No. 18-935

In the Supreme Court of the United States

MICHELLE MONASKY, PETITIONER,

v.

DOMENICO TAGLIERI

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF SANCTUARY FOR FAMILIES, NATIONAL NETWORK TO END DOMESTIC VIOLENCE, PATHWAYS TO SAFETY INTERNATIONAL, AND LEGAL MOMENTUM AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MICHAEL A.F. JOHNSON
Counsel of Record
DIRK C. PHILLIPS
KATELYN A. HORNE
AVISHAI D. DON
SHIRA V. ANDERSON
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
(202) 942-5000
michael.johnson@arnoldporter.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities—Continued Page(s)

Other Authorities—Continued Page(s)

Other Authorities—Continued Page(s)

Other Authorities—Continued Page(s)

INTEREST OF *AMICI CURIAE*

Amici are non-profit organizations with extensive experience providing services to and advocating for victims of domestic violence in the United States and abroad. Based on first-hand experience, *amici* are able to provide valuable insight into the impact of the Court's interpretation of the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670 ("Hague Convention") on parents and children who are victims of domestic violence.

Amici are concerned that the Sixth Circuit's decision will have a lasting detrimental effect on parents and children escaping domestic violence. *Amici* therefore submit this brief in support of Petitioner Monasky.[1]

SUMMARY OF THE ARGUMENT

Determining a child's "habitual residence" is often critical in Hague Convention proceedings. Indeed, in cases like this one, it can determine the outcome, because the Hague Convention does not require repatriation of children who have no habitual residence. In practical terms, a child's "habitual residence" is usually the place where the child has become acclimated. But when a child is too young to have become acclimated to any particular location, the Circuits unanimously agree that the child's "habitual residence" should be determined by "shared parental intent"—that is, the location where the parents intended the child to live.

---

[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than the *amici*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties were timely notified and consented in writing to the filing of this brief.

The Sixth Circuit claimed that it applied the "shared parental intent" standard in this case. But it rejected Monasky's argument that a "meeting of the minds," or an *actual* agreement,[2] between the parents was necessary to determine shared parental intent. Pet. App. 12a–13a. As a result, the Sixth Circuit affirmed the District Court's habitual-residence determination, even though it was undisputed that Monasky "had a fixed subjective intent" to flee Italy, and had "stated [her] desire to divorce" her abusive husband "and return to the United States as soon as possible." *Id.* at 79a, 92a, 93a, 94a, 97a. The District Court, as affirmed by the Sixth Circuit, disregarded Monasky's subjective intent because—among other things—she had established a "marital home" in Italy and "acquired items necessary for [her child] to reside" there. *Id.* at 93a.

The Sixth Circuit's holding places victims of domestic violence at serious risk. Victims will often engage in subtle cognitive, emotional, and behavioral shifts before deciding to flee an abusive partner. These shifts could include, for example, communicating more often with their family abroad or searching for job postings in their home country—all while continuing to go to work and take care of their partner. These sorts of shifts are inherently designed to go unnoticed, because victims do not want to signal their intention to their abusers in the interest of their safety and that of their children. As a result, such changes may seem inconsequential to a district judge months (or *years*) after the fact. A battered parent's observable behavior, in other words, does not always reflect actual intention.

---

[2] The Sixth Circuit characterized this concept as a "subjective agreement" standard. However, *amici* describe this concept of shared intent as "actual agreement," because it requires an actual—*i.e.*, realized—meeting of the minds.

The Sixth Circuit's rule therefore increases the chances that parents who flee domestic violence will be required to return children to abusive partners. It is beyond dispute that domestic violence can impact children—even if they are not direct recipients of the violence. The Sixth Circuit's approach therefore is directly at odds with the purpose of the Hague Convention, which makes "the interests of children" an issue "of paramount importance in matters relating to their custody." Hague Convention, preamble. This Court should vacate the decision below.

