No. 21-_____

In The
Supreme Court of the United States

HEATH RICHARD DOUGLAS,

Petitioner,

v.

NANCY SUMMERS DOUGLAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Hague Convention on the Civil Aspects of International Child Abduction requires the return of not only a child who was wrongfully *removed* from the child's habitual residence, but also a child who was wrongfully *retained* in a country other than that child's habitual residence. The question presented is:

In cases of wrongful retention, must a district court find a settled purpose to abandon a former habitual residence before concluding that a new habitual residence has arisen?

RELATED PROCEEDINGS

United States District Court (W.D. Mich.):

Douglas v. Douglas, Case No. 1:20-cv-423, March 22, 2021

United States Court of Appeals (6th Cir.):

Douglas v. Douglas, Case No. 21-1335, September 21, 2021

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

STATUTES

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Petitioner Heath Richard Douglas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinions of the Court of Appeals (App. 1) and district court (App. 16) are unreported.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on September 21, 2021. On December 29, 2021, Justice Kavanaugh granted an extension of time within which to file a petition for a writ of certiorari to and including February 3, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

TREATY PROVISION INVOLVED

Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction, as implemented in the United States through the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. §§ 9001-9011, provides in relevant part:

> 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; . . .

STATEMENT OF THE CASE

This case concerns an important question of federal law that has not been, but should be, settled by this Court—namely, the framework a district court

should apply when analyzing a wrongful retention case, as opposed to a wrongful removal case. Such cases raise questions that do not necessarily exist in wrongful removal cases and are, thus, not resolved by this Court's prior decision in *Monasky v. Taglieri*, 140 S. Ct. 719 (2020).

In *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001), the Ninth Circuit set forth a detailed framework for determining whether a habitual residence that has already been established has been changed—a question that was not before this Court in *Monasky*. Prior to this Court's decision in *Monasky*, that framework had been adopted in almost every circuit. *Darin v. Olivero-Huffman*, 746 F.3d 1 (1st Cir. 2014) (cited and followed); *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005) (found to be "instructive"); *Maxwell v. Maxwell*, 588 F.3d 245 (4th Cir. 2009) (cited and followed); *Larbie v. Larbie*, 690 F.3d 295 (5th Cir. 2012) (cited and followed); *Koch v. Koch*, 450 F.3d 703 (7th Cir. 2006) (cited and followed); *Silverman v. Silverman*, 338 F.3d 886 (8th Cir. 2003) (cited and followed); *Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir. 2004) (expressly adopted); *Abou-Haidar v. Vazquez*, 945 F.3d 1208 (D.C. Cir. 2019) (cited and followed). It appears that the only circuit that had expressly rejected the *Mozes* framework, prior to this Court's decision in *Monasky*, is the Sixth Circuit. *Robert v. Tesson*, 507 F.3d 981 (6th Cir. 2007). It did so primarily because it believed *Mozes* placed too much emphasis on the intent of the parents.

In *Monasky*, this Court settled the dispute among the circuits over whether a child's habitual residence

must be determined by shared parental intent or acclimatization by concluding that both factors could be relevant, and a court must instead consider the totality of circumstances. *Monasky*, however, was a fairly simple case. The child had only ever been in one country at the time of the child's removal—Italy.

Numerous Hague Convention cases involve children who have lived in multiple different countries at the time of the alleged wrongful retention or removal. With the Sixth Circuit's rejection of *Mozes*, and this Court's decision in *Monasky* also casting some doubt on the *Mozes* framework's continued viability, there remains no uniform framework for approaching wrongful retention cases, in which a child has generally been given consent to visit another country for at least a limited duration. The inconsistencies in the district court's summary ruling in the present case shed some light on why such a framework is needed.

Petitioner Heath Douglas is an Australian citizen who has never lived in the United States. He married Respondent Nancy Douglas, a United States citizen, in Australia, that is where they chose to make their home together, and that is where their son was born. Unfortunately, shortly after the child's birth, the parties' relationship broke down. Nancy wanted to return to the United States with the child, but Heath refused to consent to the move. Finally, Nancy told Heath that he needed to let her go and that if he wanted, she would show him her return ticket. Upon hearing the promise of Nancy's return, Heath consented. But after she

reached the United States, Nancy ceased all contact with him. She never returned to Australia.

The district court's analysis began with the determination of the "wrongful retention date," which the district court concluded was when "petitioner knew or should have known that a child would not return." According to the district court, the wrongful retention date was October 3, 2019, when Petitioner was served with divorce papers. The district court then proceeded to determine where the child's habitual residence was immediately prior to that date.

That is where the district court's analysis becomes confusing. The district court made clear that it was not relying solely on the shared intent of the parties. But it is unclear what relevance the evidence the court cited had if not in relation to the parties' intentions. For example, the district court noted that Petitioner wrote "no conditions, no expectations" when he signed travel documents for the child, that Respondent had not communicated with Petitioner since leaving Australia, and that there was no evidence in the record that Respondent gave Petitioner any reason to believe she intended to return, after she left Australia—but the district court simultaneously found that Petitioner did not have reason to know Respondent would not return to Australia until October 3, 2019. Some of the district court's analysis appears to conflate the habitual residence determination with the consent or acquiescence defenses.

