No. 18-935

IN THE

Supreme Court of the United States

MICHELLE MONASKY,

Petitioner,

v.

DOMENICO TAGLIERI,

Respondent.

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

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

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b), Sanctuary for Families, National Network to End Domestic Violence, and Pathways to Safety International respectfully request leave to submit a brief as *amici curiae* in support of the petition for writ of certiorari. *Amici* provided notice pursuant to Rule 37.1, but did so less than ten days before filing. Petitioner's counsel consented to the filing of this brief. Respondent's counsel did not take a position.

Amici are non-profit organizations with extensive experience providing services to and advocating for domestic violence victims in the United States and abroad and are accordingly familiar with the challenges facing victims who flee with their children. Based on their collective experience, *amici* can provide insight into the impacts of the Court's interpretation of the Hague Convention on victims seeking to escape an abusive environment. *Amici* seek leave to file this brief to urge this Court to grant the petition for certiorari in light of the impacts the Sixth Circuit's decision will have on families escaping domestic violence.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

Amici are non-profit organizations with extensive experience providing services to and advocating for domestic violence victims in the United States and abroad. Based on first-hand experience, *amici* can provide valuable insight into the impacts of the Court's interpretation of the Hague Convention on parents and children who are victims of domestic violence. *Amici* work with these victims to provide assistance, guidance, and emergency services and are accordingly familiar with the challenges facing victims who flee with their children. *Amici* submit this brief to provide further reflection on why the Court should grant the petition for certiorari in light of the impacts the Sixth Circuit's decision will have on families escaping domestic violence.

INTRODUCTION AND SUMMARY OF ARGUMENT

Until now, when determining a child's habitual residence under the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention"), circuit courts uniformly looked to parents' subjective intent in determining where an infant too young to have acclimatized to any location was habitually resident—and thereafter, whether the child was wrongfully removed from that country. Consideration of subjective intent allowed courts to accurately determine whether parents jointly decided to raise their infant children in a particular country, or whether one parent has alternate plans. This con-

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[1] *Amici* affirms that no counsel for a party authored this brief in whole or in part, and that person other than the *amici curiae*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

sideration is especially important with the increasing number of Hague Convention cases involving domestic violence victims who repress their intent to flee a country, as for fear of alerting the abuser of their plans.

The Sixth Circuit's decision removes any consideration of parents' subjective intent to shelter their children in the United States, leaving a significant but unknown number of especially vulnerable children severely disadvantaged. Domestic violence victims who shelter themselves and their children within the Sixth Circuit's jurisdiction will face a standard challenging their cross-border move that undermines the purpose of the Convention.

It is imperative that the Court step in to clarify the appropriate standard for determining an infant's habitual residence. Inconsistency in application of that inquiry encourages forum shopping among U.S. jurisdictions, undermining Congress's express desire for uniformity. It also obstructs the Convention's goals of protecting the child's interests in cases where the child or the fleeing parent were victims of domestic abuse. Domestic violence victims often hide objective measures that indicate their desire and intent to leave as a means of survival, because often, the most dangerous time for a victim is during and immediately after their escape. Courts that ignore subjective intent are more likely to make an erroneous habitual residence determination in cases where domestic violence is at issue—and risk sending the child back into an abusive environment.

It is true that consideration of the parents' subjective intent may make the habitual residence decision more difficult, especially where the objective facts are indeterminate. A court might even con-

clude that an infant has no habitual residence under the Convention. But that is not grounds for ignoring subjective intent; a finding of no habitual residence does not answer the question where the child should ultimately reside. In those instances, the State to which the child was removed will be the arbiter of the underlying custody dispute and will decide with whom (and therefore where) the child should live.

ARGUMENT

I. This Court's Review Is Important to Ensure That Habitual-Residence Determinations Are Uniform and Advance the Convention's Goals.

A. The Child's Best Interest Should Drive the Habitual-Residence Inquiry.

The 1960s and 1970s saw a marked increase in the number of child abductions across international boundaries, principally by divorced or divorcing parents. Brigitte M. Bodenheimer, *The Hague Draft Convention on Int'l Child Abduction*, 14 Fam. L.Q. 99, 100 (1980). Widespread attention to the problem of international child abduction peaked in the late 1970s and early 1980s. Merle H. Weiner, *Int'l Child Abduction and the Escape from Domestic Violence*, 69 Fordham L. Rev. 593, 602 (2000). In response to "legal kidnappings," the United States and twenty-two countries agreed upon a set of rules—embodied in the Oct. 25, 1980 Hague Convention—to prevent wrongful cross-border removal or retention of children from their lawful guardian(s). The United States implemented the Convention through the International Child Abduction Remedies Act ("ICARA"), Pub. L. No. 100-200, 102 Stat. 437 (1988) (codified at 22 U.S.C. §§ 9001-9011), recognizing that

"only concerted cooperation pursuant to an international agreement can effectively combat this problem." 22 U.S.C. § 9001(a)(3).