ARGUMENT

I. Hague Convention Cases Now Commonly Involve Caretaker Parents Fleeing Abusive Partners

A. The Changing Nature of Child Removal

The dominant assumption at the time of the drafting of the Hague Convention was that any removal was harmful to the child, and itself constituted a form of child abuse. Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 Fordham L. Rev. 593, 601–05 (2000). The Hague Convention was therefore drafted with a paradigmatic case of child removal in mind. As Lady Hale, President of the Supreme Court of the United Kingdom, explains, in this paradigm, a disappointed parent loses a custody dispute, and, "upset at the breakdown of [his] marriage and the loss of easy day to day contact with [his] children," takes the children and flees. Brenda Hale, *Taking Flight—Domestic Violence and Child Abduction*, 70 Current Legal Problems 1, 4 (2017). That parent then attempts to "raise a fraudulent custody claim in the new country of residence," thereby attempting "to legalize the abduction." Kyle Simpson, Comment, *What Constitutes A "Grave Risk of Harm?": Lowering the Hague Child Abduction Convention's Article 13(b) Evidentiary Burden to Protect Domestic Violence Victims*, 24 Geo. Mason L. Rev. 841, 847 (2017).

A contemporaneous report prepared by Elisa Pérez–Vera[3]—considered to be the "official history" of the Convention, *Hague International Child Abduction Convention; Text and Legal Analysis*, 51 Fed. Reg. 10503 (1986)—emphasizes that the Hague Convention's goal was to remedy precisely these sorts of removals. According to the Perez–Vera Report, the specific "situations envisaged" by the Convention's drafters "are those which derive from the use of force"—i.e., a noncustodial parent fleeing with a child to another country—"to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child." Perez–Vera Report, ¶ 11. These sorts of removals inherently harm a child, the Report insists, because "the child is taken out of the family and social environment in which its life has developed." *Id.* ¶ 12. Thus, "it can firmly be stated that the problem with which the Convention deals . . . derives all of its legal importance from the possibility of individuals establishing legal and jurisdictional links which are more or less artificial." *Id.* ¶ 15.

The Hague Convention appears to have largely succeeded in deterring these kinds of removals; as noted below, the overall percentage of these "paradigmatic" abductions has decreased. Unfortunately, the Convention's success with respect to these "paradigmatic" abductions has created serious obstacles for parents fleeing intimate partner violence.

Today, many parents who remove their children are fleeing domestic violence.[4] Generally, in these cases, "the

---

[3] *1980 Conference de La Haye de droit international prive, Enlévement d'enfants*, Elisa Pérez–Vera, *Explanatory Report* ("Perez–Vera Report") in 3 *Actes et Documents de la Quatorziéme Session* (1982).

[4] The word "abduction" or "abductor" can carry an unfair connotation of abuse. When the individual absconding with the child is

abuse begins before the transnational move," and "the victim flees with her children . . . to escape the abuse." Roxanne Hoegger, *What If She Leaves? Domestic Violence Cases Under the Hague Convention and the Insufficiency of the Undertakings Remedy*, 18 Berkeley Women's L.J. 181, 187 (2003). "The batterer, left behind in the country of habitual residence, then files a petition under the Hague Convention requesting return of the children to adjudicate the custody issues." *Id.*

The fleeing parent in the vast majority of these cases is the child's primary caregiver. According to a statistical analysis of applications made under the Hague Convention in 2015, "80% of taking persons . . . were the primary or joint-primary carer of the children involved. This can be compared with 72% in 2008 and 68% in 2003." Nigel Lowe & Victoria Stephens, *A Statistical Analysis of Applications Made in 2015 Under the* Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – *Global Report* 8 (2018).

