No. 21-5740

IN THE

Supreme Court of the United States

TIFFANY BECKER,

Petitioner,

v.

JOHN MINKIEWICZ,

Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

Tiffany Becker
7958 Sedan Ave.
West Hills, CA 91304

Appellant in Pro Per

QUESTIONS PRESENTED

The Hague Convention on the Civil Aspects of International Child Abduction requires that any child wrongfully removed from his country of "habitual residence" be returned to that country. C.M. was three years old when he embarked with his parents on a cruise around the world with the first stop scheduled for Mexico. The plan failed to materialize due to a number of unforeseeable factors, and the child returned with his mother to their home in the United States. The child's father filed a petition under the Hague Convention seeking C.M.'s return to Mexico. The district court presumptively established Mexico as C.M.'s habitual residence, although the family never had any settled intent to move there and only lived there for 13 months with no established ties to Mexico. The Court of Appeal of the State of California, Second Appellate District, Division Three affirmed after reviewing the district court's statement of decision and held that a "subjective agreement" between the parents to raise C.M. in Mexico was not necessary to establish that C.M. was a habitual resident of Mexico.

The questions presented are:

1. Where a child is too young to acclimate to his surroundings, whether a subjective agreement between the infant's parents is necessary to establish his habitual residence under the Hague Convention.

2. Was a child's removal from his mother's care in the United States, where he was born and had lived his entire life, wrongful, after spending 13 months in Mexico with no intention to move there?

3. To what extent should the legal standard and controlling precedent be extended to determine Habitual Residence in Hague Abduction cases?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

STATUTES AND TREATIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Tiffany Becker respectfully petitions for a writ of certiorari to review the judgement of the California Court of Appeals for the Second District.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three in unpublished and reprinted below in Appendix A to the Petition. Pet. App. Page 38. The statement of decision of the Superior Court of the State of California for the County of Los Angeles, Central District is reprinted below in Appendix B to the Petition. Pet. App. Page 45.

JURISDICTION

The judgement of the court of appeals was entered on February 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

The Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention" or "the Convention"), Oct. 25, 2980, 1343 U.N.T.S. 89, and relevant portions of its enabling statute, the International Child Abduction Remedies Act, 22 U.S.C. §§9001 & 9003, are reproduced in Appendix D to the Petition. Pet. App. Page 56.

STATEMENT

Determining a child's "habitual residence" is the fundamental issue in any case under the Hague Convention. The answer controls whether the Convention applies, which nation's laws determine custodial or access rights, and - crucially - whether a child must be sent back across international borders to another country for adjudication of those rights.

Under Article 3 of the Convention, the removal or the retention of a child is to be considered wrongful when it interferes with the petitioning parent's custody rights in the country of habitual residence. (Convention, art. 3; see, e.g., *Sealed Appellant v. Sealed Appellee* (5th Cir. 2004) 394 F.3d 338, 343)

The *Mozes* standard requires any petitioner in a Hague Convention case to prove either (a) that the "last shared intent" of the parents of the subject child was to abandon the child's former habitual residence and to establish a new habitual residence for the child in its place, or (b) that the child has acclimatized due to an "actual change in geography combined with the passage of an appreciable period of time," *Holder*, 392 F.3d at 1015 citing to *Mozes*, 239 F.3d at 1078. The facts of the case clearly indicate that John and Tiffany had no settled intent to settle in Mexico, and any acclimatization is negligible. The *Friedrich* standard required the court to ignore the intention of the parents in favor of looking at whether the child has become acclimated to the new environment. *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993).

The United States Supreme Court overruled both standards in February 2020 in *Monasky v. Taglieri*, 140 S.Ct. 719 (2020). It unanimously held that a child's habitual residence under the Hague Convention depends on the "totality of the circumstances" specific to the case, not on categorical requirements such as the existence of an actual agreement between the parents on where to raise their child.

The factors the courts are to consider include those considered dispositive in earlier cases, namely; settled intent and acclimatization, along with additional factors to determine habitual residence. Particularly probative in this case are a number of factors listed by the Supreme Court to

be taken into consideration, among them; a caregivers ties to the place of residence, the age of the child, the immigration status of the child and parents and whether a caregiving parent was coerced into remaining in one place over another. C.M.'s situation not only satisfies all the previous standards for determining habitual residence, the new totality of the circumstances standard only bolsters the assertion that C.M.'s Habitual Residence is the US and not Mexico.

