No. 18-935

In The Supreme Court of the United States

MICHELLE MONASKY,

Petitioner,

v.

DOMENIC TAGLIERI,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* FREDERICK K. COX INTERNATIONAL LAW CENTER IN SUPPORT OF PETITIONER

MICHAEL P. SCHARF
STEPHEN J. PETRAS, JR.
ANDREW S. POLLIS
AVIDAN Y. COVER
ALEKSANDAR CUIC
THEODORE V. PARRAN, III
Frederick K. Cox International Law Center
Case Western Reserve University School of Law
10900 Euclid Ave.
Cleveland, Ohio 44106
(216) 368-2000

DAVID A. CARNEY
Counsel of Record
ELLIOT P. FORHAN
BAKER & HOSTETLER LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, Ohio 44114
(216) 621-0200
dcarney@bakerlaw.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Regulatory Materials

Other Authorities

BRIEF OF THE *AMICUS CURIAE*

The Frederick K. Cox International Law Center respectfully submits this brief under Supreme Court Rule 37.3(a) as *amicus curiae* in support of petitioner on writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.[1]

INTEREST OF THE *AMICUS CURIAE*

The Frederick K. Cox International Law Center at Case Western Reserve University School of Law is one of the world's premier institutions dedicated to scholarly publications and projects that foster the rule of international law. Established by a multi-million dollar endowment from the George Gund Foundation in 1991, there are thirty-four full time and adjunct faculty experts in international law associated with the Cox Center. They hold leadership positions in prestigious international law-related professional organizations, including the Council on Foreign Relations, the Public International Law and Policy Group, the Canada-U.S. Law Institute, the International Law Association, and the American Society of International Law. They have testified before the Senate Foreign Relations Committee and been cited in the opinions of this Court, the

---

[1] Petitioner and respondent consented to the filing of this brief. Correspondence reflecting this consent for petitioner is on file with the Court and counsel of record for respondent consented in writing on August 19, 2019. No counsel for any party authored this brief in whole or in part, and no person or entity other than the Cox Center and its counsel made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.6.

International Court of Justice and International Criminal Tribunals. They have won three national book of the year awards. And the Chief Prosecutor of the United Nations Special Court for Sierra Leone nominated the work of the Cox Center for the Nobel Peace Prize in 2008 for the invaluable assistance the Center provided to the Office of the Chief Prosecutor on the issues of head of state immunity, recognition of the crimes of recruitment child soldiers and forced marriage, and application of the joint criminal enterprise doctrine.

The Cox Center's overarching mission is the advancement of international law. The Center is submitting this amicus brief in furtherance of that mission.

SUMMARY OF ARGUMENT

The habitual residence requirement has become a cornerstone of private international law. The concept grew in prominence following World War II to bridge the gap between the common law principle of domicile and the civil law principle of nationality. The keys to the habitual residence requirement are flexibility and discretion so that trial courts from all over the world can apply the legal construct equally to the facts of the particular case at hand. This flexibility includes the discretion not to make *any* finding of habitual residence where the facts existing in the record do not support such a conclusion. As applied to the Child Abduction Convention this means that in certain instances the treaty will not apply. But that is not a failure of the Convention; it is a failure of proof. Inherent in the habitual residence requirement is a

threshold evidentiary showing the applicant must make to show that the treaty should apply to the child in the first instance.

We believe the lower courts erred as a matter of law in holding the respondent met his burden to establish that A.M.T. acquired a habitual residence during her time in Italy here. We reach this result through a different path than the petitioner, founded not in the subjective intentions of A.M.T.'s parents but rather in weighing the totality of the factual circumstances at issue in this case, as analogous facts have been viewed by our sister signatories to the Convention.

This international and foreign domestic precedent supports the legal determination that A.M.T. never acquired a habitual residence in Italy because: (1) her constant movement and lack of a stable marital home; (2) her transient time in Italy was made less stable by the domestic violence and abuse petitioner suffered at the hands of the respondent; and (3) to the extent that parental conduct is relevant to determining a child's habitual residence, the lower courts should not have punished petitioner for her continued time in Italy attempting to make things work with respondent for the long term interest of their child.

As the New Zealand Court of Appeal has held: "The policy of the Hague Convention, therefore, is, more precisely, to deter abduction or retention *from the place of habitual residence*. The policy is not the deterrence of abduction and retention per se. Thus the policy of deterring retention or abduction should not be allowed to distort the decision on habitual residence." *Punter v. Secretary of Justice*, CA 221/05 [2007] 1 NZLR 40, 84 ¶ 181 (Glazebrook, J., emphasis in original).