The Ninth Circuit in *Mozes* observed that, in order to obtain a new habitual residence, there must be a settled intention to abandon a prior habitual residence. In cases such as the present case, where the child has lived in more than one location, the Ninth Circuit divided the many possible factual scenarios into three broad categories. The first category of cases is those in which the family as a unit has manifested a settled purpose to change habitual residence, usually when both parents and the child relocate to another country together. The second category of cases is those where the child's change of residence is clearly intended to be for a specific, delimited period. The third category of cases is those in which the petitioning parent had earlier consented to let the child stay abroad for a period of ambiguous duration. In the first category of cases, courts generally find that the child's habitual residence has changed. In the second, courts generally find that it has not. In the third category, the courts sometimes find that there was a settled mutual intent that the stay last indefinitely and sometimes find that there was not. The Ninth Circuit observed, however, that if there is a genuine difference of parental intention, then there is no settled purpose or intention and the child's habitual residence does not change.

There is no dispute as to the retention date in this case. The only dispute is regarding how the district court determined the child's habitual residence on that date. Pursuant to this Court's decision in *Monasky*, Australia was unquestionably the child's habitual residence at the time Respondent moved to the United

States with the child. It was the only country the child had ever lived in and where the child's parents had established their home. The district court should have recognized this and then proceeded to analyze whether the child's habitual residence in Australia was abandoned.

Prior to this Court's decision in *Monasky*, nearly every circuit analyzed the issue of abandonment of a habitual residence as a matter of parental intent. It has been recognized that a child could acclimate to the child's surroundings in the absence of mutual parental intent that the child's habitual residence change, but in the absence of such intent, a longer time period was considered to be required in order for that change to occur. Although this Court held in *Monasky* that an actual agreement to raise the child in a particular country was not required where the parents had established a particular country as their home, the question is significantly different when the child is moved from the country where the parents had established a home to a country where only one parent resides. There is no joint home in the new country, but nor is the child old enough to acclimate. Shared parental intent is practically the only factor that can be looked to.

Thus, in a case involving young children, where the habitual residence is alleged to have changed, this Court should hold that the question a district court must answer is whether the parents mutually agreed that the child would live in a new country indefinitely. In the present case, taking all facts in the light most

favorable to Petitioner (because it was decided on summary judgment), the parents did not so agree. The child's habitual residence was, thus, still in Australia at the time of the wrongful retention.

A. Background

The Hague Conference on Private International Law adopted the Hague Convention in 1980 "[t]o address the problem of international child abductions during domestic disputes." *Lozano v. Montoya Alvarez*, 572 U.S. 1, 4; 134 S. Ct. 1224; 188 L. Ed. 2d 200 (2014). It has been implemented in the United States through the International Child Abduction Remedies Act. *See* 22 U.S.C. §§ 9001–9011.

Article 12 of the Convention requires the prompt return of a child wrongfully removed or retained away from the country in which she "habitually resides." The threshold inquiry in any Hague case is where the child is habitually resident.

B. Facts and Procedural History

1. The parties' relationship begins.

Petitioner Heath Douglas, an Australian citizen, and Respondent Nancy Douglas, a United States citizen, met through the online dating website, eHarmony, in late October 2017. (Heath's Deposition, RE 35-2, Page ID # 261). At the time, they lived an ocean apart. Nonetheless, the parties were less concerned with the

physical distance between them and were motivated to find a quality partner.

Within a month of their initial connection on eHarmony, and after a blessing from Nancy's father for Heath to "pursue" his daughter, the couple were already solidifying international travel plans for Nancy to come to Australia to meet Heath in person in December 2017. (Heath's Deposition, RE 35-2, Page ID # 262-263); (Nancy's Deposition, RE 35-3, Page ID # 292-294). Heath found Nancy's father's verbiage to "pursue" his daughter uncomfortable. Heath wanted to court, love, and care for Nancy, not "pursue" her. (Heath's Deposition, RE 35-2, Page ID # 263). With so many shared interests and goals, Nancy was highly receptive of Heath's e-mails and elected to continue pursuing the relationship. (Heath's Deposition, RE 35-2, Page ID # 263-264). Nancy remarked that she "cherish[d]" all of his e-mails and referred to Heath as a "dream," and a "gift from God" to her. (E-mail from Nancy to Heath re: Relationships, RE 41-6, Page ID # 439).

