No. 18-935

In the Supreme Court of the United States

MICHELLE MONASKY,

Petitioner,

v.

DOMENICO TAGLIERI,

Respondent.

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

BRIEF FOR RESPONDENT

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

JOHN D. SAYRE
AMY BERMAN HAMILTON
Nicola, Gudbranson & Cooper, LLC
25 West Prospect Ave.
Cleveland, OH 44115
(216) 621-7227

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

PAUL W. HUGHES
MICHAEL B. KIMBERLY
McDermott Will & Emery
500 N. Capitol St., NW
Washington, DC 20001
(202) 756-8000

Counsel for Respondent

QUESTIONS PRESENTED

This case presents two questions relating to the Hague Convention on the Civil Aspects of Child Abduction:

1. What standard governs the review by a court of appeals of a district court's application of the Hague Convention's "habitual residence" standard to the court's factual findings—a paradigmatic mixed question of fact and law.

2. Whether the "habitual residence" standard requires proof of an "actual agreement" between the parents in order to establish the child's habitual residence.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(cont'd)

TABLE OF CONTENTS
(cont'd)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules and Regulations

Other Authorities

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-41a) is reported at 907 F.3d 404. The panel opinion (Pet. App. 42a-72a) is reported at 876 F.3d 868. The district court's opinion (Pet. App. 73a-107a) is not reported but is available at 2016 WL 10951269.

JURISDICTION

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

TREATY PROVISIONS INVOLVED

Relevant provisions of the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89, are reproduced in the Addendum to this brief.

STATEMENT

A. Legal Background.

1. The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, is the primary international legal instrument for ensuring the return of a child who has been abducted from her country of habitual residence.

This Convention was adopted "in response to the problem of international child abduction during domestic disputes." *Abbott* v. *Abbott*, 560 U.S. 1, 8 (2010). It is "based on the principle that the best interests of the child are well served when decisions

regarding custody rights are made in the country of habitual residence." *Id*. at 20.

The Convention's reporter explained that when a child's parents are involved in a domestic dispute and one parent unilaterally moves the child from one country to another, "the person who removes the child * * * hopes to obtain a right of custody from the authorities of the country to which the child has been taken." Elisa Perez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* ¶ 13, in 3 *Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction* (1982) (*Explanatory Report*). "[T]he abductor will hold the advantage, since it is he who has chosen the forum in which the case is to be decided, a forum which, in principle, he regards as more favourable to his own claims." *Id*. at ¶ 14.

The Convention's purpose is "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence." Preamble. It does so by "in effect, lay[ing] venue for the ultimate custody determination in the child's country of habitual residence rather than the country to which the child is abducted." *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 5 (2014).

Article 3 of the Convention explains that the removal or retention of a child is wrongful when it breaches rights of custody "under the law of the State in which the child was habitually resident immediately before the removal or retention." If removal or retention of a child is wrongful under Article 3, then Article 12 requires the child's return to the habitual residence, unless any exceptions set forth in Article 13 preclude return of the child.

Importantly, ordering the return of a child to his or her country of habitual residence does not determine the final custody arrangement for the child; it "allow[s] the courts of the home country to decide what is in the child's best interests." *Abbott*, 560 U.S. at 20. This Court has stated that "[j]udges must strive always to avoid a common tendency to prefer their own society and culture, a tendency that ought not interfere with objective consideration of all the factors that should be weighed in determining the best interests of the child." *Ibid.*

Congress in 1988 enacted the enabling statute for the Convention—the International Child Abduction Remedies Act. See Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified at 22 U.S.C. §§ 9001-9011). A person who seeks the return of his child "may do so by commencing a civil action by filing a petition for the relief sought" in a court of competent jurisdiction where the child is located. 22 U.S.C. § 9003(b). The petitioner must prove by preponderance of the evidence that the child was wrongfully removed or retained within the meaning of the Convention. *Id.* § 9003(e)(1)(A). The court with jurisdiction over the action must "decide the case in accordance with the Convention." *Id.* § 9003(d).

2. The Convention does not define the term "habitual residence."

The official reporter for the Conference that produced the Convention explained that "habitual residence" was "a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile." *Explanatory Report* ¶ 66. And one treatise concludes that the decision to leave "habitual residence" undefined was "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." J.H.C. Morris, *Dicey and Morris on the Conflict of Laws* 144 (10th ed. 1980).

B. Factual Background.[1]

Petitioner Michelle Monasky is a citizen of the United States. Pet. App. 73a. Respondent Domenico Taglieri is a citizen of Italy. *Ibid.* They were married in the United States in September 2011. *Id.* at 74a.

The district court found that "[f]ollowing their marriage, the parties made the mutual decision to relocate to Italy for career opportunities, but left open the possibility of returning to the United States at some point in the future should better career opportunities present themselves." Pet. App. 74a. Taglieri moved to Italy in February 2013, and Monasky followed in July 2013. *Ibid.*

During their first year in Italy, both Monasky and Taglieri worked in Milan—Taglieri at Humanitas Hospital, and Monasky at the Universitá Vita Salute San Raffaele. Pet. App. 74a. In April 2014, Taglieri's temporary position at Humanitas Hospital ended. *Ibid.* He accepted a permanent position at a hospital in Lugo, about two hours and forty minutes southeast of Milan. *Id.* at 74a & n.2. At the same time, Monasky left her previous job and began a two-year fellowship at Humanitas. *Id.* at 74a. Monasky also "began pursuing recognition of her academic credentials by the Italian Ministry of Justice." *Ibid.*

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[1] Petitioner's discussion of the facts (Br. 5-10) quotes selectively from the district court's opinion and petitioner's evidence, ignoring many of the district court's determinations and other evidence credited by the district court.

Even before Monasky and Taglieri began working in separate cities, their marriage became increasingly contentious, resulting in a physical altercation in March 2014. Pet. App. 75a.[2]

In May 2014, Monasky and Taglieri conceived a child. Pet. App. 75a. The parties "dispute[d] whether the pregnancy was voluntary." *Ibid.* Taglieri testified that "he and Monasky jointly decided to start a family"; Monasky testified that notwithstanding her "expressed reservations about becoming pregnant," Taglieri became "'more aggressive with sex,' and ultimately forc[ed] her to become pregnant." *Ibid.*

During the summer and fall of 2014, the district court found, "the parties continued to live as a married couple, but their relationship was rife with difficulties." Pet. App. 75a. Living in different cities strained the marriage; Monasky "struggled with a difficult pregnancy"; and they disagreed over the "pre-natal care and birthing of the baby." *Id.* at 75a-76a. But they traveled to the United States together to attend Monasky's sister's wedding. *Id.* at 76a.

During the pregnancy, "Monasky began—without Taglieri's knowledge—applying for jobs in the United States, inquiring about American health care and child care options, and looking for American divorce lawyers." Pet. App. 76a. But, the district court observed, "also during this time, the parties

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[2] The parties stipulated that Taglieri slapped Monasky once in March 2014. But they disagreed whether any subsequent altercations occurred. Pet. App. 75a, 103a-105a. The district court found "credible" Monasky's testimony regarding physical abuse. *Id.* at 105a; see also *ibid.* ("Based on the record, the frequency with which Taglieri subjected Monasky to physical violence and severity of the physical violence is unclear.").

made inquiries about Italian child care options, and discussed purchasing items, such as a combination stroller, car seat, and bassinet for A.M.T." *Ibid.* (citation omitted). (A.M.T. is the parties' child, whose habitual residence is the subject of this action.) They also searched for, and found, a larger apartment—although Monasky made clear that it was important that the agreement allow the lease to be broken on three months' notice, and that proviso was included in the lease. *Ibid.*

Monasky left work to begin a five-month maternity leave in January 2015. Pet. App. 77a. The district court found that "[t]hroughout January, the parties continued to prepare for A.M.T.'s birth, and emails between the parties, reflecting words of affection, suggest that their relationship was less turbulent than before." *Ibid.* (citation omitted).

The following month, however, Monasky and Taglieri began arguing again over the details of their child's birth. Pet. App. 77a. On February 10, Monasky e-mailed Taglieri information about collaborative divorce in Italy. *Ibid.*; J.A. 200. She also obtained quotes from international moving companies for a potential move to the United States. *Ibid.*

The following day, Monasky and Taglieri went to the hospital, where the doctors recommended inducing labor. Pet. App. 77a. Monasky declined that advice; on the way back to the apartment, they argued about her decision. *Ibid.* Before arriving home, Monasky asked Taglieri to return to the hospital because she felt contractions. Taglieri suggested they wait to "see how the contraction-like pains proceeded." *Ibid.*

Once back at their apartment, they continued to argue. Taglieri told Monasky that she could take a taxi back to the hospital. During that night, while Taglieri slept, Monasky did just that. Pet. App. 78a. Taglieri testified that he did not know that Monasky had left until he woke up. He then joined her at the hospital. *Ibid.*

Later that day, Taglieri drove to the airport to pick up Monasky's mother. Taglieri and Monasky's mother stayed at the hospital until Monasky underwent an emergency cesarean section to give birth to A.M.T. Taglieri remained in Milan with Monasky until she was released from the hospital. Monasky went home with her mother and Taglieri returned to Lugo. Pet. App. 78a; J.A. 70, 76.

