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 FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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QUESTIONS PRESENTED

The Hague Convention on the Civil Aspects of International Child Abduction generally requires that any child wrongfully removed from her country of "habitual residence" be returned to that country. The questions presented are:

1. Whether a district court's determination of habitual residence under the Convention should be reviewed de novo, under a deferential version of de novo review, or under clear-error review.

2. When a child is too young to acclimate to her surroundings, whether a subjective agreement between her parents is necessary to establish her habitual residence under the Convention.

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INTEREST OF THE UNITED STATES

This case involves the standard for determining a child's habitual residence under the Hague Convention on the Civil Aspects of International Child Abduction and the standard for reviewing that determination on appeal. The United States participated in the negotiation of, and is a party to, the Convention, and the Department of State is the designated Central Authority that coordinates with other contracting states and assists in the Convention's implementation in the United States. The United States thus has a substantial interest in the proper interpretation and application of the Convention.

STATEMENT

1. The Hague Convention on the Civil Aspects of International Child Abduction, *done* Oct. 25, 1980,

T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, "was adopted in 1980 in response to the problem of international child abductions during domestic disputes," *Abbott* v. *Abbott*, 560 U.S. 1, 8 (2010). See Department of State, *Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 51 Fed. Reg. 10,494, 10,503-10,516 (Mar. 26, 1986). Among the Convention's purposes is "to secure the prompt return of children wrongfully removed to or retained in any Contracting State." Convention art. 1; see *id.* art. 5.

A removal is "wrongful" if it breaches existing rights of custody or access "under the law of the State in which the child was habitually resident immediately before the removal." Convention art. 3. If the court of a contracting state determines that a child has been wrongfully removed, it must order the return of the child to his or her country of habitual residence unless one of the Convention's exceptions applies. *Id.* arts. 11, 12; see *Abbott*, 560 U.S. at 9 ("The Convention's central operating feature is the return remedy."); 51 Fed. Reg. at 10,507 (same). The return remedy reflects the Convention's premises that "the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence," *Abbott*, 560 U.S. at 20, and that an abducting parent should gain no benefit from unilaterally attempting to change the forum. Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* ¶¶ 16, 19 (Permanent Bureau trans., 1982) (*Explanatory Report*), in 3 *Actes et Documents de la Quatorzième Session* 426. (The State Department has described the explanatory report as "the official history and commentary on the Convention." 51 Fed. Reg. at 10,503; cf. *Abbott*, 560 U.S. at 19.) Accordingly, a threshold determination

in any proceeding under the Convention is to determine the place of the child's "habitual residence." The Convention, however, does not define that term.

The United States participated in the negotiation of the Convention, see *Members of the First Commission, Procès-verbaux et Documents de travail de la Première commission*, in 3 *Actes et Documents* 253-255, and the Convention entered into force for the United States in 1988. See T.I.A.S. No. 11,670, *supra*. To implement the Convention, Congress enacted the International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437, which establishes procedures for requesting return of a child abducted to the United States. See 22 U.S.C. 9001 *et seq.* (Supp. V 2017).[*] In so doing, Congress found that "concerted cooperation pursuant to an international agreement" and "uniform international interpretation of the Convention" were necessary to combat international child abduction. 22 U.S.C. 9001(a)(3) and (b)(3)(B); see *Abbott*, 560 U.S. at 16.

The Act authorizes "[a]ny person" seeking return of a child under the Convention to file a petition in state or federal court. 22 U.S.C. 9003(b). The court "shall decide the case in accordance with the Convention." 22 U.S.C. 9003(d). Absent a finding that one of the Convention's exceptions applies, a child determined to have been wrongfully removed within the meaning of the Convention must be "promptly returned" to his or her country of habitual residence. 22 U.S.C. 9001(a)(4). The Act, like the Convention, does not define "habitual residence."

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[*] In 2014, the codified Act was transferred from Title 42 of the United States Code to Title 22, so all references in this brief to those statutory provisions are to Supplement V (2017) of the 2012 edition.

2. a. Petitioner, a United States citizen, and respondent, an Italian citizen, were married in Illinois in 2011. Pet. App. 3a. Two years later, they moved to Milan, Italy, where each had obtained employment. *Id.* at 74a. Petitioner became pregnant roughly a year after the move, and their daughter, A.M.T., was born in February 2015. *Id.* at 3a-4a, 75a-80a. Not long after A.M.T.'s birth, petitioner went to the police, reporting that respondent was abusive and seeking shelter in a safe house. *Id.* at 81a. In April 2015, petitioner left Italy for the United States with A.M.T., who was eight weeks old. *Ibid.*

Respondent obtained an ex parte order from an Italian court terminating petitioner's parental rights. Pet. App. 81a. He also filed this petition under the Convention in federal district court, alleging that A.M.T. had been wrongfully removed from Italy and seeking her return there. See *id.* at 82a.

b. After a four-day bench trial, the district court ordered petitioner to return A.M.T. to Italy. Pet. App. 73a-107a.

The district court observed that "habitual residence is a threshold determination under the Convention" because removal "is only 'wrongful' if the child is removed from her habitual residence." Pet. App. 83a. The court explained that under Sixth Circuit precedent, "a child's habitual residence is the nation where, at the time of their removal, the child has been present long enough to allow acclimatization, and where this presence has 'a degree of settled purpose from the child's perspective.'" *Id.* at 85a-86a (citations omitted). The court observed, however, that young children or infants like A.M.T. cannot form a perspective on their surroundings. *Id.* at 87a. Accordingly, borrowing a standard used by other

circuits, the court held that it "must look to the 'settled purpose and shared intent of the child's parents'" to determine an infant's habitual residence. *Id.* at 89a (citation omitted); see *id.* at 88a-89a.