As the relationship progressed, Nancy took advantage of Heath's generous offer to fly her to Australia so they could meet. In an e-mail to Heath on November 25, 2017, Nancy spoke of her upcoming trip and wrote, "Leaving America and flying to you—I wouldn't want it any other way! It's going to be the best thing I've ever done!" (E-mail from Nancy to Heath re: Relationships, RE 41-6, Page ID # 439). The winter holiday season was upon the parties as Nancy arrived in Australia. Nancy spent Christmas with Heath and his

family. Shortly after Christmas, Heath proposed to Nancy, and she enthusiastically accepted his marriage proposal. (Heath's Deposition, RE 35-2, Page ID # 263-264).

2. Nancy establishes herself in Australia—the marital home.

Following an engagement of two short months, the couple married on February 10, 2018, and lived at Heath's residence in Curlewis, New South Wales, Australia ("NSW"). Within a month, the couple was surprised to learn that their happy family of two would soon become a family of three. (Heath's Deposition, RE 35-2, Page ID # 266). Recently married and now expecting a baby, Nancy established herself in Australia by applying for an NSW driver's license, obtaining an Australian phone number, signing a residential lease in her name while pregnant, and selecting a hospital and midwife in anticipation of the birth of the parties' son. (Handwritten Letter, RE 35-11, Page ID # 320); (Answer to Verified Petition for Return of Child, RE 11, Page ID # 158); (Tenancy Agreement, RE 41-10, Page ID # 447-453). The lease was initially signed by both Nancy and Heath for a tenancy duration of twelve (12) months. (Tenancy Agreement, RE 41-10, Page ID # 447-453).

As the lease was signed by both Heath and Nancy with the understanding that they would live in the house during the pregnancy and after the birth of their child, the couple began to plan for their lives together

and thoroughly discussed a ten-year commitment to residing in Australia before considering a move to the United States. (Motion for Summary Judgment Transcript, RE 53, Page ID # 523). Nancy applied for the precursor status to a permanent resident visa in Australia with the express and implied intent of residing in the country with her growing family. https://immi.homeaffairs.gov.au/visas/permanent-resident. In love, trust, and faith, Heath undertook Nancy's sponsorship for Australian permanent residency through initiating a Partner Visa application in the summer of 2018 as evidenced by the $7000 internet banking payment made on June 6, 2018 to the Department of Home Affairs. (Respondent's Answers to Petitioner's Phase I Requests, RE 41-8, Page ID # 444); (Answer to Verified Petition for Return of Child, RE 11, Page ID # 157). By applying for this visa, Nancy was committing to live in Australia long-term and was subject to a processing time of approximately two years, which would result in permanent residency status commencing in or around June 2020. (Respondent's Answers to Petitioner's Phase I Requests, RE 41-8, Page ID # 444).

In developing a "two-year plan" a mere two months before JD's birth, Nancy listed positive changes she wished to make in her life and was mindful and informed about the impact of good health, child-rearing, religion, and marriage. This two-year plan even included the plan to have a second child in 2020 or 2021, indicating the longevity of her plans to

remain in Australia and grow their family. (Two-Year Plan, RE 41-9, Page ID # 446).

As in all relationships between people, not all circumstances were easy. During Nancy's pregnancy, the couple experienced challenges in their relationship as unexpected pregnancies can raise financial, emotional, and spiritual issues in all couples. Yet, disagreements were two-sided and often resolved. In June of 2018, Nancy wrote:

> I love you Heath. I'm so so sorry for the way I've treated you when we fight. I hate it so much when we fight. It hurts my heart and makes me so sad. I also feel like I turn mean and ugly, and I'm sorry. Thank you for sticking by me and calling the sin out. I want it gone. Please forgive me . . .

(E-mail from Nancy, RE 41-11, Page ID # 455).

In this same e-mail, Nancy remarks that the couple were "one" and promised to stand by him as she is his wife. (E-mail from Nancy, RE 41-11, Page ID # 456). Nancy recognized that the fighting between the parties was mutual and a shared responsibility. (E-mail from Nancy, RE 41-11, Page ID # 456). Indeed, she enthusiastically remarked, in June 2018, that Heath's mother always supports them and that she was "blessed" to be her daughter-in-law. (E-mail from Nancy, RE 41-11, Page ID # 457). Although Nancy acknowledged her often volatile behavior towards her husband, Heath testified that he "thought 70 percent of [the marriage] was great." (Heath's Deposition, RE 35-2, Page ID # 267).

3. The parties' child is born in Australia, but the marriage begins to fall apart.

For Heath, one of the highlights of the marriage was the birth of the parties' son, JD, in early November 2018. In a mutual decision, Nancy's mother came from the United States on the date of JD's birth. (Nancy's Deposition, RE 35-3, Page ID # 289-290). Nancy and Heath may have been new parents, but they knew that they would need some help with a newborn baby. Yet, Nancy suggested that her mother stay in a nearby rental property so that her new family of three could have uninterrupted bonding time together without needing to host out-of-town relatives. (Nancy's Deposition, RE 35-3 Page ID # 289).