In other words, domestic violence has played an increasing role in Hague Convention cases in recent years. The incidence of domestic violence in families in which a child was later removed—over 50 percent—is "unusually high" compared to the rate of domestic violence in the general population, which is around 25 percent. Geoffrey L. Greif & Rebecca L. Hegar, *When Parents Kidnap: The Families Behind the Headlines* 30 (1992). Another study found that approximately one-third of all published and unpublished U.S. Hague Convention cases mentioned violence within the home. Sudha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction*, 11 Violence Against Women 115, 120 (2005); *see also* Miranda Kaye, *The Hague*

---

fleeing abuse, the taking is perhaps more accurately described as a "removal." We will accordingly use this term throughout the brief.

Convention and the Flight from Domestic Violence: How Women & Children are Being Returned by Coach & Four, 13 Int'l J.L., Pol'y & Fam. 191, 193 (1999) ("[I]n at least half of the instances of parental abduction [in the United States], violence was a relevant presence in the parental relationship."). In fact, "seven of nine [Hague] Convention cases that reached an appeals court in the last half of 2000 involved an abducting mother who claimed she was a victim of domestic violence." Shetty & Edleson, *supra*, at 120 (citing Merle Weiner, *The Potential and Challenges of Transnational Litigation for Feminists Concerned About Domestic Violence Here and Abroad*, 11 Am. U. J. of Gender, Soc. Pol'y, & L. 749 (2003)).

Hague Convention-contracting states have been carefully tracking this shift. The final report of the Third Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention noted that "the majority of children . . . were taken away from their country of habitual residence by their mothers, who not infrequently alleged that they or the children had suffered hardship and domestic violence at the hands of the father." Lord Chancellor's Dep't, Child Abduction Unit, *Report on the Third Meeting of the Special Commission to Discuss the Operation of the Hague Convention on the Civil Aspects of International Child Abduction* 1 (1997). In a questionnaire preceding the Fifth Meeting of the Special Commission, "country after country, including the United States, recognized that domestic violence is frequently raised as an issue by the respondent in Hague proceedings." Merle H. Weiner, *Half-Truths, Mistakes, & Embarrassments: The United States Goes to the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, 1 Utah L. Rev. 221, 223 n.5 (2008). In discussing domestic violence, participants raised concerns about the way the Convention

was "being used by abusive (usually male) parents to seek the return of children and primary carers . . . and that the Convention is moving away from what it was meant to deter." *Id.* at 282 (citation omitted).

By the Sixth Meeting of the Special Commission in 2011, state participants had begun to consider domestic violence an important factor in many Hague Convention cases. *See* Hale, *supra*, at 10. The Special Commission specifically "noted the higher profile and priority now being attached to domestic violence in a number of jurisdictions." *Id.* Many contracting states expressed concern that the operation of the Hague Convention was harming parents fleeing domestic violence—so much so, in fact, that "there was a very real risk that some countries would pull out of the Convention altogether." Hale, *supra*, at 11. Lady Hale, herself a member of a working group created to tackle the issue of domestic violence, concluded:

> There was and remains a very real concern in some states that their primary carer nationals were being required to choose between returning with the child to a situation where they would face a real risk of violence or abuse or refusing to return so that the child would have to go alone to a new situation. In either case there was a real risk of harm to the child.

Id.

B. The Convention's Purpose of Protecting Children is Often Best Served by *Not* Returning Them to the Countries From Which They Were Taken

The Hague Convention was designed to protect "the best interests of the child." Perez–Vera Report at ¶ 25; *see also id.* at ¶ 24 (explaining that the Hague Convention's "philosophy" is that the "struggle" to remedy child removals "must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests"). The Hague Convention's goal is

not necessarily to reverse every removal, but rather to remedy the "*harms resulting from*" a removal. *Abbott v. Abbott*, 560 U.S. 1, 21 (2010) (emphasis added). In other words, protecting a child from danger takes precedence over returning her to her home country. *See* Perez-Vera Report, at ¶ 29. Because a treaty's text must be interpreted in light of the treaty's object and purpose, *see infra* Sec. II.A, this Court should interpret the phrase "habitual residence" to best protect children from harm, including by preventing children from being returned to abusive environments.