Under the Convention, courts address the question whether a child has been wrongfully removed from the child's country of "habitual residence" without deciding the underlying custody dispute. *Delgado v. Osuna*, 837 F.3d 571, 577 (5th Cir. 2016); *see also Abbott v. Abbott*, 560 U.S. 1, 9 (2010) ("The Convention's central operating feature is the return remedy."). If a child has been wrongfully removed, she must be returned to the state of her habitual residence "forthwith," unless one of five affirmative defenses applies. Convention, preamble & arts. 12, 13; Kevin Wayne Puckett, *The Hague Convention on Int'l Child Abduction: Can Domestic Violence Establish the Grave Risk Defense under Article 13*, 20 J. Am. Acad. Matrimonial Law 259, 261 (2017).

"'Habitual residence' is the central—often outcome-determinative—concept on which the entire system [of Convention rules] is founded." *Mozes v. Mozes*, 239 F.3d 1067, 1072 (9th Cir. 2001). Wrongful removal can only occur if the child was taken from his or her habitual residence. And in determining if the left-behind parent has "right of custody," "[t]he relevant custody rights are those recognized by the state of habitual residence, and it is the state of habitual residence to which the child should be returned and where the ultimate merits of the custody are to be decided." Linda Silberman, *Hague Int'l Child Abduction Convention: A Progress Report*, 57 Law & Contemporary Problems, 225 (1994).

Any standard for determining habitual residence must reflect the Convention's values that "the interests of the children are of paramount importance in

matters relating to their custody." Convention, preamble. Indeed, the Convention reflects a shared philosophy that "the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based on an interpretation of their true interests." Elisa Pérez-Vera, *HCCH Explanatory Report on the 1980 Hague Child Abduction Convention ("Explanatory Report")*, 3 Acts and Documents of the Fourteenth Session (Child Abduction) 431 (1980).

Article 13 provides that the requesting State authorities need not return a child to the state of his or her "habitual residence" if there is a "grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Convention, art. 13(b). "Thus, the interest of the child in not being removed from its habitual residence without sufficient guarantees of stability in its new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger." Explanatory Report at 433. But because that "grave risk" exception has been construed narrowly by United States courts, *see Walsh v. Walsh*, 221 F.3d 204, 217-21 (1st Cir. 2000), it is all the more important that the habitual-residence standard maintain focus on the child's best interest.

B. Uniformity in the Habitual-Residence Determination Is Critical to Furthering the Convention's Goals.

The Sixth Circuit created a circuit split. Pet. 21-23. It spawned an inconsistency in the law that incentivizes abducting parties to forum shop and undermines the Convention's goals of protecting the children under its purview.

The Convention's efficacy depends on uniformity in its application. In enacting ICARA, Congress recognized "the need for uniform international interpretation of the Convention." 22 U.S.C. § 9001(b)(3)(B). The U.S. Department of State similarly expressed a desire that ICARA would "ensure greater uniformity in the Convention's implementation and interpretation *in the United States*." H.R. Rep. No. 525, 100th Cong., 2d Session 1988, 1988 U.S.C.C.A.N. 386, 399 (emphasis added). And in *Abbott*, this Court confirmed that the interpretations of other signatories "are entitled to considerable weight," especially where, as here, Congress has directed that uniformity "is part of the Convention's framework." 560 U.S. at 16 (quotation omitted). The goal is to promote similar outcomes across the signatory states so each forum will reach the same conclusion about a purported wrongful removal. *See id*. at 20.

Uniformity helps "deter[] child abductions by parents who attempt to find a friendlier forum for deciding custodial disputes." *Id*. To further the Convention's goal of deterring forum shopping, "it is necessary, as much as reasonably possible, to ensure that the response given by the courts in all [Contracting States] to an individual abduction will be the same." Amicus Br. of Perm. Bureau of the Hague Conference on Private Int'l Law, *Abbott*, 560 U.S. 1 (2010) (No. 08-645), at 9. Courts thus "should be most reluctant to adopt an interpretation that gives an abducting parent an advantage by coming here to avoid a return remedy that is granted in another country." *Abbott*, 560 U.S. at 21.

