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

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

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 its factual findings—a paradigmatic mixed question of fact and law.

2. Whether, in applying the "habitual residence" standard to an infant, the "shared intent" test requires proof of a subjective agreement between the parents in order to establish the infant's habitual residence, or whether the standard may be satisfied by objective indicia of the parents' shared intent.

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STATEMENT

The lower courts applied the correct legal standards in resolving the difficult, fact-bound issues in this case. Neither question presented warrants this Court's review.

The standard-of-review issue relates to a classic mixed question of fact and law: whether a particular set of facts establishes a habitual residence. This Court recently explained that not all such mixed questions are subject to the same standard of review; rather, a court must assess the nature of the particular question to decide whether the appellate court should review the matter *de novo* or under the clear-error standard. *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC* v. *Village at Lakeridge, LLC*, 138 S. Ct. 960 (2018).

None of the supposedly conflicting decisions cited by petitioner undertook this inquiry. There accordingly is no conflict warranting this Court's review: the courts of appeals will be obliged to reassess the question based on the test set forth by this Court in *U.S. Bank*. Those reassessments are likely to produce a consistent approach. If the lower courts' applications of *U.S. Bank* result in conflicting conclusions, it then may be appropriate for this Court to step in. At present, when no court has engaged in that analysis, there is no basis for this Court's intervention.

The second question presented rests on a linguistic sleight-of-hand. The test for determining habitual residence when the child is an infant turns on "shared parental intent." One type of relevant evidence is a subjective agreement by the parents. But, as the court below expressly held, "shared parental

intent" may be proven through other types of evidence, such as objective actions by the parents demonstrating a shared intent.

Petitioner tries to argue that other courts of appeals hold that a subjective agreement between the parents is essential to prove shared intent, but no court has endorsed that view. Significantly, not a single judge on the en banc court agreed with petitioner's position on this issue.

The petition should be denied.

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. 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."

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.

Congress in 1998 enacted the enabling statute for the Hague 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).

This Court has recognized that 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* v. *Abbott*, 560 U.S. 1, 20 (2010). Ordering the return of a child to his or her country of habitual residence does not determine the final custody arrangement for the child, but it "does allow the courts of the home country to decide what is in the child's best interests." *Ibid.* "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." *Ibid.*

2. Neither the Hague Convention nor the enabling statute defines the term "habitual residence."

The official reporter for the Hague Conference 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." *Mozes* v. *Mozes*, 239 F.3d 1067, 1071 (9th Cir. 2001) (quoting Elisa Perez-Vera, Explanatory Report § 66, in 3 *Hague Conference on*

Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction (1982)). 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." *Ibid.* (quoting J.H.C. Morris, *Dicey and Morris on the Conflict of Laws* 144 (10th ed. 1980)).

B. Factual Background.

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 Universita 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.*

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.[1]

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 that "the parties continued to live as a married couple, but their relationship was rife with difficulties." Pet. App. 75a. Living apart 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. They traveled to the United States 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

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[1] 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, but it did not reach a conclusion as to whether any additional physical altercations occurred. *Id.* at 105a ("Based on the record, the frequency with which Taglieri subjected Monasky to physical violence and severity of the physical violence is unclear.").

divorce lawyers." Pet. App. 76a. But, the district court observed, "also during this time, the parties 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 about the possibility of a divorce. *Ibid.* She also obtained quotes from international moving companies for a potential move to the United States. *Ibid.*

The following day, Monasky went to the hospital for a checkup, where her doctors encouraged her to induce labor. Pet. App. 77a. She declined the advice, stating that she preferred a natural birth. *Ibid.* Taglieri drove Monasky back from the hospital to their apartment. *Id.* at 78a. During the car ride, they argued about her decision. *Ibid.* Eventually, Monasky began to feel contraction-like pains and asked to return to the hospital, but Taglieri stated that they

should "go home and see how the contraction-like pains proceeded." *Ibid.*

Once back at their apartment, they continued to argue. Pet. App. 78a. Taglieri told Monasky that she could take a taxi back to the hospital. *Ibid.* Early the following morning, Monasky did just that. *Ibid.* Taglieri testified that he did not know that Monasky had left until he woke up. *Ibid.*

