, when Monasky was nine months pregnant, Taglieri "smacked the hell out of" her head. JA195. Monasky once again told Taglieri that she wanted a divorce. Pet. App. 4a, 77a; *see also* JA200–04 (e-mail from Monasky to Taglieri regarding "collaborative divorce"). Monasky also obtained multiple quotes from international moving companies for a move to the United States. Pet. App. 77a. In an e-mail to her mother, Monasky wrote, "We are divorcing. That's it. . . . The sooner I get out of Italy, the better." JA194. This time, Taglieri told her to "'go back to the States with your mom,'" who would be visiting for the birth. JA195.

Two days later, when Monasky declined a physician's recommendation to induce labor during a routine check-up, Taglieri grew angry. Pet. App. 77a. He refused to take Monasky back to the hospital when she started having contractions later that day, and she was compelled to take a taxi alone in the middle of the night. Pet. App. 78a. A.M.T. was ultimately born by cesarean section. *Id.* Taglieri's attitude toward his newborn daughter proved to be no different from his attitude toward his wife: At the hospital, Taglieri screamed at his crying newborn daughter to "shut up" and threatened to "shove [formula] up her ass." JA95; JA139–40; *see also* JA231.

Monasky's recovery from the cesarean section was complicated by a major back surgery she had undergone as a child. Pet. App. 47a; JA142. Monasky was subject to severe physical limitations during her recovery and required assistance performing basic tasks such as bathing herself and caring for A.M.T. JA142. Monasky's mother remained in Italy for two weeks to

assist her daughter. Pet. App. 78a. Meanwhile, Taglieri returned to his home in Lugo. *Id.*

During the weeks following A.M.T.'s birth, Monasky repeatedly told Taglieri that she wanted to divorce him and to return to the United States with A.M.T. Pet. App. 78a–79a (citing JA89–93; JA145–46; JA217–19). In an effort to smooth the way for her departure, Monasky gave Taglieri access to the money in her Vanguard investment account. JA206. Taglieri responded via a March 7 e-mail, "I do not want to take the money from vanguard you can gothe us whenever yoouwant . . . [sic]." JA188; *see also* JA217–19 (March 2 e-mail from Monasky to Taglieri imploring him to agree to a divorce and to "[l]et [her] go" to the United States with A.M.T.). In a subsequent e-mail to an Italian divorce lawyer, Monasky stated that Taglieri had "agreed that [she] could have sole custody" and that she planned to "return to the U.S." JA206.

But Monasky could not leave Italy until she was physically able to travel and had obtained A.M.T.'s U.S. passport. Out of necessity, Monasky traveled to Taglieri's home in Lugo on March 3 so that Taglieri could help care for A.M.T. and complete the passport-application process that they had jointly initiated "soon after A.M.T.'s birth." Pet. App. 80a; *see also* JA100–01. Because the visit to Lugo was strictly "temporar[y]," JA30, Monasky brought with her only "'a couple of suitcases and [a] stroller,'" Pet. App. 79a (alteration in original; citation omitted), which served as A.M.T.'s makeshift bed, JA144.

Throughout her temporary stay in Lugo, Monasky continued to reiterate to Taglieri that she was divorcing him and returning to the United States with A.M.T. *See* JA106–07 (Taglieri acknowledging that

Monasky "reiterated . . . that she intended to get a divorce and relocate to the United States" while in Lugo); *see also* JA206. The couple also discussed their impending divorce—and Monasky's return to the United States—with their families. *See* JA30; JA102.

On March 31, the couple had yet another argument after Taglieri refused to allow Monasky to change A.M.T.'s urine-soiled clothing due to the price of laundry. Pet. App. 81a. While screaming, Taglieri raised his hand as if to strike Monasky before going into the kitchen, where Monasky heard what sounded like Taglieri "picking up [a] knife and putting it . . . back." JA147–49; *see also* Pet. App. 81a. After Taglieri left for work, Monasky took A.M.T. to the police, who placed them in a social-services safe house for domestic-violence victims. Pet. App. 81a. For the next two weeks, they remained in protective care in three different locations, JA151–52, until they left for the United States on the same day that A.M.T.'s U.S. passport arrived, Pet. App. 50a, 81a. On the date of their departure, A.M.T. was eight weeks old. Pet. App. 82a.

3. Taglieri filed a Hague Convention petition in the U.S. District Court for the Northern District of Ohio seeking an order returning A.M.T. to Italy. *See* Pet. App. 82a. After a bench trial, the district court granted Taglieri's petition.

At the time of trial, the Sixth Circuit had not addressed the standard for determining the "habitual residence" of infants under the Hague Convention. The court had rejected consideration of parental intent in determining the habitual residence of older children—focusing instead on the child's "acclimation" to a particular country—but had left open the question whether that same standard would apply to

infants, who are generally too young to acclimate to their surroundings. *See Robert* v. *Tesson*, 507 F.3d 981, 992–93, 992 n.4 (6th Cir. 2007). Expressly noting the absence of binding precedent, the district court created its own legal standard and presumed that an "infant will normally be a habitual resident of the country where the [parents'] matrimonial home exists." Pet. App. 90a. No other court has adopted this presumption; nor did the district court explain what it meant by a "matrimonial home," given that the parties had not shared a home since Monasky was one-month pregnant, *see* JA28.

The court then shifted the burden to Monasky, examining whether she had proven that her marriage had "irrevocably broke[n] down" before A.M.T.'s birth. Pet. App. 92a. In examining the evidence, the court found that Monasky had an "intent to return to the United States with A.M.T. as soon as possible in the future." Pet. App. 94a. And it made no finding that A.M.T.'s parents ever agreed to raise her in Italy. The district court nevertheless concluded that Monasky "lacked definitive plans as to *how* and *when*" to leave Italy and thus had not "disestablish[ed]" A.M.T.'s presumptive habitual residence in Italy. Pet. App. 93a, 97a (emphases added). The court therefore issued an order directing A.M.T.'s return to Italy. Pet. App. 99a, 108a.

Monasky appealed and sought a stay of the return order, which was denied by the Sixth Circuit, Pet. App. 5a, and then by Justice Kagan, *see Monasky* v. *Taglieri*, No. 16A557 (U.S. Dec. 9, 2016). At nearly two years of age, A.M.T. was sent to Italy in December 2016. Upon returning to Italy, A.M.T. was removed from her mother because an Italian court in an *ex parte* proceeding had terminated Monasky's parental

rights, Pet. App. 81a–82a, and made Taglieri "sole custodian with full parental rights" over A.M.T., JA185.

4. On appeal, a divided panel of the Sixth Circuit affirmed after adopting its own novel standard for determining habitual residence. Rejecting the district court's "matrimonial home" approach, the panel majority held that "where the child has resided exclusively in a single country, that country is the child's habitual residence." Pet. App. 53a. Because A.M.T. "spent her entire life in Italy" before her removal to the United States, the panel majority held that "her habitual residence was Italy." Pet. App. 60a.

Judge Moore dissented, emphasizing that the majority's new single-country rule conflicted with the approach of ten other circuits that determine habitual residence by looking at a child's acclimation or the existence of shared parental intent. Pet. App. 64a (Moore, J., dissenting).

5. The Sixth Circuit granted Monasky's petition for rehearing en banc, vacated the panel's decision, and then affirmed again in a fractured 10-8 decision.

Applying yet another legal standard in this case, the en banc majority held that "the parents' shared intent" determines whether an infant who is too young to acclimate to her surroundings has attained a habitual residence in the country from which she was removed. Pet. App. 9a. The majority went on to hold, however, that "'shared parental intent'" does not require the parents to have a "'meeting of the minds' about their child's future home" or that they "see eye to eye" on the issue. Pet. App. 12a. According to the majority, "subjective agreement" is not necessary to establish an infant's habitual residence because that

"would create a presumption of no habitual residence for infants." Pet. App. 12a–13a.

The en banc majority refused to undertake its own assessment of whether eight-week-old A.M.T. had attained a habitual residence under its version of the shared-parental-intent standard. Pet. App. 11a. Instead, the majority reasoned that Sixth Circuit precedent "treat[s] the habitual residence of a child as a question of fact" subject to "clear-error review." Pet. App. 9a. Applying that "highly deferential" standard—which, in the Sixth Circuit's colorful language, requires affirmance "unless the fact findings 'strike us as wrong with the force of a five-week-old, unrefrigerated dead fish,'" *id.* (quoting *United States* v. *Perry*, 908 F.2d 56, 58 (6th Cir. 1990))—the majority upheld the district court's conclusion that eight-week-old A.M.T. was habitually resident in Italy because, in the majority's view, the district court had found that "Monasky and Taglieri intended to raise A.M.T. in Italy." Pet. App. 12a. The majority acknowledged that, shortly before A.M.T. was born, "Monasky [had] emailed Taglieri about seeking a divorce and investigated a move back to the United States," Pet. App. 4a, and that she had expressed the same intent shortly after A.M.T.'s birth, *see id.* ("In March 2015, after Monasky's mother returned to the United States, Monasky told Taglieri that she wanted to divorce him and move to America."). The majority nevertheless concluded that "[n]othing in [the district court's] habitual-residence finding leaves a 'definite and firm conviction that a mistake was made'" and therefore affirmed the district court's return order. Pet. App. 9a (citation omitted).

