No. 21-1060

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

BRIEF IN OPPOSITION

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The Sixth Circuit Court of Appeal's unpublished Opinion, *Douglas v. Douglas*, No. 21-1335, 2021 U.S. App. LEXIS 28909, at *1 (6th Cir. Sep. 21, 2021), based on Habitual Residence, found at Petitioner's App 1 affirmed the grant of Summary Disposition and Order of Dismissal to Respondent Nancy Summers Douglas in *Douglas v. Douglas*, United States District Court, Western Division, Southern District, No. 1:20-CV-00423 (Mar. 22, 2021), found at Petitioner's App 16, also unpublished.

JURISDICTION

Respondent does not dispute this Court's jurisdiction over this case pursuant to 28 U.S.C. § 1254(1) but denies that this matter satisfies the standard set forth in Supreme Court Rule 10. Petitioner filed his Petition for Writ of Certiorari on January 27, 2022.

CONCISE STATEMENT OF THE ISSUE PRESENTED

Petitioner, Heath Richard Douglas, takes issue with recent Supreme Court precedent in *Monasky v. Taglieri*, 140 S. Ct. 719 (2020), with respect to the standard of review of the issue of habitual residence. Instead, he urges this Court to rely on earlier case

law, a Ninth Circuit case, specifically mentioned in *Monasky*, considered, and rejected.

Not only is his reliance on *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001) entirely misplaced, but he also replaces undisputed material facts of this case, contra to the findings in the 6th Circuit Court of Appeals affirmation, but also the findings of the District Court in its grant of Summary Disposition, finding no support that the minor child JD's habitual residence at any time was Australia.[1]

Petitioner fails to acknowledge the critical fact that he filed his District Court action on May 14, 2020, some seven months after the date of alleged "wrongful retention," plus the additional eight-month delay after Respondent and three-month old JD departed Australia, totaling 15 months in Michigan.

The District Court's analysis was not the least bit confusing. It was affirmed by the Court of Appeals, after its review and application of the correct standard set forth in *Monasky* to the undisputed material facts, concluding that the minor child's habitual residence

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[1] Petitioner attempts to draw a distinction between 'wrongful retention' and 'wrongful removal' that is absent in the Hague Convention. Neither of the lower courts in this case found Respondent "wrongfully retained" JD in the United States, and the term "wrongful retention date" is his misnomer. Both lower courts decisions use the term "wrongful retention date" to mean the alleged date Respondent retained JD, thus triggering a determination of habitual residence. The parties separated 3 days after JD's birth. Mother and son permanently relocated to the U.S. less than 3 months later.

was never Australia on the operative date alleged, and was always Michigan.

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case, particularly its 'Facts and Procedural History,' weaves a tale thoroughly in contrast to the findings of both lower courts in this case. He begins his recitation to this Court that the minor child, somehow, had a habitual residence in Australia.

This is despite findings of fact that, in the month before JD's birth, Petitioner, his father told Respondent, his mother, 'to get the F out,' and three days after he was born, following an argument where police were summoned, the parties separated for good, and shortly after that Petitioner moved 'home' some three hours away. Appeal Opinion, p.3, R. 35-2, PID 290.

Within a month, a law firm representing Respondent wrote a letter to Petitioner informing him that she "wishes to return to Michigan . . . and seeks to also relocate [JD's] residence to the United States. *Id.*, R. 35-7, PID 305.

The Sixth Circuit Court of Appeals findings, based on the substantial record made in the District Court, is a much more reliable Statement of the Case than the one Petitioner proffers here, which he cannot dispute:

* * *

Shortly after Christmas, Heath proposed marriage, and Nancy accepted. The parties were married on February 10, 2018. Nancy moved into Heath's home, and within a month, she became pregnant.