Shortly following the birth of JD, Nancy decided to stay with her mother in the rental property, upsetting the original plans to stay with her husband and child in their family home. (Nancy's Deposition, RE 35-3, Page ID # 289-290). In actions similar to how he would later respond to Nancy's abrupt desire to go to the United States with JD, Heath ultimately chose to support the arrangement that was in JD's best interests, which he believed would also preserve the delicate marriage and familial harmony between the parties. (Nancy's Deposition, RE 35-3, Page ID # 289-290).

On November 7, 2018, the sleep-deprived new parents began to argue before Heath's departure to work for the day. (Heath's Deposition, RE 35-2, Page ID # 270). That evening, the parties picked up where they left off with the argument and Nancy and Heath used

harsh language against each other in the presence of Nancy's mother and JD. (Nancy's Deposition, RE 35-3, Page ID # 290). In frustration, after a long day at work, Heath surrendered the fight and pleaded with Nancy to leave. (Heath's Deposition, RE 35-2, Page ID # 270). In response to this call for help, Nancy's mother offered that Nancy and JD stay in her rental for three hours to allow time for reflection and relaxation, to which Heath graciously accepted. (Heath's Deposition, RE 35-2, Page ID # 270).

Heath was under the impression that Nancy and JD would be back to the home in a few hours after everyone had a chance to reflect. (Heath's Deposition, RE 35-2, Page ID # 270). Even the law enforcement officers that were directed to assess the situation remarked that Nancy and her mother could not get "their story straight" as to the argument. (Heath's Deposition, RE 35-2, Page ID # 270). In fact, Heath asserts that the police offered him support. As a result of this confusing experience, Heath became concerned that Nancy would try to keep JD from him. As a result of this argument, the parties agree that they have not lived together since November 7, 2018. (Brief in Support of Respondent's Motion for Summary Judgment, RE 35, Page ID # 223).

4. Nancy leads Heath to believe she seeks reconciliation.

The history of the parties' relationship involved times when Nancy would want space and time to

herself for a few days, and was thankful when Heath gave it to her. (Heath's Deposition, RE 35-2, Page ID # 263, p. 26). When she left the parties' apartment on November 7, 2018, the very next week, she promised Heath she would come back home. (Heath's Deposition, RE 35-2, Page ID # 271, p. 58). The next day, she changed her mind again. (Heath's Deposition, RE 35-2, Page ID # 271, pp. 58-59).

Heath maintains that he always wanted to work on the marriage and that divorce was not an option due to his unwavering faith. (Heath's Deposition, RE 35-2, Page ID # 270). Staying true to his faith, Heath made steps to salvage the marriage through continuing transparent communication with Nancy, seeking advice from trusted community members, and through purchasing and watching marriage counselling videos. (Heath's Deposition, RE 35-2, Page ID # 269).

Despite his efforts, in early December 2018, Heath was compelled to break the lease for the couple's shared apartment in Merewether due to financial and emotional devastation. (Heath's Deposition, RE 35-2, Page ID # 268). On December 3, Nancy's attorneys sought, on Nancy's behalf, to obtain Heath's permission to relocate the child to the United States, but Heath *declined*. (Letter to Appellant re: parenting arrangements, RE 35-7, Page ID # 305-307). In fact, he reacted by initiating a custody proceeding.

Over a week later, and after Heath initiated a custody proceeding, Nancy decided to try a different tactic. (RE 35-11, Page ID # 316). She deliberately lied to him

and told him that she just needed space and had a return ticket, implying that the trip would be temporary. (RE 35-11, Page ID # 316). Heath agreed to give Nancy space and dismissed his Australian custody action because she told him she would return. (Heath's Deposition, RE 35-2, Page ID # 261, pp. 18-19). He believed she just needed time. (Heath's Deposition, RE 35-2, Page ID # 261, pp. 18-19). Heath testified that he expected Nancy to be with her family for three months or so and then come back. (Heath's Deposition, RE 35-2, Page ID # 273, p. 67).

On January 11, 2019, Heath provided Nancy with a handwritten letter saying that she could go to the United States with JD. (January 11 Letter, RE 35-11, Page ID # 318). Less than two weeks later, on January 23, 2019, Heath provided Nancy with a notarized letter that permitted Nancy to travel outside of Australia with JD. (Notarized Authorization to Travel, RE 35-14, Page ID # 340). When he consented to her travel, he made clear to her attorneys it was to be for a short while. (Heath's Deposition, RE 35-2, Page ID # 274, p. 72).

That same day, and without Heath's knowledge, JD's Consular Report of Birth Abroad was granted after having been secretly applied for by Nancy some time prior. (Passport Application for Minor, RE 35-12, Page ID # 322). This document affirmed that JD is a dual United States-Australian citizen. Shortly thereafter, in advance of the February 13, 2019 trip to the United States, JD was granted an Australian passport. (Heath's Deposition, RE 35-2, Page ID # 274). Within

less than one week, Nancy departed with JD to the United States under false pretenses unbeknownst to Heath at the time. (Hearing on Motion for Summary Judgment Transcript, RE 52, Page ID # 509). Nancy did not provide Heath with any way to contact her or their son. (Hearing on Motion for Summary Judgment Transcript, RE 52, Page ID # 509). Indeed, Heath was not even aware of whether or when Nancy left Australia, after he gave her permission. She did not inform him of her and the child's departure. (Heath's Deposition, RE 35-2, Page ID # 275).