Five of the ten judges who joined the majority opinion also joined a separate concurrence defending

the panel majority's single-country approach to habitual residence. Pet. App. 15a (Boggs, J., concurring). The concurring judges made clear that they "concur[red] in [the en banc majority's] conclusion that the habitual residency inquiry is a question of fact and that the district court made no clear error in its factual findings in this case." Pet. App. 14a–15a.

All eight dissenting judges joined a principal dissent, which emphasized that, while "shared parental intent" is the correct standard where an infant is too young to acclimate to her surroundings, shared parental intent cannot properly be determined without analysis of "external indicia of the last shared agreement of the parties." Pet. App. 27a (Moore, J., dissenting). Where an infant's habitual residence is "unclear" from these external indicia, the principal dissent explained, the Hague Convention petitioner "has not satisfied [his] burden." Pet. App. 29a.

The dissenting judges further disagreed with the en banc majority's application of clear-error review, rather than *de novo* review, to the district court's habitual-residence determination. As the principal dissent explained, "[t]he district court's ultimate determination of habitual residence—in other words, its application of the legal standard to its findings of fact—is reviewed de novo." Pet. App. 30a (Moore, J., dissenting). The majority's contrary conclusion, the dissent emphasized, "puts [the Sixth Circuit] at odds with the standard of review used by [its] sister circuits in these cases." Pet. App. 30a–31a (citing cases).

SUMMARY OF ARGUMENT

The "central operating feature" of the Hague Convention is a limited return remedy that turns on whether a child was habitually resident in the country

to which her return is sought. *Abbott* v. *Abbott*, 560 U.S. 1, 9 (2010); *see also* Convention, art. 4. Because eight-week-old A.M.T. was not habitually resident in Italy, the Sixth Circuit erred in upholding the return order.

I. This Court has articulated a three-step inquiry for determining the appropriate standard of appellate review to apply to mixed questions of law and fact. *See Pierce* v. *Underwood*, 487 U.S. 552, 558 (1988). While the historical facts that inform a district court's habitual-residence determination are properly reviewed for clear error, each step in this Court's analysis points toward *de novo* review of a district court's ultimate determination of habitual residence.

A. A "relatively explicit statutory command" requires *de novo* review of habitual-residence determinations. *Pierce*, 487 U.S. at 558. Congress has expressly underscored "the need for uniform international interpretation of the Convention." 22 U.S.C. § 9001(b)(3)(B). Only "'*de novo* review tends to unify precedent' and 'stabilize the law.'" *Cooper Indus., Inc.* v. *Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436 (2001) (citation omitted).

B. A "long history of appellate practice" also supports *de novo* review. *Pierce*, 487 U.S. at 558. Almost every court of appeals reviews habitual-residence determinations *de novo*. The two courts to depart from this approach did so without explanation or citation to authority. *See Maxwell* v. *Maxwell*, 588 F.3d 245, 251 (4th Cir. 2009); *Robert* v. *Tesson*, 507 F.3d 981, 995 (6th Cir. 2007).

C. Appellate courts are "'better positioned'" than district courts to decide habitual residence. *Pierce*, 487 U.S. at 560 (citation omitted). *De novo* review is

needed to formulate "auxiliary legal principles of use in other cases," *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC* v. *Vill. at Lakeridge LLC*, 138 S. Ct. 960, 967 (2018), "guide future decisions" by parents, *Thompson* v. *Keohane*, 516 U.S. 99, 114 (1995), and give full consideration to the "substantial consequences" that flow from a habitual-residence determination, *Pierce*, 487 U.S. at 563.

D. Contrary to the Sixth Circuit's reasoning, habitual residence is not "'a question of pure fact,'" Pet. App. 8a (citation omitted), but subsumes historical facts within "a 'complex of values'" reflecting the interests the Convention was designed to protect, *Miller* v. *Fenton*, 474 U.S. 104, 116 (1985) (citation omitted). *De novo* review is necessary to ensure that those values are given appropriate weight on a consistent, predictable basis in Hague Convention cases.

II. The parties agree that shared parental intent is necessary to establish the habitual residence of a child too young to acclimate to her surroundings. But the Sixth Circuit eviscerated this requirement by holding that parental intent can be "shared" even when the parents were never actually in agreement about the country in which their child would be raised.

A. The plain meaning of "habitual residence" under the Hague Convention requires "'a degree of settled purpose'" and "'continuity.'" *Feder* v. *Evans-Feder*, 63 F.3d 217, 223 (3d Cir. 1995) (citation omitted). That accords with the term's longstanding meaning, predating the Hague Convention, of requiring more than a "temporary or a secondary" connection to a location. *Cruse* v. *Chittum*, [1974] 2 All E.R. 940, 942–43 (Eng. Fam. Div.). Only where both parents actually share an intent to raise an infant in a particular country—i.e., where they are in agreement

about where the child will be raised—can the child's presence in that country truly be considered settled, continuous, and stable.

B. An actual-agreement requirement furthers the Convention's aims by facilitating prompt review of return petitions and deterring parents from depriving infants of a stable family and social environment. The Sixth Circuit's approach, in contrast, undermines the Convention's objectives by incentivizing parents to forum-shop for a more favorable venue in which to litigate custody disputes. That approach would be especially detrimental to children born into domestic violence, who are highly vulnerable to forum manipulation.

C. The "'opinions of . . . sister signatories'" are consistent with an actual-agreement requirement. *Abbott*, 560 U.S. at 16 (citation omitted). Several courts of last resort have rejected the Sixth Circuit's view that a child always must have a habitual residence. *See*, *e.g.*, *L.K.* v. *Dir.-Gen.*, [2009] HCA 9, ¶ 25 (Austl.); *A* v. *A*, [2013] UKSC 60, ¶ 44 (UK). And appellate courts in other Contracting States have denied return petitions where the parents did not actually agree on where to raise an infant. *See*, *e.g.*, *D.W.* v. *Dir.-Gen., Dep't of Safety*, [2006] 34 Fam. L.R. 656, ¶ 53 (Austl. Fam.); *Hanna B*, No. s2008/743 (Fin. Sup. Ct. Nov. 17, 2008).

III. The Sixth Circuit's decision should be reversed under any of the competing standards of review and approaches to "shared parental intent." Neither the Sixth Circuit nor the district court concluded that Monasky and Taglieri were in agreement, at any point after A.M.T.'s birth, that A.M.T. would be raised in Italy. And, even if actual agreement is not required, it remains clear that Monasky and Taglieri did

not share an intent to raise A.M.T. in Italy. Indeed, the district court found that Monasky "inten[ded] to return to the United States with A.M.T. as soon as possible in the future" once she became physically able to travel and had received A.M.T.'s U.S. passport. Pet. App. 94a. And that is exactly what Monasky did: She fled from her abusive husband and traveled with A.M.T. to her parents' home in the United States as soon as the eight-week-old's passport had arrived.

Because A.M.T. was not habitually resident in Italy, the Court should reverse the judgment and direct entry of an order that A.M.T. be returned to the United States.

ARGUMENT

The Hague Convention "protect[s] the right of children" to the "stability which is so vital to them." *Explanatory Report* ¶ 72. It achieves this goal by providing for "the prompt return" of a child if the child was wrongfully removed from her country of habitual residence. Convention, pmbl.; *id.*, arts. 1, 4.

In this case, however, an erroneous return order shattered the only stability in a young child's life. During the eight weeks A.M.T. spent in Italy, she lived in six different homes amid a sea of ever-changing faces. The only constant in A.M.T.'s life was her primary caretaker and mother Michelle Monasky—who wanted to leave Italy as soon as possible to escape her physically and sexually abusive husband, but was forced to remain there while she recovered from a difficult childbirth and waited in a domestic-violence safe house for A.M.T.'s U.S. passport. By forcibly ordering that A.M.T. be separated from the only parent

she had ever known and returned to an uncertain existence in Italy, the court of appeals turned the Hague Convention on its head.

I. THE SIXTH CIRCUIT ERRED IN REVIEWING THE DISTRICT COURT'S HABITUAL-RESIDENCE DETERMINATION FOR CLEAR ERROR.

To determine "whether a district court's decision should be subject to searching or deferential appellate review," *McLane Co.* v. *EEOC*, 137 S. Ct. 1159, 1166 (2017), this Court applies the framework set forth in *Pierce* v. *Underwood*, 487 U.S. 552 (1988). The Court first asks whether a "relatively explicit statutory command" answers the question. *Id.* at 558. Absent such a command, the Court "ask[s] whether the 'history of appellate practice' yields an answer." *McLane*, 137 S. Ct. at 1166 (quoting *Pierce*, 487 U.S. at 558). Where "neither a clear statutory prescription nor a historical tradition exists," the Court considers whether "'one judicial actor is better positioned than another to decide the issue in question.'" *Pierce*, 487 U.S. at 558–60 (citation omitted). All three factors point toward searching review of a district court's habitual-residence determination: While underlying facts are properly reviewed for clear error, the ultimate determination of habitual residence must be reviewed *de novo*.