Monasky gave birth through emergency cesarean section to a baby girl, A.M.T. Pet. App. 78a. Taglieri and Monasky's mother were both present for the birth. *Ibid.* After Monasky and A.M.T. were released from the hospital, Taglieri returned to work in Lugo. *Ibid.* Monasky's mother stayed with her daughter for a few weeks. *Ibid.*

On March 1, 2015, Monasky again indicated her desire to obtain a divorce. Pet. App. 78a-79a. Two days later, however, she joined Taglieri in Lugo. *Id.* at 79a. Monasky said that she moved because she still needed help caring for A.M.T. while recovering from her caesarian. *Ibid.* 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.* Monasky contended "that she did not waiver on her intent to di-

vorce and return to the United States with A.M.T." *Ibid.*

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 District 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.

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 that 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 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. 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 crystal-

ized." *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, 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 there-

fore a wrongful removal under the Hague Convention.[2]

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 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

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[2] 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*.

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." *Ibid.*

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 therefore "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.

REASONS FOR DENYING THE PETITION

Questions relating to child custody are highly fact-bound, typically requiring the trier of fact to resolve conflicting evidence. That is precisely what the district court did in this case—undertaking a detailed review of the record developed during the four-day bench trial. Petitioner's attempts to manufacture

conflicts in the lower courts justifying this Court's review are unavailing. The petition should be denied.

I. The Standard-Of-Review Issue Does Not Warrant This Court's Attention.

Petitioner asserts that this Court should grant review to resolve a conflict regarding the standard for appellate review of habitual residence determinations. But her argument rests on the premise that mixed questions of fact and law are always subject to *de novo* review. That contention ignores this Court's recent decision in *U.S. Bank National Ass'n ex rel. CWCapital Asset Management LLC* v. *Village of Lakeridge, LLC*, 138 S. Ct. 960 (2018)—not cited by petitioner—which held that "[m]ixed questions are not all alike" and different appellate review standards apply in different contexts. *Id.* at 967. Similarly, the conflicting court of appeals cases cited by petitioner are not based on an examination of the specifics of the habitual residence determination, but rather on the—now-rejected—assumption that all mixed questions of fact and law are subject to the same standard of judicial review.

For that reason, there is no conflict warranting this Court's attention. The lower courts must reexamine their conclusions based on the guidance provided just last year in *U.S. Bank*. That guidance is likely to lead other courts to reach the same conclusion as the court below.

Even if a conflict were to develop, it is not clear that the issue would warrant this Court's review. The Court has addressed this issue in contexts that involve many hundreds or even thousands of cases each year. Hague Convention cases do not come close to that level.

A. The Standard Of Review For A Mixed Question Of Fact And Law Depends On The Particular Context In Which The Question Arises.

This Court in *U.S. Bank* held 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 "require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard." 138 S. Ct. at 967. In that context, "when applying the law involves developing auxiliary legal principles of use in other cases—appellate courts should typically review a decision *de novo*." *Ibid.*

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.'" 138 S. Ct at 967. "[W]hen that is so, appellate courts should usually review a decision with deference." *Ibid.*

The Court pointed out an additional criterion—that "[i]n the constitutional realm, * * * the calculus changes." 138 S. Ct. 967 n.4. That is 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." *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.

B. There Is No Conflict Warranting This Court's Review.

Petitioner's claim of a conflict among the lower courts rests entirely on cases decided prior to *U.S. Bank*'s significant guidance regarding the factors to be considered in determining the proper standard of review for a mixed question of fact and law. Most significantly, none of the supposedly conflicting decisions undertook an assessment of the particular nature of the habitual residence determination. To the contrary, they applied to the habitual residence determination a standard of review that, in the particular circuit, applied generally to mixed questions.