The Sixth Circuit's decision is at odds with the international consensus. Courts in the United Kingdom, Australia, Canada, and Hong Kong have held

or recognized that the settled or shared intent of the child's parents to reside in a particular state for an appreciable period of time is a critical factor in determining the child's habitual residence. *E.g.*, *Dep't of Family and Cmty. Servs. v. Kayasinghe* [2018] FamCA 697 (Austl.); *Kong v. Song*, [2018] B.C.S.C. 1691 (Can.); *MJB v. CWC*, [2018] HKEC 1741 (C.F.I.) (H.K.); *Re D. (A Child: Jurisdiction: Habitual Residence)* [2016] EWHC 1689 (Fam) (U.K.). By contrast, the Sixth Circuit *en banc* affirmed the district court's holding that A.M.T.'s "exclusive residence" in Italy was "dispositive" notwithstanding the parties' subjective intent. *See* App. 14a, 54a. As a result, the U.S.—more specifically, one circuit—is out of line with much of the international community.

The Sixth Circuit's decision destroyed the uniform application of a subjective intent standard in determining habitual residence. *See* Pet. 21-23. Inconsistent application of the habitual-residence inquiry deprives parents of "crucial information they need to make decisions, and children are more likely to suffer the harms the Convention seeks to prevent." *Mozes*, 239 F.3d at 1072. A parent may need to know whether a child will be returned if, for instance, the child travels abroad to the U.S. to visit in-laws or an estranged spouse. Uniformity makes it easier for a parent to determine whether an international visit would alter the habitual-residence status quo. *See id.* at 1072-73. Furthermore, the lack of uniformity within the U.S. creates the perception that the U.S. is less than fully reciprocal with other signatories. *See*.

This divide creates challenges that Martha Bailey, *Rights of Custody under the Hague Convention*, 11 BYU J. Pub. L. 33, 42-43 (1997) are especially

troubling for children of domestic violence victims. Under the Sixth Circuit's decision, whether an infant was wrongfully removed from his or her habitual residence will now depend not just on the facts surrounding the removal and the parents' intent, but on *where in the United States* the infant is sheltered. Instead of being able to flee to the safest location, domestic violence victims must now make a calculated decision as to whether that forum will be as favorable as any other given its law of habitual residence. Failure to consider this factor could be the difference between safety or the return of the child to an abusive parent. A uniform rule—and in particular, a rule that considers the parents' subjective intent—is essential for protecting children fleeing from abusive homes. *See* Pet. at 25 ("Especially in the context of domestic violence, a legal standard that does not require actual agreement between the parents opens the door to manipulation and forum-shopping by abusive parents and spouses.").

The circuit split has caused a discordance in the law, contrary to Congress's express preference for uniformity and the goals of the Convention. Our international and domestic obligations demand a uniform standard for habitual-residence determinations.

II. This Court's Clarification of the Appropriate Standard for Determining Habitual Residence Is Critical Given the Circuit Split and the Number of Cases Involving Domestic Violence.

A. The Changing Nature of Child Abduction Cases Under the Convention.

The need for the Hague Convention arose largely in response to concerns about non-custodial parents

abducting their children and seeking a more favorable custody determination in another country. Merle H. Weiner, *International Child Abduction & the Escape from Domestic Violence*, 69 Fordham L. Rev. 593, 602-03, 607-09 (2000). However, the reality does not fit that paradigm. Many of the cases arising under the Hague Convention involve a custodial parent fleeing domestic violence or child abuse. Miranda Kaye, *The Hague Convention and the Flight from Domestic Violence: How Women & Children are Being Returned by Coach & Four*, 13 Int'l J.L., Pol'y & Fam. 191, 193 (1999). One study found that approximately one-third of all published and unpublished U.S. Convention cases mentioned violence within the home. Suddha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction*, 11 Violence Against Women 115, 120 (2005). In fact, in 2003, "seven of nine Convention cases that reached an appeals court in the last half of 2000 involved an abducting mother who claimed she was a victim of domestic violence." *Id.*