The couple began arguing soon after their marriage. The arguments occurred "[e]very few days" and were "[s]evere." R. 35-3, PIO 289. Nancy testified that the "themes" of these arguments were "[t]hat [she] was disrespecting [Heath] and not submitting to [him]." *Id.* Heath threatened to kill himself and told Nancy it would be "[her] fault if he committed suicide." *Id.* at PIO 286. He also "threatened that he is a trained boxer who can kill someone in one punch and if [Nancy] were a man, he would have hit [her] already." *Id.* One night in August 2018, Heath ·'suddenly got on top of [Nancy] and grabbed both of [her] arms to get [her] to stop talking." *Id.* at PIO 288. Heath also "flipped [Nancy] on the bed." *Id.* According to Nancy, she "was sitting on the side of the bed . . . talking and [Heath] didn't like what [she] was saying and flipped [her] onto [her] back so that [she] rolled on the bed." *Id.*

For a short period of time, Nancy attempted to build a life together with Heath in Australia. On June 6, 2018, Heath paid $7,000 to the Australian Department of Home Affairs to sponsor Nancy's Permanent Partner Visa. Nancy obtained a debit card linked to Heath's National Australian Bank account. On June 29, 2018, the parties signed a twelve-month lease for an apartment in Merewether, NSW.

In September 2018, Nancy drafted a list of two-year goals. One of her goals was "baby #2 on the way by 2020/2021?" R. 41-9, PID 446. On October 31, 2018, Nancy obtained an NSW driver's license. The parties also discussed a potential ten-year commitment to stay in Australia. Heath believed that the parties "promised ten years [in Australia] and then [they] would go to America." R. 41-5, PIO 43.

By October 2018, the parties began seeking marriage counseling. They also met with multiple pastors. Because Heath thought that he might "hit" Nancy, a pastor advised him to "get [Nancy] out of the house." R. 35-2, PID 269. At the end of October, Heath told Nancy that he "[couldn't] handle this" and stayed at a motel for the night. *Id.* Around the same time, he told Nancy to "get the F out" of the apartment. R. 35-3, PID 290. He then ran after her and she returned, telling him that she wanted a divorce. However, the couple did not divorce at that time.

Nancy and Heath's son, JD, was born in Australia on November 4, 2018. Nancy's mother flew to Australia for JD's birth. On the morning of November 7, 2018, Heath and Nancy got into an argument. When Heath returned home from work, he told Nancy to·'get out" of the apartment. *Id.* He also threatened to take JD to western Australia. Police were summoned to the apartment.

For the next three months, Nancy, her mother, and JD moved between rentals and

other temporary housing. Heath and Nancy have not lived together since November 7, 2018.

On November 21, 2018, Nancy sent an e-mail to Heath stating:

> The marriage is over.
>
> I would like to return to America with [JD]
>
> Will you agree to this and sign his [Australian-passport application]? There can still be ways to see and spend time with [JD]. . . .
>
> This email confirms that we have officially separated as of today, 21/11/18.

R. 35-5, PIO 300. After separating from Heath, Nancy applied for child support. On December 3, 2018, a law firm representing Nancy wrote a letter to Heath informing him that Nancy "wishes to return to Michigan . . . to live with her parents . . . and seeks to also relocate [JD's] residence to the United States." R. 35-7, PIO 305. On December 7, 2018, Heath sent Nancy an e-mail stating, "I understand that you really do not want me in your life anymore, and this really hurts." R. 35-8, PIO 309. On December 9, 2018, Heath wrote Nancy another e-mail stating, "you obviously aren't coming back to me." R. 35-9, PIO 311. Sometime between December 2018 and January 2019, Heath left the parties' Merewether apartment and moved over three hours away, back to Curlewis.

On December 13, 2018, Heath commenced a custody proceeding in federal circuit court in Australia.

On December 15, 2018, Nancy wrote a letter to Heath:

> please sign [JD's] Australian-passport application] 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. R. 35-11, PIO 316.

As it turns out, Nancy had not purchased a return ticket to Australia, and Heath did not ask to see a return ticket.

On December 20, 2018, Nancy contacted police about the volume of text messages she was receiving from Heath. R. 35-13, PID 337. She obtained a provisional "Apprehended Domestic Violence Order" (ADVO) against Heath. Id. at PID 333-38. The ADVO prohibited Heath from directly contacting Nancy. Id. at PID 334.

> On December 24, 2018, Heath responded:
>
> OK Nancy, Merry Christmas
>
> Please take care of our little man.
>
> *Id.* On the back of his letter, Heath wrote: No conditions
>
> No expectations I will provide, love heath xo

Id. at PIO 317. Heath signed JD's Australian-passport application. Also on December 24, 2018, Heath dismissed the custody proceeding he initiated earlier that month. In January 2019, Heath paid a child-support assessment.