When Monasky's mother returned to the United States, Taglieri returned to Milan. On March 1, Monasky asked Taglieri if he would agree to a divorce in Italy. Pet. App. 78-79a. Taglieri refused, and instead asked Monasky to join him in Lugo, which she did two days later. *Ibid.*; J.A. 76-77. Monasky said that she moved because she still needed help caring for A.M.T. while recovering from her caesarian. Pet. App. 79a. Taglieri had a different interpretation and said that the couple agreed to reunite so that they could "clarify existing issues." *Ibid.*

Before the district court, the parties "sharply dispute[d] whether, while in Lugo, Monasky and Taglieri reconciled." Pet. App. 79a. Taglieri testified that "the parties got back to 'the regular course of life,'" pointing out that "Monasky continued to pursue her driver's license, inquired about hosting an *au pair*, * * * scheduled doctor appointments for A.M.T.," and arranged for her aunt to come to Italy in September to visit the parties and A.M.T. *Ibid.* Al-

so, Monasky asked Taglieri's mother to plan to stay with the baby while she attended a conference in Lindau, Germany, to be held several months later—in June or July. *Id.* at 91a. Monasky contended "that she did not waiver on her intent to divorce and return to the United States with A.M.T." *Id.* at 79a.

On March 31, 2015, Monasky and Taglieri had an argument. Pet. App. 81a. At one point, Monasky slammed her hand down on a table. *Ibid.* According to Monasky, Taglieri then raised his hand as if to hit her but did not. *Ibid.* Shortly thereafter, Taglieri left for work. *Ibid.*

Without telling Taglieri, Monasky went to a police station and filed a report stating that Taglieri was abusive. Pet. App. 81a. She told the police that she planned to return to Milan and open a separate bank account. *Ibid.* She then took A.M.T. to a "safe house" at an undisclosed location. *Ibid.* When Taglieri returned home to find Monasky and A.M.T. gone, he went to the police and revoked his permission for the issuance of A.M.T.'s U.S. passport. *Ibid.* Monasky and Taglieri communicated via telephone on April 3, but Monasky remained at the safe house with A.M.T. *Ibid.*

In April 2015, Monasky and her daughter returned to the United States and moved in with her parents in Painesville, Ohio. Pet. App. 81a-82a. A.M.T. was approximately eight weeks old when she left Italy. *Id.* at 81a.

C. Proceedings Below.

1. District Court.

On May 15, 2015, Taglieri filed a petition in the United States District Court for the Northern Dis-

trict of Ohio seeking the return of A.M.T. to Italy pursuant to the Hague Convention and the federal implementing statute. Pet. App. 82a.

Following a four-day bench trial, the district court granted the petition and issued an order directing that A.M.T. be returned to Italy. Pet. App. 73a-107a.

The court stated that "[b]ecause removal or retention is only 'wrongful' if the child is removed from her habitual residence, habitual residence is a threshold determination under the Convention." Pet. App. 83a. It observed that when a child is too young to have become acclimatized to a residence, "the court must look to the 'settled purpose and shared intent of the child's parents in choosing a particular habitual residence.'" *Id.* at 89a (citation omitted).

Under the "shared intent" test, the inquiry

> would begin with determining whether there is a marital home where the child has resided with his parents. If the answer is yes, ordinarily a court would conclude that the intent of the parties and their settled purpose is to be in that place. Thus, the habitual residence of the child is in that place. While there are particular facts and circumstances that might necessitate the consideration [of] other factors, the court finds that, in this case, despite all the acrimony between the parties, the facts and circumstances do not require such consideration.

Pet. App. 97a.

The court found "no question that the parties established a marital home in Italy, and resided in that

place with the child until Monasky departed with her to the United States." Pet. App. 97a. In addition, "when Monasky came to Italy," the parties "were not in agreement that she would come only for a short, definite period of time and then return to the United States. She and Tagli[e]ri were coming to Italy to live together and work, with no definitive plan to return to the United States, though that was not ruled out as [a] possibility in the future." *Ibid.*

The district court observed that "[c]ourts grappling with the breakdown of the marriage before, or at the time of, the birth of a child have not indicated that, where there is an established marital home in which the child resides, the unilateral actions and intentions of one parent are sufficient to disestablish what would normally be the habitual residence of the child." Pet. App. 97a-98a. Under that approach, Italy would qualify as A.M.T.'s habitual residence.

But the district court did not rest its decision on that ground alone. It went on to consider Monasky's different legal theory—that "where a parent determines at, or before, the birth of a child that her marriage has broken down and has a plan to raise her child not in the state of her marital home, but elsewhere, the court should find that no habitual residence exists." Pet. App. 98a. Even if the law supported that proposition, the court held, the facts of this case did not. Monasky "continued after the birth of the child to live in Italy and had no definitive plans to bring her to the United States until the last altercation which precipitated her return to the United States." *Ibid.*

Monasky argued that the marriage broke down in February 2015. Pet. App. 92a. The district court carefully considered the entire record in assessing

this contention (see *id.* at 92a-94a)—and concluded that "it was not until the March 31, 2015 incident, where Taglieri raised his hand as if to hit Monasky, that Monasky's plan to leave Italy became crystalized." *Id.* at 94a. For that reason, before March 31, there was a shared intent to raise the child in Italy, at least for some undetermined amount of time.

The court recognized that "[l]eading up to A.M.T.'s birth, and in fact during Monasky's labor, the parties argued relentlessly. If the court considers only Monasky's stated desire to divorce, and the period of time immediately surrounding A.M.T.'s birth, it might conclude that the parties' relationship had fundamentally 'broken down.'" Pet. App. 93a.

On the other hand, the court explained,

> there is also evidence which suggests that, despite Monasky's stated desire to divorce Taglieri and return to the United States as soon as possible, Monasky lacked definitive plans as to how and when she would actually return to the United States. This evidence suggests that Monasky, in fact, took steps to be able to remain in Italy with the parties' daughter for an undetermined period of time. For instance, Monasky and Taglieri acquired items necessary for A.M.T. to reside in Italy, including, but not limited to, a rocking chair, stroller, car seat, and bassinet. Additionally, as late as March 2015, Monasky continued to pursue an Italian driver's license. Monasky also continued to set up routine medical appointments for A.M.T., informed Taglieri that she registered them as a host family for an *au pair*, and invited an American family

> member to visit the parties in Italy in mid-September.

Pet. App. 93a.

These and other facts "support, rather than undermine, a court's conclusion that, despite her intent to return to the United States with A.M.T. as soon as possible in the future, Monasky had no crystalized plan in place to do so." Pet. App. 94a; see also *ibid.* ("[M]ost of the steps that Monasky took in March 2015 * * * seemed to reflect a settled purpose and intent to remain in Italy, at least for an undetermined period of time.").

The court recognized Monasky's "exhibited ambivalence about the state of the parties' relationship," but concluded that "an acrimonious marriage alone" could not "prevent[] a young child from acquiring a habitual residence, as most Hague Convention cases involve less than harmonious marital circumstances." Pet. App. 96a.

"It is true that scheduling doctor's appointments for A.M.T. may certainly amount only to 'routine, practical realities,' as Monasky argues, and not indicia of Monasky's intent to remain in Italy with A.M.T. But, the court is not persuaded that registering the parties for an *au pair*, continuing to take driver's lessons, and scheduling times for American family members to visit the parties in Italy months in the future are also the result of 'routine practical realities.'" Pet. App. 96a-97a. Rather, the court concluded, they demonstrated the absence of a definitive plan to bring A.M.T. to the United States. For that reason, Monasky could not establish the breakdown of the marriage and the intent to raise the child in a place other than Italy.

The court thus concluded that "the child's habitual residence was the parties' marital home, Italy, at the time of removal." Pet. App. 98a. Monasky's decision to take A.M.T. to the United States was therefore a wrongful removal under the Hague Convention.[3]

2. Court of Appeals.

A three-judge panel of the court of appeals affirmed the district court's judgment. Pet. App. 42a-71a. Monasky sought and obtained rehearing en banc. *Id*. at 108a-109a.

The en banc Sixth Circuit affirmed the district court's determination by a 10-8 vote. Pet. App. 1a-40a.

The majority, speaking through Judge Sutton, observed that Sixth Circuit precedent "offers two ways to identify a child's habitual residence." Pet. App. 7a. "The primary approach looks to the place in which the child has become 'acclimatized.' The second approach, a back-up inquiry for children too young or too disabled to become acclimatized, looks to 'shared parental intent.'" *Ibid.*

Here, "[n]o one thinks that A.M.T. was in a position to acclimate to any one country during her two months in this world. That means this case looks to the parents' shared intent." Pet. App. 9a.

The court of appeals stated that clear-error review applied to the district court's determination that the parents' shared intent designated Italy as

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[3] Monasky sought a stay of the district court's order pending appeal. Pet. App. 5a. Stay applications were denied by the Sixth Circuit and by Justice Kagan as Circuit Justice. *Ibid.*

A.M.T.'s habitual residence. It observed that "[t]he Hague Convention's explanatory report treats a child's habitual residence as 'a question of pure fact.'" Pet. App. 8a. "So long as the district court applies the correct legal standard, as [the district court] did here, the determination of habitual residence is a question of fact subject to clear-error review, sometimes characterized as abuse-of-discretion review, as the Convention's explanatory report says and as our cases confirm." *Id.* at 11a.