For these reasons, there simply is no conflict appropriate for review by this Court. Rather—when next confronted by the question of the appropriate standard of review for a habitual residence determination—each court of appeals should, and presumably will, undertake the context-specific analysis required by *U.S. Bank*. They should reach the same conclusion as the court below given the fact-intensive nature of the inquiry. See pages 22-23, *infra*. If a deep conflict develops regarding the application of the *U.S. Bank* test in this context, then there could be an issue warranting this Court's attention.

Given the need for the lower courts to reexamine the issue in light of *U.S. Bank*, however, there is no reason for the Court to intervene at this time.

Petitioner bases her claim of a conflict on decisions from seven courts of appeals applying a *de novo* review standard. Each of those courts, however, applied that standard based on an across-the-board rule regarding the standard of review for mixed questions, and did not undertake a context-specific assessment of the habitual residence inquiry:

- **Second Circuit**: *Guzzo* v. *Cristofano*, 719 F.3d 100, 109 (2d Cir. 2013), rested its application of the *de novo* review standard on a number of Hague Convention decisions from other circuits, none of which were grounded in an assessment of the nature of the habitual-residence-specific inquiry.
- **Third Circuit**: *Feder* v. *Evans-Feder*, 63 F.3d 217 (3d Cir. 1995), justified its application of the *de novo* standard by citing *Universal Minerals, Inc.* v. *C.A. Hughes & Co.*, 669 F.2d 98, 102-103 (3d Cir. 1981), a case that involved the standard of appellate review of a judicial determination of abandonment of title to personal property. See 63 F.3d at 222 n.9.
- **Fifth Circuit**: *Larbie* v. *Larbie*, 690 F.3d 295 (5th Cir. 2012), cited (*id.* at 306) *Barzilay* v. *Barzilay*, 600 F.3d 912, 916 (8th Cir. 2010)—which in turn cited *Silverman* v. *Silverman*, 338 F.3d 886, 896 (8th Cir. 2003) (en banc). As discussed below, *Silverman* relies entirely on a non-habitual-residence case.
- **Seventh Circuit**: *Koch* v. *Koch*, 450 F.3d 703, 710 (7th Cir. 2006), rested its application of the *de novo* review standard on a number of decisions from other circuits, none

of which were grounded in an assessment of the nature of the habitual-residence-specific inquiry.

- **Eighth Circuit**: *Silverman* v. *Silverman*, 338 F.3d at 896, justified its application of the *de novo* standard by citing *McNeilus Truck & Manufacturing, Inc.* v. *Ohio ex rel. Montgomery*, 226 F.3d 429 (6th Cir. 2000), which involved the standard for appellate review of the district court's "finding that the stated purpose of the statute at issue was a proper public purpose." *Id.* at 437.
- **Ninth Circuit**: *Mozes* v. *Mozes*, 239 F.3d 1067, 1073 (9th Cir. 2001), relied on the Third Circuit's *Feder* decision (discussed above) and on *United States* v. *McConney*, 728 F.2d 1195, 1202 (9th Cir. 1984) (en banc), which applied *de novo* review to a lower court's determination of exigent circumstances in the context of the Fourth Amendment.
- **Eleventh Circuit**: *Ruiz* v. *Tenorio*, 392 F.3d 1247, 1252 (11th Cir. 2004), relied on the *Mozes* decision, discussed above.

Petitioner also points (Pet. 15-16) to the First Circuit's decision in *Nicolson* v. *Pappalardo*, 605 F.3d 100, 105 (1st Cir. 2010). But that court's statement that the district court's application of the legal standard was entitled to "some deference" (*ibid.*) rested on *Bolton* v. *Taylor*, 367 F.3d 5, 7-8 & n.1 (1st Cir. 2004)—which involved the standard for appellate review of a jury's application of the Fourth Amendment's reasonable suspicion standard. Like the other rulings discussed above, the First Circuit

did not undertake an assessment of the nature of the habitual residence inquiry, which is what *U.S. Bank* requires.[3]

In sum, none of petitioner's assertedly conflicting decisions rest on the context-specific determination mandated by *U.S. Bank*. For that reason, the lower courts will be obliged to reconsider those decisions in light of *U.S. Bank*. Until that reconsideration occurs, there can be no disagreement among the lower courts warranting this Court's intervention.