Applying that shared-parental-intent standard, the district court concluded that Italy was A.M.T.'s habitual residence and that petitioner's removal of A.M.T. to the United States was thus wrongful. Pet. App. 90a-100a. The court rejected petitioner's argument that she and respondent had never agreed to settle in Italy permanently and thus could not have held a shared parental intent to raise A.M.T. there. See *id.* at 90a-92a. Instead, the court determined that the balance of the evidence showed that the "parties established a marital home in Italy," that petitioner's conduct "seemed to reflect a settled purpose and intent to remain in Italy, at least for an undetermined period of time," and that petitioner's plan to leave Italy had not "crystalized" until shortly before she left. *Id.* at 94a, 97a.

c. Both the court of appeals and Justice Kagan, acting as circuit Justice, denied a stay of the district court's order. C.A. Doc. 24 (Nov. 30, 2016); Order in No. 16A557 (Dec. 9, 2016). Petitioner thereupon returned A.M.T. to Italy, where she has lived since. See Pet. App. 5a; Pet. Br. 11-12, 54-55.

3. A panel of the court of appeals affirmed. Pet. App. 42a-71a. Reviewing its own precedent, including a case decided after the district court's decision here, the court of appeals determined that it had used "three distinct standards to determine a child's habitual residence." *Id.* at 53a. First, "where the child has resided exclusively in a single country, that country is the child's habitual residence." *Ibid.* Second, a country is a habitual residence if "the child has been present long

enough to allow acclimatization, and where this presence has a 'degree of settled purpose from the child's perspective.'" *Ibid.* (citations omitted); see *id.* at 53a-54a. Third, if the child is very young and thus "'lack[s] the cognizance to acclimate to any residence,'" the court "consider[s] the shared parental intent of the child's parents." *Id.* at 54a (citation omitted).

Applying that framework, the court of appeals determined that A.M.T.'s habitual residence was in Italy because she "was born in Italy and resided there exclusively until [petitioner] took A.M.T. to the United States." Pet. App. 54a. The court declined to address shared parental intent because under its framework, A.M.T.'s exclusive residence in Italy was dispositive. See *id.* at 54a-55a.

Judge Moore dissented. Pet. App. 60a-71a. She would have applied the "shared-parental-intent standard." *Id.* at 67a. "What matters" under that standard, Judge Moore explained, "is where the parents 'intended the children to live.'" *Id.* at 69a (citation omitted). In her view, a petitioner under the Convention "fail[s] to satisfy his burden of proof under the shared-parental-intent standard" "if the shared intent is 'either unclear or absent.'" *Ibid.* Judge Moore thus would have reversed the district court's judgment. *Id.* at 71a.

4. On rehearing en banc, the court of appeals again affirmed the district court's judgment. Pet. App. 1a-40a.

a. The court of appeals determined that its precedent "offers two ways to identify a child's habitual residence." Pet. App. 7a. The court explained that "[t]he primary approach looks to the place in which the child has become 'acclimatized.'" *Ibid.* (citation omitted). "The second approach," the court explained, is "a back-

up inquiry for children too young or too disabled to become acclimatized." *Ibid.* That inquiry, which "looks to 'shared parental intent,'" directs courts "to identify the location where the parents 'intended the child to live.'" *Id.* at 7a-8a (brackets and citation omitted).

The court of appeals emphasized, however, that "[b]oth of these inquiries come back to the same, all-important point—the habitual residence of the child." Pet. App. 8a. Consistent with that principle, the court reiterated that "the habitual residence of a child [i]s a question of fact." *Id.* at 9a; see *id.* at 8a ("The Hague Convention's explanatory report treats a child's habitual residence as 'a question of pure fact.'") (citation omitted).

Accordingly, the court of appeals reviewed the district court's factual finding of habitual residence for clear error. See Pet. App. 9a. Although the court of appeals found that some of the evidence in the record supported finding a shared parental intent to raise A.M.T. in Italy, other evidence suggested that the parents had formed no such intent. See *id.* at 10a. "Faced with this two-sided record," the court observed, the district court "had the authority to rule in either direction." *Id.* at 11a. Under clear-error review, the court of appeals determined that it "ha[d] no warrant to second-guess [the district court's] well-considered finding." *Ibid.*

The court of appeals rejected petitioner's argument that she and respondent "never had a 'meeting of the minds' about their child's future home." Pet. App. 12a (citation omitted). "[T]hat possibility," the court explained, "offers a sufficient, not a necessary, basis for locating an infant's habitual residence." *Ibid.* The court

observed that requiring "a subjective agreement between the parents * * * would place undue weight on one side of the scale" and in effect "would create a presumption of no habitual residence for infants, leaving the population most vulnerable to abduction the least protected" by the Convention. *Id.* at 12a-13a.

b. Judge Boggs concurred, reiterating the view he expressed for the panel majority that when "a child has lived in only one country with his or her parents, * * * that country is the child's habitual residence, absent unusual circumstances." Pet. App. 17a; see *id.* at 14a-23a.

c. Judge Moore dissented. Pet. App. 23a-34a. She agreed that finding a child's habitual residence "is necessarily a fact-intensive inquiry." *Id.* at 28a; see *id.* at 26a. And she "agree[d] with the lead opinion [that] the applicable legal standard" here was shared parental intent. *Id.* at 34a; see *id.* at 24a. Nevertheless, Judge Moore believed that the "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." *Id.* at 30a. In her view, the district court had unduly focused on petitioner's uncertain plans to leave Italy and the location of the marital home, see *id.* at 31a-33a, perhaps because it had been "forced to hypothesize about the contours" of the shared-parent-intent standard since the Sixth Circuit had not yet adopted that standard at the time of the district court's decision, *id.* at 31a. Accordingly, Judge Moore would have remanded for the district court to reevaluate A.M.T.'s habitual residence in light of the new circuit precedent. *Id.* at 34a.

d. Judges Gibbons (Pet. App. 34a-38a) and Stranch (*id.* at 38a-40a) also filed dissenting opinions, agreeing that the district court erred by failing to "focus[] on

where the parents 'intended the child to live.'" Pet. App. 36a (brackets and citation omitted).