The alternative leads to often-devasting consequences. *First*, a return order in a domestic violence case will force the fleeing parent (and victim) to make an impossible choice: she can either return with her child, thereby again placing herself in danger, or she can separate from her child and cause irreparable trauma. *Second*, and most importantly, a return order will send the child back to an abusive environment, which is inherently harmful. In this way, "[t]he remedy of return uniquely disadvantages" the abused parent, as "it reverses the accomplishment of the victim's flight by returning the child" to the abusive environment from which the victim fled. Weiner, *International Child Abduction*, *supra*, at 634.

Returning a child to an abusive environment is seldom, if ever, in her best interests. As an initial matter, the child may already be, or may become, subject to abuse. Because domestic violence "is instrumental, directed at subjugating, controlling and isolating," when a victim of domestic violence finally acquires independence from her abuser, research demonstrates that the batterer can "turn to abuse and subjugation of the *children* as a tactic of . . . control." Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 Int'l J. of Health Servs. 97–119 (1988) (emphasis added).

Furthermore, it is beyond dispute that it is *not* in a child's best interest to live in an abusive environment, even when the abuse is not specifically directed at the child. *See* Hale, *supra*, at 7. Children exposed to frequent domestic violence in the home demonstrate lower cognitive functioning, reduced resilience, and emotional and mood disorders that are not significantly different from children who were themselves physically abused. Taryn Lindhorst & Jeffrey L. Edleson, *Battered Women, Their Children, and Int'l Law* 109 (Northeastern Univ. Press 2012). These children "suffer increased physical and psychological illnesses that undermine their health, social and emotional development, and interpersonal behaviors." Lynn Hecht Schafran, *Evaluating the Evaluators: Problems with "Outside Neutrals,"* 42 The Judges' Journal 10, 13 (2003). Without adequate response from a caregiver, they may also experience frequent activation of their physiologic stress response system. Heather C. Forkey, *Children Exposed to Abuse and Neglect: The Effects of Trauma on the Body and Brain*, 30 J. Am. Acad. Matrimonial L. 307, 311 (2018). Such "toxic stress" leads to "alterations in neurodevelopment, gene translation, and immune response, resulting in predictable behavioral, learning, and health issues." *Id.*

This analysis applies even if the child does not actually witness the domestic abuse. "Children are intuitive, and they are aware of and impacted by such abuse when they witness household tensions or a mother's emotional distress." Simpson, *supra*, at 857.

Any brief removal of a child from an abusive environment is soon forgotten upon return. Fortunately, many children who appear to have profound and clinically significant problems can rebound—quickly and dramatically—after experiencing even a relatively short period of safety and security. Carolyn A. Kubitschek, *Failure of the Hague Abduction Convention to Address Domestic*

Violence and its Consequences, 9 J. Comp. L. 111, 116 (2014). Such gains, however, are lost if the child is returned to the traumatic situation that prompted the child's removal in the first place. This is particularly true when the return places the child's primary caretaker back in the control of her abuser. Indeed, returning a child to an abusive situation "is rarely an appropriate judicial response to domestic violence," even where the abuser has not directly harmed the child. *Id.* at 115. A batterer may be "severely controlling" and use a "harsh, rigid disciplinary style" "caus[ing] the reawakening of traumatic memories, setting back post-separation healing." *Id.* at 115-16 (quotation omitted).

Both Congress and the Permanent Bureau of the Hague Conference have recognized the severe trauma that children undergo in abusive homes. Congress has declared that "spouse abuse is relevant to child abuse in child custody disputes," because "children are emotionally traumatized by witnessing physical abuse of a parent" and may experience "actual and potential emotional . . . harm [and] the negative effects of exposure to an inappropriate role model." H. Con. Res. 172, 101st Cong. 1990. For its part, the Permanent Bureau has concluded that "there are correlations between a child's exposure to domestic violence, whether direct or indirect, and contemporaneous childhood and later problems in adult life." Hague Conference on Private International Law, *Domestic and Family Violence and the Article 13 "Grave Risk" Exception in the Operation of the* Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: *A Reflection Paper* ¶ 22 (Preliminary Document No 9 of May 2011) (Permanent Bureau 2011). This includes "higher rates of aggressive and antisocial and fearful and inhibited behaviours among children, lower social competence, and higher than

average rates of anxiety, depression, trauma symptoms and temperament problems." *Id.* (quotation omitted).