The court concluded that "[n]o such [clear] error occurred here." Pet. App. 11a. It found the district court's analysis "thorough, carefully reasoned, and unmarked by any undue shading of the testimony provided by the competing witnesses." *Id.* at 10a. It therefore had "no warrant to second-guess [the district court's] well-considered finding." *Id.* at 11a.

The court of appeals found no need to remand the case because the Sixth Circuit had clarified the habitual residence standard in a decision rendered after the district court's ruling in this case (*Ahmed* v. *Ahmed*, 867 F.3d 682 (6th Cir. 2017)). It held that the district court had applied the standard set forth in *Ahmed*. Pet. App. 12a.

The court also rejected Monasky's contention that the district court erred because "she and Taglieri never had a 'meeting of the minds' about their child's future home." Pet. App. 12a. It held that a "meeting of the minds" provides "a sufficient, not a necessary, basis for locating an infant's habitual residence. An absence of a subjective agreement between the parents does not by itself end the inquiry." *Ibid.* That is because most divorcing parents "d[o] not see eye to eye on much of anything by the end." *Ibid.* Requiring a subjective agreement would there-

fore "create a presumption of no habitual residence for infants, leaving the population most vulnerable to abduction the least protected." *Id.* at 12a-13a.

Judge Boggs filed a concurring opinion. Pet. App. 14a-23a. He joined the majority's opinion but stated that there was an alternative ground for affirming the district court's decision: "absent unusual circumstances, where a child has resided exclusively in a single country, especially with both parents, that country is the child's habitual residence. An excessive reliance solely on the two-part test, one that will often turn exclusively on 'shared parental intent,' could jeopardize that simple conclusion for young children, leaving them without a habitual residence and therefore unprotected by the Hague Convention." *Id.* at 15a.

Judges Moore, Gibbons, and Stranch filed separate dissenting opinions. Pet. App. 23a-40a. They stated that the case should be remanded to allow the district court to assess the facts in light of the Sixth Circuit's intervening *Ahmed* decision.

In addition, Judge Moore (whose opinion was joined by the other dissenting judges) stated that the majority erred in holding that the district court's determination of habitual residence is subject to clear-error review, because the "ultimate determination of habitual residence—in other words, its application of the legal standard to its findings of fact—is reviewed de novo." Pet. App. 30a.

SUMMARY OF ARGUMENT

The Hague Convention "addresses a pressing and never-ceasing policy problem—the abductions of children by one half of an unhappy couple" in order to gain an advantage in the child-custody determina-

tion accompanying the marriage's dissolution. Pet. App. 6a (en banc majority). When one parent unilaterally moves the child within a nation, that nation's domestic law is capable of resolving the dispute. But when a child is abducted across international borders, an agreement among nations was needed to provide a prompt and effective mechanism for resolving the dispute.

"The Convention's mission is basic: to return children 'to the State of their habitual residence,' to require any custody disputes to be resolved in that country, and to discourage parents from taking matters into their own hands by abducting a child." Pet. App. 6a (en banc majority). "Habitual residence" is thus the linchpin of the Convention's protections—the Convention is "based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence." *Abbott*, 560 U.S. at 20.

This case presents two questions regarding the Convention's habitual residence standard—the standard of appellate review for district courts' determinations of habitual residence; and whether an actual agreement between the parents regarding the place where the child will be raised is a necessary prerequisite to establishing the child's habitual residence. Because the appellate review question turns to some extent on the nature of the habitual residence inquiry, we address the substantive question first.

I. We agree with the Solicitor General that an individual's habitual residence is "the place or abode where he or she customarily or usually lives or dwells." U.S. Am. Br. 14-15.

The Convention does not define "habitual residence," which requires the Court to look to the words' plain meaning. "Habitual" means customary or usual; and "residence" means presence at a place of abode. The Convention therefore requires identification of the place that the child customarily or usually lived prior to his or her abduction.

The Convention's drafting history confirms that conclusion, explaining that the Convention's purpose was to restore a child to the family and social environment in which his or her life had developed. And that is consistent with the Convention's purpose: requiring resolution of custody disputes in the country of the child's habitual residence because the connection between the child and that nation makes it the most appropriate place for deciding that issue.

Importantly, the drafters expressly rejected technical legal tests such as "domicile" or "nationality." They instead adopted an undefined term requiring broad consideration of all facts relevant to determining the child's connection with the country in question.

The courts of a number of other signatory nations have adopted that construction of "habitual residence"—and those determinations "appl[y] 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 (quoting 22 U.S.C. § 9101(b)(3)(B)). For example, the Supreme Court of Canada held just last year that a child's habitual residence is "the focal point of the child's life—'the family and social environment in which its life has developed'—immediately prior to the [challenged] removal or retention." *Office of the Children's Lawyer* v. *Balev*,

[2018] 1 S.C.R. 398, 421 (¶ 43) (citation omitted). The court explained that this standard requires consideration of "the entirety of the child's situation. * * * The temptation 'to overlay the factual concept of habitual residence with legal constructs' must be resisted." *Id.* at 422 (¶ 47). The same interpretation has been adopted by the highest courts in the European Union and the United Kingdom, and by courts in a number of other signatory nations.

Petitioner argues that a young child can have a habitual residence only if the parents have reached an "actual agreement" on "where the child will be raised." Pet. Br. 29.

That proposed standard is contrary to the Convention's text, drafting history, and context—all of which require consideration of all facts relevant to determining where the child usually lives. While each parents' intent is relevant to that inquiry, that is one of many factors that a court must assess. Other signatory nations have squarely rejected a standard turning solely on parental intent.

Moreover, even when assessing parental intent, proof of an actual agreement between the parents is not required. Each parent's intent regarding the child's usual dwelling place may be established by objective evidence—the parents' statements and actions, whether taken individually or together. Indeed, courts routinely look to such objective evidence to ascertain a party's intent in a variety of legal contexts.

Petitioner's proposed standard suffers from the additional flaw that it would produce a large number of cases in which a young child would be found to have no habitual residence. "After all, in most cir-

cumstances where the inter-family tension is so great that one parent has abducted a young child it is very likely that the parents will have quarreled about many things, most especially about their hopes and plans for where the child will be raised." Pet. App. 16a-17a (Boggs, J., concurring). Petitioner's standard therefore "would create a presumption of no habitual residence for infants, leaving the population most vulnerable to abduction the least protected." Pet. App. 12a-13a (en banc majority).

II. A district court's habitual residence determination is a classic mixed question of law and fact. This Court's decision in *U.S. Bank Nat'l Ass'n* v. *Village at Lakeridge, LLC*, 138 S. Ct. 960 (2018), makes clear that such determinations should be reviewed under a clear error standard.

Habitual residence determinations "immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address * * * 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *U.S. Bank*, 138 S. Ct at 967. Indeed, the habitual residence standard requires a case-specific determination based on consideration of all relevant facts.

In addition, appellate courts will not develop "auxiliary legal principles of use in other cases," *U.S. Bank*, 138 S. Ct at 967—a consideration that would weigh in favor of *de novo* review—because the Convention's text and drafting history specify a purely factual inquiry. Other signatory nations have expressly held 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." *AR* v. *RN*, [2015] UKSC 35 ¶ 17. Other common-law nations therefore apply a deferential standard of review to lower courts' habitual residence determinations.

Finally, deferential review furthers the Convention's objective of securing the "prompt return" of a child wrongfully removed from her habitual residence. Article 1. The habitual residence determination is preliminary—to determine where the critical decisions regarding custody are made. According a greater degree of finality to the district court's determination is consistent with that goal.

De novo review also will inevitably encourage more appeals in these emotionally-fraught disputes—because the chances of reversal are greater. That result would undermine the Convention's emphasis on prompt return, and therefore favors adoption of the clear-error standard.

III. This Court should affirm the court of appeals' judgment and end this proceeding.

A.M.T. was returned to Italy nearly three years ago, following the district court's decision and the denial of stays by the Sixth Circuit and this Court. This Court should not prolong the uncertainty regarding that order by directing another round of district court and appellate proceedings.

Further delay undermines the Convention's object of "prompt" resolution of the preliminary habitual residence determination. And this Court has noted the burden on children and parents from delay in resolving domestic relations matters.

The certiorari petition presented two challenges to the court of appeals' judgment: that habitual resi-

dence requires an actual agreement between the parents and that the court of appeals applied the wrong standard of review in affirming the district court's determination. If the Court rejects those arguments, there is no basis for setting aside the court of appeals' judgment.

Petitioner includes a new argument in her brief—urging this Court to make its own habitual residence determination based on its own *de novo* review of the factual record in this case. But that issue is not fairly encompassed within the questions presented in the certiorari petition and, therefore, is not before the Court. In addition, *de novo* factual review by this Court to overturn the conclusions of both lower courts is plainly inconsistent with the governing standard of review and the record.