SUMMARY OF ARGUMENT

1. A subjective or actual parental agreement is not necessary to a determination of habitual residence.

a. The Convention's text, its negotiation and drafting history, and case law from other contracting parties demonstrate that determining a child's habitual residence requires a flexible and factbound inquiry. The ordinary meaning of habitual residence is the place where an individual customarily or usually lives or dwells. That is a quintessentially factual question that resists further doctrinal explication or subdivision. The physical location of one's dwelling obviously is a question of fact, and whether the individual customarily or usually dwells there invariably will involve "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Pierce* v. *Underwood*, 487 U.S. 552, 561-562 (1988) (citation omitted).

The Convention's negotiation and drafting history confirm that habitual residence is a factbound concept. In choosing habitual residence as the Convention's connecting factor, the drafters expressly rejected the two principal alternatives—domicile and nationality—as being too rigid and technical. Rather, the drafters sought to avoid any dependence on "artificial jurisdictional links." *Explanatory Report* ¶ 11. They therefore chose "habitual residence," an often-used term in the Hague Conference on Private International Law that they understood was "a question of pure fact, differing in that respect from domicile." *Id.* ¶ 66. Habitual residence also was chosen for its flexibility to adapt to changing familial circumstances, which legalistic concepts like domicile and nationality often cannot do.

Finally, emerging case law from other contracting states to the Convention supports viewing habitual residence as a flexible and factbound concept. Recent decisions from the courts of contracting states, including the Supreme Courts of Canada and the United Kingdom, as well as the Court of Justice of the European Union, have made clear that determining a child's habitual residence "reflects essentially a question of fact," Case C-111/17, *OL* v. *PQ*, ¶ 51, ECLI:EU:C:2017:436 (E.C.J. June 8, 2017), and that courts making such determinations "must look to all relevant considerations arising from the facts of the case at hand," *Office of the Children's Lawyer* v. *Balev*, [2018] 1 S.C.R. 398, 421 (Can.).

b. Under that flexible and factbound inquiry, the existence of a subjective parental agreement is neither necessary nor sufficient to determine a child's habitual residence. "Imposing * * * legal construct[s] onto the determination of habitual residence" would "detract[] from the task of the finder of fact." *Balev*, [2018] 1 S.C.R. at 422. Although a parental agreement might be relevant in some cases, it should not be dispositive; as the court of appeals here observed, Convention cases frequently arise when "parents d[o] not see eye to eye on much of anything." Pet. App. 12a. A rigid requirement of a parental agreement would contravene the flexible and factbound nature of habitual residence and also in practice leave many young children with no habitual residence at all.

Instead, courts should consider all admissible evidence relevant to determining the ultimate factual inquiry: the location of the child's usual or customary dwelling. That can include evidence of the parents' in-

tent (such as an actual agreement, parental employment, purchasing a home or signing a long-term lease, establishing local bank accounts, or applying for driver's or professional licenses); the child's ties to the place (such as the length of residence, the child's language and assimilation, school or daycare enrollment, or participation in social activities); and any other relevant factors (such as immigration status or the existence of family and social networks).

Because the habitual-residence inquiry is factbound and flexible, the relative weight of any given circumstance will vary from case to case and ultimately would be a matter of discretion for the trial court. The inquiry is not, however, boundless. For instance, setting aside extraordinary circumstances (such as a child born on an overseas vacation), a child's habitual residence likely cannot be in a country in which he or she has never been physically present. In all cases, the touchstone is determining the child's usual or customary dwelling.

Although the court of appeals here recognized that the habitual residence inquiry "is one of fact," Pet. App. 3a, and although the courts below determined A.M.T.'s habitual residence without finding a subjective parental agreement to be necessary to that determination, the district court did not engage in the flexible and factbound inquiry required by the Convention. Accordingly, this Court should vacate and remand so that it can apply that inquiry in the first instance.

2. Because it is a question of pure fact, a district court's determination of habitual residence should be reviewed on appeal for clear error. That conclusion remains unchanged even if such determinations involve mixed questions of law and fact. As this Court explained in *U.S. Bank National Association* v. *Village at*

Lakeridge, LLC, 138 S. Ct. 960 (2018), the standard of appellate review for a mixed question depends "on whether answering it entails primarily legal or factual work." *Id.* at 967. Determining habitual residence entails primarily factual work; it requires the district court "to marshal and weigh evidence, make credibility judgments, and otherwise address * * * 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *Ibid.* (citation omitted). The court of appeals thus correctly determined that its review here was for clear error. Indeed, courts of other contracting states to the Convention, including the Supreme Court of Canada and the Court of Appeal of the High Court of Hong Kong, agree that trial-court determinations of habitual residence should be reviewed deferentially on appeal.

ARGUMENT

This case presents two questions: first, the standard of appellate review applicable to a district court's determination of a child's habitual residence under the Convention, and second, whether a court must find a subjective parental agreement as part of that determination. In *U.S. Bank National Association* v. *Village at Lakeridge, LLC*, 138 S. Ct. 960 (2018), this Court explained that for mixed questions of law and fact, the standard of appellate review depends on whether applying the substantive rule of decision "entails primarily legal or factual work." *Id.* at 967. Determining the nature of the substantive rule is thus an antecedent inquiry. Accordingly, the government addresses the second question presented first.