After she left Australia, Nancy would not respond to any of Heath's e-mails or text messages. (Heath's Deposition, RE 35-2, Page ID # 275, p. 78). After almost a month of not allowing Heath to see the child, Nancy sought and obtained a temporary restraining order against Heath (based on his sending e-mails and text messages seeking the whereabouts of the child), and he was not legally allowed to contact her until May 2019 when it was dismissed. (Heath's Deposition, RE 35-2, Page ID # 275, p. 79). When he spoke to the Australian government, they said nothing could be done until he knew where the child was. (Heath's Deposition, RE 35-2, Page ID # 275, p. 79). He attempted to find out where the child was through local law enforcement in Michigan, but Nancy's parents would not give them any information. (Heath's Deposition, RE 35-2, Page ID # 275, p. 81). Since Nancy would not respond to messages or e-mails, he could only find out where the child was once he could afford to fly to the United States. (Heath's Deposition, RE 35-2, Page ID # 275,

p. 79). Heath realized the full extent of Nancy's deceit when she served him with divorce papers on October 3, 2019. It was only after the divorce was filed that the police finally found the child on another welfare check. (Heath's Deposition, RE 35-2, Page ID # 279, pp. 98-99).

5. Heath initiates Hague proceedings after realizing that Nancy and the child are not returning, but the district court grants summary judgment.

As Heath exhausted all alternative and extrajudicial options to reconcile the marriage and see his son, he turned to the courts for help. On May 21, 2020, Heath filed a Verified Petition for Return of the Child. Within the document, Heath asserted that JD was taken to the United States and that Nancy wrongfully retained JD in the United States as of October 3, 2019. The district court had jurisdiction pursuant to 22 U.S.C. §§ 9003(a) (jurisdiction under the convention) and 28 U.S.C. §§ 1331 (federal question jurisdiction). Nearly two months later, Nancy filed an Answer to Verified Petition for Return of Child denying that she wrongfully retained her son and disputing key material facts.

Nancy moved for summary judgment. Heath filed a response on January 4, 2021. On March 22, 2021, the district court granted Nancy's motion for summary judgment and dismissed Heath's complaint. (Order Granting Motion for Summary Judgment, RE 49, Page

ID # 499). The district court expressly found that the date Heath knew or should have known Nancy and the child would not return to Australia was October 3, 2019. (RE 56, Page ID # 565). It expressly found that Nancy had lied to Heath about her intent to return, and October 3, 2019, was when Heath knew she had lied. (RE 56, Page ID # 565).

Nonetheless, the district court concluded that on that date, Michigan was the child's habitual residence. (RE 56, Page ID # 565-566). The district court noted that pursuant to *Monasky*, the parties' intent was only one factor that should be considered in determining the child's habitual residence. (RE 56, Page ID # 566). The court then went on to conclude that because Heath wrote "no conditions, no expectations" in his response to Nancy's request to travel to the United States, he had "only a subjective hope that the respondent and their child would return to Australia." (RE 56, Page ID # 567). Lastly, the district court found that there was no evidence Nancy gave Heath any indication she intended to return *after* she left Australia. (RE 56, Page ID # 568).

6. The Sixth Circuit's decision

Heath filed a timely notice of appeal with the district court on April 6, 2021. (Notice of Appeal, RE 51, Page ID # 501). The Sixth Circuit, however, affirmed the district court's ruling. (App. 1). It is worth noting that despite the fact that this case was decided on summary judgment, and all facts were to be taken in the

light most favorable to Heath, the Sixth Circuit set forth the facts from Nancy's perspective in its opinion—"facts" that portrayed Heath in a negative light, and which the district court never found or cited. (App. 2-4).

The Sixth Court accepted Heath's contention that when he wrote "no conditions, no expectations," he meant that he did not want to put any expectations or conditions on Nancy's travel if she needed to go anywhere to see friends or family. (App. 13-14). It instead found that Heath's January letters and the parties' conduct established that by October 3, 2019, the parties intended for the child to live in the United States. (App. 14). The Sixth Circuit found that the child was "at home" in Michigan because the child lived there for seven months by the time of the wrongful retention date. (App. 14). The Sixth Circuit did not discuss the age of the child, or elaborate on the January letters or parties' conduct that it believed indicated the parties intended for the child to live in Michigan.

REASONS FOR GRANTING THE PETITION

A. This Court's guidance is necessary with regards to the framework applicable in wrongful retention cases, particularly ones involving young children, as the *Monasky* decision leaves more questions than answers in this context.