The proper course, rather, is for this Court to affirm the judgment below. The district court compiled a comprehensive record. Assuming the Court rejects petitioner's standard-of-review argument, the lower courts' determinations are dispositive of the parental intent element of the inquiry. The district court also took account of the other facts relevant under the broad inquiry that the Convention requires, recognizing that they all weigh in favor of finding A.M.T.'s habitual residence to be Italy—it is where she was born and the only place she lived before she was removed unilaterally by petitioner.

For these reasons, the only conclusion open to the lower courts is that Italy was A.M.T.'s habitual residence. "[A] young child who has resided exclusively in an established, albeit inharmonious, living arrangement with his or her parents in a single country has a habitual residence in that country." Pet. App. 17a (Boggs, J., concurring).

ARGUMENT

I. An "Actual Agreement" Between The Parents Is Not Required To Establish An Infant's Habitual Residence.

A. The Habitual Residence Test Requires A Flexible Factual Inquiry To Determine Where The Child Usually Or Customarily Lives.

Petitioner's argument rests on the premise that an infant's habitual residence turns entirely on "shared parental intent." Pet. Br. 28. It is true that the courts of appeals generally have applied that standard (see Br. in Opp. 23-24), but this Court has not previously had occasion to interpret the Convention's habitual residence standard. The threshold question here, therefore, is defining that term.

The Convention's text, history, and purposes—as well as interpretations by other signatory nations—demonstrate that the habitual residence standard requires a flexible factual inquiry to determine where the child usually or customarily lives. The intent of the child's parents is relevant, but not dispositive.

1. The Convention's text, drafting history, and context.

"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).

The Convention provides that the removal or retention of a child is wrongful when it breaches rights

of custody "under the law of the State in which the child was *habitually resident* immediately before the removal or retention." Article 3 (emphasis added). Determining a child's habitual residence is therefore the critical inquiry in ascertaining whether the Convention's protections apply when a child has been removed from a country without the agreement of both parents.

The Convention does not define the term "habitual residence." In the absence of a definition, the Court should look to the words' ordinary meaning. See *Abbott*, 560 U.S. at 11 (interpreting "place of residence" in the Convention based on the words' ordinary meaning).

The ordinary meaning of "habitual" is "[c]ustomary" or "usual," *Black's Law Dictionary* 640 (5th ed. 1979). "Residence" means "[p]ersonal presence at some place of abode." *Id.* at 1176; see also *Webster's Third New International Dictionary* 1931 (1976) (defining "habitual" as "customary" or "usual" and "residence" as "a temporary or permanent dwelling place, abode, or habitation"); 6 *Oxford English Dictionary* 996 (2d ed. 1989) (defining "habitual" as "customary" or "a settled practice or condition" and "residence" as "one's usual dwelling-place or abode").

As the Solicitor General concludes, "an individual is habitually resident in the place or abode where he or she customarily or usually lives or dwells." U.S. Am. Br. 14-15. The habitual residence test is thus fundamentally factual: assessing in each case all of the circumstances relevant to determining where the child customarily or usually lives.

The Convention's drafting history strongly supports that conclusion. "Because a treaty ratified by

the United States is 'an agreement among sovereign powers,'" this Court considers "as 'aids to its interpretation' the negotiation and drafting history of the treaty." *Medellín* v. *Texas*, 552 U.S. 491, 507 (2008) (quoting *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1985)).

The Convention's drafters confirmed they intended to require the fact-specific inquiry specified by the plain meaning of habitual residence, explaining that the "removal [of a child] from its habitual environment" occurs when "the child is taken out of the family and social environment in which its life has developed." *Explanatory Report* ¶ 11[4] And they described the Convention's purpose as promptly "restor[ing] a child *to its own environment*." *Ibid.* (emphasis added).

The chairman of the drafting committee reinforced that conclusion, stating that the term "habitual residence" was selected because "the State with the primary concern to protect a child against abduction" is "the place where he or she usually lives." A.E.

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[4] As the Executive Branch explained when it transmitted the Convention to the Senate, the *Explanatory Report* "is recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it." State Dep't, *Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 51 Fed. Reg. 10503, 10503 (1986). The Court has relied on the *Explanatory Report* in prior decisions construing the Convention. *Abbott*, 560 U.S. at 19 (2010) (noting that the *Explanatory Report* supports the conclusion that the Hague Convention treats *ne exeat* rights as rights of custody); *Chafin* v. *Chafin*, 568 U.S. 165, 182 (2013) (Ginsburg, J., concurring) (citing the *Explanatory Report* to note that a purpose of the Convention was to avoid rival custody hearings in different countries).

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

The drafters rejected the terms "domicile" and "nationality" precisely because those terms incorporate technical legal standards inconsistent with a case-specific factual inquiry. They characterized "habitual residence" as "a question of pure fact, differing in that respect from domicile." *Explanatory Report* ¶ 66. One treatise explains that the decision to leave "habitual residence" undefined was "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." J.H.C. Morris, *Dicey and Morris on the Conflict of Laws* 144; see also A.E. Anton, 30 Int'l & Comp. L.Q. at 544 (observing that in some legal systems, "domicile has a technical character which was thought to make its choice inappropriate").[5]

A broad, non-technical, fact-specific inquiry is also compelled by the Convention's objectives.

The Convention "was adopted in 1980 in response to the problem of international child abductions during domestic disputes." *Abbott*, 560 U.S. at 8. One parent would unilaterally move the child from one country to another, often the country of that parent's birth and/or citizenship—with the "hope[]" of "obtain[ing] a right of custody from the authorities of the country to which the child has been taken." *Ex-*

[5] The same term had been employed in prior Hague Convention agreements, and for the same reason—because it avoids the incorporation of technical legal standards. *E.g.*, 1961 Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, Oct. 5, 1961, 658 U.N.T.S. 144.

planatory Report ¶ 13. "[T]he abductor will hold the advantage, since it is he who has chosen the forum in which the case will be decided, a forum which, in principle, he regards as more favourable to his own claims." *Id.* ¶ 14.

The Convention is "based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence." *Abbott*, 560 U.S. at 20; see also Convention Preamble (emphasizing that stating that "the interests of children" are "paramount"); *Explanatory Report* ¶ 25 (stating that the Convention's goals "correspond to a specific idea of what constitutes the 'best interests of the child'").

It accomplishes this goal by "in effect, lay[ing] venue for the ultimate custody determination in the child's country of habitual residence rather than the country to which the child is abducted." *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 5 (2014).

A habitual residence test that broadly considers the child's connections to the country or countries in question—and encompasses all facts relevant to that connection—is consistent with the Convention's focus on the child's "best interests." That standard is most likely to produce a determination that protects a child against removal from the place in which he or she usually lives (and to protect against retention in a place in which he or she did not usually live). A test that artificially limits the facts relevant to the habitual residence inquiry or substitutes legal presumptions for a full factual analysis, by contrast, could well result in a determination that fails to identify the place with which the child has the requisite connection. See also *Abbott*, 560 U.S. at 20 ("Judges must strive always to avoid a common tendency to

prefer their own society and culture, a tendency that ought not interfere with objective consideration of all the factors that should be weighed in determining the best interests of the child.").

2. ***Interpretations by other signatory nations.***

When interpreting treaties, "'the opinions of our sister signatories [are] entitled to considerable weight.'" *Air France* v. *Saks*, 470 U.S. 392, 404 (1985) (citation omitted). The Court therefore carefully considers "'the postratification understanding' of signatory nations." *Medellín*, 552 U.S. at 507 (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) ("recognize[ing]" the "need for uniform international interpretation of the Convention").

The courts of a number of signatory nations have interpreted "habitual residence" to direct a case-specific assessment of all relevant facts to determine where the child customarily or usually lived.

First, just last year, the Supreme Court of Canada held that a child's habitual residence is the nation that is "the focal point of the child's life—'the family and social environment in which its life has developed'—immediately prior to the [challenged] removal or retention." *Office of the Children's Lawyer* v. *Balev*, [2018] 1 S.C.R. 398, 421 (¶ 43) (quoting *Explanatory Report* ¶ 11).

That standard, the court stated, requires consideration of "the entirety of the child's situation. While courts allude to factors or considerations that tend to recur, there is no legal test for habitual residence and the list of potentially relevant factors is not closed. The temptation 'to overlay the factual concept of habitual residence with legal constructs' must be resisted." *Balev*, 1 S.C.R. at 422 (¶ 47). The standard is "'fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions.'" *Ibid*. (quoting *Redmond* v. *Redmond*, 724 F.3d 729, 746 (7th Cir. 2013)).

The *Balev* court stated that "[c]onsiderations include 'the duration, regularity, conditions and reasons for the [child's] stay in" a country. 1 S.C.R. at 421 (¶ 44) (citation omitted). "The judge considers all relevant links and circumstances" related to the child and the country in question. *Id*. at 421 (¶ 43).