C. The Habitual Review Issue Does Not Arise With Sufficient Frequency To Warrant This Court's Attention.

The Court has addressed the standard of review applicable to mixed questions of fact and law only in three contexts that arise with great frequency: whether a confession was voluntary under the governing due process standard; whether a search is permissible under the Fourth Amendment; and

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[3] Petitioner quotes (Pet. 19) statements by several courts of appeals indicating that "consistency and predictability" are important in the habitual residence context. But none of those courts undertook the analysis required by *U.S. Bank*. For example, the *Mozes* court was rejecting the suggestion that courts should eschew any "attempt to develop guiding principles for courts to consult when making findings of 'habitual residence'"—in other words, further refine the governing legal standard. 239 F.3d at 1072. It was not assessing whether it would be possible to derive such principles in reviewing mixed questions in this particular context, which is the inquiry *U.S. Bank* requires. The same is true of the other cases cited by petitioner. See *Koch*, 450 F.3d at 712-713 (referring to legal standards, not to standard of review—which the court addressed in a separate section much earlier in its opinion (*id.* at 710)); *Silverman*, 338 F.3d at 896 (relying on *Mozes*' analysis).

whether a transaction meets the Bankruptcy Code's arm's-length requirement. See *Miller* v. *Fenton*, 474 U.S. 104 (1985); *Ornelas* v. *United States*, 517 U.S. 690 (1996); *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC* v. *Village of Lakeridge, LLC*, 138 S. Ct. 960 (2018).

Petitioner has not even attempted to show that Hague Convention cases presenting a habitual residence question arise with anything close to the frequency of those issues. Nor could she. The number of criminal cases and bankruptcy cases in which the issues addressed by this Court must be decided are orders of magnitude greater than the number of Hague Convention cases.

For that reason, the question presented is not sufficiently important to warrant this Court's attention.

D. The Court Below Correctly Applied A Clear-Error Standard.

The court below did not apply the *U.S. Bank* factors in holding that habitual residence determinations are subject to deferential appellate review. But the court's analysis is entirely consistent with that decision.

The court of appeals cited the Hague Convention's explanatory report, which "treats a child's habitual residence as 'a question of pure fact.'" Pet. App. 8a. The treaty's drafters thus did not anticipate that courts would be able to "expound on the law" by developing "auxiliary legal principles" relevant to the habitual residence inquiry—the factors that would make *de novo* review appropriate. *U.S. Bank*, 138 S. Ct. at 967.

Rather, designating the question as one of "pure fact" makes clear that it is an inquiry that "immerse[s] courts in case-specific factual issues—compelling them to marshal and weigh evidence, [and] make credibility judgments," which means that deferential review is the appropriate standard under *U.S. Bank*. See 138 S. Ct. at 967.

Moreover, the court of appeals' explanation of the district court's analysis makes clear that this is the precise inquiry that the district court undertook in the four-day bench trial and 30-page opinion. See Pet. App. 9a-11a.

For all of these reasons, the court below was correct in subjecting the district court's habitual residence determination to review for clear error.

II. The Lower Courts' Holding That Subjective Agreement Between Parents Is Not A Necessary Prerequisite To Finding Habitual Residence Does Not Warrant Review.

Petitioner argued below that a subjective agreement between the parents is required to establish "shared parental intent" regarding a child's habitual residence. The court below expressly rejected that contention, holding that a subjective agreement is sufficient, but not necessary, to demonstrate shared intent. Pet. App. 12a; see also page 14, *supra*. Significantly, not a single judge on the en banc court disagreed with that conclusion.

In seeking review of that determination, petitioner argues that the court of appeals' ruling conflicts with decisions of other courts of appeals. Pet. 21-23. Petitioner asserts that four courts of appeals hold that, in cases involving "infants too young to acclimate to their surroundings," parents must "share[]

a subjective intent—that is, * * * a meeting of the minds—to raise the child" in a particular country before a court may determine that the child has a habitual residence in that country. Pet. 21.