On January 11, 2019, Heath wrote a letter to Nancy stating:

> You are free to go home now. I am sorry for not getting these through to you earlier, but maybe the timing is just right? I don't know.
>
> I want the best for you and [JD] and if that is back in America with your folks, then you have my blessing!
>
> Thanks for your patience with me as I learnt what it is to be a good Dad and friend. I have never had to sacrifice so much!
>
> Be blessed Nancy!

Id. at PIO 318. On January 30, 2019, Heath signed a letter authorizing JD to travel with Nancy to the United States. The next month, Nancy unilaterally withdrew her Permanent-Partner-Visa application.

While in Australia, Nancy maintained American bank accounts, filed U.S. tax returns, and maintained a mailing address in the United States. After separating from Heath, she opened an Australian bank account to facilitate her receipt of financial assistance.

On February 13, 2019, Nancy and JD flew to the United States. Nancy ended Heath's child-support

assessments. Since their arrival, Nancy and J.D. have lived with Nancy's parents in Michigan.

Heath traveled to the United States in August 2019. Security footage from August 22, 2019, captured Heath appearing without notice at Nancy's home. He left within five minutes. Heath also appeared with luggage and flowers at Nancy's father's workplace.

Nancy filed for divorce in September 2019 and served Heath with divorce papers in Australia on October 3, 2019.

Heath filed his petition for return of JD on May 14, 2020, some seven months after the date of alleged "wrongful retention," and an additional eight months after Appellee and three-month-old JD left Australia

The sole issue before the District Court was where the habitual residence of the minor child, JD, was prior to October 3, 2019, Heath's alleged date of "wrongful retention." The District Court ruled that, on October 2, 2019, the infant's habitual residence was in Michigan.

Hon. Paul L. Maloney, after extensive briefing and argument, granted Respondent Nancy Summers Douglas' Motion for Summary Disposition. (Motion for Summary Judgment Hearing Transcript, RE 56, Page ID # 568).

The Court acknowledged the gravity and the burden that must accompany such a ruling:

> When faced with a motion for summary judgment, the non-moving party must set forth

> specific facts showing there is a genuine issue for trial. The Court must view the facts, and I have viewed the facts, in a light most favorable to the non-moving party. In resolving a motion, the Court does not weigh the evidence and determine the truth of matter, the Court only determines whether there exists a genuine issue of material fact. And based on this record, I appreciate Mr. Bossory's argument, but I don't find any genuine issue of material fact that would prevent the Court from resolving the two issues before the Court pursuant to respondent's motion, that is, what is the date of wrongful retention and what is the child's habitual residence the day before the wrongful retention. To cut to the bottom line first, the Court finds that the date of wrongful retention was October 3rd, 2019, and that the child's habitual residence on October 2nd, 2019, was the State of Michigan (Motion for Summary Judgment Hearing Transcript, RE 56, Page ID # 562).

The Court further indicated its ruling comports with *Monasky*, "that a child's habitual residence depends on the totality of the circumstances specific to the case, and an actual agreement between the parents is not necessary . . . "[2] (Motion for Summary Judgment Hearing Transcript, RE 56, Page ID # 563).

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[2] The court also cited other Sixth Circuit decisions, *Vasquez v. Acevedo*, 931 F.3d 519 (2019), and *Pantaleris v. Pantaleris*, 601 F. App'x 345 (2015).

The Court went on to hold:

The Court in—This Court in *Lopez-Moreno*, 456 Federal Supplement 3d 904 at 908, indicates that after summarizing the different approaches taken by the courts to determine the date of wrongful retention, this Court concluded, and I do so here, that wrongful retention is determined by when petitioner knew or should have known that a child would not return. That's *Lopez-Moreno* at Page 909.

The District Court found "seven particular items in the record" to support its decision that the child's habitual residence was Michigan on "the operative date." (Motion for Summary Judgment Hearing Transcript, RE 56, Page ID # 566).

The District Court found that Heath's reliance on 'shared intent' was the "end all be all" and that "[n]o one factor based on case law is dispositive." (Motion for Summary Judgment Hearing Transcript, RE 56, Page ID # 566). It found that the parties' written communications, including law firm correspondence back to December 2018, together with Appellant's responses, citing particularly Page I.D. 318 of the record, show that Appellant had "only a subjective hope of the child's return . . . Petitioner literally wrote "no conditions, no expectations." (Motion for Summary Judgment Hearing Transcript, RE 56, Page ID # 543).