Second, the Court of Justice of the European Union holds that "the 'habitual residence' of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment"—and must be determined by "taking account of all the circumstances of fact specific to each individual case." Case C-111/17, *OL* v. *PQ*, ¶ 42, ECLI:EU:C:2017:436 (June 8, 2017); accord, Case C-497/10 PPU, *Mercredi* v. *Chaffe*, ¶ 47, ECLI: EU:C:2010:829 (Dec. 22, 2010).[6]

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[6] The Court of Justice interpreted the term 'habitual residence" in the European Union regulation implementing the Hague Convention, see *OL* v. *PQ*, ¶ 37, but the court did not indicate that its decision was limited to the EU regulation—and there would be no basis for according a different meaning to the same words in the Convention and a law implementing the Conven-

The court stated that relevant factors "include the duration, regularity, conditions, and reasons for the child's stay" in the country, as well as the child's nationality. *OL* v. *PQ*, ¶ 44. When the child is an infant, "the environment * * * is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of, and * * * an infant necessarily shares the social and family environment of that person or persons." *Id.* ¶ 45; see also *Mercredi* v. *Chaffe*, ¶ 48.

Third, the Supreme Court of the United Kingdom has adopted the test applied by the Court of Justice of the European Union—"'the place which reflects some degree of integration by the child in a social and family environment' in the country concerned," and agrees that the standard requires consideration of "numerous factors." *In re A (Children)*, ¶ 54(iii) & (iv). "[H]abitual residence is a question of fact and not a legal concept such as domicile." *Id.* ¶ 54(i).

The supreme court emphasized 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." *In re A (Children)*, ¶ 54(vii); see also *id.* ¶ 39 (criticizing prior lower court decisions that "overlay the factual concept of habitual residence with legal constructs"). In *In re LC (Children)*, [2014] UKSC 1, 21 (¶ 59), the court ob-

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tion. See also *id.* at ¶¶ 36, 39 (noting the "very similar wording" of the two texts). Indeed, the Supreme Court of the United Kingdom has expressly held that the term has the same meaning in both the EU regulation and the Hague Convention. *In re A (Children)*, [2013] UKSC 60, ¶ 54(ii).

served that "habitual residence is a question of fact: has the residence of a particular person in a particular place acquired the necessary degree of stability * * * to become habitual?"

Fourth, the Court of Appeal of the High Court of Hong Kong—adopting the approach applied in the European Union and the United Kingdom—holds that habitual residence "corresponds to the place which reflects some degree of integration by the child in a social and family environment"; "[t]he question is the quality of the child's residence, in which all sorts of factors may be relevant." *LCYP* v. *JEK*, [2015] 5 H.K.C. 293, ¶ 7.7(3), (4). "Habitual residence is a question of fact which should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce." *Id.* ¶ 7.7(1).

Fifth, courts in New Zealand and Australia have also adopted an interpretation of habitual residence requiring assessment of all factors relevant to the child's relationship to the country claimed to be his or her habitual residence.

In *Punter* v. *Secretary for Justice,* [2007] 1 NZLR 40 (CA), the Court of Appeal of New Zealand determined that the habitual residence inquiry is "a broad factual inquiry" that "should take into account all relevant factors" relating to the "ties" between the child and the country in question. *Id.* at 61 (¶ 88); see also *id.* at 71 (¶ 130) ("the test is a factual one, dependent on the combination of circumstances in the particular case").

The High Court of Appeal of Australia subsequently followed *Punter*, holding that the inquiry focuses on "the connection between the child and the

particular state" and requires consideration of "'all relevant factors, including settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and currently), the degree of assimilation into the state, including living and schooling arrangements, and cultural, social and economic integration.'" *LK* v. *Director-General, Dep't of Cmty. Servs.* (2009) 237 CLR at ¶ 44 (quoting *Punter*).

In sum, as the Supreme Court of Canada concluded, "the clear trend" of the international Hague Convention jurisprudence is "adoption of" the standard requiring a case-specific assessment of all facts relevant to the connection between the child and the country in question. *Balev*, 1 S.C.R. at 423 (¶ 50). Particularly in light of the statutory injunction favoring international harmonization, this Court should adopt that standard for determining habitual residence.

B. There Is No Justification for Petitioner's "Actual Agreement" Requirement.

Petitioner asserts that an infant cannot have a habitual residence unless there is an "actual agreement" between the parents "on where the child will be raised." Pet. Br. 29. This "actual-agreement requirement" means that the sole question in determining habitual residence is "whether the parents were in agreement, after their child was born, that the infant would be raised in a particular country." Pet. Br. 35.

That proposed standard suffers from multiple flaws.

To begin with, the Convention's text, drafting history, and context require consideration of all facts relevant to determining where the child usually lives—while parental intent is relevant it is one of many facts that a court must assess. Other nations have expressly rejected a test turning solely on parental intent.

In addition, proof of an "actual agreement" between the parents is not required to demonstrate the parents' intent with respect to the child's habitual residence. That intent, like mental state in other circumstances, may be established by evidence of the parents' statements and actions—whether taken together or separately. Indeed, petitioner cites no case making an "actual agreement" between the parents a prerequisite to finding habitual residence. Her standard would produce a large number of cases in which an infant would have no habitual residence, thereby encouraging the very forum-shopping through unilateral movement of children that the Convention was designed to prevent.

Finally, petitioner's contention that the parents must agree that the child "would be raised in a particular country" is contrary to the Convention's plain meaning that habitual residence turns on where the child has lived, and not where the child will live for the indefinite future.

1. ***Parental intent is one factor in the habitual residence inquiry—but a court also must consider other facts relevant in determining where the child usually lives.***

The Convention's text, drafting history, and context—and the interpretation by other signatories—

make clear that the habitual residence standard requires a court to assess all factors relevant to determining where the child customarily or usually lives. See pages 22-31, *supra*. The intent of the child's parents is simply one factor among the many that a court must consider. Petitioner is therefore wrong in asserting that parental intent is the sole relevant factor for determining an infant's habitual residence.

Importantly, courts of other signatory nations have expressly rejected a habitual residence standard based solely on parental intent.

For example, the Supreme Court of Canada recognized that "[t]he circumstances of the parents, including their intentions, may be important, particularly in the case of infants or young children." *Balev,* 1 S.C.R. at 422 (¶ 45). But it "caution[ed] against over-reliance on parental intention," observing that "at one time, many courts applied a parental intention approach" but "more recent cases indicate a clear shift from the parental intention approach" to a standard requiring case-specific consideration of all relevant facts. *Id*. at 422, 426 (¶¶ 45, 56). "The role of parental intention in the determination of habitual residence 'depends on the circumstances particular to each individual case.'" *Id*. at 422 (¶ 45) (citation omitted).

The Court of Justice of the European Union stated that "the intention of the parents cannot as a general rule by itself be crucial to the determination of the habitual residence of a child," and the "weight to be given to that factor * * * depends on the circumstances specific to each individual case." *OL* v. *PQ*, ¶¶ 47, 48.

The Supreme Court of the United Kingdom found the standard requiring consideration of all relevant facts "preferable" to the test that had been applied in prior decisions by English courts, which turned on parental intent, because the habitual residence standard "focus[es] on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors." *In re A (Children)*, ¶ 54(v). It also recognized that "[t]he social and family environment of an infant or young child is shared with those (whether parents or not) upon whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned." *Id.* ¶ 54(vi); accord *AR* v. *RN*, ¶ 17 (reaffirming standard adopted in *In re A (Children)*).

The Hong Kong court stated that parental intent is relevant, but must be "factored in, along with all the other relevant factors" in determining a child's habitual residence. *LCYP,* [2015] 5 H.K.C. at ¶ 7.7(6); accord *Punter,* [2007] 1 NZLR at 55, 65 (¶¶ 54, 104) (same); *LK*, 237 CLR at ¶ 44 (Australia court reaching same conclusion). As the New Zealand court explained, "strong concentration on parental purpose can, contrary to the purpose of the Hague Convention, lead to the removal of a child from what has become its familiar environment." 1 NZLR at 66 (¶ 107).

Some U.S. courts, including the court below, have adopted a bifurcated approach to habitual residence, finding parental intent controlling with respect to younger children and—for older children—the "acclimatization" of the child in the particular country. See, *e.g.*, Pet. App. 7a-8a.

To begin with, as Judge Boggs explained, most of the cases considered by the lower courts have involved the situation "where 'a child has alternated residences between two or more nations.'" Pet. App. 55a. The lower courts' formulations of the habitual residence inquiry have been shaped by their focus on determining which of the two nations qualified as the child's habitual residence, and, sometimes, whether the child's movements across borders precluded any finding of a habitual residence. See *id.* at 53a (explaining that the Sixth Circuit "use[s] * * * distinct standards" depending on whether "the child has resided exclusively in a single country" or "has alternated residences between two or more nations").

As already explained (at 22-32), the Convention prescribes a habitual residence standard that requires the court to assess all of the facts relevant to determining where the child customarily or usually lives. Particular cases will, of course, involve different sets of facts, but that does not change the legal standard or the scope of the inquiry.

More fundamentally, the lower courts' approach of crafting subsidiary legal standards for different factual contexts—"parents' intent" for the youngest children; "acclimatization" for older children; and a combination for children in the middle—is inconsistent with the Convention's text and context as well as the drafters' injunction that habitual residence is a question of "pure fact." *Explanatory Report* ¶ 66; see also pages 24-26, *supra*. As the Supreme Court of Canada explained, "[i]mposing * * * legal construct[s] onto the determination of habitual residence" would "detract[] from the task of the finder of fact, namely to evaluate all of the relevant circumstances." *Balev*, 1 S.C.R. at 422 (¶ 46); see also *Punt-*

er, [2007] 1 NZLR at 66 (¶ 106) (emphasizing "the need to ensure that the concept of habitual residence remains a factual one not limited by presumptions or presuppositions"); pages 28-31, s*upra* (discussing other signatory nations' consistent rejection of such subsidiary legal standards).