In summation, the trial court used the *Moses* and *Friedrich* standard. The facts of the case do not satisfy either standard, and reliance on the latter standard is patently erroneous. In light of the parents' failure to share a settled intention to abandon the United States as the children's habitual residence and the children's lack of acclimatization to the family's new location, the trial court erred in concluding that his habitual residence was Mexico and not the United states and the court's removal was wrongful. Finally, the *Monasky* totality of the circumstances standard which supersedes all previous standards, robustly establishes the fact that C.M.'s habitual residence is the United States, and under the Hague Convention his custody should be determined there.

When Congress adopted legislation implementing the Convention, it expressly underscored "the need for uniform international interpretation of the Convention." 22 U.S.C. § 9001(b)(3)(B). That uniformity will be impossible to attain as long as the courts remain divided about fundamental aspects of whether and when the Hague Convention applies.

1. In 1980, the member states of the Hague Conference on Private International Law—including the United States—unanimously adopted the Convention on the Civil Aspects of International Child Abduction. See U.S. Dep't of State, Hague International Child Abduction Convention; Text and

Legal Analysis, Letter of Submittal from George P. Schultz to Pres. Ronald Reagan (Oct. 4, 1985), 51 Fed. Reg. 10,494, 10,496 (Mar. 26, 1986). The limited purpose of the Convention was "to secure the prompt return of children who have been abducted from their country of habitual residence or wrongfully retained outside that country." Letter of Transmittal from Pres. Ronald Reagan (Oct. 30, 1985), id. at 10,495; see also Convention pmbl. As this Court has explained, the Convention's "central operating feature" is the remedy of sending a child back across international borders to her country of habitual residence. *Abbott v. Abbott*, 560 U.S. 1, 9 (2010). This remedy is available only where the child's removal was "wrongful," i.e., if the child was taken across international borders in breach of custody rights defined by the laws of the country in which she was habitually resident. See Convention arts. 3, 12. Where the child was not habitually resident in the country from which she was removed, the Convention does not apply—although other remedies under other treaties or domestic law may be available. The question of habitual residence is therefore the fundamental inquiry in every Hague Convention case.

In 1988, Congress passed the Hague Convention's enabling statute, the International Child Abduction Remedies Act. See Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified at 22 U.S.C. §§ 9001–9011). In its findings, Congress echoed the Convention's purpose "to help resolve the problem of international abduction and retention of children" and to "deter such wrongful removals and retentions." 22 U.S.C. § 9001(a)(4). Consistent with the Convention's limited purposes, Congress empowered "courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claim." Id. § 9001(b)(4).

2. Petitioner Tiffany Becker and Respondent John Minkiewitz met in Los Angeles and lived together. Their son C.M. was born in 2013. (2 RT 274) Petitioner and her family embarked on a cruise around the world in 2016. (1 RT 101).

They bought and decked out a boat specifically for this purpose. (2 RT 236) Their first port of call was Ensenada, Mexico, a popular spot for cruisers, where they docked their boat on their first stop. (1 RT 101) However, a number of medical, financial, and climate issues arose, and their trip was delayed. (2 RT 217-234) During that time, the couple broke up, and Respondent ordered Appellant off the boat. (2 RT 289) So after 13 months spent in Mexico, Appellant returned with her four year old son to the only home she'd ever had, back to California. (2 RT 281) After losing a custody battle, Respondent brought a Hague Abduction Petition and the trial court ordered the 4 year old removed from his mother and his home in the United States that evening. (1 CT 000007)

3. On March 18, 2018, Appellant filed a Request for Order of Custody and Child Support. On April 24, 2018, Judge Rosen signed and submitted the order which stated that California was C.M.'s place of residence. (1 RT 22). The case was left open for review and ultimately consolidated with the Hague Convention Child Abduction case that followed. (1 CT 00007). On October 26, 2018, Respondent filed a Warrant in Lieu of Writ of Habeas Corpus in the Los Angeles Superior Court. (2 CT 000334) Judge Trent- Lewis ordered that C.M. not be removed from the State of California pending the outcome of the proceedings. (2 CT 000335)(3 CT 000741). On October 26, 2018, Respondent filed a Petition for the Hague Convention for Child Abduction. (1 CT 000007). Judge Trent-Lewis decided in favor of Respondent, and C.M. was ordered to be repatriated to Mexico. (3 RT 475). C.M. was removed from his mother and

sent to Mexico the next day. (3 RT 544). The Statement of Decision was filed on May 9, 2019. (1 CT 000029).