A. The Statutorily Recognized Need For Uniform Interpretation Of The Convention Supports *De Novo* Review.

In implementing the Hague Convention, Congress underscored "the need for uniform international interpretation of the Convention." 22 U.S.C. § 9001(b)(3)(B). Only *de novo* review can satisfy that express congressional command.

To give effect to Congress's statutory mandate, federal courts must harmonize their analyses of the Hague Convention with other courts' Hague Convention opinions. That harmonization is especially critical here because "habitual residence" is not defined in the Convention or by Congress. To stabilize the meaning of this "central—often outcome-determinative—concept," *Mozes* v. *Mozes*, 239 F.3d 1067, 1072 (9th Cir. 2001), it is essential that courts take a consistent approach across cases.

This Court has recognized that only "'*de novo* review tends to unify precedent' and 'stabilize the law.'" *Cooper Indus., Inc.* v. *Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436 (2001) (quoting *Ornelas* v. *United States*, 517 U.S. 690, 697–98 (1996)). Indeed, "[i]ndependent appellate review of legal issues best serves the . . . goal[ ] of doctrinal coherence" because, on appeal, "the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge." *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 231–32 (1991). The same holds true for mixed questions of law and fact: Even if appellate judges undertaking independent review "cannot supply 'a definite rule,' they nonetheless can reduce the area of uncertainty" and thereby "advanc[e] uniform outcomes." *Thompson* v. *Keohane*, 516 U.S. 99, 113 n.13 (1995). "[D]eferential appellate review," in contrast, "invites divergent development of [the] law." *Salve Regina*, 499 U.S. at 234.

Several courts of appeals have applied *de novo* review to habitual-residence determinations for expressly these reasons. *See*, *e.g.*, *Mozes*, 239 F.3d at 1072 ("To achieve the uniformity of application across countries, upon which depends the realization of the

Convention's goals, courts must be able to reconcile their decisions with those reached by other courts in similar situations."); *Ruiz* v. *Tenorio*, 392 F.3d 1247, 1252 (11th Cir. 2004) (per curiam) ("This reference to other cases helps to achieve the Convention's goal of uniformity of application across countries."). As the United States has explained and these opinions recognize, "full appellate review" is "necessary to promote national uniformity in interpretation of the Convention." U.S. *Amicus* Br. 28, *Chafin* v. *Chafin*, 568 U.S. 165 (2013) (No. 11-1347).

The perils of deferential review are clear from this case. In applying clear-error review, the Sixth Circuit emphasized that the district court could have "rule[d] in either direction" regarding A.M.T.'s habitual residence. Pet. App. 11a. Permitting two district courts to reach opposite outcomes based on the same set of facts is "inconsistent with the idea of a unitary system of law," *Ornelas*, 517 U.S. at 697, and flatly at odds with the congressionally recognized "need for uniform international interpretation" of the Hague Convention, 22 U.S.C. § 9001(b)(3)(B).

B. Longstanding Appellate Practice Supports *De Novo* Review.

In addition to an explicit statutory command, a "long history of appellate practice," *Pierce*, 487 U.S. at 558, supports *de novo* review of habitual-residence determinations.

For nearly twenty years after Congress enacted ICARA in 1988, the courts of appeals were unanimous in reviewing habitual-residence determinations *de novo*. *See Gitter* v. *Gitter*, 396 F.3d 124, 133 n.8 (2d Cir. 2005); *Feder* v. *Evans-Feder*, 63 F.3d 217, 222 n.9 (3d Cir. 1995); *Miller* v. *Miller*, 240 F.3d 392, 399, 401

(4th Cir. 2001); *Larbie* v. *Larbie*, 690 F.3d 295, 306 (5th Cir. 2012); *Koch* v. *Koch*, 450 F.3d 703, 710 (7th Cir. 2006); *Silverman* v. *Silverman*, 338 F.3d 886, 896 (8th Cir. 2003) (en banc); *Mozes*, 239 F.3d at 1073 (9th Cir.); *Ruiz*, 392 F.3d at 1252 (11th Cir.); *see also Nicolson* v. *Pappalardo*, 605 F.3d 100, 105 (1st Cir. 2010) (applying *de novo* review with "some" deference).

The two circuits that departed from this consensus did so without any explanation or citation to any authority. In *Maxwell* v. *Maxwell*, 588 F.3d 245 (4th Cir. 2009), the Fourth Circuit purported to follow the *de novo* approach, stating that it would "'exercise plenary review of the court's choice of and interpretation of legal precepts and its application of those precepts to the facts.'" *Id.* at 250 (quoting *Feder*, 63 F.3d at 222 n.9). But the court of appeals went on to state—without elaboration—that "the crux of the issue on appeal is whether the district court's determination [of] habitual residence . . . is clearly erroneous." *Id.* at 251; *see also Robert* v. *Tesson*, 507 F.3d 981, 995 (6th Cir. 2007) (stating that "habitual residence is [a question] of fact, and is reviewed for abuse of discretion").

That "[a]lmost every Court of Appeals reviews" habitual residence *de novo*—and has done so since the Convention's implementation—"carries significant persuasive weight." *McLane*, 137 S. Ct. at 1167.

C. Appellate Courts' Institutional Advantages Support *De Novo* Review.

In ascertaining whether a trial or appellate court is better positioned to resolve a particular issue, this Court has considered whether "applying the law involves developing auxiliary legal principles of use in other cases," or involves, instead, addressing "'multi-

farious, fleeting, special, narrow facts that utterly resist generalization.'" *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC* v. *Vill. at Lakeridge LLC*, 138 S. Ct. 960, 967 (2018) (quoting *Pierce*, 487 U.S. at 561–62). *De novo* appellate review is "necessary" where a given legal concept "'acquire[s] content only through application,'" *Cooper Indus.*, 532 U.S. at 436 (quoting *Ornelas*, 517 U.S. at 697), and where guidance is needed to "'make[ ] it possible to reach a correct determination beforehand'" as to how the legal concept will be applied, *Ornelas*, 517 U.S. at 697 (citation omitted). These considerations support *de novo* review of a district court's habitual-residence determination because appellate courts can most effectively ensure that habitual-residence determinations are made in a clear and predictable manner.

1. *De novo* review of habitual-residence determinations is warranted because appellate courts are better situated than trial courts to bring clarity and consistency to cases in which legal determinations are made based on a set of underlying factual findings. Like determinations of "reasonable suspicion" and "probable cause"—which are reviewed *de novo*—"[a]rticulating precisely what [habitual residence] mean[s] is not possible." *Ornelas*, 517 U.S. at 695. Rather, habitual residence is a "fluid concept[ ] that take[s] [its] substantive content from the particular contexts in which [it] [is] being assessed." *Id.* at 696. An infant's eight-week stay in her country of birth, for example, may be deemed to reflect a habitual residence in one context—e.g., where the parents reside together and both intended at the time of the child's birth to remain in that country and raise the child there—but not in another—e.g., where the infant is born during the parents' vacation abroad or while one parent is temporarily residing in the country for work.

As a result, appellate courts in both the United States and other Contracting States have set forth "governing principle[s]" to guide the habitual-residence inquiry. *Feder*, 63 F.3d at 223. These principles govern, among other matters, the relationship between shared parental intent and acclimation, the indicia sufficient to establish either the existence of shared parental intent or that a child has acclimated to her surroundings, and the application of these concepts to infants. *See*, *e.g.*, *Silverman*, 338 F.3d at 897–98 (summarizing the framework for ascertaining habitual residence); *Mozes*, 239 F.3d at 1073–81 (similar); *LCYP* v. *JEK*, [2015] HKCA 407, ¶ 7.7 (H.K. C.A.) (similar); *A* v. *A*, [2013] UKSC 60, ¶ 54 (U.K.) (similar). "Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, [these] legal principles" in order to ensure consistent application and outcomes in factually analogous cases. *Ornelas*, 517 U.S. at 697.

2. *De novo* review of habitual-residence determinations is also necessary to "provide consistency and predictability" for parents confronting potentially significant decisions about their children's lives. *Koch*, 450 F.3d at 712–13. Just as *de novo* review of reasonable-suspicion and probable-cause determinations helps "provid[e] law enforcement officers with a defined 'set of rules'" to guide their conduct, *Ornelas*, 517 U.S. at 697 (citation omitted), the Hague Convention was designed "to protect children by creating a system of rules that will inform certain decisions made by their parents," *Mozes*, 239 F.3d at 1072. To that end, Contracting States have recognized the need for a "fuller understanding of the Convention on the

part of . . . parents and other persons exercising responsibility for children." Hague Conference, 1989 Special Commission Report, at 6 (Conclusion 2).[3]

Appellate courts provide parents with the necessary guidance and predictability by specifying and clarifying the legal principles that underpin habitual-residence determinations. If habitual residence were subject to the disparate outcomes fostered by clear-error review, the "law declaration aspect of independent review" would be lost, *Thompson*, 516 U.S. at 115, and parents would be "deprived of crucial information they need to make decisions," *Mozes*, 239 F.3d at 1072.