ARGUMENT

I. THIS COURT LOOKS TO INTERNATIONAL LAW IN DETERMINING THE SHARED EXPECTATIONS OF TREATY PARTIES.

A. "A treaty is in the nature of a contract between nations." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984). Like other contracts, treaties "are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the States thereby contracting." *Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912). American courts are required "to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France v. Saks*, 470 U.S. 392, 399 (1985); *see also Lozano v. Montayo Alvarez*, 572 U.S. 1, 12 (2014) (same).

Applying these principles necessarily "begins with [the] text" of a treaty. *Medellin v. Texas*, 552 U.S. 491, 506 (2008). But as the Court has emphasized it also permits courts to examine "the negotiation and drafting history of the treaty" and "'the postratification understanding' of signatory nations." *Id.* at 507 (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)); *see also Factor v. Laubenheimer*, 290 U.S. 276, 294-95 (1933) (holding that "[i]n considerations which should govern the diplomatic relations between nations, and the good faith of treaties," the Court may "look beyond its written words to the negotiations and diplomatic correspondence of the contracting parties relating to

the subject-matter, and to their own practical construction of it").

B. International and foreign domestic precedent interpreting treaties reflects the contracting parties' post-ratification understanding of them. The Court has thus recognized that "'[t]he opinions of our sister signatories are entitled to considerable weight.'" *Abbott v. Abbott*, 560 U.S. 1, 16 (2010) (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999)) (internal quotations and ellipsis omitted); *see also, e.g., Lozano*, 572 U.S. at 12 (analyzing international law in interpreting Child Abduction Convention); *El Al Israel Airlines*, 525 U.S. at 175-76 (1999) (holding Warsaw Convention had preemptive effect; "[d]ecisions of the courts of other Convention signatories corroborate our understanding of the Convention's preemptive effect"); *Air France v. Saks*, 470 U.S. 392, 399 (1985) (adopting interpretation of Warsaw Convention that was "consistent with the negotiating history of the Convention, the conduct of the parties to the Convention, and the weight of precedent in foreign and American courts"); *The Pizzaro*, 15 U.S. 227, 245-46 (1817) (Story, J.) (interpreting treaty in the context of "the language of the law of nations, which is always to be consulted in the interpretation of treaties").

Notably, the Court is not alone in looking to international and foreign domestic precedent to interpret treaties; this is a standard practice among the highest international and foreign domestic courts including in particular with respect to the Child Abduction Convention. *See L.K. v. Director-General, Department of Community Services*, [2009] HCA 9, 237 CLR 582, 596 ¶ 36 (interpreting habitual

residence concept in Convention case; holding "care is to be exercised to avoid giving the term a meaning in Australia that differs from the way it is construed in the courts of other contracting states"); *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, ¶ 36 (Can.) (same; "this Court should prefer the interpretation that has gained the most support in other courts and will therefore best ensure uniformity of state practice across *Hague Convention* jurisdictions, unless there are strong reasons not to do so"); *Punter*, 1 NZLR 80, ¶ 171 ("As the Hague Convention is an international convention, there should not be any differences between jurisdictions in the interpretation of the concept of habitual residence."); *PAS v. AFS*, [2004] IESC 95 (Ir.) (same; "The Convention is an international agreement designed to resolve situations of personal conflict and the principle of comity and mutual trust between jurisdictions is of prime importance.").

II. THE CHILD ABDUCTION CONVENTION EMPLOYED THE HABITUAL RESIDENCE REQUIREMENT TO PROVIDE FLEXIBILITY AND DISCRETION.

A. The concept of habitual residence has long been a cornerstone of private international law. *E.g., L.K*, 237 CLR at 591, ¶ 21 ("The expression 'habitual residence', and its cognate forms, have long been used in international conventions, particularly conventions associated with the work of the Hague Conference on Private International Law."); L.I. DE WINTER, NATIONALITY OR DOMICILE?: THE PRESENT STATE OF AFFAIRS 423-24 (The Hague Academy of

International Law 1969) (discussing use of habitual residence as a connecting factor at the Hague Conference dating back to 1896).