4. On July 8, 2019, Appellant timely filed an appeal with the Los Angeles Court of Appeals. (1 CT 000040). A supplemental brief was filed on February 6, 2021, and oral argument was heard on February 9, 2021. On February 10, 2021, the Court delivered its unpublished opinion and affirmed the judgement in favor of Respondent. (Statement of Decision) No party sought rehearing.

5. On March 23, 2021, Appellant timely filed a Petition for Review before the California Supreme Court. On May 12, 2021, the Petition for Review was denied, which is what brings Appellant to this Court.

REASONS FOR GRANTING THE PETITION

In the past decade, this Court has granted review four times to clarify application of the Hague Convention. See *Lozano v. Montoya Alvarez*, 572 U.S. 1 (2014) (equitable tolling); *Chafin v. Chafin*, 568 U.S. 165 (2013) (mootness); *Abbott v. Abbott*, 560 U.S. 1 (2010) (custody rights) and *Monasky v. Taglieri* 589 U.S. 140 (2020) (standard of review). While the court has established in *Monasky* that habitual residence is a result of the "totality of the circumstances", that description is endlessly vague and warrants further exploration, especially in light of the grievous injustice that would ensue if the opinion in this case so far were to hold. This case provides the Court with a valuable opportunity to address the meaning of "habitual residence" and the substantive standard for its determination.

Even before the Second District Court of Appeals' decision in this case, the courts of appeals were deeply divided on habitual residence determinations. The Court should not permit these intolerable conflicts to persist. Because the Hague Convention's application turns on habitual

residence, every petitioner seeking a return order under the Convention must establish that the child was habitually resident in the country from which he was removed. Accordingly, the question of habitual residence "is the central—often outcome-determinative—concept on which the entire system is founded." *Mozes v. Mozes*, 239 F.3d 1067, 1072 (9th Cir. 2001). In the absence of clarity regarding this essential element of Hague Convention litigation, "parents are deprived of crucial information they need to make decisions" and courts are set "adrift with" no meaningful guidance to inform their decision-making, id.—in direct contravention of Congress's emphasis on "the need for uniform international interpretation of the Convention," 22 U.S.C. § 9001(b)(3)(B). In addition, inconsistent application of the Hague Convention can have dire consequences for young children who are subject to a return order that takes them away from their primary caregiver.

This Court should grant review to restore the "uniform[ity]" that Congress deemed essential in the language and animating objectives of the Hague Convention.

I. This Case Is An Ideal Vehicle To Clarify The Scope And Authority Of Habitual Residence In The Context Of Hague Convention

This case raises the central legal issue of Habitual Residence. The issue of habitual residence arises in every case brought under the Convention and therefore constitutes "One of the most important inquiries under the ICARA." *Murphy v. Sloan,* 764 F.3d at 1150 citing to *Asvesta v. Petroutsas*, 580 F.3d 1000, 1017 (9th Cir. 2009). Where the child was not habitually resident in the country from which he or she was removed, the Convention does not apply, although other remedies under other treaties or domestic law may be available. The question of habitual residence is therefore the fundamental inquiry in every Hague Convention case. Neither the Hague Convention nor

the ICARA provide a definition for habitual residence. Therefore, the central issue before the Court is whether Mexico or the United States was the child's habitual residence at the time of the removal.

To date, the California Supreme Court has set no definitive standard for resolving the question as to what constitutes Habitual Residence. California alone receives more of these cases than many countries. During the five-year period from 2007 through 2011, California received an average of 69 new incoming cases per year, approximately one- half of which were cases from Mexico. In 2010, California received 31 cases from Mexico and sent 32 outgoing cases to Mexico. In 2011, California received 33 cases from Mexico and sent 36 cases to Mexico.[1]

California's case load is substantial even compared to other countries. In 2003, for example, California received 78 incoming Hague cases. During that same year, the entire country of Canada received only 67, Australia received 62, and France 55. Only three countries received more incoming cases than the entire state of California did that year: Germany (98), Spain (106), and the United Kingdom (159). California's total number of incoming cases represented about 23% of the 345 cases received in the United States as a whole that year. Both globally and nationally, California is a significant source of the international child abduction cases handled. Approximately one-half of California's cases are related to Mexico.[2]

The court's decision below conflicts with other ruling appellate decisions and dramatically expands the implications of Habitual Residence. The absence of clear judicial standards has led to confusion, as is evident

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[1] https://oag.ca.gov/ca-mexico/child-abduction

[2] Ibid.

here. Furthermore, blatant legal error made by the court by applying the Uniform Child Custody Jurisdiction and Enforcement Act in a Hague Convention Case, directly contradict and challenge that premise and the parameters of the Hague Convention.

