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

REPLY TO BRIEF IN OPPOSITION

LIISA R. SPEAKER*
JENNIFER M. ALBERTS
SPEAKER LAW FIRM, PLLC
Attorneys for Petitioner
819 N. Washington Ave.
Lansing, MI 48906
(517) 482-8933
lspeaker@speakerlaw.com

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY TO RESPONDENT'S STATEMENT OF THE ISSUE PRESENTED

Respondent makes several broad assertions in her brief in opposition that require correction. **First**, Respondent mischaracterizes Petitioner's argument as one that is opposed to this Court's decision in *Monasky v. Taglieri*, 140 S. Ct. 719 (2020). *Monasky* questioned whether a child's habitual residence could be in the country in which two parents made their home even though the two parents never had an actual agreement to raise the child there. *Id.* at 723-724. In *Monasky*, similar to the present case, the mother and child left the country in which the parties had made their home—Italy—just two months after their child was born. *Id.* at 724. The mother argued that because the marriage was falling apart already at around the time of the child's birth, the parties never had an agreement to raise the child in Italy. *Id.* at 725. This Court rejected that argument and affirmed the District Court's determination that Italy was the child's habitual residence. *Id.* at 726, 731.

It is Respondent, not Petitioner, who makes an argument that was rejected by this Court in *Monasky*. She argues that because the parties' marriage was already rocky at the time of the child's birth, his habitual residence was *never* Australia—exactly the argument that was made and rejected by this Court in *Monasky*. Petitioner, by contrast, wishes for this Court to adhere to *Monasky* by finding that Australia was at least initially the child's habitual residence, and then address a question not yet addressed by this Court: under

what circumstances does a child's habitual residence *change*?

Second, contrary to Respondent's contention, this Court did not wholly reject the *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001), framework in *Monasky*. This Court recognized that federal courts of appeals shared a common understanding of what a child's habitual residence is and diverged from one another "only in emphasis." *Monasky*, 140 S. Ct. at 726-727. The Court further recognized that "[b]ecause children, especially those too young or otherwise unable to acclimate, depend on their parents as caregivers, the intentions and circumstances of caregiving parents are relevant considerations." *Id.* at 727. The Court's primary concern in deciding that an "actual agreement" is not required in order for a child to have a habitual residence was that, with such a standard, a parent could always unilaterally block any finding of habitual residence by withholding agreement. *Id.* at 728.

This case presents a different question than *Monasky* did, because under *Monasky*, Australia would have clearly been the child's habitual residence prior to the mother and child's move to the United States. The question is whether their move to the United States *changed* that habitual residence. Respondent wrongly asserts that the Hague Convention draws no distinction between wrongful removal and wrongful retention. The Convention, Article 12, clearly states that "[w]here a child has been wrongfully *removed or retained* in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial

or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith." (emphasis added). The use of the phrase "removed or retained" signifies that there is a distinction between removal and retention.

Lastly, Respondent makes a few general statements regarding the facts of this case that require correction. First, she claims that Petitioner "replaces undisputed material facts" in this case, contrary to the "findings" of the Sixth Circuit and District Court. (Brief in Opposition, p. 2). But this case was decided on summary judgment and neither the District Court nor the Sixth Circuit was permitted to make factual findings. Everything Petitioner stated in his Petition for Writ of Certiorari was based on evidence in the record, and those facts must be taken in the light most favorable to him, not to Respondent. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 261 n.2 (1986). Second, Respondent repeatedly asserts that the child lived in Michigan for 15 months by the time Petitioner filed his petition, but the question before this Court is the child's habitual residence at the time of the date of wrongful retention, not the habitual residence on the date of filing. Thus, the repeated use of the period of "15 months" is misleading.

Petitioner will address Respondent's arguments in more detail below.

REPLY TO RESPONDENT'S REASONS FOR DENYING PETITION

As noted above, Petitioner does not contend that this Court's decision in *Monasky v. Taglieri*, 140 S. Ct. 719 (2020), does not apply to his petition. Quite the opposite, as this Court's decision in *Monasky* indicates that the child had an initial habitual residence in Australia, where the parties made their home together, even though the family separated shortly after the child's birth. The question posed by this case is whether that habitual residence changed when Respondent moved to the United States with the child.