The concept itself represents a compromise; it was intended to bridge the gap between the common-law principle of domicile and the civil-law principle of nationality. "The main reasons for its acceptance at The Hague seem to be the recognized need to retreat from the nationality principle, which had previously dominated private international law in Europe, and the difficulties of the concept of domicile, which had different meanings in different countries." Rhona Schuz, *Habitual Residence of Children*, 13 CHILD & FAM. L. Q. 1, 2 (2001); *see also* P.M. NORTH, D.C.L., THE PRIVATE INTERNATIONAL LAW OF MATRIMONIAL CAUSES IN THE BRITISH ISLES AND THE REPUBLIC OF IRELAND 177 (North-Holland Publishing Co. 1977) ("'Habitual residence' is a connecting factor which can provide a bridge between the common law's reliance on domicile and the civil lawyer's reliance on nationality."); *L.K.*, 237 CLR at 592, ¶ 21 (quoting Perez-Vera, "Explanatory Report", in Permanent Bureau of the Hague Conference on Private International Law (ed), *Actes et Documents de la Quatorzieme Session 6 au 25 Octobre 1980* (1982), vol 3, 426, at p 445) (emphasis in original) (holding "'the notion of habitual residence [is] a well-established concept in the Hague Conference, which regards it as a question of pure fact, *differing in that respect from domicile*."); DE WINTER, NATIONALITY OR DOMICILE 428 ("From the very beginning it has been stressed that 'habitual residence' signifies a situation of *fact*,

as opposed to 'domicile,' which is a *legal* concept." (emphasis in original)).[2]

B. The Hague Conference has never defined the habitual residence requirement. This omission "has been a matter of deliberate policy, the aim being to leave the notion free from technical rules which can produce rigidity and inconsistencies as between different legal systems." *Punter*, CA 221/05 [2007] 1 NZLR 40, ¶ 23 (quoting Laurence Collins (ed), *Dicey and Morris on the Conflict of Laws* (vol 1, 13th ed, 2000)); *see also L.K.* 237 CLR at 591-92 ¶ 21 (quoting McLean, *Recognition of Family Judgments in the Commonwealth* (1983), p. 28) ("as one author has put it, the expression has 'repeatedly been presented as a notion of fact rather than law, as something to which no technical legal definition is attached so that judges from any legal system can address themselves directly to the facts.'"); Rhona Schuz, *Habitual Residence of Children*, 13 CHILD & FAM. L. Q. 1, 3-4 (2001) (noting the "omission is deliberate and designed to prevent the concept becoming too rigid and technical, so that it can be applied by judges of all legal systems as a factual test.").

The linchpin of the habitual residence requirement is thus flexibility and discretion, allowing judges from

---

[2] We agree with the petitioner that the resolution of this question of fact, even though characterized as "pure," is necessarily imbued with and informed by governing legal principles. (Pet. Br. 26-28.) For this reason, and to ensure appellate courts can provide the guidance necessary for uniform application of this important international treaty, we agree with the petitioner that a *de novo* standard of appellate review should apply to the trial court's legal conclusion on habitual residence. (*Infra* at 21-22.)

common-law and civil-law countries alike the latitude to apply the concept based on the totality of the circumstances at hand. *See Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, ¶ 36 (adopting "hybrid approach" under the Convention which "allows the judge to make the order on all the evidence"; "The reality is that every case is unique."); DR. E.M. CLIVE, *The Concept of Habitual Residence*, THE JURIDICAL REVIEW, Part 3, pg. 137 (1997) ("The attraction of the concept of habitual residence has always been that it is a simple, non-technical concept that can be applied directly to the facts of cases."); DE WINTER, NATIONALITY OR DOMICILE 428 (lack of formal definition "has the advantage that the courts have more latitude to decide—on the basis of all the factual data available and guided by their commonsense—whether or not a person has habitual residence in a certain country."); *SK v. KP*, CA 64/04, [2005] 3 NZLR 590, 608 ¶ 71 ("Habitual residence has been described as particularly suited to the family law context as it is a factual concept and thus has the flexibility to respond to modern conditions, which is lacking in the concepts of domicile or nationality."); PAUL R. BEAUMONT AND PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 89 (Toronto: Oxford University Press, 1999) ("The strength of habitual residence in the context of family law is derived from the flexibility it has to respond to the demands of a modern, mobile society; a characteristic which neither domicile nor nationality can provide. To preserve this versatility the Hague Conference has continually declined to countenance the incorporation of a definition.").

Professor A.E. Anton, the chairperson of the Child Abduction Convention, explained that "the effectiveness of the Convention may depend less upon its precise terms than upon its adoption by a relatively large number of States." A.E. ANTON, *The Hague Convention on International Child Abduction*, 30 INT'L COMP. LAW. 537, 543 (Vol. 30, No. 3 (Jul., 1981)); *compare Office of the Children's Lawyer v. Balev*, 2018 SCC 16, ¶ 36 ("The *Hague Convention* was concluded on October 25, 1980. With more than 90 contracting parties, it ranks as one of the most important and successful family law instruments completed under the auspices of the Hague Conference on Private International Law.").