Various appellate courts have properly concluded that habitual residence is determined by the parents' last shared settled intent and where the child has the most significant ties. The trial court erroneously applied the UCCJEA which does not apply here, and referenced the fact that C.M. spent the last six months in Mexico. (CT 000031)

However, the six-month period that the judge deemed relevant is of no significance in a Hague Convention case. Whereas a child's "home state" for a child custody case under the Uniform Child Custody Jurisdiction and Enforcement Act requires residency of six months (California Family Code Sec. 3402(g)), habitual residence under the Hague Convention is an entirely different and unrelated term. *Holder v. Holder,* 305 F. 3d 854 (9th Cir. 2002).

A new habitual residence can be established after a month or less of residency, as the court in *Mozes* confirmed, or in other cases it may not exist even if the child has resided in a country for three years, as in *Murphy v. Sloan.* 764 F.3d. at 1144. Furthermore, the Supreme Court stressed that "mere physical presence" in a location is insufficient to create a habitual residence. *Monasky* 140 S.Ct. at 729. *Murphy v. Sloan* disregarded the impact of a "trial period" of residence and concluded: "[I]f a child is born where the parents have their habitual residence, the child normally should be regarded as a habitual resident of that country." C.M.'s thirteen months at a marina in Mexico, en route on the family's attempted cruise around the world, does not establish habitual residence as defined by the Hague convention.

While acknowledging the erroneous application, the Court of Appeal decided that this blatant legal error did not warrant review. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

Although clear error was demonstrated in the trial court's decision, and clearly cited in the Statement of Opinion as a compelling factor, the Court of Appeals decided that it did not warrant further exploration, and merely wrote it off, stating that the court would have come to the same decision regardless. (Statement of Opinion 5)

The opinion issued by the Court would sweep in virtually every Hague Abduction case, and convert it to a standard custody case, without addressing the nuances that are so essential. The decision below creates an enormous legal barrier to the efficient resolution and child stability intended by the Hague convention. Without clear guidance from this Court, the Hague Convention on Child abduction will continue to be abused and pushed far beyond what the Convention intended. This Court should grant review to consider the limits of Habitual Residence and ensure that the intention and design of the Hague Convention prevail to achieve its worthy goal.

II. Certiorari Is Warranted to Resolve Whether An Actual Agreement Between the Parties is Necessary to Establish a Child's Habitual Residence.

Neither the Hague Convention nor the ICARA provide a definition for habitual residence. Therefore, the central issue before the Court is whether Mexico or the United States was C.M.'s habitual residence at the time of the removal. "The determination of habitual residence is one of the most

important inquiries under the ICARA." *Murphy v. Sloan,* 764 F.3d at 1150 citing to *Asvesta v. Petroutsas*, 580 F.3d 1000, 1017 (9th Cir. 2009).

To determine C.M.'s habitual residence at the time of the removal, the Ninth Circuit formulated a two-step analytical framework in *Mozes v. Mozes*, 239 F.3d 1067, 1071-73 (9th Cir. 2001) which has been recognized and utilized as the pivotal analysis in the United States on habitual residence.

The first prong in establishing habitual residence is a "settled intention to abandon the one left behind." *Holder v. Holder*, 392 F.3d 1009, 1015 (9th Cir. 2004) citing to *Mozes*, 239 F.3d at 1075. The second prong is "acclimatization"; that the child's relative attachments to the two countries have changed to the point where requiring return to the original forum would now be tantamount to taking the child 'out of the family and social environment in which its life has developed.' *Id.* at 1081 citing the Perez-Vera Report, page 1069 supra, at ¶11.

John and Tiffany had no settled intent to abandon the United States and settle in Mexico. On the contrary, they continued to maintain significant ties to the United States, they had no express, bilateral, agreement to move to Mexico, and made no meaningful indications that their stay in Mexico was long-term or permanent. The trial court's premise that the passage of six months in Mexico signifies intent, and that Tiffany failed to prove otherwise, is erroneous.