Domestic violence often plays a role in parental abduction cases. A study published in the 1990's reported that "the marriages of the parents [reporting abductions] tended to be characterized by domestic violence." *See* Geoffrey L. Greif & Rebecca L. Hegar, *When Parents Kidnap: The Families Behind the Headlines* 18-19 (1993). The incidence of domestic violence in families in which a child was later abducted—over 50 percent—is "unusually high" compared to the rate of marital violence in the general population, which is around 25 percent. *Id.* at 30. The participants of the third meeting of the Special Commission, discussing the operation of the Hague Convention on the Civil Aspects of International Child Abduction, also noted that "the majority of

children . . . were taken away from their country of habitual residence by their mothers, who not infrequently alleged that they or the children had suffered hardship and domestic violence at the hands of the father." Lord Chancellor's Dep't, *Child Abduction Unit, Report on the Third Meeting of the Special Commission to Discuss the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, Apr. 8, 1997, at 1.

In a questionnaire preceding the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention, "country after country, including the United States, recognized that domestic violence is frequently raised as an issue by the respondent" in Hague proceedings. Merle H. Weiner, *Half-Truths, Mistakes, & Embarrassments: The United States Goes to the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, 1 Utah L. Rev. 222, 223 n.5 (2008). In discussing domestic violence, participants raised concerns about the way the Convention was "being used by abusive (usually male) parents to seek the return of children and primary carers . . . and that the Convention is moving away from what it was meant to deter." *Id.* at 282-83.

Thus, this new reality creates an even more compelling need for this Court to clarify the standard for determining habitual residence.

B. The Circuit Split Means the Likelihood of an Infant Being Returned to An Abusive Environment Is Forum-Dependent.

The Sixth Circuit's decision creates a circuit split that undermines the Convention's goal of deterring

forum shopping in custody disputes. That alone warrants review. But even more pressing is the impact on cases, such as this one, in which a parent is fleeing from domestic violence. On top of their efforts to escape from abusers, victims and their infants must now consider which U.S. jurisdictions give them the best chance of permanent safety. Victims too overwhelmed or scared to think about the consequences of sheltering in Ohio instead of Texas will be rolling the dice. Whether the infant will be returned to an abuser under the Convention now turns not only on the facts, but on the forum.

It is beyond dispute that it is not in a child's best interest to live with domestic violence, even when that violence is not directed at the child. Children exposed to frequent domestic violence in the home demonstrate lower cognitive functioning, reduced resilience and emotional and mood disorders that is not significantly different from children who were physically abused. Taryn Lindhorst & Jeffrey L. Edleson, *Battered Women, Their Children, and Int'l Law* 109 (Northeastern Univ. Press 2012). Indeed, Congress has recognized that "children are emotionally traumatized by witnessing physical abuse of a parent" and may experience "potential emotional and physical harm [and] the negative effects of exposure to an inappropriate role model." H. Con. Res. 172, 101st Cong. 1990. A child in an abusive environment may experience frequent activation of his or her physiologic stress response system without adequate response from a caregiver. Heather C. Forkey, *Children Exposed to Abuse and Neglect: The Effects of Trauma on the Body and Brain*, 30 J. Am. Acad. Matrimonial Law. 307, 311 (2018). Such stress leads to "alterations in neurodevelopment, gene transla-

tion, and immune response, resulting in predictable behavioral, learning, and health issues." *Id.*

Many children that appear to have profound and clinically significant problems can rebound—quickly and dramatically—after experiencing even a relatively short period of safety and security. Carolyn A. Kubitschek, *Failure of the Hague Abduction Convention to Address Domestic Violence and Its Consequences*, 9 J. Comp. L. 111, 116 (2014). But any progress a child removed from an abusive environment can make toward recovery will be lost if the child is returned to the traumatic situation that prompted the child's removal in the first place. Indeed, returning a child to an abusive situation "is rarely an appropriate judicial response to domestic violence," even where the abuser has not directly harmed the child. Kubitschek, at 115. A batterer may be "severely controlling" and use a "harsh, rigid disciplinary style" "caus[ing] the reawakening of traumatic memories, setting back post-separation healing." *Id.* at 115-16 (quotation omitted). As such, "[t]he remedy of return uniquely disadvantages domestic violence victims who have abducted their children—it reverses the accomplishment of the victim's flight by returning the child" to the place from which the victim fled. Weiner, at 634.