III. UNDER WELL-ESTABLISHED INTERNATIONAL LAW, THE FLEXIBLE APPLICATION OF THE CONVENTION PERMITS A FINDING OF *NO* HABITUAL RESIDENCE.

A. International and foreign domestic courts have held the flexibility inherent in the habitual-residence concept includes the discretion not to find *any* habitual residence under the Child Abduction Convention. The Family Division of the High Court of England and Wales (Hedley, J.), in a leading case involving a return petition filed in connection with an infant custody dispute, viewed the threshold question as "whether this case comes within the Hague Convention." *W and B v. H (Child Abduction: Surrogacy)*, [2002] 1 FLR 1008, ¶ 3. In other words, "before I ask myself whether these children are habitually resident in England or California, I must ask myself whether they are habitually resident

anywhere at all." *Id.*, ¶ 17. The Family Court answered this question in the negative, refusing to engage in the "artificiality" that would have been required on the facts of that case to make a finding of habitual residence in either California or England. *Id.*, ¶ 26. The court instead found that "these children have no place of habitual residence[.]" *Id.*

The Ontario Court of Appeal has likewise held that a court is not required to make a finding of habitual residence under the Convention. *Jackson v. Graczyk*, 2007 ONCA 388 (Ont. Ct. App.). The father in that case argued that "Florida must have been the child's habitual residence because [the child] had never lived anywhere else." *Id.*, ¶ 28. The court rejected this argument because "[t]he purpose of the habitual residence requirement under the Convention is to ensure that children have some connection – 'some strong and readily perceptible link' – to the jurisdiction to which they are being returned." *Id.*, ¶ 36 (quoting BEAUMONT & MCELEAVY 101). "The Convention, however, does not say that a child must always have a habitual residence. Indeed, the child may have no connection, no readily perceptible link, to any jurisdiction." *Id.*,¶ 37. "If that is the case," the court continued, "the Convention will not apply." *Id.* The court held that this result is warranted in cases where "a child . . . knows nothing" of a particular nation "socially, culturally, and linguistically," such that there would "be little benefit in sending him there." *Id.* (quoting BEAUMONT & MCELEAVY 90).

B. Both the European Union Court of Justice and the Supreme Court of the United Kingdom agree that some children have no habitual residence. In *Mercredi v. Chaffe*, Case C-497/10 PPU (E.U.C.J.), the

court was asked to provide guidance on the habitual residence requirement in answering a jurisdictional question under European Union law. The court held that "the environment of a young child is essentially a family environment," which is "even more true where the child concerned is an infant." *Id.*, ¶ 54-55. In particular, where "the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment." *Id.*, ¶ 55. "It follows from all of the foregoing," the court held, "that the concept of 'habitual residence'… must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment." *Id.*, ¶ 56.

The court acknowledged that in certain cases the end result of this factual analysis may lead to a finding that the child has no habitual residence at all: "If the application of the abovementioned tests were, in the case of the main proceedings, to lead to the conclusion that the child's habitual residence cannot be established, which court has jurisdiction would have to be determined on the basis of the criterion of the child's presence," *id.*, ¶ 57, the result provided for in a different provision of the European Union regulations. *See id.* ¶ 9 (quoting Art. 13(1) ("[w]here a child's habitual residence cannot be established . . . ., the courts of the Member State where the child is present shall have jurisdiction")); *see also Proceedings brought by A*, C-523-07 (E.U.C.J.) 2009, ¶ 43 (likewise holding "it is conceivable that at the end of this assessment it is impossible to establish the Member State in which the child has his habitual residence").

C. The Supreme Court of the United Kingdom followed the European Union Court of Justice's analysis of the habitual residence concept in *A v A (Children: Habitual Residence)* [2013] UKSC 60, [2014] AC 1. While Lady Justice Hale's opinion does not make a final determination of habitual residence, the opinion sets out certain principles regarding interpretation of the habitual residence concept that remain relevant here. These principles include accepting the notion that "[a]s the Advocate General pointed out in para AG45 and the court confirmed in para 43 of *Proceedings brought by A*, it is possible that a child may have no country of habitual residence at a particular point in time." *Id.*, ¶ 54. The opinion contemplated that *A v. A* might be such a case, as "the facts are particularly stark." *Id.*, ¶ 56. In particular, the child "would probably not have been conceived, and certainly would not have been born and kept in Pakistan, had his mother not been held there against her will. Without that, the child would undoubtedly have become habitually resident in this country." *Id.*, ¶ 56. For these reasons, Lady Hale stated that "I would not feel able to dispose of this case on the basis that Haroon was not habitually resident in England and Wales on 21 June 2011 without making a reference to the Court of Justice." *Id.*, ¶ 58.