As explained below, the Convention requires courts determining a child's habitual residence to eschew formal or rigid legal requirements, and instead to conduct

an inherently flexible and factbound inquiry. Accordingly, a subjective agreement between the child's parents, while potentially relevant in some cases, is not categorically necessary to such a determination. And because the inquiry into habitual residence is predominantly factual, under *U.S. Bank* a district court's finding of habitual residence should be reviewed for clear error. Although the court of appeals here applied the correct standard of review, neither court below applied the correct substantive standard under the Convention for determining habitual residence. Accordingly, this Court should vacate the judgment below and remand for further proceedings.

I. A SUBJECTIVE AGREEMENT BETWEEN THE PARENTS IS NOT REQUIRED TO ESTABLISH AN INFANT'S HABITUAL RESIDENCE

As the court of appeals recognized, determining a child's habitual residence under the Convention is "a question of pure fact." Pet. App. 8a (citation omitted); see *id.* at 9a. That factual inquiry must remain flexible and take into account all relevant circumstances in each case in light of the "paramount importance" under the Convention of "the interests of children." Convention preamble; see 22 U.S.C. 9001(a)(1). Accordingly, no single piece of evidence can, in the abstract, be deemed either necessary or dispositive to determining habitual residence. It follows that a subjective agreement between the parents regarding where an infant should live—like any other potentially relevant evidence—is not categorically required to establish the infant's habitual residence.

A. Determining A Child's Habitual Residence Requires A Flexible And Factbound Inquiry

The ordinary meaning of the Convention's text, its negotiating and drafting history, and case law from other contracting states all demonstrate that habitual residence is a flexible and factbound concept.

1. "The interpretation of a treaty, like the interpretation of a statute, begins with its text," *Abbott* v. *Abbott*, 560 U.S. 1, 10 (2010) (citation omitted), including "the context in which the written words are used," *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 699 (1988) (citations omitted). Here, the Convention, "[f]ollowing a long-established tradition of the Hague Conference," does not define habitual residence. *Explanatory Report* ¶ 53. But the term's ordinary meaning reflects its inherently factual nature. See *Abbott*, 560 U.S. at 11 (applying the ordinary meaning of "place of residence" in the Convention); cf. *Santovincenzo* v. *Egan*, 284 U.S. 30, 40 (1931).

The ordinary meaning of "habitual" is "[c]ustomary" or "usual." *Black's Law Dictionary* 640 (5th ed. 1979) (*Black's*); see 6 *Oxford English Dictionary* 996 (2d ed. 1989) ("existing as a settled practice or condition; constantly repeated or continued; customary"); *Webster's Third New International Dictionary* 1017 (1976) (*Webster's*) (similar). And the ordinary meaning of "residence" is "[p]ersonal presence at some place of abode," *Black's* 1176, or "one's usual dwelling-place or abode," 13 *Oxford English Dictionary* 707 (2d ed. 1989), or "the act or fact of abiding or dwelling in a place for some time," *Webster's* 1931; see *ibid.* ("a temporary or permanent dwelling place, abode, or habitation"). It follows that an individual is habitually resident in the place

or abode where he or she customarily or usually lives or dwells.

That ordinary meaning is reflected in other areas of law. For instance, setting aside some provisos not applicable here, Congress has defined "Habitual Residence" in the Compact of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, 48 U.S.C. 1901 note, to mean "a place of general abode or a principal, actual dwelling place of a continuing or lasting nature." Compact tit. IV, art. VI, § 461(g). The Department of Homeland Security has adopted that definition for purposes of certain immigration laws. See 8 C.F.R. 214.7(a)(4)(i). And for purposes of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, S. Treaty Doc. No. 51, 105th Cong., 2d Sess. (1998), 1870 U.N.T.S. 167, the Department of Homeland Security has promulgated regulations allowing a child adoptee to be deemed habitually resident in the country of his or her "actual residence" instead of his or her country of citizenship as long as "the child's status in that country is sufficiently stable for that country properly to exercise jurisdiction over the child's adoption or custody." 8 C.F.R. 204.303(b).

Consistent with those illustrations of the term's ordinary meaning in other contexts, determining an individual's "habitual residence" under the Convention is, at bottom, a question of pure fact. The physical location of someone's actual abode or dwelling is obviously factual in nature. So too is whether that individual usually or customarily lives in that location in a continuing or lasting or sufficiently stable manner. However framed, that inquiry resists further doctrinal explication or subdivision into component parts; the answer ultimately

will depend on the circumstances in a given case. Although the analogy is admittedly imperfect, determining an individual's customary or usual dwelling, like determining whether a legal position is substantially justified, invariably will "involve multifarious, fleeting, special, narrow facts that utterly resist generalization." *Pierce* v. *Underwood*, 487 U.S. 552, 561-562 (1988) (citation omitted); cf. *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 586 (2018) (observing that a probable cause determination is "not readily, or even usefully, reduced to a neat set of legal rules") (citation omitted).

2. That the inquiry into habitual residence is inherently flexible and factbound is reinforced by the Convention's negotiation and drafting history. "Because a treaty ratified by the United States is 'an agreement among sovereign powers,'" courts should interpret it in light of "the negotiation and drafting history of the treaty." *Medellin* v. *Texas*, 552 U.S. 491, 507 (2008) (citation omitted). For the same reason, courts must "read the treaty in a manner 'consistent with the *shared* expectations of the contracting parties.'" *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 12 (2014) (citations omitted); see 22 U.S.C. 9001(b)(3).

Under the Convention, "the interests of children are of paramount importance." Convention preamble; see 22 U.S.C. 9001(a)(1). To that end, the Convention pursues the twin goals of "protect[ing] children internationally from the harmful effects of their wrongful removal" and "ensur[ing] their prompt return to the State of their habitual residence." Convention preamble. Both goals "correspond to a specific idea of what constitutes the 'best interests of the child.'" *Explanatory Report* ¶ 25. Even the Convention's various exceptions to its rule of prompt return—such as when "the child is

now settled in its new environment," Convention art. 12, or when "there is a grave risk that his or her return would expose the child to" harm, Convention art. 13—are in service of the child's interests. See *Explanatory Report* ¶¶ 25, 29-31.