The risk to a child of being returned to a traumatic environment is not alleviated by the Convention's "grave risk" exception, which provides that a State need not order the return of a child when "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." Convention art. 13. That exception has been narrowly construed and is rarely successful. *See, e.g.*, *Soto*

v. Contreras, 880 F.3d 706, 710 (5th Cir. 2018) (noting that grave risk determinations are rare). While the "grave risk" provision contemplates factors that overlap with the experiences of domestic violence observers or survivors, it ignores the harm children in abusive environments suffer in all but the most severe cases. The subjective standard for habitual residence brings that harm to light by considering the intent and motivations of both parents.

The Court need not decide here whether the Convention adequately protects domestic abuse victims and their children from harm. That is a question for another case. But it is imperative that the Court step in now to create a uniform standard for determining an infant's habitual residence. The child's return should turn on application of a uniform standard, not jurisdictional geography.

C. The Subjective Standard More Accurately Captures the Parties' Actual Intent and Thus Allows Courts to More Correctly Determine A Child's Habitual Residence.

The Sixth Circuit's decision adopted a purely objective standard for determining habitual residence. *Amici* support the adoption of a subjective intent standard for determining the habitual residence of infants too young to have acclimatized to any one country. The subjective standard would allow parents to explain their intentions in leaving, their fear of the batterer, and their concerns for their own and their child's safety. Such evidence would reveal the *actual* intent of the parent and should thus be an essential element of any analysis of "shared intent."

By contrast, the Sixth Circuit's test, which focuses only on objective evidence, does not provide the complete reality—especially in domestic violence cases. More specifically, a habitual-residence standard that ignores or discounts the parents' subjective intent is especially harmful to victims of domestic violence because the decisions leading to the victim's escape are often not apparent from an objective standpoint. Often, victims of domestic violence are unlikely to overtly show that they plan to leave their abuser. *See* The National Domestic Violence Hotline, *Types of Safety Planning*, https://www.thehotline.org/help/path-to-safety/#types. To the contrary, they often need their abuser to believe that they will stay under their abuser's power and control—and in the country—to ensure their own safety and the safety of their child.

For example, before an abused partner decides to leave, he or she will often experience subtle cognitive, emotional, and behavioral shifts. *See* Deborah K. Anderson & Daniel G. Saunders, *Leaving an Abusive Partner*, 4 Trauma, Violence, & Abuse 172, 175-76 (Apr. 2003). The victim will seek out social support, make safety plans, or set limits on the relationship; "they beg[in] leaving in ways that [a]re not always visible to the casual observer." *Id.* at 176. Furthermore, it can be critically important that these plans remain unnoticed by the abuser.

Research and *Amici*'s combined decades of experience make clear that the most dangerous time for an abused partner is when he or she leaves. Weiner, at 626. Indeed, battered women are 75 percent more likely to be murdered when they try to flee than when they stay. Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, 28 The Col-

orado Lawyer 19 (Oct. 1999). If a victim's plan is uncovered before the victim is ready to leave, she may never have the chance. This is why *Amici* and other domestic violence service providers work closely with clients considering leaving their abusers to create safety plans to help victims and their children leave quietly and confidentially. It is also why objective standards of intent (*e.g.*, enrolling a child in school) are such poor indicators of actual intent—on the surface, life must go on until all measures are in place to ensure the best possible chance of a domestic violence victim leaving her abuser safely.

The subjective intent standard is thus a crucial means by which a trial court can understand an abused partner's mental state. Did she make plans to stay with her abusive partner because she intended to remain there? Or was it because she needed to avoid alerting the partner to her actual intent to escape with the child? The Sixth Circuit's objective approach wrongly assumes that a party's actions speak for the motivations behind them. *Taglieri v. Monasky*, 907 F.3d 404, 409-10 (6th Cir. 2018). That could not be more wrong, or more dangerous.

The consideration of parental subjective intent in determining a child's habitual residence may make a court's fact-finding more difficult, but more accurately reflects the situation on the ground. The subjective intent standard also increases the likelihood that a court will make a finding of *no* habitual residence, especially when a child is too young to have acclimatized or to have an opinion on the matter. But the finding of no habitual residence is not contrary to the goals of the Convention. If there is no habitual residence, there is also no wrongful removal, and any underlying custody disputes will be set-

tled by the jurisdiction to which the child was removed. In short, the consideration of the parents' subjective intent will reduce the likelihood that domestic violence cases will end in the return of the child to an abuser. That result is in line with the purposes of the Convention.

CONCLUSION

The petition should be granted.

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