D. Numerous other foreign domestic-court cases are in accord, likewise holding that under the totality of the circumstances at issue in any particular case a child may have no habitual residence under the Convention. *See L.K. v. Director-General, Department of Community Services*, [2009] HCA 9, 237 CLR 582, 595 ¶ 32 (rejecting return order to Israel without finding it necessary to also reach the question of

"[w]hether the[children] were habitually resident in Australia when the father asked for their return"; "[N]either the Regulations nor the Abduction Convention provides for a particular vindication or enforcement of rights in relation to the child"); *SK v. KP*, CA 64/04, [2005] 3 NZLR 590, 608 ¶ 71 ("a person can be without a habitual residence"); *DW v. Director-Gen., Dep't of Child Safety*, [2006] FamCa 93 (holding child never acquired habitual residence in the United States without reaching question as to whether child was habitually resident in Australia); *Al Habtoor v. Fotheringham*, [2001] EWCA Civ. 186, ¶¶ 26-27 (child "might have been habitually resident in neither jurisdiction" at issue; "Mr. Everall powerfully submits that this definition impliedly omits the highly relevant third alternative, namely that on 10 February Tariq might have been habitually resident in neither jurisdiction."); *London Borough of Lambeth v. JO and Others*, [2014] EWHC 3597 (Fam), ¶ 48 (holding seven-month who had spent her entire life in England did not acquire habitual residence "given that the court has accepted that her mother's habitual residence is Nigeria"; "This court cannot find she has, at this stage, a habitual residence in either country.").

IV. THESE DECISIONS ARE CONSISTENT WITH THE NOTION THAT THE HABITUAL RESIDENCE REQUIREMENT ESTABLISHES A THRESHOLD EVIDENTIARY SHOWING.

A. This overwhelming consensus of international and foreign domestic courts is consistent with American law, most prominently the Third Circuit's decision in *Delvoye v. Lee*, 329 F.3d 330, 332 (3d Cir.

2003). That case involved a Belgian father and an American mother who moved to Belgium for the birth of their baby. "The parties' relationship was deteriorating both before and after the birth of their child." *Delvoye v. Lee*, 224 F. Supp. 2d 843, 845 (D.N.J. 2002); *see also* 329 F.3d at 332 (same). The mother wanted to return to the United States following the baby's birth; the father initially refused to sign the baby's passport application but eventually acquiesced, and the mother returned home to the United States with their baby. After failed attempts at reconciliation the father filed a petition for the baby's return to Belgium under the Child Abduction Convention. *See* 329 F.3d at 331-32.

The Third Circuit noted the case presented "the unique questions whether and when a very young infant acquires an habitual residence." *Id.* at 333. In answering these questions, the court laid out certain general principles. First, "[w]here a matrimonial home exists, i.e., where both parents share a settled intent to reside, determining the habitual residence of an infant presents no particular problem, it simply calls for application of the analysis under the Convention with which courts have become familiar." *Id.* at 333. On the other hand, "[w]here the parents' relationship has broken down, . . . as in this case, the character of the problem changes." *Id.* In that context, "the mere fact that conflict has developed between the parents does not *ipso facto* disestablish a child's habitual residence, once it has come into existence." *Id.* But as the court held, "where the conflict is contemporaneous with the birth of the child, *no habitual residence may ever come into existence*." *Id.* (emphasis added).

Applying these principles, the court held that the child had not acquired a habitual residence in Belgium for two predominant reasons. First, respondent, "at petitioner's urging, had traveled to Belgium to avoid the cost of the birth of the child and intended to live there only temporarily." *Id.* at 334. Second, the respondent had "retained her ties to New York, not having taken her non-maternity clothes, holding only a three-month visa and living out of the two suitcases she brought with her." *Id.* Under these facts, the court held, "there is lacking the requisite 'degree of common purpose' to habitually reside in Belgium." *Id.*