Petitioner's best evidence of shared parental intent predated the child's birth. This was followed by the December 2018 communications, and by then they were not even living in the same city (Motion for Summary Judgment Hearing Transcript, RE 56, Page ID # 567-568).

Since leaving Australia, "respondent has not given petitioner any reason to believe that she or the child would return . . . " (Motion for Summary Judgment Hearing Transcript, RE 56, Page ID # 568). And "finally," the record, "contains no evidence . . . any indication she intended to return." (Motion for Summary Judgment Hearing Transcript, RE 56, Page ID # 568).

For all the above reasons, Judge Maloney found there was no genuine issue of a material fact and granted Summary Judgment in favor of Respondent, affirmed by the 6th Circuit.

REASONS FOR DENYING THE PETITION

I. PETITIONER IS ATTEMPTING TO DISTINGUISH, IF NOT SEEKING REVERSAL OF, THE *MONASKY* DECISION. IT DOES NOT LEAVE MORE 'QUESTIONS THAN ANSWERS' AS PETITIONER ALLEGES.

A. Standard of Review.

In *Monasky*, this Court reviewed conflicting standards for determination of habitual residence (including

the case Petitioner relies on) among several Circuits. Just because Petitioner prefers to rely on a prior, Ninth Circuit case, does not mean that the *Monasky* standard should not apply to this Petition.

Petitioner requests this Court to grant certiorari and determine what he claims is an unsettled area of the Hague Convention;[3] namely, whether a "framework" is needed to determine habitual residence in cases where the child was wrongfully retained as opposed to wrongfully removed. No such distinction is made in the Hague Convention itself.

Petitioner clearly prefers the standard set forth in *Mozes v. Mozes*, 239 F. 3d 1067, 1073-81 (9th Cir. 2001), which determined that because the parents had no mutual intent to move the children's residence, that

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[3] The Hague Convention on the Civil Aspects of International Child Abduction ("Convention") is a multi-lateral treaty that establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained from their place of habitual residence. 1980 T.I.A.S. No. 11,670 (Exhibit A to the Petition, ECF 9, Page ID 119-126; 22 U.S.C. § 9001(1)(4)). The International Child Abduction Remedies Act ("ICARA") implements the Convention in the United States. 22 U.S.C. §§ 9001 to 9011. Under ICARA, a person may petition a court with jurisdiction in the country where a child is located for the return of the child to his or her habitual residence in another signatory country so that the underlying, substantive time-sharing (custody) dispute can be determined in the proper jurisdiction. (See 42 U.S.C. § 9003; Convention, art. 3(a), T.I.A.S. No. 11,670, at P. 4.) The inquiry by a Court in a return action under ICARA, "is limited to the merits of the abduction claim and not the merits of the underlying custody battle." *Pielage v. McConnell*, 516 F.3d 1282, 1286 (11th Cir. 2008), quoting *Ruiz v. Tenorio*, 392 F.3d 1247, 1250 (11th Cir. 2004).

the country where they were "retained" (the United States) was not their habitual residence, although they had lived there for fifteen months.

He ignores that this Court considered the *Mozes* standard, which places greater weight on parents' "mutual intent" than the now precedent standard in *Monasky*, which rejects this as the standard for determining habitual residence. This Court specifically granted certiorari to clarify the differing standards in *Mozes* and other pre-*Monasky* cases. This Court stated:

> We granted certiorari to clarify the standard for habitual residence, an important question of federal and international law, in view of differences in emphasis among the Courts of Appeals. 587 U. S. ___, 139 S. Ct. 2691, 204 L. Ed. 2d 1089 (2019). Compare, *e.g.*, 907 F. 3d, at 407 (case below) (describing inquiry into the child's acclimatization as the "primary" approach), with, *e.g.*, *Mozes* v. *Mozes*, 239 F. 3d 1067, 1073-81 (CA9 2001) (placing [*726] greater weight on the shared intentions of the parents), with, *e.g.*, *Redmond* v. *Redmond*, 724 F. 3d 729, 746 (CA7 2013) (rejecting "rigid rules, formulas, or presumptions"). Certiorari was further warranted to resolve a division in Courts of Appeals over the appropriate standard of appellate review. Compare, *e.g.*, 907 F. 3d, at 408-09 (case below) (clear error), with, *e.g.*, *Mozes*, 239 F. 3d, at 1073 (*de novo*). *Monasky v. Taglieri*, 140 S. Ct. 719, 725-26 (2020).