"Wrongful retentions typically occur when a parent takes a child abroad promising to return with the

child and then reneges on that promise[.]" *Redmond v. Redmond*, 724 F.3d 729, 738 n.5 (7th Cir. 2013). Prior to this Court's decision in *Monasky v. Taglieri*, 140 S. Ct. 719 (2020), nearly every circuit followed the Ninth Circuit's seminal case of *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001), when it came to the determination as to whether a child's habitual residence had changed after the child was moved from one location to another. *Darin v. Olivero-Huffman*, 746 F.3d 1 (1st Cir. 2014) (cited and followed); *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005) (found to be "instructive"); *Maxwell v. Maxwell*, 588 F.3d 245 (4th Cir. 2009) (cited and followed); *Larbie v. Larbie*, 690 F.3d 295 (5th Cir. 2012) (cited and followed); *Koch v. Koch*, 450 F.3d 703 (7th Cir. 2006) (cited and followed); *Silverman v. Silverman*, 338 F.3d 886 (8th Cir. 2003) (cited and followed); *Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir. 2004) (expressly adopted); *Abou-Haidar v. Vazquez*, 945 F.3d 1208 (D.C. Cir. 2019) (cited and followed).

The Ninth Circuit wrote that "the first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind." *Mozes*, 239 F.3d at 1075. But because young children "normally lack the material and psychological wherewithal to decide where they will reside," the Ninth Circuit concluded that "in those cases where intention or purpose is relevant—for example, where it is necessary to decide whether an absence is intended to be temporary and short-term—the intention or purpose which has to be taken into account is that of the person or persons

entitled to fix the place of the child's residence." *Id.* at 1076.

The Ninth Circuit surveyed many cases—specifically, cases where the question was whether the child's habitual residence had been changed by a move consented to by both parents—and divided them into three categories. On one side of the spectrum were cases where the family as a unit had manifested a settled purpose to change habitual residence permanently—usually "when both parents and the child translocate together under circumstances suggesting that they intend to make their home in the new country." *Id.* In those cases, courts tend to find that the child's habitual residence has changed, even where one parent later claims he or she had reservations about the move. *Id.* at 1076-1077.

On the other side of the spectrum were cases in which "the child's initial translocation from an established habitual residence was clearly intended to be of a specific, delimited period." *Id.* at 1077. In those cases, courts have generally refused to allow the changed intentions of one parent (to make the stay permanent, rather than temporary) to lead to an alteration in the child's habitual residence. *Id.*

In between these two extremes are "cases where the petitioning parent had earlier consented to let the child stay abroad for some period of ambiguous duration." *Id.* The outcomes of those cases are very fact dependent. *Id.* at 1077-1078. If the court finds that the parents shared a settled mutual intent that the stay

last indefinitely, then the child's habitual residence has changed. *Id.* at 1077. However,

> If . . . there is a genuine difference [of parental intention] then the conclusion must be that there is no settled purpose or intention. The position is like that of an adult who cannot decide whether a move is short-term or long-term. In such a case the habitual residence would not be changed until a lengthy period of time had elapsed.

Id. at 1078 n. 29.

The Ninth Circuit's framework did not hinge solely on parental intent. In order for a child's habitual residence to change, for example, there must be an actual change of geography, coupled with that intent, and passage of "an appreciable period of time." *Id.* at 1078. "When the child moves to a new country accompanied by both parents, who take steps to set up a regular household together, the period need not be long." *Id.* But, "[o]n the other hand, when circumstances are such as to hinder acclimatization, even a lengthy period spent in this manner may not suffice." *Id.*

The Ninth Circuit also provided for the possibility of a child's habitual residence changing as the result of acclimatization only, in the absence of a shared mutual intent. However, it concluded that "in the absence of settled parental intent, courts should be slow to infer from [contacts such as a child's performance in school, new friends, and so on] that an earlier habitual residence has been abandoned." *Id.* at 1079. This is

primarily because the Hague Convention "is designed to prevent child abduction by reducing the incentive of the would-be abductor to seek unilateral custody over a child in another country." *Id.* Thus, "[t]he greater the ease with which habitual residence may be shifted without the consent of both parents, the greater the incentive to try." *Id.*

In *Mozes*, the children had lived in Israel with their parents for their entire lives. *Id.* at 1069. The husband consented to the wife living in the United States with the children for at least fifteen months. *Id.* A year after she moved to the United States, however, she filed for divorce in the United States. *Id.* The Ninth Circuit concluded that the parents had no settled mutual intent to change the children's habitual residence and, thus, it could only have been altered if "the United States had supplanted Israel as the locus of the children's family and social development." *Id.* at 1084.

In *Monasky v. Taglieri*, 140 S. Ct. 719 (2020), this Court held that courts should consider the totality of the circumstances when determining the habitual residence of a child. One of the specific questions this Court chose to address was whether an "actual agreement" between the parents to raise their child in a country was required, in order for that country to become the child's habitual residence. *Id.* at 723. In that case, the parents married in the United States, but they moved to Italy together without definite plans to return to the United States, and both found work in Italy. *Id.* at 724.