B. We agree with the consensus in international and foreign domestic precedent and with the Third Circuit's decision in *Delvoye*. The shared expectations of the contracting parties as expressed through their use of the habitual residence requirement was to place an initial evidentiary burden on the applicant to establish that the treaty should apply to a particular child as a threshold legal matter. In other words, the treaty does not apply as a matter of course or simply because a child has been taken across international lines by one parent or the other. As Professor Anton stated at the time: "Under the scheme of the Convention the applicant must establish that there was a wrongful removal or retention within the meaning of Article 3[.]" A.E. ANTON, 30 Int'l Comp. Law. Quarterly 537, 552 (Applicant's burden of proof); *ME v. CYM*, [2017] 4 HKLRD 739, ¶ 78 ("The burden lies on the Father to convince the Court that the UK was the place of the Child's habitual residence so that the Hague Convention was engaged."); *State Central Authority v. Evans*, [2008] FamCA 859, ¶ 81 (rejecting

return application where the court was "satisfied that the child was not habitually resident in New Zealand at the required time," and thus also "the SCA has not satisfied its burden of proof"); *C. (S.) v. H. (L.W.)*, 2010 NBBR 229, ¶ 45 (New Bruns. Ct. of Queen's Bench 2010) ("SC bears the burden of establishing that N was 'habitually resident' in Ireland immediately before her retention in New Brunswick.").

Notably, in the United States and many other countries, this burden is expressed by statute or regulation; the American statute requires the petitioner to "establish by a preponderance of the evidence . . . that the child has been wrongfully removed or retained *within the meaning of the Convention*." 22 U.S.C. § 9003(e)(1)(A) (emphasis added); *see also* Isr. Reg. Chapter 22(1): Return to Abroad of Abducted Children, § 295C(a)-(d) (requiring application claim to be filed in an affidavit form containing certain attachments; "If the claimant hasn't filed one or more of the documents stated in sub-Regulation (b), including the absence of verification, the court shall hear the claim, but shall be entitled to give weight to this accordingly in its decision."); New Zealand Care of Children Act 2004, Public Act 2004 No 90, § 105 (Application to court for return of child abducted to New Zealand) (court is required to make order of return only if "the court is satisfied that the grounds of the application are made out," including "that the child was habitually resident in that other Contracting State immediately before the removal"); Austr., Regulations Relating to Children's Courts and International Child Abduction, No. R. 250, Chap. IV, No. 15 (requiring return application to include, *inter alia*, "*(f)* a sworn affidavit

setting out the chronological exposition of events and circumstances leading to the abduction of the child").

C. We acknowledge that certain foreign domestic courts have rejected this view and held that a child should never be left without a habitual residence under the Convention. The Alberta Court of Appeal recently held that "[t]he Convention does not contemplate a child with no habitual residence." *R.V.W. v. C.L.W.*, 2019 ABCA 272, ¶ 13. The Supreme Court of the United Kingdom (Wilson, J.) has also expressed concern that "[t]he absence of habitual residence anywhere places a child in a legal limbo." *B (A Child) Habitual Residence: Inherent Jurisdiction*, [2016] UKSC 4, 2016 WL 00386247, at *1.[3] Other judges have expressed similar sentiments, including the judges in the Sixth Circuit majority below. They worried that not applying the Convention here would "deprive the children most in need of protection – infants – of any shelter at all and encourage self-help options along the way, creating the risk of abduction ping-pong at best, or making possession 100% of the law at worst." *Taglieri v. Monasky*, 907 F.3d 404, 411 (6th Cir. 2018); *see also id.* at 411 (Boggs, J., concurring) (worrying that "when a child has *no* habitual residence, either parent is free, so far as the Convention is concerned, to take the child to, or to

[3] This concern may be more related to or at least measured by the fact that habitual residence is also a jurisdictional concept in the United Kingdom. *See* BEAUMONT & MCELEAVY 113 (recognizing that it may be more appropriate to stretch the habitual residence concept in jurisdictional cases than in cases decided under the Child Abduction Convention).

retain the child in, *any* country, without fear of legal process") (emphasis in original).

Respectfully, these concerns misapprehend the nature of the Child Abduction Convention. Had the contracting parties intended that the treaty should always apply they would have said the child must be returned to the country where he or she was physically present prior to removal. The evidence suggests the contracting parties did not do so because they wanted to ensure that the *child* had some meaningful connection to the state of desired return before the court entered a return order. The contracting parties were "[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody[.]" Convention on the Civil Aspects of International Child Abduction (25 Oct. 1980) (Preamble). The contracting parties recognized that "children must no longer be regarded as parents' property, but must be regarded as individuals with their own rights and needs." Perez-Vera Report, ¶ 24 (quotation omitted). "The struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests." *Id.*