To accord with the Hague Convention's purpose and to protect the best interests of removed children, this Court should interpret "habitual residence" in the way that best protects them from their return to environments rife with domestic violence and abuse.

II. The "Actual Agreement" Standard for "Habitual Residence" Best Ensures That Children Will Not Be Returned to Abusers

A. The Term "Habitual Residence," Like the Hague Convention as a Whole, Must Be Interpreted in Light of the Best Interests of the Child

A removal is "wrongful" under the Hague Convention only if it was done "in breach of rights of custody . . . under the law of the State in which the child was habitually resident." Hague Convention, art. 3(a). If the removal was *not* wrongful, a parent cannot seek the return of the child under the Hague Convention or its implementing legislation, *see* the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. § 9001, *et seq.*, and any custody dispute will be decided by the courts of the removed-to country. For this reason, "[h]abitual residence is the central—often outcome-determinative—concept on which the entire system [of Hague Convention rules] is founded." *Mozes v. Mozes*, 239 F.3d 1067, 1072 (9th Cir. 2001).

Neither the Hague Convention nor ICARA defines "habitual residence." As a result, it is imperative for this Court to interpret the concept "in the light of [the Hague Convention's] object and purpose"—namely, the protection of children. *See Restatement (Third) of Foreign Relations Law* § 325(1) (1987); *see also United States v. Stuart*, 489 U.S. 353, 368 (1989) ("[A] treaty should generally be construed . . . to give effect to the purpose which

animates it." (internal quotation marks omitted) (citing *Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 163 (1940)).

B. An "Actual Agreement" Standard for "Habitual Residence" Places the Proper Amount of Emphasis on the Subjective Mental State of the Fleeing Parent

In this case, the Sixth Circuit affirmed the District Court's habitual-residence finding even though it was undisputed that Monasky had a "stated desire" to flee Italy "as soon as possible," Pet. App. 93a–94a. The Sixth Circuit held that the record was actually "two-sided" on the question of Monasky's intent, because Monasky had "set up routine checkups for [her child] in Italy" and, together with her husband, "purchased several items necessary for raising [her child] in Italy," including a stroller and a bassinet. *Id.* at 10a–11a.

The assumption underlying the Sixth Circuit's decision is that a person's public-facing actions presumptively, perhaps conclusively, indicate speak for the motivations behind them. For victims of domestic violence, however, that holding could not be more wrong—or more dangerous.

In many cases, observable actions can be used to determine a person's motivations and to support a finding of shared intent. However, in cases involving domestic violence, the fleeing parent's observable actions often run counter to her actual intent—and deliberately so. District courts should not be hamstrung by a purportedly "objective" standard that elevates observable behavior over common sense in circumstances in which an abuse victim would have sound reasons to act in ways that disguise, rather than reveal, her true intentions.

Indeed, victims of domestic violence are unlikely to ever overtly show that they plan to leave their abuser. Research and *amici*'s combined decades of experience make

clear that the most dangerous time for an abuse victim is when she leaves. *See*, *e.g.*, Weiner, *International Child Abduction*, *supra*, at 626. Victims are often "most vulnerable to stalking, assault, abuse, and homicide" at the moment that they leave their partners. Kaye, *supra*, at 193. Indeed, battered women are 75 percent more likely to be murdered when they try to flee. Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, 28 The Colorado Lawyer 19, 19 (1999). Individuals who plan to leave the web of control of their abusers need to be especially careful imminently before they leave because it is precisely "[a]t the moment of separation or attempted separation" that "the batterer's quest for control often becomes most acutely violent and potentially lethal." Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 5–6 (1991).