That is wrong. No court applying the "shared intent" test requires proof that the parents had a "subjective agreement" to find a habitual residence. Rather, each court holds—like the court below—that the parents' subjective agreement is one way, but not the only way, to establish a child's habitual residence.

Petitioner's contrary argument rests on a linguistic sleight-of-hand, interpreting the phrase "shared intent" to mean "subjective agreement." In fact, courts have consistently held that the relevant standard is "shared intent," which can be proven by either a subjective agreement or objective indicia demonstrating the two parties' intent.[4]

1. *Second Circuit.* In *Gitter* v. *Gitter*, 396 F.3d 124 (2d Cir. 2005), the Second Circuit articulated the following standard for determining habitual residence:

> First, the court should inquire into the shared intent of those entitled to fix the child's residence (usually the parents) at the latest time that their intent was shared. *In making this determination the court should*

[4] The amicus brief suffers from the same flaw, asserting that the court of appeals' ruling "removes any consideration of parents' subjective intent." Amicus Br. 2. That is not correct. The lower court simply held that shared parental intent may be established by objective facts, and not only by demonstrating the existence of an actual subjective agreement by the parents.

> *look, as always in determining intent, at actions as well as declarations*. Normally the shared intent of the parents should control the habitual residence of the child. Second, the court should inquire whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent.

Id. at 134 (emphasis added).

The *Gitter* court thus recognized two factors that courts should consider in determining habitual residence: shared parental intent and acclimatization. In determining intent, the court held that courts should look to "actions as well as declarations"—that is, to *objective* and *subjective* factors.

Significantly, *Gitter* cited as "particularly instructive" (396 F.3d at 134) the Ninth Circuit's decision in *Mozes* v. *Mozes*—and *Mozes* rested its finding of habitual residence on factors other than a subjective agreement. See 239 F.3d at 1083 (explaining that a mother's decision to find full-time employment in Australia before moving to Scotland was "the sort[] of objective action[] that ordinarily lead[s] courts to find a settled intent on the part of a family to take up habitual residence").

2. *Third Circuit.* Petitioner also relies (Pet. 21) on *Feder* v. *Evans-Feder*, 63 F.3d 217 (3d Cir. 1995). But that court, too, focused on "shared intent" rather than subjective agreement:

> [W]e believe that a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient

> for acclimatization and which has a "degree of settled purpose" from the child's perspective. We further believe that a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.

Id. at 224. The passage of the opinion relied on by petitioner (Pet. 21)—quoting an English court decision—simply states that "the conduct" *and* "the overtly stated intentions and agreement of the parents" are important factors. It thus makes clear that factors *other than* a subjective agreement between the parents are relevant in ascertaining habitual residence, which is precisely what the court below concluded here.

Petitioner also points to *Delvoye* v. *Lee*, 329 F.3d 330 (3d Cir. 2003). But that decision repeatedly cites *Feder*, and applies the "shared intention" test set forth in *Feder*. See *id.* at 332-334. And the *Delvoye* court held that "[b]ecause [the father] and [the mother] lacked the 'shared intentions regarding their child's presence [in Belgium],' [the child] did not become an habitual resident there." *Id.* at 334 (quoting *Feder,* 63 F.3d at 224).

That conclusion says nothing about the proper outcome here, because the facts of *Delvoye* were dramatically different from the facts here. The father was a resident of Belgium, and the mother a resident of the United States; the father spent about a quarter of his time in the United States, living with the mother. 329 F.3d at 332. "[The mother] began prenatal care in New York, but because [the father] re-

fused to pay the cost of delivery of the baby in the United States and Belgium offered free medical services, [the mother] agreed to have the baby in Belgium. In November 2000, she traveled to Belgium on a three-month tourist visa, bringing along only one or two suitcases. She left the rest of her belongings, including her non-maternity clothes, in the New York apartment. While in Belgium [the mother] lived out of her suitcases. When her visa expired she did not extend it." *Ibid.* The child was born in May 2001, and the mother and child returned to the United States in July. *Ibid.*

As the court of appeals explained, "the district court found that [the mother], at [the father's] urging, had traveled to Belgium to avoid the cost of the birth of the child and intended to live there only temporarily. She retained her ties to New York, not having taken her non-maternity clothes, holding only a three-month visa and living out of the two suitcases she brought with her. Thus, there is lacking the requisite 'degree of common purpose' to habitually reside in Belgium." *Delvoye*, 329 F.3d at 334.