The discretion not to find any habitual residence is thus essential to the effective operation of the Convention, by ensuring that a return order not only benefits the left-behind parent but also the *child*. Where the applicant cannot meet his or her burden to establish that the child had meaningfully integrated into any particular state the courts should not engage in fiction and artificial construct to find a habitual residence. As now-Justice Grazebrook wrote for the

New Zealand Court of Appeal more than a decade ago: "The policy of the Hague Convention, therefore, is, more precisely, to deter abduction or retention *from the place of habitual residence*. The policy is not the deterrence of abduction and retention per se. Thus the policy of deterring retention or abduction should not be allowed to distort the decision on habitual residence." *Punter*, CA 221/05 [2007] 1 NZLR 84, ¶ 181 (emphasis in original); *see also* BEAUMONT & MCELEAVY 113 (recognizing "the non-application of the instrument may be the best result in cases where a child is not habitually resident anywhere or is just as habitually resident in the State of refuge as in the place from which he or she has been taken").

D. Finally, it should be noted that the Convention expressly contemplates that its jurisdiction over this subject matter is not exclusive. Article 18 of the Convention provides that "[t]he provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time." Article 29 of the Convention provides that "[t]his Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to judicial or administrative authorities of a Contracting State, *whether or not under the provisions of this Convention*." And Article 34 of the Convention provides that "the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained

or of organising access rights." As the Department of State commented in its transmittal to Congress: "the aggrieved person may pursue remedies outside the Convention." 51 Fed. Reg. 10494, 10507 (Mar. 26, 1996), Department of State, Hague International Child Abduction Convention; Text and Legal Analysis (citing Articles 18, 29 and 34).

This in turn is not to undermine the importance of the Convention or its preeminent place in private international law. It is simply to acknowledge that the Convention was never contemplated to cover every potential situation or to rule the field. As the Family Court of Australia has held in rejecting the argument that "if there was no order for return, the philosophy of the Hague Convention would be frustrated": "[I]f the father's desire is to be a part of the child's life but also for the mother to continue her role in a significant way, those proceedings can be brought here." *State Central Authority v. Barnes (No 3)*, [2014] FamCA 1099, ¶¶ 45, 58-59.

V. THE COURT SHOULD CONDUCT A PLENARY REVIEW OF THE FACTUAL RECORD AND HOLD RESPONDENT DID NOT MEET HIS BURDEN.

A. For the reasons explained in the petitioner's brief, the Court should exercise plenary review over the lower courts' legal determination regarding habitual residence in this case. As with probable cause and reasonable suspicion, "[a]rticulating precisely what [habitual residence] mean[s] is not possible." *Ornelas v. United States*, 517 U.S. 690, 695 (1996). The concept can "acquire content only through application." *Id.* at 697. "Independent

review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Id.* This is particularly so with respect to the Child Abduction Convention, where Congress has recognized "the need for uniform international interpretation of the Convention." 22 U.S.C. § 9001(b)(3)(B). The only way courts can provide the necessary guidance to ensure uniform application of the Child Abduction Convention is through a *de novo* appellate review that pays appropriate deference to the district court's factual findings but allows the appellate court freedom to make its own independent determination regarding the ultimate habitual-residence conclusion. Determining who prevails in Child Abduction Convention cases should not depend upon who decides, as the Sixth Circuit held below, 907 F.3d at 405, but upon the law as interpreted in this country and other signatory states.

In this case, three guiding principles found in international and foreign domestic precedent support the legal determination that infant A.M.T. acquired no habitual residence during her eight weeks in Italy. *First*, there was no stable marital home, so this case lacks the primary indicium of habitual residence. Instead, the majority of A.M.T.'s eight weeks in Italy were marked by movement: after an initial period in the hospital with her mother, she spent time in an apartment in Milan with her mother and maternal grandmother, time in Lugo with her mother and father, and, finally, time in domestic-violence shelters with her mother. The only constant in her life – apart from her mother – was change. Likewise, her mother had never integrated into her social environment in Italy, which counsels against a habitual residence

finding. *See ME v. CYM*, [2017] 4 HKLRD 739, 759 (refusing to find removal wrongful in situation where infant's mother had not integrated into the United Kingdom during the family's move there and it was "not seriously disputed that the Mother has all along been the Child's primary caregiver"); *C. (S.) v. H. (L.W.)*, 2010 NBBR 229, ¶ 45 (New Bruns. Ct. of Queen's Bench 2010) (rejecting return order where parents "did not settle on any long-term plans for the period after N was born"; "Theirs plans were a play being written one act at a time."); *D v. D*, 2001 Scot. 1st Div. 1104, 1115 (2001) (rejecting return order where "the conditions and circumstances of the parties' living [in Switzerland] were too unsettled to justify an inference that anyone, particularly the child, had acquired a habitual residence there"); *compare In the Matter of KL (A Child)*, [2013] UKSC 75, ¶ 26 (Hale, J.) (finding habitual residence based on the facts at issue but noting "the fact that the child's residence is precarious may prevent it from acquiring the necessary quality of stability").