As a result, while a victim may seek out social support, make safety plans, or set limits on the relationship, these are subtle shifts that "[a]re not always visible to the casual observer." Deborah K. Anderson & Daniel G. Saunders, *Leaving an Abusive Partner*, 4 Trauma, Violence, & Abuse 163, 176 (2003). Abuse victims often need their abuser to believe that they will stay under their abuser's power and control—and in the country—to ensure their safety and the safety of their children. Indeed, many women stay with partners who batter them while preparing to leave surreptitiously. As the World Health Organization has noted, "most abused women are not passive victims;" and "what might be interpreted" later by a judge as a mother's "inaction may in fact be the result of a calculated assessment about how to protect herself and her children." World Health Org., *Understanding and Addressing Violence Against Women: Intimate Partner Violence* 3 (2012).

If a victim's plan is uncovered before the victim is ready to leave, she may never have the chance to seek safety. This is why *amici* and other domestic violence service providers work closely with clients considering leaving their abusers to create safety plans to help victims and their children leave quietly and confidentially. It is also why, in cases involving domestic violence, what are often characterized as objective indicia of intent to reside in a country indefinitely (such as enrolling a child in school) are such poor indicators of *actual* intent. On the surface, life must go on until all measures are in place to ensure a domestic violence victim's best possible chance of leaving her abuser safely.

Amici therefore support the adoption of an "actual agreement" standard for determining the habitual residence of children too young to have acclimated to any one country. Even when an abuse victim acts in a manner that would appear to evince an intent to stay with her abuser, she still retains the thought of fleeing the moment the opportunity arises. The "actual agreement" standard would therefore allow parents to explain their intentions in staying, their fear of their batterers, and their concerns for their own and their child's safety. Such evidence would better reveal the *actual* intent of the parent and should thus be an essential element of the analysis of "shared parental intent" in such cases.

C. The "Actual Agreement" Standard Provides American Courts With Greater Discretion to Make Repatriation Decisions.

The Sixth Circuit rejected the "actual agreement" standard on the grounds that it may lead to findings of "*no* habitual residence for children, leaving the population most vulnerable to [removal] the least protected." Pet. App. 13a (emphasis added). But as the principal dissent correctly recognized in this case, the "assumption that every child must have" a habitual residence is a "faulty"

one. *Id.* at 30a. "[I]f an attachment to a State does not exist, it should hardly be invented." *In re A.L.C.*, 607 F. App'x 658, 662 (9th Cir. 2015) (quotation omitted). Moreover, this notion does not accurately reflect the reality of Hague Convention cases today. *See supra* Sec. I.A.

An "actual agreement" standard would actually *increase* protections for children. The standard would provide American courts with more discretion to evaluate the dynamics between parents based on their demeanor in the neutral environment of the courtroom—rather than based on their outward behavior in an environment where the removing parent was forced to obscure her intentions. Such a standard therefore reduces the likelihood that domestic violence cases will end in the return of a child to an abuser. That result is in line with the purpose of the Convention: to protect the best interests of the child.

Considering whether parents *actually* had a "meeting of the minds" when determining a child's habitual residence in cases involving domestic abuse may make a court's fact-finding more difficult, but it better reflects these situations' reality. More importantly, this analysis better positions the court to protect a child's safety. As a practical matter, it may in some cases increase the likelihood that a child has *no* habitual residence. However, such a finding does not end the inquiry; it simply means that custody will be adjudicated by the jurisdiction to which the child was removed.

D. The "Actual Agreement" Standard Is in Line With International Consensus

In enacting ICARA, Congress recognized "the need for uniform international interpretation of the Convention." 22 U.S.C. § 9001(b)(3)(B). The U.S. Department of State similarly expressed a desire that ICARA would "ensure greater uniformity in the Convention's implementation and interpretation." H.R. Rep. No. 525, 100th Cong., 2d Session 1988, 1988 U.S.C.C.A.N. 386, 399.