The very different facts of this case point in the opposite direction, as the district court explained in detail. See pages 8-13, *supra*.

3. *Fifth Circuit.* *Berezowsky* v. *Ojeda*, 765 F.3d 456 (5th Cir. 2014), applied the same "shared intent" standard as the other courts of appeals: the Fifth Circuit stated that it had "adopted an approach that begins with the parents' shared intent or settled purpose regarding their child's residence"; and that the "parents' intentions should be dispositive where, as here, the child is so young that he or she cannot possibly decide the issue of residency." *Id.* at 466 (quotations omitted).

The Fifth Circuit did refer at one point to "some sort of meeting of the minds regarding their child's habitual residence, so that they are making the decision together." *Berezowsky*, 765 F.3d at 468. But the court did not hold or even indicate that what is required in every case is an actual subjective agreement regarding the child's residence. To the contrary, the court determined whether the required shared intent was present by canvassing the same objective indicia cited by other courts of appeals—and assessing whether those objective facts justified inferring the existence of a shared intent regarding the child's residence.

Thus, in holding that the district court erred in finding a shared intent that the child's habitual residence would be in Mexico, the court of appeals stated that "the district court focused on the fact that 'neither parent has meaningful or deep-rooted ties to the United States.' In doing so, the district court ignored the primary consideration in the habitual residence determination: shared parental intent." *Berezowsky*, 765 F.3d at 469.

Moreover, the court of appeals did not rest its decision solely on the absence of a subjective agreement. After stating that the district court "never found that [the parents] reached an agreement or meeting of the minds regarding [the child's] future," it went on to point out that "the district court did not make a finding that [the parents] intended to abandon Texas as [the child's] habitual residence" and that the record did not "support a determination that the parents formed a shared intent to make Mexico [the child's] habitual residence." *Berezowsky*, 765 F.3d at 469. If a subjective agreement were required,

there would have been no warrant for the court to make those additional determinations.

The *Berezowsky* court also looked to numerous objective factors, such as "the circumstances of the family's move" and the "belongings that [the parties] brought with them to the new country." 765 F.3d at 472. The Fifth Circuit's own analysis therefore makes clear that proof of an actual subjective agreement is not required—the requisite "shared intent" can be inferred from objective facts demonstrating that the parents shared the intent to make a particular nation the child's habitual residence.

4. *Ninth Circuit.* *Murphy* v. *Sloan*, 764 F.3d 1144 (9th Cir. 2014), is wholly inapposite because it involved a child who was eight years old at the time of the litigation, and therefore rests in significant part on the acclimatization prong of the standard, which is inapplicable when—as here—the case involves an infant.

Like the other decisions, *Murphy* applies the "shared intent" standard: "the proper standard for habitual residence, which takes into account the shared, settled intent of the parents and then asks whether there has been sufficient acclimatization of the child to trump this intent." 764 F.3d at 1150.

In upholding the district court's conclusion that the parents' shared intent pointed to the United States as the child's habitual residence, the court of appeals cited a long list of objective factors—confirming that subjective 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 habitu-

> al 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.

Murphy, 764 F.3d at 1151.

The court relied on these facts for its conclusion that there was no shared intent to transfer the child's habitual residence to Ireland. The snippet relied on by petitioner—that "there was never any discussion, let alone agreement, that the stay abroad would be indefinite" (Pet. 22 (quoting *Murphy*, 764 F.3d at 1152))—was an additional observation, not at all the basis for the court's legal conclusion.

In sum, there simply is no disagreement among the courts of appeals: all of the courts that have addressed the issue apply a "shared intent" standard under which evidence of a subjective agreement between the parents is relevant, but not necessary, to establish a habitual residence. That is the precise approach that the courts below applied in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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