Monasky specifically rejects "placing greater weight" on shared intentions or any other standard in favor of a "totality of circumstances" test for habitual residence. *Monasky* clarifies the "habitual residence" test previously adopted in *Friedrich I*, and later revised in *Robert v. Tesson*, 507 F.3d 981, 989 (6th Cir. 2007).

Crucially, *Monasky* states its decision is not limited to the factual circumstance presented in the case but was rendered to clarify going forward the standard of review for habitual residence.

Monasky acknowledges the core premise of the Convention is "the interest of children . . . in matters relating to their custody," are best served when custody decisions are made in the child's country of "habitual residence." 140 S. Ct. 719 (2020), slip op., P. 2, quoting Convention Preamble, Treaty Doc., at P. 7. The Convention "ordinarily requires the prompt return of a child wrongfully removed or retained away from the country in which she habitually resides." *Id.*

Despite *Molasky*'s rejection of the *Mozes* standard, Petitioner nevertheless argues this Court should now ignore this precedential case and readopt *Mozes*'s "shared intentions of the parents" test. This is because it is the only test, while relying on facts (that neither court below found to be genuinely material), that could *possibly* lead to a determination that Australia was JD's habitual residence. Both Courts below fully debunked this argument, whether the standard or not.

Petitioner further urges this Court to draw a distinction between wrongful retention cases and

wrongful removal cases, claiming that in wrongful retention cases, the court should first consider whether "there was a settled intention to abandon [the residence] that was left behind." Petitioner's Brief, pg. 21, quoting *Mozes*, 239 F.3d at 1075.

What Petitioner fails to acknowledge is that this Court, in *Monasky*, considered the language of the Hague Convention ("the Convention ordinarily requires the prompt return of a child wrongfully removed or retained away from the country in which the child habitually resides. Art. 12, Treaty Doc., at 9,) which makes no such distinction. The removal or retention is wrongful if done in violation of the custody laws of the child's habitual residence. Art. 3. *Monasky* at 722. Again, *Monasky* holds that a child's habitual residence depends on the totality of the circumstances specific to the case." *Id*. at 723. JD's habitual residence was found, and affirmed on appeal, to be the U.S.

This Court refused to adopt any other framework set forth in prior, lower court decisions for a habitual residence determination, other than one that considers the totality of circumstances specific to the case, giving no more weight to any one factor, such as "shared intentions."

B. This is not an "ambiguous retention" case.

Petitioner also urges this Court, if it doesn't overrule *Monasky*, to at least make an exception to its decision by relying on lower court precedent "where the

petitioning parent had earlier consented to let the child stay abroad for some period of ambiguous retention," Petitioner's Brief at 22, quoting *Mozes* at 1077.

Whatever merit this argument may have, it simply does not fit with the undisputed material facts in this case. They overwhelmingly show, and both Courts below found, as summarized earlier in the 6th Circuit opinion, that both parties understood that Respondent and JD were returning to the United States, permanently. Witness just one of his statements: "I want the best for you and [JD] and if that is back in America with your folks, then you have my blessing!", clearly indicating he understood that Respondent was returning to America, not visiting for an 'ambiguous' period. R. 35-11, PIO 318.

Very significant to the District Court, was that Petitioner did not contest this move for fifteen months after JD departed for the United States with his mother, long after he "knew or should have known" Respondent wasn't ever returning to Australia.

C. Even if the parental intention factor was given more weight, there is no question that the United States is JD's habitual residence.

Even if this Court cares to make a distinction between wrongful removal and wrongful retention cases, a distinction the Hague Convention does not care to make and, contrary to *Monasky*, place greatest weight on a "parental intention" factor, as Petitioner urges, he

still cannot prove there was parental intention or that that JD's habitual residence was Australia, then he could twice below.