For example, parents would be unable to "guess, let alone determine, whether they are at risk of losing custody by allowing their children to visit overseas or . . . to make international trips with an estranged spouse." *Silverman*, 338 F.3d at 896. As a result, a parent facing marital difficulties may be less likely to allow a child to travel with the other parent or to visit family in another country out of concern that the child's current residence will not be deemed to be his "habitual residence" under the Hague Convention. *Id.* And a parent in an abusive relationship may be less likely to remove herself and her child from that dangerous setting because the parent may worry that even fleeting connections to the country of removal could establish a "habitual residence" and trigger a return order. That uncertain legal framework is not

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[3] The Hague Conference on Private International Law periodically convenes Special Commission meetings to review the practical operation of the Hague Convention. After each meeting, the Special Commission publishes its Conclusions and Recommendations in a report. For clarity, the Conclusions and Recommendations of each Special Commission are referred to here as "Hague Conference, [year] Special Commission Report."

what was intended by the Contracting States when they signed the Hague Convention or by Congress when it implemented the Convention.

3. Independent review is appropriate for the additional reason that habitual-residence determinations carry "substantial consequences." *Pierce*, 487 U.S. at 563. A habitual-residence determination ordinarily establishes not only the country in which custody rights will be adjudicated but also the country in which a child will live and the parent in whose care the child will reside while those rights are being adjudicated. Moreover, habitual-residence determinations can have significant "practical consequences" for the ultimate custody decision because the custody laws of the Contracting States vary widely. Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 101 (1999) ("Beaumont & McEleavy"). An erroneous determination of habitual residence is therefore an enormously consequential outcome that appellate courts should guard against by undertaking *de novo* review.

D. The Sixth Circuit's Reasoning In Applying Clear-Error Review Is Not Persuasive.

In applying clear-error review, the Sixth Circuit relied exclusively on a statement in the Hague Convention *Explanatory Report* that habitual residence is "'a question of pure fact.'" Pet. App. 8a (quoting *Explanatory Report* ¶ 66). The court of appeals' reliance on the *Explanatory Report* is misplaced.

Although the habitual-residence inquiry often encompasses a number of historical facts, the ultimate determination of habitual residence reflects a *legal* judgment about the settings in which the Contracting

States intended the Hague Convention's return remedy to be available. Indeed, as the *Explanatory Report* goes on to clarify, the Hague Conference signatories considered habitual residence a "well-established concept." *Explanatory Report* ¶ 66. And that concept "indirectly brings into clear focus those relationships which the Convention seeks to protect." *Id.* ¶ 64. To give that undefined concept its proper contours, courts must articulate legal principles and "exercise judgment about the values that animate" habitual residence, *Mozes*, 239 F.3d at 1073, including stability, continuity, and settled purpose, *see infra* Part II.A.

In this respect, habitual residence closely resembles other types of determinations that are reviewed *de novo*, such as probable cause, reasonable suspicion, the voluntariness of a confession, and *Miranda* "in custody" determinations. *See Ornelas*, 517 U.S. at 699; *Miller* v. *Fenton*, 474 U.S. 104, 116 (1985) (independent review of voluntariness in habeas cases); *Thompson*, 516 U.S. at 113 (same as to "in custody" determinations). Like those other concepts, habitual residence has a "hybrid quality" that subsumes a number of historical facts within "a 'complex of values.'" *Miller*, 474 U.S. at 116 (citation omitted). And while "[c]redibility determinations . . . may sometimes contribute to the establishment of the historical facts," habitual residence requires an additional "evaluation made after determination of those circumstances," *Thompson*, 516 U.S. at 113—namely, whether those facts demonstrate that a child has the type of settled, stable existence in the country from which she was removed to trigger the protections of the Hague Convention.

Appellate courts are better positioned to undertake that evaluation in a manner that gives effect to

the intentions of the Contracting Parties and that provides courts and parents with a clear, consistent set of principles governing habitual-residence determinations.

* * *

In sum, the Sixth Circuit's application of "highly deferential" clear-error review to the district court's habitual-residence determination is inconsistent with the three factors that this Court has articulated for ascertaining the standard of review for mixed questions of law and fact. Pet. App. 9a. Each of those factors demonstrates that, rather than inquiring whether the district court's determination struck the court "as wrong with the force of a five-week-old, unrefrigerated dead fish," *id.* (internal quotation marks omitted), the Sixth Circuit should have reviewed historical facts for clear error while making a *de novo* determination as to whether those facts establish that A.M.T. was habitually resident in Italy. As explained below, those facts make clear that eight-week-old A.M.T. was not habitually resident in Italy when Monasky fled with her to the United States.

II. THE SIXTH CIRCUIT ERRED IN HOLDING THAT SHARED PARENTAL INTENT CAN BE ESTABLISHED WHERE THE PARENTS ARE NOT ACTUALLY IN AGREEMENT.

The parties agree—as every court of appeals to have decided the question has concluded—that eight-week-old A.M.T.'s habitual residence "turns on 'shared parental intent'" because she was too young to have acclimated to her surroundings. Br. in Opp. 4. Although the Sixth Circuit purported to adopt the "shared parental intent" standard in its en banc decision, Pet. App. 8a–9a, it adopted that standard in

name only—upholding the district court's supposed determination that A.M.T.'s parents shared an intent to raise her in Italy even though Monasky and Taglieri were not actually in "agreement" about where to raise their child, Pet. App. 12a.

As an initial matter, it is entirely unclear how parents can share an intent to raise a child in a specific country where there is no agreement between the parents on where the child will be raised. The Sixth Circuit never explained how *shared* parental intent can exist where the parents do not actually "see eye to eye" on where to raise their child. Pet. App. 12a. The Court can and should reject the Sixth Circuit's habitual-residence standard on that basis alone.

That outcome is confirmed by the text, context, and purpose of the Hague Convention, as well as by decisions from other Contracting States. Those interpretive guideposts all make clear that parents must actually *share* an intent to raise an infant in a particular country—i.e., they must be in agreement on that issue—in order for that country to be deemed the infant's habitual residence.

A. Text And Context Support An Actual-Agreement Requirement.

The interpretation of a treaty "must begin . . . with the text of the treaty and the context in which the written words are used." *Air France* v. *Saks*, 470 U.S. 392, 396–97 (1985); *see also Abbott*, 560 U.S. at 10 (same). Here, although "habitual residence" is not defined in the Hague Convention or in the treaty's implementing legislation, the Convention's text and context demonstrate that an infant's residence in a country cannot be "habitual" unless both parents share an

intent—and thus are in actual agreement—that she remain there.

A "habitual residence" requires regular physical presence in a country with an intention of remaining there for at least some time. *See* Black's Law Dictionary 640 (5th ed. 1979) (defining "habitual" as "[c]ustomary, usual, of the nature of a habit"); *id.* at 1176 (defining "residence" as "the fact of abode and the intention of remaining").[4] The phrase "habitual residence" thus requires "'a degree of settled purpose'" or "'a sufficient degree of continuity to be properly described as settled.'" *Feder*, 63 F.3d at 223 (quoting *In re Bates*, No. CA 122-89 (U.K. E.W.H.C. 1989)); *see also Mozes*, 239 F.3d at 1074 n.15 ("'The significance of the adverb "habitually" is that it recalls two necessary features . . . namely residence adopted voluntarily and for settled purposes.'" (alteration in original; citation omitted)).

The broader context informing the Hague Convention's use of the phrase "habitual residence" confirms that a settled purpose and continuity are essential to establishing a habitual residence. When the Hague Convention was adopted, the concept of habitual residence was already "well-understood" in international law. *Explanatory Report* ¶ 66. "Habitual residence" had been used in earlier conventions, including a 1961 convention concerning the protection of minors. *See id.*; *see generally* Convention Concerning the Powers of Authorities and the Law Applicable

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[4] Because English was an authoritative language of the Convention, *see* Convention, arts. 24, 45, this Court can "look to the [English] legal meaning for guidance," *Air France*, 470 U.S. at 399.

in Respect of Protection of Infants, Oct. 5, 1961, 658 U.N.T.S. 144 ("1961 Convention").

The 1961 Convention focused on the concept of habitual residence because—unlike the concept of domicile—habitual residence reflects the quality of a child's ties to a country. As explained in a report that preceded finalization of the 1961 Convention, a child's domicile is a legal attachment that automatically follows the domicile of the child's parents—or, in some countries, the child's father—and can be disconnected from the child's actual social environment. *See* M.W. de Steiger, *Rapport Explicatif*, *in* 4 Acts and Documents of the Ninth Session, Protection of Minors 7, 13–14 (1960) ("*Rapport Explicatif*"). Habitual residence, in contrast, refers to a social environment in which the child actually lived and to which he developed substantial ties. *See id*.