The Hague Convention clearly contemplates that a child might be lawfully *removed* from his country of residence but then wrongfully *retained* in a new country. Article 12 provides that "[w]here a child has been wrongfully *removed or retained* in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith." (emphasis added). The use of the phrase "or retained" as an alternative to a wrongful removal signifies that a child's retention may be wrongful even in situations where the child's removal was not. Thus, the mere fact that Petitioner consented to the child travelling to the United States with Respondent for some period of time is not itself dispositive on the issue of whether the

child was later wrongfully retained in the United States.

Importantly, at the time of wrongful retention, the child had lived in Australia for three months and then the United States for eight months. He had ***not*** lived in the United States for *fifteen* months, and he was less than a year old. The *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001), framework is helpful because in *Monasky*, this Court did not need to determine whether a prior habitual residence had been altered. But in *Mozes*, the Ninth Circuit focused on precisely that question.

Respondent ignores that the District Court itself treated a wrongful retention case as something distinct from a wrongful removal case. The District Court stated that it first needed to determine the date of wrongful retention, which it believed was "when petitioner knew or should have known that a child would not return." (RE 56, Page ID # 563). The District Court expressly determined that the date Petitioner "knew or should have known" that the child would not be returning was October 3, 2019. (RE 56, Page ID # 564). By the District Court's own findings, then, Petitioner believed Respondent and the child would be returning prior to that date.

The District Court's decision is confusing because it is internally inconsistent. The District Court cited the fact that Respondent informed Petitioner via letter on December 3, 2018, that she desired to relocate to the United States with the child (RE 56, Page ID # 566); found that nothing other than Respondent's December

15, 2018, note, which stated Respondent had a return ticket, suggested Respondent would return to Australia (RE 56, Page ID # 566); and found that Petitioner writing "no expectation, no conditions" meant that he had no more than a subjective hope that Respondent and the child would return to Australia (RE 56, Page ID # 567). These findings seem at odds with the District Court's finding that Petitioner only knew or should have known that the child would not be returning on October 3, 2019. That is, the District Court's focus *was* wholly on the intentions of the parties. But it never found that *Petitioner* intended for the child's habitual residence to be changed to the United States.

Of particular note here is that in *Monasky*, this Court decided the way it did to prevent one parent from unilaterally taking a child to a country other than the country where the parents had made their home together. In the present case, Respondent did just that. And although she obtained permission from Petitioner initially, as soon as he signed the travel documents, he lost all say in the child's future. Respondent simply would not allow Petitioner to contact her or the child after that. These are not the actions of a mother who believes the father shares her intention to raise the child in the United States. They are the actions of a mother who fears the father changing his mind and seeks to avoid any opportunity for him to seek the child's return.

Petitioner never dallied in his attempts to seek the child's return, as Respondent would lead this Court to believe. Rather, he was prevented from ascertaining

Respondent's intentions because she would not communicate with him. Respondent did not provide Petitioner with any way to contact her or their son. (Hearing on Motion for Summary Judgement Transcript, RE 52, Page ID # 509). She did not even tell him when she and the child left Australia! (Heath's Deposition, RE 35-2, Page ID # 275). After she left Australia, Respondent would not respond to any of Petitioner's e-mails or text messages. (Heath's Deposition, RE 35-2, Page ID # 275, p. 78). She obtained a temporary restraining order which prevented him from legally contacting her until May 2019. (Heath's Deposition, RE 35-2, Page ID # 275, p. 79). Petitioner attempted to find out where the child was through local law enforcement in Michigan, but Respondent's parents would not give them any information. (Heath's Deposition, RE 35-2, Page ID # 275, p. 81). It was only *after* the date of wrongful retention that the police finally found the child while conducting a welfare check. (Heath's Deposition, RE 35-2, Page ID # 279, pp. 98-99).

The District Court should have first determined that the child's initial habitual residence was Australia and then considered whether the facts of the case demonstrated that that habitual residence had changed. Where the change of location was effectuated through the mother's deceit and avoidance, the District Court should have concluded that the child's habitual residence never changed from Australia.

CONCLUSION

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

Respectfully submitted,

LIISA R. SPEAKER*
JENNIFER M. ALBERTS
SPEAKER LAW FIRM, PLLC
Attorneys for Petitioner
819 N. Washington Ave.
Lansing, MI 48906
(517) 482-8933
lspeaker@speakerlaw.com

**Counsel of Record*

March 11, 2022