Importantly, the Convention does not purport to resolve any underlying custody or access dispute; instead, its remedy is limited to returning the child to her country of habitual residence, where the courts can adjudicate and resolve such disputes. See Convention arts. 16, 19; *Explanatory Report* ¶ 36; 22 U.S.C. 9001(b)(4). Accordingly, such returns should be "prompt," Convention preamble; indeed, the Convention appears to contemplate decisions on whether to return a child to be rendered within six weeks of a petition's being filed, see Convention art. 11.

Both the negotiators' focus on the child's interests and the need for prompt resolution of petitions seeking a child's return are reflected in the choice of the flexible and fact-specific concept of habitual residence as the Convention's "connecting factor." In making that choice, the drafters rejected the two main alternatives: domicile and nationality. The Hague Conference had generally abandoned nationality as the connecting factor in its conventions in light of the rise of both stateless and multiple-nationality individuals. See Kurt H. Nadelmann, *Habitual Residence and Nationality as Tests at The Hague: The 1968 Convention on Recognition of Divorces*, 47 Tex. L. Rev. 766, 766-767 (1969).

Nationality had itself replaced domicile, see Nadelmann 767, which was regarded as too "technical" and a "term of art," Jeff Atkinson, *The Meaning of "Habitual Residence" Under the Hague Convention on the Civil Aspects of International Child Abduction and the*

Hague Convention on the Protection of Children, 63 Okla. L. Rev. 647, 649 (2011) (citation omitted); see Nadelmann 768 (observing that domicile had a "different meaning * * * in different systems"); see also Pet. App. 56a (panel opinion below recognizing that "[h]abitual residence should not be determined through the 'technical' rules governing legal residence or common law domicile") (citation omitted); Pet. App. 85a (district court order acknowledging the same). Accordingly, the Hague Conference generally had settled on using habitual residence, which became "a well-established concept in the Hague Conference." *Explanatory Report* ¶ 66.

The Convention here was no different. Because of their relative rigidity and inflexibility, both nationality and domicile were unsuited for the Convention and its goals. Professor Anton, the chairman of the commission that drafted the Convention, explained:

> The choice of the criterion of the habitual residence of the child was scarcely contested. It was clearly desirable to select a single criterion. That of the child's nationality seemed inappropriate because the State with the primary concern to protect a child against abduction is that of the place where he or she usually lives. In some systems the criterion of domicile would point to that place, but in others domicile has a technical character which was thought to make its choice inappropriate.

A. E. Anton, *The Hague Convention on International Child Abduction*, 30 Int'l & Comp. L.Q. 537, 544 (1981).

The Convention's drafters thus chose habitual residence—"the place where [the child] usually lives," Anton 544—which they viewed "as a question of pure fact, differing in that respect from domicile." *Explana-*

tory Report ¶ 66. Using the factbound concept of habitual residence avoided dependence on "artificial jurisdictional links," *id.* ¶ 11, which would have been contrary to the Convention's goal of protecting the interests of the child by promptly "restor[ing] a child to its own environment," *ibid.* As commentators have observed, "[t]he 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." Paul R. Beaumont & Peter E. McEleavy, *The Hague Conference on International Child Abduction* 89 (Oxford Univ. Press 1999). Habitual residence was thus "chosen precisely for its flexibility to deal with modern society." Erin Gallagher, *A House Is Not (Necessarily) a Home: A Discussion of the Common Law Approach to Habitual Residence*, 47 N.Y.U. J. Int'l L. & Pol. 463, 468 (2015).

That negotiation and drafting history confirms that habitual residence is a flexible and factbound concept that resists further legal rules. As Professor Anton observed, because habitual residence is "a question of fact," further attempts to define it would be "otiose." Beaumont & McEleavy 89 (citation omitted). Indeed, "the Hague Conference has continually declined to" define the term precisely so the concept can "retain[] the maximum flexibility for which it [i]s so admired." *Id.* at 89-90.

3. The views of other contracting states confirm that habitual residence is a flexible and factbound concept. This Court has explained that "'the postratification understanding' of signatory nations" is relevant to the interpretation of treaties. *Medellin*, 552 U.S. at 507 (citation omitted); see *Air France* v. *Saks*, 470 U.S. 392, 404

(1985) (explaining that "the opinions of our sister signatories [are] entitled to considerable weight") (citation omitted). That "principle applies with special force here, for Congress has directed that 'uniform international interpretation of the Convention' is part of the Convention's framework." *Abbott*, 560 U.S. at 16 (citation omitted); see 22 U.S.C. 9001(b)(3)(B). Consistent with the term's ordinary meaning as discussed above, courts of other contracting states have converged on the understanding that determining "habitual residence" requires a flexible and factbound inquiry.

For example, the Supreme Court of Canada recently explained that courts making determinations of habitual residence "must look to all relevant considerations arising from the facts of the case at hand." *Office of the Children's Lawyer* v. *Balev*, [2018] 1 S.C.R. 398, 421. In adopting that flexible, factbound standard, the Canadian high court expressly rejected approaches that would focus on either "the intention of the parents with the right to determine where the child lives" (what it deemed a "forward-looking parental intention model"), or "the child's acclimatization in a given country" (what it deemed a "backward-focused" approach), to the exclusion of the other. *Id.* at 419-420. Instead, *Balev* determined that a "hybrid" approach—one that "considers all relevant links and circumstances" in all cases—is the most appropriate under the Convention. *Id.* at 421. "Imposing * * * legal construct[s] onto the determination of habitual residence," the Canadian high court observed, would "detract[] from the task of the finder of fact, namely to evaluate all of the relevant circumstances in determining where the child was habitually resident at the date of wrongful retention or removal." *Id.* at 422 (citation omitted).