About one year later, the wife became pregnant. *Id.* The parties inquired about childcare options in Italy, made purchases for their baby to live in Italy, and found a larger apartment in Italy. *Id.* Unbeknownst to the husband, however, the wife also looked into returning to the United States. *Id.* She asked about United States divorce attorneys, applied for jobs in the United States, and determined what it would cost her to move. *Id.* Shortly after the child was born, the wife told the husband she wanted a divorce, and two months later, she left for the United States with the child. *Id.*

The wife argued that the child's habitual residence was not Italy because she never agreed to raise the child in Italy. *Id.* at 725. This Court, however, rejected her assertion that an actual agreement between parents as to where to raise their child was required in order for the child to obtain a habitual residence. *Id.* at 726. This Court acknowledged that the intentions and circumstances of a child's parents are relevant considerations, especially when the child is too young to acclimate. *Id.* at 727. But this Court also noted that when a child has only ever lived in one place, that place is likely to be the child's habitual residence. *Id.* And the fact that the child's parents have made their home in a particular place is a fact that can enable a trier of fact to determine the residence is "habitual." *Id.* at 719.

The *Mozes* Court would have come to the same conclusion under the facts of *Monasky*. The case falls squarely under the Ninth Circuit's first category of cases, where a family, as a unit, moves to another

country and makes their home in that new country. The husband and wife chose to move to Italy together, and never formed a mutual settled purpose to change that residence thereafter.

The instant case, however, presents a different question. The parties' home together was in Australia, and the question is whether that is the child's habitual residence (as in *Monasky*), or whether the child's habitual residence was changed when the mother, Nancy, traveled to the United States with the child. Although this Court rejected an "actual agreement" requirement in *Monasky*, here, there is essentially nothing to look to other than the parties' mutual intent. The child was an infant at the time he traveled to the United States and the time of wrongful retention and was not capable of acclimatization. The only home the parties had made together with the child was in Australia. The *Mozes* framework makes sense in this case, and all cases in which a child, particularly an infant, has lived in more than one home.

The district court cited this Court's decision in *Monasky* as a counterpoint to Heath's arguments that Heath did not intend for the child to live permanently in the United States. Although the district court did make some statements that seemed to indicate it believed the parties intended the child to live in the United States, its opinion was contradictory on that point. For example, the district court found that Heath knew or should have known Nancy would not return to Australia on October 3, 2019, when he was served divorce papers. If he had intended the child to live in the

United States permanently, he would have known Nancy would not return to Australia before that date.

The district court also did not analyze this case under the framework most circuits apply when considering whether a child's habitual residence has *changed*. That is, it did not acknowledge that the child's habitual residence at the very least *was* Australia, and then consider whether the child's parents formed a mutual settled purpose to abandon that residence in favor of the United States. This case would have been simple if Heath and Nancy had moved to the United States together, as a family. But they did not. There was significant discord in their relationship already at the time of Nancy's trip to the United States. Heath clearly intended to remain in Australia, while Nancy secretly intended to live in the United States. But did Heath intend for his child to live permanently in a country separate and apart from him?

Because the district court decided this case on summary judgment, it was required to construe all facts in the light most favorable to Heath. There are several facts that indicate that Heath never intended for the child to live permanently in the United States. First, Nancy had to *lie* to Heath to obtain his permission for the child to visit the United States. There is no dispute that after Heath initially refused to give permission for Nancy and the child to travel to the United States, she wrote the following letter:

> Dear Heath,
>
> Please sign so I can go somewhere where I have support and people I know and a free place to stay. I need the space. If you want, I can show you my return ticket.
>
> If you really love me, you'll let me go.
>
> Nancy

(RE 35-11, Page ID # 316; RE 35, Page ID # 235-236).

Second, although Heath did ultimately grant Nancy permission to travel to the United States with the child, she ceased all contact with him after departing Australia and obtained a restraining order to prevent him from contacting her. When Heath spoke to the Australian government, they said nothing could be done until he knew where the child was. (Heath's Deposition, RE 35-2, Page ID # 275). He attempted to find out where the child was through local law enforcement in Michigan, but Nancy's parents would not give the officers any information. (Heath's Deposition, RE 35-2, Page ID # 275). It was only after Nancy filed for divorce on October 3, 2019, that Heath discovered where the child was even located. Heath's conduct amply demonstrated that he did not intend for the child to remain in the United States indefinitely.

As noted above, nearly every circuit has found the *Mozes* framework instructive for cases in which the question is whether a child's habitual residence has *changed*. *Darin v. Olivero-Huffman*, 746 F.3d 1 (1st Cir. 2014) (cited and followed); *Gitter v. Gitter*, 396 F.3d 124

(2d Cir. 2005) (found to be "instructive"); *Maxwell v. Maxwell*, 588 F.3d 245 (4th Cir. 2009) (cited and followed); *Larbie v. Larbie*, 690 F.3d 295 (5th Cir. 2012) (cited and followed); *Koch v. Koch*, 450 F.3d 703 (7th Cir. 2006) (cited and followed); *Silverman v. Silverman*, 338 F.3d 886 (8th Cir. 2003) (cited and followed); *Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir. 2004) (expressly adopted); *Abou-Haidar v. Vazquez*, 945 F.3d 1208 (D.C. Cir. 2019) (cited and followed). Only the Sixth Circuit has expressly rejected the *Mozes* framework, and it did so primarily because it believed *Mozes* placed too much emphasis on the intent of the parents. *Robert v. Tesson*, 507 F.3d 981 (6th Cir. 2007).