As explained by courts interpreting the concept of habitual residence before adoption of the Hague Convention, intent was essential to ensuring that physical presence in a country was truly "habitual." Courts thus construed "habitual residence" as requiring both an intent to remain for some time and a residence that was not of "temporary or . . . a secondary nature." *Cruse* v. *Chittum*, [1974] 2 All E.R. 940, 942–43 (Eng. Fam. Div.); *see also*, *e.g.*, *Indyka* v. *Indyka*, [1967] 3 W.L.R. 510, 534 (HL) (requiring a "real and substantial connection").

Because an infant is too young to develop her own intentions about her place of residence, an infant's residence cannot be deemed "habitual" unless "the persons entitled to fix [her] residence . . . agree" to raise her in that country. *Mozes*, 239 F.3d at 1076. As the courts of appeals requiring actual agreement have

recognized, the parents' joint view on where they intend to raise the child provides the settled purpose and continuity that the infant herself is unable to manifest. *See*, *e.g.*, *Gitter*, 396 F.3d at 133 (asking "where the parents mutually intended the child's habitual residence to be"); *Berezowsky* v. *Ojeda*, 765 F.3d 456, 468 (5th Cir. 2014) ("the parents must reach some sort of meeting of the minds regarding their child's habitual residence"); *Murphy* v. *Sloan*, 764 F.3d 1144, 1152 (9th Cir. 2014) (holding that an infant was not habitually resident in Ireland because "there was never any discussion, *let alone agreement*, that the stay abroad would be indefinite" (emphasis added)).

In holding that the habitual residence of an infant can be established in the absence of the parents' mutual intent, the Sixth Circuit rendered the word "habitual" meaningless. Where no meeting of the minds is required, there is no reliable means for ensuring that an infant's mere physical presence in a country has a sufficiently settled quality to be deemed "habitual." Thus, in many cases, an infant's habitual residence would simply be where she had resided since birth. That would impermissibly render superfluous the qualifying term "habitual" because an infant's short-lived presence in a country does not intrinsically demonstrate sufficient continuity and stability to make that residence "habitual." *Cf. Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 299 n.1 (2006) ("it is generally presumed that statutory language is not superfluous").

This case exposes the deficiencies of the Sixth Circuit's approach to habitual residence. The Sixth Circuit reasoned "[t]hat an 'infant will normally be a habitual resident of the country where the matrimonial home exists.'" Pet. App. 13a (citation omitted). But

the purported existence of a "matrimonial home" before A.M.T. was even conceived had little bearing on whether her parents actually shared an intent that she would be raised in Italy. Indeed, Monasky and Taglieri did not even share the same home after the first month of Monasky's pregnancy, and, far from intending to reunite, Monasky "inten[ded] to return to the United States with A.M.T. as soon as possible." Pet. App. 94a. Moreover, A.M.T. lived essentially a nomadic existence during her short time in Italy, living in six different locations while surrounded by a shifting cast of characters, with the lone constant being her mother. The Sixth Circuit nevertheless upheld the district court's habitual-residence determination because, in the court of appeals' view, the "absence of a subjective agreement between the parents does not" foreclose a finding of shared parental intent. Pet. App. 12a.

Just as the Contracting States to the 1961 Convention expressly rejected a domicile test because that test ignored whether the child's social environment had any stability or continuity, *see Rapport Explicatif* 13–14, this Court should reject the Sixth Circuit's habitual-residence standard because it can result in an infant's being deemed habitually resident in a country where her presence was unsettled and fleeting—the exact opposite of a *habitual* residence.

B. Requiring Actual Agreement Accords With The Convention's Objects And Purposes.

The Convention's "objects and purposes" also inform the standard for establishing habitual residence. *Abbott*, 560 U.S. at 20. "The Convention is based on the principle that the best interests of the child are well served when decisions regarding custody rights

are made in the country of habitual residence." *Id*. The Convention therefore aims to "ensure [a child's] prompt return" to her habitual residence, and to "protect children internationally from the harmful effects of their wrongful removal or retention." Convention, pmbl.

An actual-agreement requirement promotes both aims by facilitating prompt review of Hague Convention applications and by deterring parents from removing infants from a stable social environment. In contrast, the Sixth Circuit's approach to habitual residence would complicate Hague Convention proceedings, facilitate forum-shopping, and threaten the stability and safety of infants who are born into a violent home.

1. An Actual-Agreement Requirement Facilitates Prompt Resolution Of Return Petitions.

An actual-agreement requirement helps ensure that courts can promptly resolve which country is the appropriate forum in which to adjudicate custody rights.

a. By design, the Hague Convention seeks to ensure "prompt" judicial resolution of a return petition. Convention, pmbl.; *id.*, arts. 1, 7; *see also* Convention, art. 11 (requiring courts to "act expeditiously in proceedings for the return of children"). To that end, the Convention authorizes courts to consider "documents and any other information appended" to a petition. Convention, art. 30. As the United States recognized when this provision was added to the Convention, streamlining litigation in this manner is "extremely important from a procedural point of view" because it ensures "the speedy consideration of applications."

Procès-verbal No. 11, *in* 3 Acts and Documents of the Fourteenth Session, Child Abduction 320 (1982) (United States); *see also Procès-verbal* No. 7, *id.* 292 (Ireland) (noting that long delays might "allow a child to form new attachments").

Judicial delay nevertheless continues to be "a severe problem . . . that affect[s] the efficient operation of the Convention." Hague Conference, 2017 Special Commission Report, ¶ 3; *see also* Hague Conference, 1993 Special Commission Report, at 5 (Conclusion 7) ("[d]elay in legal proceedings is a major cause of difficulties in the operation of the Convention"). Special Commissions convened after the Convention's enactment have repeatedly recommended that "[a]ll possible efforts should be made to expedite such proceedings." Hague Conference, 1993 Special Commission Report, at 5 (Conclusion 7); *see also* Hague Conference, 2006 Special Commission Report, ¶ 1.4.1 ("reaffirm[ing]" recommendations of 2001 Special Commission that return petitions be processed "expeditiously" and that courts use "firm management" to "ensure the speedy determination of return applications").

b. Requiring that both parents actually agree on the country in which an infant will be raised facilitates prompt judicial resolution of return petitions. Where actual agreement is required, a court need undertake only a relatively straightforward inquiry to ascertain an infant's habitual residence: whether the parents were in agreement, after their child was born, that the infant would be raised in a particular country. While the answer to that inquiry may, in some cases, require consideration of testimony, in many other cases the answer can be readily ascertained through objective evidence—such as the parents' purchasing a new home together, expanding an existing

home, or signing a contract for long-term child care—demonstrating that the parents mutually intended to raise the child in a particular country.[5] By facilitating resolution in these cases "on the basis only of the application and any documents or statements in writing submitted by the parties," this approach "serve[s] to expedite the disposition of the case." Hague Conference, 1993 Special Commission Report, at 5 (Conclusion 7).

Absent an actual-agreement requirement, however, the inquiry would be significantly more complicated. Attempting to divine parental intent in the absence of agreement between the parents would require the court to sift through potentially voluminous evidence regarding the infant's day-to-day existence in a country—such as the parents' purchasing a car seat, securing short-term child care, or setting up doctors' appointments—to assess whether that evidence somehow indicates a sufficiently settled "shared" intent to raise the infant in that country. That inquiry, in turn, often would necessitate "taking oral testimony or requiring the presence of the parties in person," which could substantially complicate and lengthen the proceedings. Hague Conference, 1993 Special Commission Report, at 5 (Conclusion 7). For example, if the petitioner presented evidence that the removing parent had arranged for short-term child care for the infant, oral testimony may be required to provide context for that decision: Was it a temporary measure intended to bide time until the infant could

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[5] Where such objective evidence is ambiguous, either party may seek to establish the existence (or non-existence) of actual agreement to raise the child in a particular country through declarations and testimony.

travel to another country or a manifestation of parental intent to raise the child in that country? As commentators have recognized, "[t]o engage in a prolonged assessment of the material facts would be to defeat one of the primary objectives of the Convention." Beaumont & McEleavy 103.

This case powerfully illustrates the practical shortcomings of jettisoning an actual-agreement requirement in determining shared parental intent. The district court took *seventeen* months to decide the case—including six months to write an opinion after a four-day bench trial. Had the district court required Taglieri to provide evidence at the outset that he and Monasky were in agreement that A.M.T. would be raised in Italy, the court could have resolved the case far more quickly—likely on a motion for summary judgment—because Taglieri has never identified meaningful evidence of such an agreement. Indeed, the documentary evidence in the case—embodied in e-mails that Monasky sent both before and after A.M.T. was born—lays bare the absence of any such agreement and instead makes clear that Monasky's "'fixed subjective intent'" was "to take A.M.T. to the United States." Pet. App. 97a. Under an actual-agreement standard, that would have been the end of the case.