Likewise, the Court of Justice of the European Union has held that determining a child's place of habitual residence under the European Council regulations implementing the Convention for intra-European cases "reflects essentially a question of fact," and courts making such determinations therefore must "tak[e] account of all the circumstances of fact specific to each individual case." Case C-111/17, *OL* v. *PQ*, ¶¶ 42, 51, ECLI: EU:C:2017:436 (June 8, 2017). Of particular salience here, in *OL* the Court of Justice explained that even "[w]here the child in question is an infant," courts must consider a variety of evidence, including "the duration, regularity, conditions and reasons for" the custodial parent's presence in the country at issue, as well as "geographic and family origins and the family and social connections which [that parent] and child have with that" country. *Id.* ¶ 45. The Court of Justice emphasized that although the "intention of the parents to settle permanently with the child in a Member State * * * can also be taken into account, * * * the intention of the parents cannot as a general rule by itself be crucial to the determination of the habitual residence of a child." *Id.* ¶¶ 46-47. As the Court of Justice earlier had explained in Case C-497/10, *Mercredi* v. *Chaffe*, ECLI: EU:C:2010:829 (Dec. 22, 2010), "taking account of all the circumstances of fact specific to each individual case" is necessary to fulfill the Convention's purposes. *Id.* ¶ 47.

The Supreme Court of the United Kingdom likewise has rejected efforts to "overlay the factual concept of habitual residence with legal constructs." *In re A (Children)*, [2013] UKSC 60, ¶ 39. Instead, "habitual residence is a question of fact and not a legal concept such as domicile," and will "depend[] upon numerous factors,

* * * with the purposes and intentions of the parents being merely one of the relevant factors." *Id.* ¶ 54. The high court reiterated that "[t]he essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce." *Ibid.*; see *AR* v. *RN*, [2015] UKSC 35, ¶ 17; *In re KL (A Child)*, [2013] UKSC 75, ¶ 20.

In *LCYP* v. *JEK*, [2015] 5 H.K.C. 293, the Hong Kong Court of Appeal of the High Court, citing *In re A* and other United Kingdom cases, agreed that "[h]abitual residence is a question of fact which should not be glossed with legal concepts." *Id.* ¶ 7.7 (citation omitted). The court explained that although "parental intent does play a part in establishing or changing the habitual residence of a child," it is not dispositive and instead "will have to be factored in, along with all the other relevant factors," in determining habitual residence. *Ibid.*

The Court of Appeal of New Zealand similarly rejected an exclusive shared-parental-intent approach in *Punter* v. *Secretary for Justice* [2007] 1 NZLR 40, emphasizing "the need to ensure that the concept of habitual residence remains a factual one not limited by presumptions or presuppositions" and reiterating that courts must consider "all of the relevant factual circumstances." *Id.* at 66 (¶ 106); see *id.* at 71 (¶ 130) (explaining that "the test is a factual one, dependent on the combination of circumstances in the particular case"); *id.* at 85 (¶ 189) ("Parental purpose should be treated as an important factor, but not decisive.").

Agreeing that the "approach described in [*Punter*] * * * should be followed," the High Court of Australia held that courts should undertake "'a broad factual in-

quiry' into all factors relevant to determining the habitual residence of a child, of which the settled purpose or intention of the parents is an important but not necessarily decisive factor." *LK* v. *Director-General, Dep't of Cmty. Servs.* (2009) 237 CLR 582, 591, 600 (¶¶ 18, 45).

The point need not be belabored. As *Balev* observed, although there is not yet an "[a]bsolute consensus" among contracting states to the Convention, the "clear trend" from courts in those countries is to determine habitual residence using a flexible, factbound approach free from rigid legal or doctrinal requirements. [2018] 1 S.C.R at 423.

B. Under A Flexible And Factbound Inquiry, A Subjective Parental Agreement Is Not Categorically Necessary

Because the determination of habitual residence is inherently factbound and flexible, a subjective agreement between the parents is not necessary to that determination. Indeed, as explained above, even a shared parental intent is not necessary to that determination, so it follows *a fortiori* that an actual or subjective agreement between the parents—which even petitioner agrees is relevant only insofar as it establishes such intent, see Pet. Br. 28-29—is not categorically required either. To the contrary, as with all questions of fact, courts may find a variety of evidence relevant to their consideration, as the district court here did. Pet. App. 90a-98a; see pp. 26-27, *infra* (describing such types of evidence). A subjective agreement between the parents about where their child should live might in some cases be relevant to determining the child's habitual residence. For example, when a child has lived in several countries, an agreement (or other indicia of parental intent) may shed light on whether the particular dwelling

from which the child was wrongfully removed was sufficiently stable, lasting, or continuing in nature for that dwelling (as opposed to one of the other dwellings) to be regarded as the place of habitual residence. See Pet. App. 12a; *In re A*, *supra*, ¶ 54. But a subjective parental agreement—or lack thereof—should not be dispositive; as the court of appeals observed, cases under the Convention frequently arise in situations when the "parents d[o] not see eye to eye on much of anything." Pet. App. 12a.

Imposing a rigid requirement of a subjective agreement would contravene not only the flexible and fact-bound nature of the inquiry, but also the Convention's purposes. As the court of appeals observed, such a requirement would in practice leave many young children, especially those who have resided in only one country, with *no* habitual residence at all, thereby "leaving the population most vulnerable to abduction the least protected" under the Convention. Pet. App. 13a. That would undermine the Convention's goal to "deprive [the abducting parent's] actions of any practical or juridical consequences" by eliminating any benefit from unilaterally moving the child. *Explanatory Report* ¶ 16. To be sure, it might be possible to construe the Convention in such a way that in rare instances a very young child may lack a habitual residence under the Convention. See Pet. App. 29a-30a (Moore, J., dissenting); Beaumont & McEleavy 90, 112-113. But courts should not *create* the need to confront whether (and if so when) the Convention contemplates that undesirable scenario by imposing rigid legal requirements or constructs on what should be a quintessentially flexible and factual inquiry

under the Convention. That concern is particularly salient when, as here, a child has lived in only one country from birth to the wrongful removal.