Accordingly, this Court has long held that "[a] uniform, text-based approach ensures international consistency in interpreting the [Hague] Convention," *Abbott*, 560 U.S. at 12. Uniformity helps "deter[] child abductions by parents who attempt to find a friendlier forum for deciding custodial disputes." *Id.* at 20. To further the Hague Convention's goal of deterring forum shopping, then, "it is necessary, as much as reasonably possible, to ensure that the response given by the courts in all [Contracting States] to an individual abduction will be the same." Br. for Perm. Bureau of the Hague Conference on Private Int'l Law as Amici Curiae Supporting Petitioner at 9, *Abbott v. Abbott*, 560 U.S. 1 (2010) (No. 08-645).

Courts in the United Kingdom, Australia, Canada, and Hong Kong have held or recognized that the settled or shared intent of the child's parents to reside in a particular state for an appreciable period of time is a critical factor in determining the child's habitual residence. *E.g.*, *Dep't of Family and Cmty. Servs. v. Kayasinghe* [2018] FamCA 697 (Austl.); *Kong v. Song*, 2018 BCSC 1691 (Can.); *MJB v. CWC*, [2018] HKEC 1741 (C.F.I.) (H.K.); *Re D. (A Child) (Jurisdiction: Habitual Residence)* 2016 EWHC 1689 (Fam) (U.K.). Here, by contrast, the Sixth Circuit *en banc* affirmed the District Court's holding that Monasky's subjective intent to flee Italy was not dispositive. *See* Pet. App. 12a–13a. Vacating the Sixth Circuit's decision is therefore necessary to ensure the "uniform" application of the Hague Convention internationally. *Abbott*, 560 U.S. at 12.

E. The Convention's "Grave Risk" Exception Is Not Sufficient to Prevent the Return of Children to Abusive Parents

Article 13(b) of the Hague Convention states that the return of a child is not required if the parent opposing return establishes that "there is a grave risk that [the child's] return would expose the child to physical or

psychological harm." Hague Convention, art. 13(b). Under U.S. law, the parent opposing return must establish a "grave risk" by "clear and convincing evidence." 22 U.S.C. § 9003(e)(2)(A).

Courts routinely construe the "grave risk" standard narrowly, which renders it inapplicable in many circumstances where return would place a child in a volatile and dangerous environment. *See, e.g.*, *Souratgar v. Lee*, 720 F.3d 96, 103 (2d Cir. 2013); *Soto v. Contreras*, 880 F.3d 706, 712–713 (5th Cir. 2018); *Baxter v. Baxter*, 423 F.3d 363, 373–374 (3d Cir. 2005). Indeed, "[f]indings of grave risk are rare." *Soto*, 880 F.3d at 710 (5th Cir. 2018) (citing *Delgado v. Osuna*, No. 4:15-CV-00360-CAN, 2015 WL 5095231, at *13 (E.D. Tex. Aug. 28, 2015), *aff'd*, 837 F.3d 571 (5th Cir. 2016)).

In many cases—such as the one at issue here—courts disregard domestic violence as evidence that a child will be in danger upon return, because the abuse in question was not specifically directed *at the child*. Similarly, courts have discounted the notion that an abusive *partner* may be an abusive *parent*. *See, e.g.*, *Belay v. Getachew*, 272 F. Supp. 2d 553, 560 (D. Md. 2003) (finding the "grave risk" exception inapplicable because, "to the extent that any abuse did occur, it is evident that it will never occur again" because the parents had since divorced). Some courts have even read this exception to mean that "the court is *not* to make a determination of the child's best interest." *March v. Levine*, 136 F. Supp. 2d 831, 843–44 (M.D. Tenn. 2000) (emphasis added). Commentators have therefore long considered the grave risk exception "insufficient" to protect victims of domestic violence and their children. Weiner, *International Child Abduction*, *supra*, at 704.