Thus, the Seventh Circuit has explained that parental intent may be "an important factor in the analysis," but the "habitual-residence inquiry remains a flexible one, sensitive to the unique circumstances of the case and informed by common sense." *Redmond*, 724 F.3d at 744. The inquiry must "remain[] essentially fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions." *Id.* at 746.

The Solicitor General is therefore correct in explaining that "courts determining a child's habitual residence should consider the full range of admissible evidence relevant to that determination. U.S. Am. Br. 26. That includes:

- "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."

U.S. Am. Br. 26-27.

2. An "actual agreement" between the parents is not necessary to establish the parents' intent regarding a child's habitual residence.

The core of petitioner's argument is that an infant's habitual residence may be established only by an actual agreement between the parents to raise the child in a particular country. Absent such an agreement, petitioner says, an infant has no habitual residence.

That contention is inconsistent with the Convention's text and drafting history—and the interpretation by other nations—all of which, as already explained, require an inquiry encompassing all relevant facts. And it fails for additional reasons as well.

First, even the U.S. courts that have grounded the habitual residence inquiry in the parents' intent have not required proof of an actual agreement. Rather, they have relied on objective actions by each parent to determine whether or not the parents had a similar intent regarding the child's habitual residence. Cf. *Norfolk Monument Co.* v. *Woodlawn Mem'l Gardens, Inc.*, 394 U.S. 700, 704 (1969) (stating that parties' behavior constituted "admissible circumstantial evidence from which the fact finder may infer agreement").

Petitioner asserts (Br. 31-32) that four appellate decisions endorse her "actual agreement" test, but that argument rests on a linguistic sleight-of-hand: interpreting the phrase "shared intent" to require

"actual subjective agreement" rather than proof that each parent had the same intent. Those courts viewed objective evidence of each parent's intent to be relevant—and none based its decision on the presence or absence of an "actual agreement."

For example, in *Gitter* v. *Gitter*, 396 F.3d 124 (2d Cir. 2005), the court applied a "shared intent" standard—but stated that "[i]n making this determination the court should look, as always in determining intent, at actions as well as declarations." *Id.* at 134.

In *Mozes* v. *Mozes*, 239 F.3d 1067, 1075, 1076 (9th Cir. 2001), the court stated that "intention [need not] be expressly declared, if it is manifest from one's actions" and that "representations of the parties cannot be accepted at face value, and courts must determine [the question] from all available evidence." See also *id*. at 1082 (examining objective facts to determine mother's intent).

The second Ninth Circuit decision—*Murphy* v. *Sloan*, 764 F.3d 1144 (9th Cir. 2014)—repeats a long list of objective factors cited by the district court, confirming that actual agreement is not the critical inquiry:

> that "[the mother's] move to Ireland with [the child] was intended as a 'trial period,' and that [the child] never abandoned her habitual residence in the United States"; that [the child] retains strong ties to community and family in California and elsewhere in the United States; that [the mother] had no fixed residence in Ireland as of the date of the wrongful retention; that many of [the mother's and child's] possessions remained in California; and that [the child] was continuing to

> spend part of the year in California with [the father]. The district court further noted that [the child] retained both U.S. and Irish citizenship; that [the mother] has a California driver's license, but not an Irish one; and that [the mother] had no permanent home or longer-term lease or means of support in Ireland, and no longer had any attachment to Ireland in terms of work or schooling after she completed her master's degree in October 2013.

Id. at 1151.

The *Murphy* court relied on these facts in upholding the district court's conclusion that the parents did not intend to transfer the child's habitual residence to Ireland. The snippet invoked by petitioner—that "there was never any discussion, let alone agreement, that the stay abroad would be indefinite" (Br. 32 (quoting *Murphy*, 764 F.3d at 1152))—was an additional observation, not at all the basis for the court's legal conclusion.

The majority in *Berezowsky* v. *Ojeda*, 765 F.3d 456 (5th Cir. 2014), did refer to "an agreement" and "meeting of the minds," *id*. at 469, but did not rest its decision solely on that ground. Rather, the majority went on to "assum[e] arguendo that the separate, uncoordinated intentions of two parents" could provide the necessary intent (*id*. at 471), assessed a variety of objective evidence regarding the parents' actions, and concluded that evidence was insufficient to establish the parents' intent (*id*. at 471-73). The dissent reached the opposite conclusion based on that evidence. *Id*. at 476-79.

Moreover, petitioner ignores the decisions that canvass objective acts in determining whether the parents had the requisite intent. In *Nicolson* v. *Pappalardo*, 605 F.3d 100 (1st Cir. 2010), for example—a case that resembles this one—the court considered the father's employment and the factual circumstances of the parents' marriage and residences in concluding that the infant's habitual residence was Australia. See also *Hollis* v. *O'Driscoll*, 739 F.3d 108, 112 (2d Cir. 2014) (finding "the clear establishment of [the child's] habitual residence in New Zealand" because that is where the parents lived before and after the child's birth).[7]

Second, petitioner's "actual agreement" test would thwart the Convention's fundamental objective: to prevent unilateral removal of a child to another country by one parent in violation of the custody rights of the other parent.

The Convention's drafters explained that "the problem with which the Convention deals * * * [is] the possibility of individuals establishing legal and jurisdictional links which are more or less artificial" that would enable the individual to "change the applicable law and obtain a [custody] decision favorable to him." *Explanatory Report* ¶ 15. The Convention's drafters determined that "one effective way of deterring [such actions] would be to deprive [them] of any practical or juridical consequences"—by requiring

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[7] Petitioner admits (Br. 45) that she "has found no decision from another Contracting State squarely addressing whether actual agreement is required to establish shared parental intent." But she then goes on (Br. 46-47) to cherry-pick quotations in an attempt to create the impression that some courts have adopted her actual-agreement standard. They have not.

the return of the child to the country of his or her habitual residence and enabling the authorities of that nation to make the custody determination. *Id.* ¶ 16.

The Convention's linchpin is thus the habitual residence determination. As long as a child has a habitual residence, one parent cannot gain an advantage by moving the child without the other parent's permission—because the Convention will require the child's return to the country of habitual residence so that the custody determination may be made there.

But petitioner's "actual agreement" standard would, as the court below explained, "create a presumption of no habitual residence for infants, leaving the population most vulnerable to abduction the least protected." Pet. App. 12a-13a. Actual agreements have been found in few if any reported cases.

Particularly when a child is born to a couple whose marriage was experiencing difficulty prior to the child's arrival, an express agreement is highly unlikely. As the court below put it, "the products of any broken marriage" are "apt to tell you that their parents did not see eye to eye on much of anything by the end." Pet. App. 12a.

Under petitioner's extremely-difficult-to-satisfy "actual agreement" standard, therefore, either parent would have license to move the child unilaterally in order to gain an advantage in the custody determination—the precise result that the Convention seeks to prevent. Indeed, a parent could keep open the ability to abduct the child unilaterally simply by withholding his or her "actual agreement"—even if all of the relevant facts made clear that the child was

habitually resident in the country in which she was living. The test therefore enables the very forum-shopping and gamesmanship that the Convention is designed to prevent.

Moreover, as this Court has recognized, the Convention's purpose is also "to prevent harms resulting from abductions. An abduction can have devastating consequences for a child. * * * Studies have shown that separation by abduction can cause psychological problems ranging from depression and acute stress disorder to posttraumatic stress disorder and identity-formation issues." *Abbott*, 560 U.S. at 21. By drastically limiting the reach of the Convention's protection, petitioner's actual agreement test greatly increases such harms.

As Professor Silberman has explained, "the core concept of the Convention is preserved only if unilateral moves by one parent are resisted"—and the only way to prevent such unilateral acts is to reject a legal rule that would dramatically increase the number of cases in which a child is found to have no habitual residence. Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1068 (2005).[8]

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[8] Petitioner points out (Br. 45-46) that some courts have stated that it is possible that a child will have no habitual residence. But the existence of such a possibility does not justify adoption of a legal standard that would dramatically increase the number of cases in which the Convention would provide no check on unilateral abduction of children, particularly infants. It also is noteworthy that the comments cited by petitioner all relate to potential situations in which a child had a habitual residence and may have lost it without gaining a new habitual residence. The possibility that a child may have a "'nomadic life'" is quite different from determining that an infant who lived in the same

Third, petitioner contends (Br. 34) that an actual agreement standard promotes expeditious decisionmaking. But, as the Solicitor General explains, that "proves too much, for *any* rigid legal requirement would have the same effect." U.S. Am. Br. 25. And the Convention's text and drafting history, and the interpretation by other signatories, conclusively reject such a limit on the factual inquiry.

Moreover, it is far from clear that petitioner's test would result in quicker decisions. If "actual agreement" were the only relevant factor, the parties would engage in a relentless search for any potentially relevant fact and witness that could possibly help prove, or disprove, such an agreement. A standard permitting consideration of all relevant facts, by contrast, would allow a more common-sense approach by permitting the parties to adduce the range of facts they deem relevant.