Petitioner's suggestion (Pet. Br. 34-37) that an actual-agreement requirement would result in faster adjudications (when no such agreement exists) proves too much, for *any* rigid legal requirement would have the same effect. For instance, a requirement that a child have lived in a place for at least one year—as sometimes is required to establish domicile, see *Martinez* v. *Bynum*, 461 U.S. 321, 327 n.6 (1983)—or that the parents own or have a long-term lease for their dwelling also would result in rapid determinations in cases where those factors are absent. Yet applying such rigid requirements would be contrary to the flexible and fact-bound inquiry the Convention requires. And petitioner's speculation (Pet. Br. 37-42) that an actual-agreement requirement would prevent forum-shopping just as easily could support the opposite conclusion: knowing that the lack of an agreement would per se preclude any finding of habitual residence, a would-be abductor could simply avoid affirmatively agreeing to anything and thereby evade the Convention's reach.

Although the court of appeals here appeared to recognize the factual nature of a habitual-residence determination, see Pet. App. 3a, 8a-9a, it nevertheless seemed to adhere to a binary view of considering *either* the child's acclimatization *or* the parent's shared intent—but not both, much less other considerations as well. *Id.* at 7a-8a; see *id.* at 24a (Moore, J., dissenting) (agreeing with that binary standard). As explained above, that framework is incorrect; courts should consider all relevant evidence in all cases.

The Seventh Circuit's decision in *Redmond* v. *Redmond*, 724 F.3d 729 (2013), illustrates the correct approach to determining habitual residence under the Convention. There, the court refused to "overcomplicat[e] the issue of habitual residence with layers of rigid doctrine," and instead explained that, "in accordance with 'the ordinary and natural meaning of the two words it contains,'" determining a child's habitual residence "requires an assessment of the observable facts on the ground." *Id.* at 742-743 (citation omitted). *Redmond* rejected exclusive reliance on shared parental intent, explaining that although such intent can be "an important factor in the analysis," the "habitual-residence inquiry remains a flexible one, sensitive to the unique circumstances of the case and informed by common sense." *Id.* at 744. After reviewing various competing approaches in the courts of appeals—some of which focus on acclimatization, others of which focus on parental intent, see *id.* at 744-746—*Redmond* reiterated that both parental intent and acclimatization can be relevant, but that ultimately any determination of a child's habitual residence must "remain[] essentially fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions." *Id.* at 746.

That approach is consistent with the ordinary meaning of habitual residence, the negotiation and drafting history of the Convention, and the emerging case law from other contracting states described above. Under that approach, courts determining a child's habitual residence should consider the full range of admissible evidence relevant to that determination. Such evidence potentially may include evidence of the parents' intent (such as an actual agreement, expressed intent to remain in the country, parental employment, the purchase

of a home or the signing of a long-term lease, moving household belongings, establishing local bank accounts, or applying for driver's or professional licenses); the child's ties to the place (such as the length of residence, the child's language and assimilation, school or daycare enrollment, or participation in social activities); and any other relevant factors (such as immigration status, the reasons the child was in the country, or the existence of family and social networks), as they existed at the time of the wrongful removal or retention. See generally, *e.g.*, *Balev*, [2018] 1 S.C.R. at 414, 421, 423; *In re A*, *supra*, ¶¶ 48, 55; *Punter* [2007] 1 NZLR at 61-62 (¶ 88); Atkinson 654-657. Because the habitual-residence inquiry is factbound and flexible, the relative weight of any given evidence will vary from case to case and ultimately would be a matter of discretion for the trial court. Cf. *Anderson* v. *Bessemer City*, 470 U.S. 564, 574 (1985).

Importantly, the list above is intended to be illustrative, not mandatory or exhaustive; courts are free to consider any admissible evidence relevant to answering the ultimate factual inquiry: the location of the child's habitual residence. Conversely, the inquiry is not boundless. For instance, setting aside extraordinary circumstances (such as an infant born on an overseas vacation), a child's habitual residence likely cannot be in a country in which he or she has never been physically present. See Case C-393/18, *UD* v. *XB*, ¶ 53, ECLI:EU:C:2018:835 (E.C.J. Oct. 17, 2018) (observing that under the Convention's implementing regulation for intra-European cases, habitual residence "may not be established in a Member State which the child has never been to"); *OL*, *supra*, ¶ 35 (similar); Pet. App. 15a (Boggs, J., concurring) (similar). That conclusion flows from the

ordinary meaning of "habitual"; absent extraordinary circumstances, an individual cannot have *usually* resided somewhere if he or she has *never* resided there. In all cases, the touchstone is determining the location of the child's usual or customary dwelling or abode. See *Redmond*, 724 F.3d at 746 ("In the final analysis, the court's focus must remain on 'the *child's* habitual residence.'") (brackets and citation omitted); *Balev*, [2018] 1 S.C.R. at 421 (explaining that a court's task is to "determine[] the focal point of the child's life"). Courts should consider any and all admissible evidence relevant to making that purely factual determination.