2. An Actual-Agreement Requirement Protects Infants And Prevents Forum-Shopping.

An actual-agreement requirement also protects infants both by helping to ensure that an infant remains in "the family and social environment in which its life has developed," *Explanatory Report* ¶¶ 12–15, and by preventing parents from forum-shopping for a

more favorable venue in which to litigate custody disputes based on "artificial jurisdictional links," *id.* ¶ 11.

a. The Hague Convention is designed to "protect[ ] the right of children to have the stability which is so vital to them respected." *Explanatory Report* ¶ 72. The return remedy is intended to further this objective by requiring that a child be returned to her country of habitual residence, i.e., "where the child's relationships [had] developed." *Id.* ¶ 65; *see also* U.S. Dep't of State, *Hague Int'l Child Abduction Convention; Text & Legal Analysis*, 51 Fed. Reg. 10,494, 10,504 (Mar. 26, 1982) ("Children who are wrongfully moved from country to country are deprived of the stable relationships which the Convention is designed promptly to restore"). The return remedy does not apply, however, where a child would be "guarantee[d] [her] stability in a new situation." *Explanatory Report* ¶ 72; *see also* Convention, art. 12 (authorizing a return remedy in suits filed more than one year after removal *unless* "the child is now settled in its new environment"); *id.*, art. 13 (limiting the return remedy in circumstances where it would be harmful to the child).

By prescribing the forum that should adjudicate custody rights, the return remedy eliminates the incentive for parents to remove or retain a child outside of her habitual residence in order to shop for a more favorable forum. But without a clear standard for ascertaining habitual residence, parents may not be deterred by the Convention from engaging in forum-shopping and may be willing to take their chances on their ability to defeat a return petition. In contrast, a parent considering absconding with a child will be far less likely to do so if it is clear that the parent would

be removing the child from her habitual residence and that a return order would therefore be the probable outcome. Effective operation of the Convention thus requires an "understanding of the Convention on the part of . . . parents and other persons exercising responsibility for children." Hague Conference, 1989 Special Commission Report, at 6 (Conclusion 2).

b. In accordance with the Convention's objectives, requiring proof that both parents agree on where to raise a child promotes stability in children's lives and deters forum-shopping.

Where there was parental agreement prior to removal, an infant is more likely to have settled and continuous ties to a country that reflect "the family and social environment in which its life has developed." *Explanatory Report* ¶¶ 12–15; *see also supra* Part II.A. The existence of parental agreement about where to raise the child lends a degree of stability to the infant's existence, even if the parents' agreement subsequently breaks down. Conversely, where there was never parental agreement on where to raise the child, the infant's life in the country from which she was removed is likely to have lacked the "stability" that the Convention seeks to protect. *Explanatory Report* ¶ 72. If the parents "did not see eye to eye" on where to raise the child at any point after the child was born, Pet. App. 12a, it is likely that the infant's social environment was fraught with uncertainty, instability, and acrimony. The Convention was not designed to return infants to such unstable settings.

Moreover, by providing a clear-cut standard for assessing an infant's habitual residence, the actual-agreement requirement also helps to deter forum shopping. A parent is likely to know whether, before

the breakdown of the relationship, he was in agreement with the other parent about where the infant would be raised. The knowledge of that agreement—and the fact that it can often be verified through objective evidence such as a joint decision to purchase a home or sign a contract for long-term child care—will make it less likely that a parent will decide to flee with a child and take his chances on the outcome of Hague Convention proceedings. In contrast, a habitual-residence standard under which shared parental intent can exist in the absence of actual agreement between the parents would be far more amorphous and subjective, and, given the inherent uncertainties of intent-based judicial inquiries, would be less likely to deter parents from removing infants from countries that should properly be deemed their habitual residence.

c. The Sixth Circuit rejected an actual-agreement requirement for determining shared parental intent solely because it was concerned that some children might have "no habitual residence and thus no protection." Pet. App. 8a. That concern is misplaced.

The Hague Convention is not premised on the belief that all removal "is bad for the child." Adair Dyer, *Report on International Child Abduction by One Parent ('Legal Kidnapping')*, *in* 3 Acts and Documents of the Fourteenth Session, Child Abduction 12, 22 (1982) ("*Dyer Report*"). Indeed, removal may actually "remov[e] him from an unstable or uncertain environment." *Id.* Accordingly, the Convention provides only a limited return remedy that "does not cover all children" who are removed or retained without the permission of both parents. *Hague Convention Text & Legal Analysis*, 51 Fed. Reg. at 10,504; *see also Explanatory Report* ¶ 37 (similar). If a child is not "habitu-

ally resident" in a Contracting State immediately before the removal or retention, the Convention does not "apply." Convention, art. 4.

"[T]his [outcome] should not immediately be regarded as an undesirable lacuna. If a child does not have a factual connection to a State and knows nothing of it socially, culturally, and linguistically, there will be little benefit in sending him there." Beaumont & McEleavy 90. Moreover, where the Convention does not apply, that means only that there is no Convention-specified forum for adjudicating custody rights—not that there is *no* forum at all for that adjudication or no other potential procedures for securing a child's return. A parent seeking the return of a removed or retained child would still be protected by "remedies available under other laws or international agreements," and would still be able to litigate custody rights under the laws of the country in which the child is currently residing. 22 U.S.C. § 9003(h); *see also* Convention, art. 34 (the Convention does "not restrict the application" of other international agreements when it does not apply). For example, 49 States have adopted the Uniform Child Custody Jurisdiction and Enforcement Act, which prescribes the State or foreign country that has jurisdiction to adjudicate custody rights in non-Hague Convention cases and authorizes a state court to "fashion an appropriate remedy" where the court concludes that it lacks jurisdiction to adjudicate the custody dispute. *See* Unif. Child Custody Jurisdiction & Enforcement Act, 9 U.L.A. §§ 208(b), 302(a) (1999).

By proceeding on the assumption that all children must have a habitual residence, the Sixth Circuit undermined the Convention's objective of preventing the

establishment of venue based on "artificial jurisdictional links." *Explanatory Report* ¶ 11; *see also Holder* v. *Holder*, 392 F.3d 1009, 1020 (9th Cir. 2004) ("'[I]f an attachment [to a State] does not exist, it should hardly be invented.'" (second alteration in original) (quoting Beaumont & McEleavy 89)). In fact, artificially imposing a habitual residence may inflict severe harm on a child by returning the child to an unstable environment to which he lacks meaningful ties and causing the "sudden upsetting of [the child's] stability" and "traumatic loss of contact with the parent who has been in charge of his upbringing." *Explanatory Report* ¶ 24; *see also D.W.* v. *Dir.-Gen., Dep't of Safety*, [2006] 34 Fam. L.R. 656, ¶ 54 (Austl. Fam.) ("the interests of children generally could well be adversely affected if the courts too readily find" that a child had "become 'habitually resident' in [a] foreign country").

That is precisely what transpired here. After Taglieri's petition was erroneously granted, A.M.T. was forcibly removed from the only parent she had ever known—a parent who had raised her for nearly two years—and was returned to an unfamiliar environment that had offered her no stability in the eight short weeks she had spent there and that was full of people whom she did not know and who did not speak her language. A.M.T. is precisely the type of child the Hague Convention aimed to protect by *not* prescribing a return order.

3. An Actual-Agreement Requirement Is Essential To Protect Children Born Into Domestic Violence.

An actual-agreement requirement for determining shared parental intent is especially important to protect children who are born into domestic violence.

The Hague Convention itself was not focused on the removal of children from a context of domestic violence. The "typical" situation it addressed was, instead, "where custody has been settled on one of the" parents, and "exclusion of the non-custodial parent" leads that parent to abduct the child. *Dyer Report* 20. But because so many abducting parents since 1980 have reported that they are fleeing domestic violence, recent meetings of the Special Commission have made issues of domestic and family violence a "high priority" and have sought to "promot[e] greater consistency in dealing with domestic and family violence allegations." Hague Conference, 2011 Special Commission Report, ¶ 37.

The actual-agreement requirement takes heed of the special concerns and challenges that domestic violence creates by preventing an abusive parent from establishing the habitual residence of a child based on the abused parent's coerced "consent." In cases of "verbal and physical abuse of a spouse," courts have recognized that "the conduct of the victimized spouse asserted to manifest 'consent' must be carefully scrutinized." *Tsarbopoulos* v. *Tsarbopoulos*, 176 F. Supp. 2d 1045, 1056 (E.D. Wash. 2001); *see also*, *e.g.*, *A*, [2013] UKSC 60, ¶ 65 (finding "highly relevant" "[t]he circumstances in which the[ ] children came to be in Pakistan, and the coercion to which their mother was subject"). An actual-agreement requirement ensures that "[h]abitual residence is not established when the removing spouse is coerced involuntarily to move to or remain in another country." *Silverman*, 338 F.3d at 900.