Fourth, there is no support for petitioner's contention that an actual agreement requirement is needed to protect children in situations of domestic violence.

To begin with, the Convention separately—and specifically—addresses the protection of children in such situations. Article 13(b) states that a nation "is not bound to order the return of the child" if there is a grave risk * * * that * * * return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Indeed, petitioner invoked that provision in the district court, but the court held petitioner had failed to make the necessary showing (Pet. App. 100a-106a),

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country for the first eight weeks of her life (as here) never had any habitual residence.

and the court of appeals affirmed that determination (*id*. at 58a-60a).

In addition, the parents' relationship can be considered in assessing the facts relevant to the habitual residence determination—as petitioner herself recognizes. Pet. Br. 43 (citing cases).

Most importantly, the Convention's habitual residence determination is a preliminary determination that directs where the custody proceedings will take place. "The Convention is based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence." *Abbott*, 560 U.S. at 20. And custody determinations consider the full range of circumstances relating to the child's and parents' relationships.

3. ***The habitual residence test requires only that the nation in question was the child's usual residence, not that the child will remain there for the indefinite future.***

Petitioner's proposed standard is flawed for an additional reason: she asserts that a habitual residence can be established only if the parents intend that the child "would be raised in a particular country." Pet. Br. 35. That requirement is inconsistent with the Convention's text and history, and with other signatories' interpretations.

Habitual residence focuses on the child's situation at the time of the challenged removal or retention: the place where a child usually or customarily lived at that particular time. See pages 22-31, *supra*. That inquiry does not require that the child's presence at that place continue into the indefinite future.

Thus, the Supreme Court of the United Kingdom explained that it is "the stability of the residence that is important * * * . There is no requirement that the child should have been resident in the country * * * for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently." *AR* v. *RN,* ¶ 16; see also *Mozes*, 239 F.3d at 1082 (stating that a young child with "no clearly established habitual residence elsewhere" may "become habitually resident even in a place where it was intended to live only for a limited time"); Mo Zhang, *Habitual Residence v. Domicile: A Challenge Facing American Conflict of Laws*, 70 Me. L. Rev. 161, 182 (2018) ("Domicile has a focus on the future intention while habitual residence attaches importance to the present or apparent intention.").

II. Habitual Residence Determinations Are Subject To Clear Error Review.

When a court of appeals reviews a district court's judgment, "questions of law" are "reviewable *de novo*" and "questions of fact" are "reviewable for clear error." *Pierce* v. *Underwood*, 487 U.S. 552, 558 (1988). A third category—mixed questions of law and fact—encompasses questions "'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 Nat'l Ass'n* v. *Village at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018) (quoting *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 n.19 (1982)).

The habitual residence determination is a classic mixed question of law and fact—and this Court's decision in *U.S. Bank* makes clear that it should be reviewed for clear error. That conclusion is supported

by the decisions of other common-law signatory nations, which also apply a deferential standard of appellate review. And it is compelled by the Convention's focus on prompt resolution of the habitual-residence question.

A. The *U.S. Bank* Standard Requires Deferential Review.

This Court held in *U.S. Bank* that "the standard of review for a mixed question [of fact and law] all depends—on whether answering it entails primarily legal or factual work." 138 S. Ct. at 967. That is because "[m]ixed questions are not all alike." *Ibid.*

Some mixed questions, the Court stated, "require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard." 138 S. Ct. at 967. "[W]hen applying the law involves developing auxiliary legal principles of use in other cases—appellate courts should typically review a decision *de novo*." *Ibid.*; see also *ibid.* (stating that a mixed question should be reviewed *de novo* when it "requires courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard").

Other mixed questions "immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address what [this Court] ha[s] (emphatically if a tad redundantly) called 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *U.S. Bank*, 138 S. Ct at 967. "[W]hen that is so, appellate courts should usually review a decision with deference." *Ibid.*

Applying these criteria, the *U.S. Bank* Court held that the particular mixed question at issue

there—whether a transaction was conducted at arm's length for bankruptcy law purposes—was "fact-intensive" and therefore reviewable only for clear error. 138 S. Ct. at 968-969.

The *U.S. Bank* standard mandates clear error review of habitual residence determinations.

First, the habitual residence inquiry involves "case-specific factual issues"—obligating a court to assess all of the facts relevant to determining where the child usually lives and make a case-specific determination based on those facts. See pages 23-26, *supra*. Indeed, the Convention's drafters themselves described the habitual residence determination as "a question of pure fact." *Explanatory Report* ¶ 66. And other signatory nations describe the test as a factual determination. See pages 27-31, *supra*.

A myriad of facts could be relevant in deciding habitual residence, as discussed above. See pages 36-37, *supra*. This determination therefore falls on the "factual" side of the distinction drawn in *U.S. Bank*.

Second, because the inquiry is factual and case-specific, an appellate court will not develop "auxiliary legal principles" that could govern other cases. Indeed, the Convention's drafters rejected technical legal rules in favor of a "pure fact" standard. See pages 24-25, *supra*. And other nations have held the development of such auxiliary principles to be precluded by the Convention's fact-specific approach. *AR* v. *RN*, [2015] UKSC 35 (¶ 17) ("[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"); *Balev*, 1 S.C.R. at 419 (¶ 38) (stating that the "goal" of the Convention's drafters "was

to avoid legal technicalities and adopt a fact-based determination"); pages 29-31 & 35-36, *supra*.

Third, other common-law nations have applied a deferential standard of review to a lower court's habitual residence determination. The Supreme Court of Canada stated that whether the habitual residence determination "is viewed as a question of fact or a question of mixed fact and law, appellate courts must defer to the application's judge's decision * * * absent palpable and overriding error." *Balev*, 1 S.C.R. 419 (¶ 38); see also *AR* v. *RN*, ¶ 18 (noting "the limited function of an appellate court in relation to a lower court's finding as to habitual residence. Where the lower court has applied the correct legal principles to the relevant facts, its evaluation is not generally open to challenge unless the conclusion which it reached was not one which was reasonably open to it").[9]

B. Clear Error Review Furthers The Convention's Goals.

One of the two "objects" of the Convention—set forth in its first Article—is "to secure the *prompt* return of children wrongfully removed to or retained in any Contracting State" (emphasis added). And the Convention requires signatory nations to "use the most expeditious procedures available" to "secure within their territories the implementation of the objects of the Convention." Article 2.

Deferential review of the habitual residence determination furthers that goal. By contrast, *de novo*

[9] Even if the Court were to hold that habitual residence turns only on parental intent, clear-error review would be appropriate. That inquiry too is inherently factual.

review would significantly delay final determinations—and therefore prevent the prompt return of wrongfully removed children.

To begin with, the habitual residence decision merely resolves the preliminary question of where the custody determination will be made. See pages 24-26, *supra*. "If decisions are overturned too readily on appeal this will undermine the summary nature of the jurisdiction. After all, decisions under the Hague Convention are only as to choice of forum and not decisions as to ultimate custody (or even as to ultimate country of residence). *Punter*, [2007] 1 NZLR at 88 (¶ 204).

This Court's decision in *Chafin* further confirms that the Convention's emphasis on "prompt return" favors clear-error review. There, the Court held that an appeal of a district court's order directing that a child be returned to another country did not become moot when the child was returned. *Chafin* v. *Chafin*, 568 U.S. 165 (2013).

In explaining that conclusion, the Court stated that if cases did become moot, "courts would be more likely to grant stays as a matter of course to prevent the loss of any right to appeal." 568 U.S. at 178. And "[s]uch routine stays" would "conflict with the Convention's mandate of prompt return to a child's country of habitual residence." *Ibid.* In addition, "[r]outine stays could * * * increase the number of appeals"—further delaying children's return. *Ibid.*

The same considerations weigh heavily in favor of the clear-error standard of review. *De novo* review inevitably will encourage appeals—because the chances of reversal are greater. Given the emotion-laden nature of these disputes, the increased possi-

bility of a change in the decision necessarily will encourage appeals. That result is directly contrary to the Convention's emphasis on prompt return, and favors adoption of the clear-error standard. See also *Chafin*, 568 U.S. at 182 (Ginsburg, J., concurring), (highlighting "the need for both speed and certainty in Convention decisionmaking").

C. Petitioner's Arguments Provide No Grounds For Ignoring the *U.S. Bank* Standard.

Petitioner ignores this Court's *U.S. Bank* decision. The other authorities that she cites do not justify *de novo* review of habitual residence decisions.

To begin with, petitioner points to the provision of the statute implementing the Hague Convention in which Congress "recognize[d]" the "need for uniform international interpretation of the Convention." 22 U.S.C. § 9001(b)(3)(B). But that general statement about "international interpretation" is logically read to refer to the questions of law that arise in connection with the Convention's application—as an injunction to "give the opinions of our sister signatories 'considerable weight.'" *Ermini* v. *Vittori*, 758 F.3d 153, 161 (2d Cir. 2014) (quoting *Saks*, 470 U.S. at 404). There is no basis for construing it as a directive to apply *de novo* review to every single issue that arises under the Convention.

That is particularly true with respect to habitual residence determinations—because consistency with other nations' interpretations means treating such determinations as questions of "pure fact" that are subject to deferential review. See page 48, *supra*.