But when the child is an infant, and the habitual residence alleged by one parent is not a place in which both parents have made a home together, there is no other basis to look to in order to determine the child's habitual residence. In wrongful retention cases, the first question that must be asked is the date of the wrongful retention. That is, however, undisputed here. The wrongful retention date is October 3, 2019.

Second, this Court should hold, in accordance with *Mozes*, the court must determine whether the child's habitual residence was *ever* the country to which the petitioner seeks to have the child returned. Pursuant to *Monasky*, the child's habitual residence in the present case at least *was* Australia. This will be discussed in more detail in Part B.

Third, a court must determine whether there was a settled purpose to abandon that habitual residence

in favor of a new one. When all of these steps are taken, it is clear that in the tumultuous period of the parties' relationship that occurred just after the child was born, Heath did not manifest an intent that the child reside permanently in the United States. Thus, there was never a settled purpose to abandon the child's habitual residence, even though he consented to the child traveling to give Nancy "space."

This Court should reverse the Sixth Circuit's decision and establish a clearer framework for use in wrongful retention cases, where a child has been moved from one residence to another.

B. The Sixth Circuit's decision directly conflicts with this Court's decision in *Monasky*.

The Sixth Circuit cited "the degree of integration by the child in a social and family environment" as one relevant consideration when determining the child's habitual residence. (App. 14). The Court went on to note that the child was three days old when he left the apartment in which Heath and Nancy resided and was not "meaningfully integrated in any social or family environment in Australia." (App. 14). Thus, his residence there was "merely transitory." (App. 14).

These conclusions were erroneous for two significant reasons. First, this Court acknowledged in *Monasky*, as most circuits have, that an infant is "unable to acclimate." 140 S. Ct. at 727. Thus, whether the child had "meaningfully integrated into any social or

family environment in Australia" was not the appropriate inquiry. The child was too young to do so.

Second, the facts of this case prior to Nancy's departure from Australia were nearly identical to the facts of *Monasky* in all relevant ways. There, the mother left the country with the child when the child was two months old. *Id.* at 724. Here, Nancy went to the United States with the child when the child was around three months old. But this Court in *Monasky* did not determine that the child's presence in Italy was "merely transitory" because the child was there for only two months. Instead, this Court expressed concern that if it accepted the mother's arguments, there would be "a presumption of no habitual residence for infants, leaving the population most vulnerable to abduction the least protected." *Id.* at 728. This Court held that the district court correctly found Italy to be the child's habitual residence, in part because the parents had made their home together in Italy before the child's abduction. *Id.* at 729.

Here, similarly, the parties made their home together in Australia. When Nancy took the child to the United States, she did so alone. There was only one country in which the family resided as a family: Australia. Under *Monasky*, Australia was not merely a "transitory" residence but was clearly the child's first habitual residence. It was the country in which the parties resided, the country in which the child was born, and the country in which they intended to raise the child. The Sixth Circuit incorrectly determined

that Australia was never the child's habitual residence.

C. The factual circumstances of this case justify relief because this is a textbook case of child abduction through deceit and avoidance.

As this Court noted in *Monasky*, the purpose of the Hague Convention is to stop child abductions and unilateral decisions to relocate the child to another country. 140 S. Ct. at 728. The Convention should be construed in a way that accomplishes that purpose. In the instant case, however, the Sixth Circuit essentially allowed just that.

Nancy obtained Heath's permission to travel only by lying to him, pretending that she intended to return. After she tricked him into signing the travel documents, she ceased all contact with him. Heath was not aware of whether or when the child actually traveled to the United States, whether he arrived safely, or where he was living in the United States. Nancy completely ghosted him and prevented him from knowing anything about the child's well-being *or* her intentions.

The district court expressly found that Heath only "knew or should have known" about Nancy's true intention to remain in the United States on the date of wrongful retention, October 3, 2019. Before then, Heath had no way of ascertaining Nancy's plans because she would not respond to any of his attempts at communication.

This is a textbook case of child abduction, where one parent obtains the other parent's permission to visit another country by lying about his or her intent to remain there, and then never comes back. The lack of communication as soon as Heath signed the travel documents belies any assertion that there was a mutually settled purpose in this case.

This Court should clarify the framework for addressing wrongful retention cases so that the Hague Convention's purposes may better be served in cases like this one.

CONCLUSION

Petitioner respectfully requests that this Court grant his petition for certiorari.

Respectfully submitted,

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