If actual agreement is not required, however, there is a much greater possibility that a court could deem an infant habitually resident in a country where

one of the parents remained involuntarily after the child's birth. Indeed, that is exactly what occurred in this case. The district court found that Monasky was physically and sexually abused by her husband and "inten[ded] to return to the United States with A.M.T. as soon as possible in the future." Pet. App. 94a; *see also* Pet. App. 103a–105a. The court nevertheless concluded that A.M.T. was habitually resident in Italy because Monasky "had no crystalized plan in place" to return to the United States "until the March 31, 2015 incident" that prompted Monasky to flee to a domestic-violence safe house. Pet. App. 94a.

That troubling result ignores that Monasky could not purchase a plane ticket until A.M.T.'s U.S. passport had arrived and misconstrues her dependence on Taglieri's assistance to help care for A.M.T. while she recuperated from the birth. In affirming this result, the Sixth Circuit put a thumb on the scale in favor of domestic abusers and compelled a child's return to an abusive parent—even though the abused parent was the child's primary caretaker and had remained in the country of birth involuntarily. If the Sixth Circuit's approach prevails, other parents victimized by domestic violence may be unwilling to remove themselves and their children from that dangerous setting—even if they would be justified in doing so—out of fear that the children would be returned under the Hague Convention and that, like Monasky, the abused parents would lose all custody rights under the laws of the country to which the children were returned. There is no indication that the Contracting States or Congress intended that highly problematic outcome.

C. Requiring Actual Agreement Accords With The Decisions Of Courts In Other Contracting States.

The post-ratification understanding of other Contracting States is consistent with requiring actual agreement to establish shared parental intent and hence an infant's habitual residence. *See Abbott*, 560 U.S. at 16 ("In interpreting any treaty, '[t]he opinions of our sister signatories . . . are entitled to considerable weight.'" (alterations in original; citation omitted)). Several courts of last resort in other Contracting States have explicitly rejected the Sixth Circuit's rationale for declining to adopt an actual-agreement requirement. And appellate courts in other Contracting States have repeatedly denied a return petition where the parents did not actually agree on where to raise an infant.

1. Petitioner has found no decision from another Contracting State squarely addressing whether actual agreement is required to establish shared parental intent. But several courts of last resort have expressly rejected the Sixth Circuit's view that a child must always have a habitual residence.

In *L.K.* v. *Director-General*, [2009] HCA 9, ¶ 25 (Austl.), the High Court of Australia explained that, "[e]ven if place of habitual residence is necessarily singular, that does not entail that a person must always be so connected with one place that it is to be identified as that person's place of habitual residence." The court listed as "example[s]" circumstances where the child has "abandon[ed]" a habitual residence "without at once becoming habitually resident in some other place" or has a "nomadic life." *Id.*

Other courts of last resort have agreed that a child need not have a habitual residence. *See A*, [2013] UKSC 60, ¶ 44 (UK) ("[T]he English jurisprudence recognises that a person may have no country of habitual residence."); *S.K.* v. *K.P.*, [2005] 3 N.Z.L.R. 590 ¶ 89 (N.Z.) ("[T]here may be cases where habitual residence has not been gained in a new State but where it can no longer be said that habitual residence is retained in the former State"); *see also* Beaumont & McEleavy 96–101 (summarizing foreign cases where a child was found to have lost a habitual residence without necessarily acquiring a new one). The Sixth Circuit's contrary conclusion—that all children *must* have a habitual residence, Pet. App. 8a—is incompatible with these decisions.

2. Where there has been no actual agreement to raise an infant in a particular country, appellate courts in other Contracting States have repeatedly held that the infant was not habitually resident there.

In *D.W.*, [2006] 34 Fam. L.R. 656, for example, the Family Court of Australia—which is one level below the High Court of Australia—held that an infant who traveled with his mother shortly after birth from Australia to the United States did not acquire habitual residence in the United States after two-and-a-half months because the mother had moved there only "to see how a relationship with [the father] would 'work out'" and, as a result, "there could be no shared intention on the part of the parents of the child in question that the United States was to be their habitual residence." *Id.* ¶¶ 52–53; *see also id.* ¶¶ 8–10.

The Supreme Court of Finland has twice considered the habitual residence of an infant in the absence of actual agreement and concluded, in both cases, that several months in a new country were insufficient to

establish an infant's habitual residence. *See Satu B* v. *Andrew A*, No. 824, ¶ 8 (Fin. Sup. Ct. Apr. 12, 2011) (holding that, where an infant was taken at age seventeen months to Finland without any "consensus . . . about the family's intention to move to Finland at any specific time," the infant's habitual residence was not Finland); *Hanna B*, No. s2008/743, ¶ 10 (Fin. Sup. Ct. Nov. 17, 2008) (holding that, where an infant was taken at age four months to Scotland without any agreement "to stay even for the time being in Scotland," the infant's habitual residence was not Scotland).

In the United Kingdom, appellate courts in the decades after the Convention was adopted uniformly held that "'[a]n appreciable period of time and a settled intention'" by both parents were "'necessary'" to establish a new habitual residence. *C.* v. *C.*, [1995] C.S.I.H. 17 (Scot.) (quoting *In re J (A Minor) (Abduction: Custody Rights)*, [1990] 2 AC 562 (HL)); *see also*, *e.g.*, *TLMP* v. *AWP*, [2013] CSOH 40, ¶ 40 (Scot.) ("I need not address the assertion that [the child] is habitually resident in Scotland, other than to say that that cannot be the case in the absence of the mother's consent which, as I have held, was never given.").

The U.K. Supreme Court recently shifted the focus of the habitual-residence inquiry from the parents' intent to their "social and family environment," but has emphasized that this shift is "unlikely . . . [to] produce any different results." *A*, [2013] UKSC 60, ¶ 54. Indeed, that court recently held in *AR* v. *RN*, [2015] UKSC 35 (UK), that although "a joint parental intention to live permanently in the country in question is by no means decisive," the fact that the parents had agreed that two young children would move to Scotland with their mother for "a period of 12 months" was

sufficient to demonstrate that "[t]heir life there had the necessary quality of stability" to establish a new habitual residence. *Id.* ¶¶ 21, 23.[6]

Thus, a number of foreign courts have adopted interpretations of the Hague Convention and modes of analysis for determining habitual residence that call into question the Sixth Circuit's rejection of an actual-agreement requirement.

* * *

The text, context, and purpose of the Hague Convention—along with the decisions of other Contracting States—point decisively in favor of an actual-agreement requirement to establish shared parental intent and hence the habitual residence of an infant. As discussed next, however, even if shared parental intent can exist without actual agreement between the parents, the record in this case makes clear that A.M.T. was not habitually resident in Italy.

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[6] In addition, courts in other Contracting States have denied return petitions where, as here, the infant's primary caretaker did not intend to raise the infant in a particular country and did not herself have strong ties to that country. *See*, *e.g.*, *Beairsto* v. *Cook*, 2018 NSCA 90, ¶¶ 114, 117 (Can. N.S. C.A.) (seven-week-old infant born into context of domestic abuse was not habitually resident in country where the infant's sole caretaker "was uncertain whether she would return to" that country and had "no family [there], no support network, and was only there on a visitor's visa"); *see also* FamC (TA) 046252/04 *Ploni* v. *Almonit* [2005] (not reported, 13.1.05) (Isr.) (infant's acquisition of habitual residence requires a shared actual intention of the parents) (summary available at https://www.incadat.com/en/case/865).

III. A.M.T. WAS NOT HABITUALLY RESIDENT IN ITALY UNDER ANY STANDARD OF REVIEW OR HABITUAL-RESIDENCE TEST.

Under any of the competing standards of review and habitual-residence tests, the Sixth Circuit erred in affirming the district court's habitual-residence determination and return order. Under the appropriate habitual-residence standard for infants, the district court's ruling was erroneous—and, indeed, clearly erroneous—because A.M.T.'s parents were never in agreement that A.M.T. would be raised in Italy. Even under the Sixth Circuit's flawed approach to shared parental intent (and under either potential standard of review), however, the Sixth Circuit still erred because the district court expressly found, and the record makes abundantly clear, that Monasky *lacked* the intent to raise A.M.T. in Italy and instead "inten[ded] to return to the United States with A.M.T. as soon as possible." Pet. App. 94a. The Court should reverse the district court's judgment and direct the entry of a re-return order.[7]

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[7] At a minimum, the court of appeals' decision must be vacated because it failed to recognize that the "district court's finding rest[ed] on an erroneous view of the law," which is a sufficient "basis" for "set[ting] aside" that finding. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982). The district court imposed—and the Sixth Circuit condoned as "the correct legal standard," Pet. App. 14a—a burden-shifting presumption, not recognized by any other court, that a "matrimonial home" established before a child's birth is the child's habitual residence after birth. Pet. App. 97a; *see also* Pet. App. 13a (endorsing view "[t]hat an 'infant will normally be a habitual resident of the country where the matrimonial home exists'" (quoting Pet. App. 90a)). On appeal, not even Taglieri defended that legally flawed presumption, which ignores the realities of the child's life and parents' intentions.