* * * * *

Although the court of appeals recognized that the inquiry into habitual residence "is one of fact," Pet. App. 3a, and although both the district court and the court of appeals correctly concluded that they could determine A.M.T.'s habitual residence without requiring proof of a subjective parental agreement, the district court made its determination without engaging in the flexible and factbound inquiry that the Convention requires. Instead, it appeared to focus on shared parental intent to the exclusion of other considerations. See *id.* at 97a-98a. This Court has repeatedly emphasized that it is a "court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *United States* v. *Stitt*, 139 S. Ct. 399, 407 (2018) (citation omitted). Accordingly, the Court should vacate the judgment below and remand the case so the lower courts have the opportunity to apply the correct legal standard to determine A.M.T.'s habitual residence in the first instance.

II. APPELLATE COURTS SHOULD REVIEW DETERMINATIONS OF HABITUAL RESIDENCE FOR CLEAR ERROR

A district court's determination of habitual residence should be reviewed on appeal for clear error. Appellate courts traditionally review legal determinations de novo and factual determinations for clear error. See *Pierce*, 487 U.S. at 558. The ordinary meaning of the term habitual residence is quintessentially factual, and international case law likewise treats habitual residence as a question of fact. See pp. 14-16, 19-23, *supra*. And as explained above, the contracting states to the Convention deliberately chose habitual residence as the connecting factor precisely because they regarded it as a question of pure fact. See pp. 16-19, *supra*. It follows that a district court's determination of habitual residence should be reviewed for clear error. See *Pierce*, 487 U.S. at 558.

That conclusion remains unchanged even if the question of habitual residence is viewed as a "mixed" question of law and fact. "A mixed question asks whether 'the historical facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.'" *U.S. Bank*, 138 S. Ct. at 966 (citation and ellipsis omitted). Because "[m]ixed questions are not all alike," the standard of review for a given mixed question depends "on whether answering it entails primarily legal or factual work." *Id.* at 967.

For example, de novo review is appropriate "when applying the law involves developing auxiliary legal principles of use in other cases." *U.S. Bank*, 138 S. Ct. at 967. That is because of "appellate courts' 'institu-

tional advantages' in giving legal guidance." *Ibid.* (citation omitted). Conversely, questions requiring the district court "to marshal and weigh evidence, make credibility judgments, and otherwise address * * * 'multifarious, fleeting, special, narrow facts that utterly resist generalization,'" should be reviewed "with deference." *Ibid.* (citation omitted). The mixed question in *U.S. Bank* was whether a certain transaction between two persons had been conducted at arm's length. *Id.* at 965. This Court found that question "about as factual sounding as any mixed question gets" because a court answering it would "take[] a raft of case-specific historical facts, consider[] them as a whole, balance[] them one against another," and ultimately "make a determination that when two particular persons entered into a particular transaction, they were (or were not) acting like strangers." *Id.* at 968 (footnote omitted).

Like the question at issue in *U.S. Bank*, the question of habitual residence also "entails primarily * * * factual work." 138 S. Ct. at 967. It too requires a court to consider many case-specific facts, see pp. 26-27, *supra*; consider and balance all of them; and ultimately determine whether the child was (or was not) usually or customarily dwelling in a particular country at the time of his or her wrongful removal. And as this case illustrates, district courts often will have to make credibility judgments and address fleeting, special, and narrow facts that are unique to each case. See, *e.g.*, Pet. App. 103a-105a (finding petitioner's account of domestic abuse credible and respondent's account not credible); *id.* at 96a-97a (relying on petitioner's "registering the parties for an *au pair*" and "scheduling times for American family members to visit the parties in Italy months in the future" as relevant evidence of parental intent).

To be sure, as petitioner points out (Pet. Br. 21), the government previously has observed that "full appellate review" can "promote national uniformity in the interpretation of the Convention." Gov't Br. at 28, *Chafin* v. *Chafin*, 568 U.S. 165 (2013) (No. 11-1347). But that statement was not made in reference to the appellate standard of review. The question in *Chafin* was whether an appeal from a return order under the Convention is rendered moot once the child has been returned; the government explained that if the answer were yes, "the full course of appellate proceedings" would occur only "in cases in which stays had been obtained or where return was denied." *Id.* at 27. In context, therefore, the government's observation in the *Chafin* brief was not contrasting de novo appellate review with deferential review, but rather full appellate review with no appellate review at all.

Deferential appellate review of habitual-residence determinations also is consistent with the Convention's goals. As the New Zealand Court of Appeals observed, "[i]f decisions are overturned too readily on appeal this will undermine the summary nature of * * * decisions under the Hague Convention," which "are only as to choice of forum and not decisions as to ultimate custody." *Punter* [2007] 1 NZLR at 88 (¶ 204); see Convention art. 1 (explaining the Convention's objective "to secure the prompt return of children"); cf. *Chafin* v. *Chafin*, 568 U.S. 165, 179 (2013) (observing that granting stays pending appeal under too permissive a standard would create incentives for losing parents to appeal, which "would undermine the goal of prompt return and the best interests of children who should in fact be returned").

Indeed, courts of other contracting states to the Convention agree that determinations of habitual residence should be reviewed deferentially. The Supreme Court of Canada, for instance, has said that "appellate courts must defer to the application judge's decision on a child's habitual residence, absent palpable and overriding error." *Balev*, [2018] 1 S.C.R. at 419. Likewise, the Supreme Court of the United Kingdom has noted "the limited function of an appellate court" in reviewing "a lower court's finding as to habitual residence," observing that such a finding "is not generally open to challenge" unless the lower court reached a conclusion that "was not * * * reasonably open to it." *AR*, *supra*, ¶ 18. And the Hong Kong Court of Appeal of the High Court has observed that determinations of habitual residence "involve an assessment of a number of different factors to be weighed against each other" and thus are "closely analogous to the exercise of a discretion and the appeal court should approach them in a similar way." *LCYP*, *supra*, ¶ 19. Adopting a deferential appellate standard of review here thus would be in keeping with Congress's stated "need for uniform international interpretation of the Convention," 22 U.S.C. 9001(b)(3).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded.

Respectfully submitted.

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