The District Court's decision in this case is particularly illustrative. The District Court specifically found that Taglieri physically and verbally abused Monasky on numerous occasions. Pet. App. 105a. The Court

nonetheless declined to apply the "grave risk" exception on the grounds that Taglieri "was [n]ever physically violent *towards [their child]*." *Id.* (emphasis added). The District Court's holding, however, minimizes the fact that a child can *become* a victim of domestic abuse once the previously abused parent is out of the picture, and can suffer severe psychological harm from simply being raised in an abusive home. *See supra* Sec. I.B.

Numerous courts have unfortunately echoed the District Court's refusal to invoke the "grave risk" exception in the face of blatant and horrific evidence of abuse:

- The First Circuit found that there was no "grave risk" of harm in a case where the fleeing spouse "described incidents of brutality that . . . paint a disturbing portrait of a physically, sexually, and emotionally abusive and controlling husband"—allegations that "were not to be taken lightly." *Mauvais v. Herisse*, 772 F.3d 6, 18 (1st Cir. 2014).
- The Western District of Kentucky found that there was no "grave risk" of harm in a case where a husband had raped his wife on three separate occasions and pushed her twice while she was holding their child. He had countered his wife's allegations by pointing to a lack of photographic evidence documenting the abuse "aside from several photographs showing light, minor bruising" on both the mother and child. *Pliego v. Hayes*, 86 F. Supp. 3d 678, 699–703 (W.D. Ky. 2015).
- The District of Massachusetts found that there was no "grave risk" of harm in a case where a clinical psychologist had expressly determined that the children had been "frequently exposed to situations that put them at serious risk for current and future psychological harm." *McManus v. McManus*, 354 F. Supp. 2d 62, 69 (D. Mass. 2005) (quotation omitted). The court held that a

"*serious* risk" of harm did not rise to the level of a "*grave* risk" of harm. *Id.* at 70 (emphasis added).

- The District of Maryland found that there was no "grave risk" of harm in a case where the abused spouse needed to visit a shelter for battered women and testified that her daughter "had to bear witness to the marital abuse" firsthand. *Belay v. Getachew*, 272 F. Supp. 2d 553, 556 (D. Md. 2003).
- The Northern District of Illinois found that there was no "grave risk" of harm in a case where the abusive spouse had "slapped [the fleeing parent] at least three times, hit her on the head with his fist at least twice, grabbed at her waist and threw her down at least once, allegedly choked her briefly, and hit her in the face with his arm." *Tabacchi v. Harrison*, No. 99 C 4130, 2000 WL 190576, at *12 (N.D. Ill. Feb. 10, 2000).
- The Supreme Court of Kansas found that there was no "grave risk" of harm in a case where the abusive spouse attacked the fleeing spouse in front of the children—pulling her hair and kicking her—and struck the children with a belt during meals. *Dalmasso v. Dalmasso*, 269 Kan. 752, 761, 9 P.3d 551, 558 (2000).
- The Court of Appeals of Kentucky found that there was no "grave risk" of harm in a case where the abusive spouse once "went into a violent rage, destroyed items in the house, and pushed [the children] to the floor," and "on one occasion . . . pulled [his child's] hair so violently during a quarrel that she was hospitalized with severe neck injuries." *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 850 (Ky. Ct. App. 1999).

In short, "the courts' appropriate concern that the ["grave risk" exception] not be permitted to swallow the return rule has . . . developed into an improper disregard for the Convention's intended protections against danger." Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 38 FAM. L.Q. 529, 535 (2004). The exception, standing alone, fails to sufficiently safeguard children from being returned to abusive homes. For this reason, "habitual residence" must be interpreted in a manner to prevent these sorts of returns.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to vacate the decision below.

Respectfully submitted.

MICHAEL A.F. JOHNSON
Counsel of Record
DIRK C. PHILLIPS
KATELYN A. HORNE
AVISHAI D. DON
SHIRA V. ANDERSON
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
(202) 942-5000
michael.johnson@arnoldporter.com

AUGUST 2019