Second, allegations of domestic violence and abuse cut against a finding of habitual residence because they also are contrary to the marked stability that makes a residence habitual. As the Family Division of the High Court of Justice of England and Wales recently held in refusing a return order under the Convention in a case involving allegations of domestic violence and abuse: "In the circumstances, wherever the fault lies and whoever is telling the truth, on the account of *both* parents, the six weeks in which NY was in England prior to the relevant date cannot be said on the evidence before the court to have been stable." *TY v. HY*, [2019] EWHC 1310 (Fam), ¶ 56

(emphasis in original, noting the child's "situation in England between their arrival and their separation in January 2019 was far from a picture of stable integration into family and social life"); *Beairsto v. Cook*, 2018 NSCA 90, ¶¶ 14-15, 113-16 (Nov. Scotia App. Ct. 2018) (rejecting return order where mother had returned home with her six-week-old infant following domestic-violence incident; "There is no need to detail the various incriminations. But on January 21, 2017, an incident of domestic violence was reported to the authorities by Ms. Beairsto."); *UD v. XB*, Case C-393/18 PPU, ¶ 86 (E.U. Ct. of Just. 2018) (doubting whether in cases involving domestic coercion and abuse "the mother's and child's involuntary and precarious stay in a third State is sufficiently permanent and regular for the child to have her habitual residence there"); *SF v. HL*, [2015] EWHC 2891 (refusing to find habitual residence where child's time spent in England was marked by domestic strife; "[T]he unsettled and chaotic nature of the parents' relationship is in my judgment a fact which tends to militate against a conclusion that, during the very short period that R was in the jurisdiction before the proceedings were commenced, R attained the requisite degree of integration into a social and family environment in England such as to change her habitual residence.").

Third, to the extent that parental conduct becomes relevant to the Court's decision on habitual residence, the lower courts should not have punished the petitioner for prolonging her stay abroad in Italy, whether during her pregnancy or after, in hoping to reach some sort of accord with respondent in the long term best interests of their child. (*See* Pet. Br. 11, 13.)

As the Full Court of the Family Court of Australia has held: "the interests of children generally could well be adversely affected if the courts too readily find that a parent of a child who attempts a reconciliation in a foreign country with the other parent in order to try to create for the child a family consisting of both its parents, has, together with the child, become 'habitually resident' in that foreign country." *DW v. Director-General, Dept. of Child Safety*, [2006] FamCa 93; *see also, e.g., Punter*, 1 NZLR 40, 83 ¶ 178(d) (recognizing that "[a] finding that a new habitual residence has been acquired might discourage parents from trying to save their marriages, and thus contradict the policy of encouraging matrimonial harmony in the child's best interests").

Taken together, this factual record should lead the Court to hold as a matter of law that under the facts of this case respondent failed to meet his evidentiary burden to establish a habitual residence in and thus that the Convention does not apply. *See SK v. KP*, CA 64/04, [2005] 3 NZLR 590, 608 ¶ 100 (opinion of Glazebrook, J.) (commenting that "it is unfortunate that this matter should have taken so long to reach a hearing in this Court, with the consequent uncertainty for S and her parents," and noting Hague Convention cases should proceed "at the appellate level expeditiously"); *Beairsto v. Cook*, 2018 NSCA 90, ¶ 85 (deciding habitual residence on appeal because in Convention proceedings "[s]peed is the goal, not protracted proceedings"). This holding would find substantial support in international and foreign domestic precedent and would advance not inhibit the goals of the Child Abduction Convention and the habitual residence requirement.

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

Dated: August 22, 2019

MICHAEL P. SCHARF
STEPHEN J. PETRAS, JR.
ANDREW S. POLLIS
AVIDAN Y. COVER
ALEKSANDAR CUIC
THEODORE V. PARRAN, III
Frederick K. Cox International Law Center
Case Western Reserve University School of Law
10900 Euclid Ave.
Cleveland, Ohio 44106
(216) 368-2000

DAVID A. CARNEY
Counsel of Record
ELLIOT P. FORHAN
BAKER & HOSTETLER LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, Ohio 44114
(216) 621-0200
dcarney@bakerlaw.com

Counsel for Amicus Curiae