Further, other, earlier cases concerning iterations of a 'parental intention' standard demonstrate the types of facts that *may* establish an infant's habitual residence, are simply not present in this case. Two such cases are *Cunningham v. Cunningham*, 237 F. Supp. 3d 1246 (M.D. Fla. 2017) and *Grano v. Martin*, 443 F. Supp. 3d 510 (S.D.N.Y. 2020).

Predetermining this Court's holding in *Monasky*, *Cunningham* and *Grano* considered past intentions, as only a part of the "totality of the circumstances" in determining an infant child's place of habitual residence at the time of an alleged wrongful removal or wrongful retention; in other words, standing alone, well stated in *Monasky* evidence of "shared intent" is not dispositive.

Cunningham involved a mother's petition seeking return of her 18-month-old child to Japan. The parties had been married in 2014 while the child's father was stationed in Japan. In early 2015, while mother was pregnant, the couple relocated to Maryland, USA, with the initial intention of remaining in Maryland permanently. *Id.* at 1253-54. The marriage was troubled both before and after the move, and before the child was born, the mother moved back to Japan. Father not only consented to the mother's return to her home country, but he assisted with her arrangement. *Id.* at 1254-55, 1266. The child was born in July 2015 in Japan. Later

that same year, mother returned to Maryland with the child to see the father. *Id.* at 1257.

Cunningham framed the issue as determining "how an infant's initial habitual residence is first established," and that a newborn's "place of birth does not automatically bestow upon that child a habitual residence." *Id.* at 1264-65 (quotation marks and citations omitted). *Cunningham* emphasized that while the parties once had the shared intent of remaining in the United States, this intent had dissolved when the father helped the mother move back to Japan prior to the birth of their child and that the parties had been living in separate countries, despite still being married. *Id.* at 1266-67.

In language similar in Judge Mahoney's District Court opinion, the *Cunningham* court specifically noted that, "under the circumstances, the father could have had no reasonable expectation that the mother and child would be returning to the United States." *Id.* at 1266

In *Grano v. Martin*, 443 F. Supp. 3d 510 (S.D.N.Y. 2020), *aff'd* by 821 F. App'x 26 (2d Cir. 2020), the District Court was faced with the issue of whether an infant child should be returned from New York to Spain. When the parties began dating in March 2013, the father was a citizen of Spain and the mother, a United States citizen present in Spain on a student visa. *Id.* at 515. In late 2013 or early 2014, when the mother's student visa was about to expire, the parties registered as

a "couple-of-fact" in their local Spanish municipality. *Id.* at 516.

In January 2016, after an unsuccessful attempt to get married in New York, the parties returned to Spain to marry. *Id.* at 517. The mother became pregnant later that year. *Id.* at 518. The parties' relationship continued to deteriorate during the pregnancy, and the child was ultimately born in the United States in July 2017. *Id.*

The *Grano* Court held that the totality of the circumstances suggested that at the time of the child's removal from Spain in October 2018 the facts and circumstances established that the parties had planned to live in Spain indefinitely, built a home there after the child's birth, and were settled until the mother's departure. *Id.* at 539.

Under such facts, *Grano* held that the child's country of habitual residence in October 2018 was Spain. *Id.* at 539. Importantly, the child had spent less than three months in New York before moving to Spain for nearly a year, where his family built a home and generally went about living a life there that was settled. *Id.* The Court granted the father's petition. *Id.* at 545.

Again, although JD was born in Australia, he developed no ties to that country before moving to Michigan. While the parties dispute whether they ever shared an intention to remain in Australia, much like in *Cunningham*, there was no dispute that the marriage was breaking down prior to JD's birth; divorce

was even discussed. Significantly, the parties permanently separated three days after he was born.

II. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *MONASKY*.

Petitioner claims that the Sixth Circuit incorrectly applied *Monasky* because it considered "the degree of integration by the child in a social and family environment" when determining JD's habitual residence. Again, Petitioner relies on a legal interpretation of habitual residence law that is not sustainable. The undisputed, genuine material facts establish that on October 3, 2019, Michigan was JD's habitual residence, and had been for quite some time. Therefore, the parties' custody dispute must be resolved in Michigan.[4]

A child resides where he lives, but his "residence in a particular country can be deemed 'habitual' . . . only when [his] residence there is *more than transitory*." Slip Op., p. 7 (emphasis added). Turning to the *E. Perez-Vera Explanatory Report*[5] for guidance, *Monasky*