Next, petitioner says (Br. 21-22) that there is a "[l]ong-standing" appellate practice of *de novo* re-

view. But, as we explained at the certiorari stage (Br. in Opp. 19-20), virtually all of those decisions rested on a general conclusion regarding the review standard applicable to mixed questions of fact and law—not an analysis of the particular circumstances presented by the habitual residence determination.

Petitioner also invokes (Br. 24) the principle that *de novo* review would provide "'governing principle[s]' to guide the habitual-residence inquiry." But, as already discussed (at pages 35-36), the "pure fact" standard precludes development of such principles—as other signatories have expressly recognized.

Petitioner cites the Ninth Circuit's ruling in *Mozes*, but that decision justified non-deferential appellate review by citing the need to develop subsidiary legal principles, relying on an English court decision. 239 F.3d at 1073. But the principles applied in that English court decision—including a focus on parental intent—were subsequently "abandoned" by the Supreme Court of the United Kingdom. *In re A (Children)*, ¶ 54(v); see Reunite International Child Abduction Centre Am. Br. 6-8, 11-18 (discussing change in U.K. case law).

Petitioner next asserts (Br. 26) that *de novo* review is warranted because habitual residence determinations "carry 'substantial consequences.'" But the preliminary habitual residence simply identifies where the custody decision will be made—and it is the custody decision that has those consequences. *Explanatory Report* ¶ 19; page 26, *supra*. The great weight placed by petitioner on the preliminary decision is contrary to the principles embodied in the Convention.

Finally, petitioner cites (Br. 27) this Court's decisions regarding the standard of review for probable cause, reasonable suspicion, and voluntariness determinations under the Fourth and Fifth Amendments. But the Court in *U.S. Bank* explained that "[i]n the constitutional realm, * * * the calculus changes"—because "the role of appellate courts [in constitutional cases] 'in marking out the limits of [a] standard through the process of case-by-case adjudication' favors *de novo* review even when answering a mixed question primarily involves plunging into a factual record." 138 S. Ct. at 967 n.4. Those decisions are therefore inapposite in this non-constitutional context.[10]

III. This Court Should Affirm The Court Of Appeals' Judgment.

The district court's order requiring A.M.T.'s return to Italy was issued on September 14, 2016—and she returned there in December 2016, nearly *three years ago*. This Court should not prolong the uncertainty regarding that order by directing another round of district court and appellate proceedings. The Court instead should affirm the court of appeals' judgment and end this case—allowing the Italian courts to address custody issues free from any cloud over the validity of their proceedings.

First, as already discussed, the Convention's objective is the "prompt" resolution of the habitual residence issue so that the critical determination—the

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[10] Petitioner's reliance (Br. 20) on *Salve Regina College* v. *Russell*, 499 U.S. 225 (1991), is mystifying because that case involves the standard of review for interpretations of state law—which are purely legal questions.

custody proceeding—can proceed in that nation. Further delay undermines that goal.

Second, this Court has repeatedly recognized the harm resulting from prolonged uncertainty in domestic relations matters. "There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home' * * * especially when such uncertainty is prolonged." *Lehman* v. *Lycoming Cty. Children's Servs. Agency*, 458 U.S. 502, 513-514 (1982); see also *Troxel* v. *Granville*, 530 U.S. 57, 75 (2000) (discussing "[t]he burden of litigating a domestic relations proceeding").

Third, the questions presented in the petition are whether habitual residence can be found only if there is an "actual agreement" between the parents and whether a district court's habitual residence determination should be subjected to *de novo* review. If the Court rejects those contentions, it should affirm the court of appeals' judgment.

Petitioner includes in her brief a new argument—not advanced in the petition—that "[u]nder any of the competing standards of review and habitual-residence tests, the Sixth Circuit erred in affirming the district court's habitual-residence determination and return order." Pet. Br. 49. She also asserts, in a footnote, that "[a]t a minimum, the court of appeals' decision must be vacated" because it supposedly rested on an erroneous "burden-shifting presumption" (Pet. Br. 49 n.7)—another claim not mentioned in the petition.

Because neither of these new contentions is fairly encompassed within the questions presented, they are not properly before the Court. Sup. Ct. R. 14.1 (a)

(stating that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court"). It is particularly remarkable that petitioner would ask this Court to undertake a *de novo* case-specific assessment of the facts of this case.[11]

Fourth, the Solicitor General concludes (U.S. Am. Br. 28) that the Court should remand to allow the lower courts to apply the proper legal standard. We respectfully disagree, for two reasons.

To begin with, as explained above, petitioner's challenge to the lower courts' determination rested entirely on her actual agreement and *de novo* review contentions. If the Court rejects those arguments, then petitioner has no further basis for challenging the lower court's ruling.

Moreover, there can be no claim that further factual development is necessary. The record before the district court is comprehensive—the result of a four-day trial during which the parties adduced all of the potentially relevant facts.

The district court focused part of its analysis on evidence relating to the parents' intent, finding based on that factor that Italy was A.M.T.'s habitual residence. If the Court upholds the court of appeals' application of clear-error review, there is no basis for disturbing that determination. See Pet. App. 9a-13a (decision of en banc court of appeals affirming district court's holding).

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[11] Petitioner's factual argument (Br. 49-54) is not at all supported by the record before the district court, and is contrary to the district court's factual findings, as respondent explained in his court of appeals brief. Taglieri C.A. Br. at 4-13, 32, 35-43 No. 16-4128 (6th Cir. filed Jan. 3, 2017).

The district court also addressed the other facts relevant under the proper legal standard—explaining that petitioner and respondent came to Italy together and that A.M.T. resided there from her birth until her unilateral removal. Pet. App. 97a-98a. These facts, too, weigh in favor of the conclusion that Italy was A.M.T.'s habitual residence at the time she was removed to the United States. As Judge Boggs put it below, "a young child who has resided exclusively in an established, albeit inharmonious, living arrangement with his or her parents in a single country has a habitual residence in that country." Pet. App. 17a (concurring opinion).[12]

The Court accordingly can and should affirm the court of appeals' judgment. "Under the circumstances of this case * * * a remand would do nothing more than prolong a suit that has already persisted for eight years and cost the parties on both sides significant resources." *Fisher* v. *Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2209 (2016); see also *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 621 (1966) ("Ordinarily we would be inclined to remand to the Court of Appeals for further consideration * * * However, in view of the fact that this controversy already dates back more than eight years * * * and that the relevant standard is not hard to apply in

[12] Importantly, the fact that A.M.T. lived in different places within Italy is irrelevant. "The purpose of the habitual-residence inquiry under the Hague Convention is to determine which State's laws should govern the custody dispute. Accordingly, the inquiry is limited to the *country* of habitual residence, not whether the accommodations within the country were stable." *Hollis*, 739 F.3d at 112 (citations and quotation marks omitted).

this instance, we think this controversy had better terminate now.").[13]

[13] Petitioner asserts (Br. 54-55) that a "re-return order" is appropriate relief in the event that the district court's habitual residence determination were reversed. Even if petitioner prevailed on both of the questions presented and subsequent proceedings in this case were somehow to produce a final judgment holding that Italy was not A.M.T.'s habitual residence—a result entirely unjustified under the law and the facts—U.S. courts could not issue an order directing that A.M.T. be returned to the United States. The equitable factors that must be considered before granting any injunctive relief, as well as the principles embodied in the Convention, would preclude such injunctive relief. Cf. *Chafin*, 568 U.S. at 182 & n.2 (Ginsburg, J., concurring) (referring to a re-return order as "unsettling" and discussing a U.K. court's rejection of automatic "re-return" orders). See *Berezowsky* v. *Ojeda*, 652 Fed. Appx. 249 (5th Cir. 2016) (upholding district court's refusal to issue re-return order).

Moreover, petitioner's representations regarding the proceedings in Italy (Br. 54-55) are significantly incomplete. An order issued by the Italian court in December 2018 awarded legal custody of A.M.T., on an interim basis, to the Lugo municipality—not to either respondent or petitioner—with placement at respondent's residence; and provided that mother-daughter visits would continue under the plan prescribed in a court order issued earlier in 2018. The December 2018 order further directs the Lugo and Milan social services agencies to provide support to A.M.T., petitioner, and respondent, and to file periodic reports with the court. Il Tribunale di Milano, N. 34973/2015, *Taglieri* contro *Monasky* (Dec. 6, 2018).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic[*]
127 Wall Street
New Haven, CT 06511
(203) 432-4992

JOHN D. SAYRE
AMY BERMAN HAMILTON
Nicola, Gudbranson & Cooper, LLC
25 West Prospect Ave.
Cleveland, OH 44115
(216) 621-7227

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

PAUL W. HUGHES
MICHAEL B. KIMBERLY
McDermott Will & Emery
500 N. Capitol St., NW
Washington, DC 20001
(202) 756-8000

Counsel for Respondent

OCTOBER 2019

[*] The representation of respondent by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

ADDENDUM

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The States signatory to the present Convention, Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions —

CHAPTER I — SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are —

a to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where —

a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention —

a 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

* * * *

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children. If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new

environment. Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that —

a the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not

lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The 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 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

* * * *