A. The record overwhelmingly establishes that Monasky and Taglieri never agreed or otherwise manifested a *shared* intent to raise A.M.T. in Italy. To the contrary, "Monasky had a 'fixed subjective intent' to take A.M.T. to the United States," Pet. App. 97a, once she had physically recovered from her cesarean section and had obtained A.M.T.'s U.S. passport.

As Taglieri acknowledged, Monasky "was never happy in Italy"—a country where she had no support network and could not speak the language—"and . . . planned to leave from the start." JA114. Those plans started to crystallize after Taglieri began physically and sexually abusing Monasky. Pet. App. 75a, 103a–105a. Starting in August 2014, Monasky began to apply for jobs in the United States, look for American health-care and child-care options, and search for American divorce lawyers. Pet. App. 76a; *see also* JA28. Monasky also insisted on obtaining a lease agreement with a three-month escape clause. Pet. App. 76a; JA199. And shortly before A.M.T. was born, Monasky obtained multiple quotes from moving companies for a move back to the United States. Pet. App. 77a.

Both before and after A.M.T.'s birth, Monasky communicated to Taglieri her intent to return to the United States with A.M.T. *See* Pet. App. 77a–80a; *see also* JA105–07; JA111; JA113–14; JA116. For example, in February 2015—mere days before A.M.T.'s birth—Monasky told Taglieri that "she wanted to divorce and return to the United States with [A.M.T.]," Pet. App. 92a, after he "smacked the hell out of [her]," JA195; *see also* JA200–04. In the immediate aftermath of A.M.T.'s birth, Monasky repeated these intentions to Taglieri, Pet. App. 78a–79a (citing JA89–93; JA145–46; JA217–19), and attempted to facilitate her

departure by giving Taglieri access to her investment account, *see* JA188; JA205. Taglieri responded, "you can gothe us whenever yoouwant . . . [sic]." JA188.

Monasky's intentions remained firm even after she reluctantly agreed in early March to visit Taglieri "temporarily" at his home in Lugo, JA30—bringing with her "only 'a couple of suitcases and [a] stroller,'" Pet. App. 47a (alteration in original; citation omitted)—so that he could help care for A.M.T. while Monasky recuperated from her cesarean section and could co-sign A.M.T.'s U.S. passport application. During her stay in Lugo, Monasky again "reiterated her desire for a divorce and contacted several Italian divorce attorneys to understand the divorce process and her options with respect to alimony and child custody." Pet. App. 80a–81a; *see also* JA106–07; JA113–14. In an e-mail to an Italian divorce lawyer, Monasky stated that Taglieri had "agreed that [she] could have sole custody" and that she planned to "return to the U.S." JA206. Both parties even discussed their impending divorce—and Monasky's return to the United States—with their families. *See* Pet. App. 79a; JA30; JA101–02.

Monasky followed through on her plan to leave Italy with A.M.T. as soon as it was possible for her to do so. Monasky was unable to return to the United States after the first trimester of her pregnancy because she was under doctors' orders not to travel due to the risk of premature labor. Pet. App. 76a. Even after A.M.T.'s birth, Monasky was unable to return immediately to the United States. Her recovery from the cesarean section was "'long' and 'difficult,'" Pet. App. 78a (quoting JA141–43), and Monasky could not travel with A.M.T. to the United States until A.M.T. "b[ore] a valid United States passport," 8 U.S.C.

§ 1185(b). While Monasky was visiting Taglieri at his home in Lugo, they "ma[d]e arrangements for A.M.T. to obtain her Italian and American passports," and, on March 11, 2015, they traveled round-trip between Lugo and Milan with four-week-old A.M.T.—a trip of 330 miles—"in order to apply for A.M.T.'s United States passport." JA30.

On March 31, 2015, after a serious fight in which Taglieri raised his hand as if to hit Monasky, Pet. App. 81a; JA147–48, Monasky fled with A.M.T. to a safe house for domestic-violence victims, Pet. App. 81a. A.M.T.'s U.S. passport arrived two weeks later, and Monasky then immediately departed Italy with A.M.T. Pet. App. 50a, 81a. It would have been impossible for Monasky to return to the United States with A.M.T. any sooner.

B. Despite this extensive evidence of Monasky's intent to raise A.M.T. in the United States—and the district court's finding that she "inten[ded] to return to the United States with A.M.T. as soon as possible," Pet. App. 94a—the Sixth Circuit concluded that the district court did not clearly err when it supposedly found that "Monasky and Taglieri intended to raise A.M.T. in Italy," Pet. App. 12a.

As an initial matter, the court of appeals' conclusion is unfounded because the district court did *not* find that Monasky actually intended to raise A.M.T. in Italy: It found exactly the opposite, Pet. App. 94a, 97a, but nevertheless deemed A.M.T. to be habitually resident in Italy based on its flawed "matrimonial home" presumption, Pet. App. 97a. In any event, the evidence on which the Sixth Circuit relied to uphold the district court's habitual-residence determination is insufficient to overcome the extensive evidence of Monasky's intent to raise A.M.T. in the United States.

First, the Sixth Circuit focused on evidence that Monasky and Taglieri had previously established a home in Italy—specifically, that they had "agreed to move to Italy to pursue career opportunities and live 'as a family'" in 2013, they "secured full-time jobs" in 2013, and Monasky "pursued recognition" of her academic credentials in April 2014. Pet. App. 10a. That evidence, however, pertained to the parents' intent before A.M.T. was even conceived in May 2014. JA28. The Sixth Circuit altogether ignored that, after Monasky involuntarily became pregnant, she almost immediately began to take steps to facilitate her return to the United States, JA29–30, and repeatedly "reiterated" to Taglieri, in the crucial weeks immediately before and after A.M.T.'s birth, "that she intended to get a divorce and relocate to the United States," JA107. The Sixth Circuit cited no authority supporting the extraordinary proposition that, if a parent purportedly holds an intent to raise a child in a particular country at some point in time before the child is conceived, the parent is bound by that intent for purposes of the Hague Convention even if she feels differently by the time the child is born.

Second, the Sixth Circuit relied on evidence reflecting the reality that A.M.T. lived in Italy for eight weeks after her birth—noting that her parents had discussed purchasing a combination "stroller, car seat, and bassinet," and that Monasky had pursued an Italian driver's license, registered on an *au pair* website, and set up post-birth check-ups for A.M.T. Pet. App. 10a; *see also* Pet. App. 76a. All of that evidence, however, reflected inchoate actions pertaining to the everyday necessities of taking care of A.M.T. during the short period that Monasky was compelled to remain in Italy while she recuperated from the birth and waited for A.M.T.'s U.S. passport. There is

no reason to think that the Contracting States—in drafting a treaty designed "to protect children," Convention, pmbl.—would have wanted habitual residence to be determined under an approach that discourages a parent with the imminent and entirely justified intent to flee an abusive relationship from taking the basic steps necessary to preserve the infant's health and safety before their departure can be effectuated.

By focusing on the mundane necessities of A.M.T.'s day-to-day life in Italy, the Sixth Circuit also ignored the instability of A.M.T.'s eight-week stay in the country. During those weeks, A.M.T. lived in six different locations—several days at a hospital, JA29, two weeks in Monasky's apartment in Milan, JA29–30, an undisputedly "temporar[y] stay" of four weeks at Taglieri's apartment in Lugo, JA30–31, and two weeks in protective custody in three separate locations, JA31; *see also* JA151–52. That itinerant existence underscores that A.M.T.'s parents *shared* no intention of making Italy her settled home.

* * *

Because A.M.T. was not habitually resident in Italy at the time of her removal, the Court should reverse the judgment below. It should also order that "the District Court undo what it has done" by ordering A.M.T.'s immediate return to the United States. *Chafin* v. *Chafin*, 568 U.S. 165, 173 (2013). Such a "'re-return'" order is the "typical appellate relief" where a Hague Convention petition has been erroneously granted. *Id.* at 173. A re-return order would be especially appropriate here because the Italian courts have stripped Monasky of her parental rights in an *ex parte* proceeding, Pet. App. 81a–82a, and, since

A.M.T.'s return to Italy, have refused to hold any hearing on her parental rights or the very custody adjudication that the Hague Convention is intended to ensure, *see* Trib. per i Minorenni di Milano, 19 marzo 2019, n. 535/19 (It.); Trib. per i Minorenni dell' Emilia Romagna in Bologna, 20 novembre 2017, n. 1337/17 (It.).

This separation is not only deeply hurtful to Monasky, but also highly detrimental to A.M.T.'s development. Since the age of nearly two years, A.M.T. has been forcibly separated from her mother—who, until that point, had been her primary caretaker—during a critical developmental period. Absent a re-return order, Monasky will have no meaningful legal recourse in either the United States or Italy, and A.M.T. will be forced to grow up without her mother's love, guidance, protection, and support. A.M.T. should be returned to the United States for a custody adjudication that will fully and fairly consider the interests of A.M.T. as well as the rights of both parents.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to issue an order directing A.M.T.'s return to the United States.

Respectfully submitted.

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