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[4] Whether the child is at home in the country at issue is a question of fact. *Monasky*, 140 S. Ct. at 730. Thus, answering the question is "a task for factfinding courts, not appellate courts," and habitual residence determinations "should be judged on appeal by a clear-error review standard deferential to the factfinding court." *Id. Monasky* points out that this rule also serves the purposes of the Convention because it expedites the appellate process. *Id.*

[5] *Sealed Appellant v. Sealed Appellee*, 394 F.3d 338, 343 (5th Cir. 2004) ("The Explanatory Report is recognized as the official

acknowledges that this is a "fact sensitive inquiry" that considers the family and social environment, as well as the child's integration into such an environment. *Id.* at 7-8. When the child is not old enough to be cognizant of his or her surroundings, the "intentions and circumstances of caregiving parents are relevant considerations . . . No single fact, however, is dispositive . . . " *Id.* at 9.

Moreover, *Monasky* notes that common sense suggests that "[w]here a child *has lived in one place with her family indefinitely, that place is likely to be her habitual residence*." *Id.* at 9 (emphasis added). *Monasky* is clear that there is no "actual-agreement requirement for infants." *Id.* at 11.

Justice Alito's concurring opinion states that habitual residence "means the place where the child in fact *has been living for an extended period*—unless that place *was never regarded as more than temporary* or there is another place to which *the child has strong attachments*." *Id.*, Alito, J., concurring, slip concurring Op. at 2 (emphasis added).

Petitioner never pled that JD, three-months old at the time, was 'wrongfully removed' from Australia in February 2019, because he couldn't. The undisputed evidence, particularly by his own omissions, precludes that assertion. Written communications and signatures, including passport applications and Consents to Travel by which he authorized Respondent to depart

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history, commentary, and source of background on the meaning of the provisions of the Convention.").

to Michigan, confirms that he knew (or should have known) the parties' very short marriage was over, and Respondent was leaving never to return. He failed to take any legal action for over 15 months, until he filed his Petition in May 2020.

By the time Petitioner filed his petition, JD was no longer an infant and had established a life in Michigan. If Petitioner had filed his petition *immediately* after Respondent departed to the United States, as the Hague Convention suggests he should have, even then, JD's status as a three-month-old would allow Respondent to argue the "degree of the child's integration in a social and family environment" was in the United States.

But JD was eleven months old when Petitioner alleged a "wrongful retention," and another seven more months passed before he filed his petition. By then, JD had lived fifteen of his eighteen months of life with his mother and grandparents in Michigan, a fact not gone unnoticed by the District Court and the Court of Appeals.

A. The factual circumstances in this case do not justify relief.

The single issue on appeal is the location of JD's habitual residence on October 2, 2019. The District Court concluded that the date of the alleged wrongful retention was October 3, 2019, the day Petitioner was served with the Michigan divorce papers. The 6th Circuit affirmed.

The entire factual record, outside of one "objectively ambiguous" email, proves that Petitioner knew that JD and his mother were departing Australia and moving permanently. If Petitioner truly believed that Respondent had "abducted" JD, his lack of attention to what should have been an urgent situation for the "devoted father" he now claims to be, is compelling evidence that the matter was far less exigent to him for quite some time. The undisputed, genuine, and material facts found by the District Court and affirmed by the Circuit Court are beyond reproach. This Court is not the forum for a review of constricted and truncated facts argued by Petitioner. He had his opportunity below first in the District Court and again in the Court of Appeals.

Citing *Monasky*, the 6th Circuit, in concluding its affirming of the District Court's grant of Summary Disposition, in finding that as of October 2, 2019, JD was "at home" in Michigan, not Australia, held, "*No reasonable jury, considering the totality of the circumstance, could conclude the Heath demonstrated by a preponderance of the evidence that JD's habitual residence was Australia as of the operative wrongful-retention date*." p.11 (emphasis added).

CONCLUSION

The Sixth Circuit's faithful application of this Court's "totality of circumstances" test as set forth in *Monasky* does not warrant review. Petitioner has failed

to demonstrate that this case falls into some legal loophole where *Monasky* does not apply, nor does he demonstrate that his case was wrongfully decided under the *Monasky* standard, or that the factual circumstances of this case justify relief. Accordingly, Respondent respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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