A. **The Parties had no settled intention to abandon the United States as C.M.'s Habitual Residence and settle in Mexico**

1. **The parties did not share a settled intent to move to Mexico permanently.**

The issue here is whether John and Tiffany shared a manifested settled intent to abandon their habitual residence in California and establish a new

habitual residence in Mexico. *Mozes v. Mozes* is the leading 9th circuit opinion, in which the court maintains that the first step in determining habitual residence is the shared settled intent of the parents *Id.* at 1075.

The trial court expressly ruled that, when the parties sailed out of California, they did not intend to live in Mexico, and planned on cruising around the world. (Tr. 1/28: 19).

Furthermore, there is no evidence of any express agreement between the parents that they would live with C.M. in Mexico for any long-term period of time. In the era of social media, emails and text messaging, it must be expected that an agreement between parents in California that they would move or had moved, indefinitely and permanently, from California to Mexico would be reflected in some electronic evidence. Yet no such evidence was presented by either party, whether in the form of emails, text messages or other communications between the parents themselves, or communications between either John or Tiffany to any other friend, family member, baby-sitter, health care provider, bank, insurance company, post office or any other person or company connected to them.

It must therefore be assumed that neither John nor Tiffany sent a letter or email or text message to anyone that indicated that they were abandoning the United States and becoming long-term residents of Mexico, and had no intent to do so.

a) **Intent must be mutual.**

John could not change C.M.'s habitual residence from the United States to Mexico without Tiffany's consent, by deciding on his own to remain Mexico permanently, because to change "children's habitual residence requires a mutual settled intention on part of the [both] parents". *Papakosmas v. Papakosmas*, 483 F.3d 617 (Ninth Circuit 2007)

The requisite intent must be shared between the two parents of a child who have custodial rights concerning their child. *Mozes* and its progeny stress the fundamental distinction between one parent's unilateral attempt, which cannot lead to any change of habitual residence, as compared to the shared decision proven to have been made by both of the parents that does change a child's habitual residence. (cite)

The Court stated in *Kline v. Kline* that often, circumstances are such that, even though the exact length of the stay was left open to negotiation, the court is able to find no settled mutual intent from which such abandonment can be inferred. In cases where the child's initial translocation from an established habitual residence was clearly intended to be of a specific, delimited period, courts have generally refused to find that the changed intentions of one parent led to an alteration in the child's habitual residence. *Kline* 10-15127 (9th Cir. 2011).

As Tiffany repeatedly asserted, she never had any intention to settle in Mexico for the long term. (cite) The trial judge agreed that when the couple set sail they never planned to stay in Mexico permanently. (Tr. 1/28: 19) John alone applied for permanent residency for himself to the exclusion of Tiffany and C.M., which precipitated the parties' break-up and Tiffany's return to the United States. (cite). Even if John alone changed his intention along the way, that is insufficient to establish a new habitual residence for C.M..

As the Court stated in *Kline*, "The 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. The greater the ease with which habitual residence may be shifted without the consent of both parents, the greater the incentive to try." (*Kline* at cite.) Ignoring these indisputable,

crucial elements to the case, puts the entire goal of the Hague Convention in question, and the safety of the children it is designed to protect in jeopardy.

Neither Tiffany's consent to an initial, temporary stay, nor John's unilateral decision to alter their plans, indicate a shared, settled intent to abandon the United States as their habitual residence.

2.**The parties maintained significant ties to the United States.**

Where the parties cannot agree on where the child's residence has been fixed, "the representations of the parties cannot be accepted at face value," and courts must look to all available evidence to make a determination. *Mozes*, 239 F.3d at 1076.

In this case, the parties went to great length to maintain their ties with the United States and did not seek to establish counterparts in Mexico, as their stay there was intended to be temporary. They did not look for doctors or establish a treatment regimen for C.M. for the medical care that was essential for his health. (cite) Neither did they close their bank accounts or liquidate their assets. (cite)

As a child born prematurely, C.M. has a number of significant health issues that required frequent care, monitoring and treatment from his healthcare team. (cite) However, all of C.M.'s essential doctor's visits took place in the United States, not Mexico. (cite) Tiffany never obtained health insurance for herself or C.M. in Mexico, and John too took returned to the United States to take care of his medical needs. (cite) reinforcing the fact that their intent was that the United States remain the habitual residence.

In *Ruiz v. Tenorio*, the mother maintained bank accounts and credit cards in the United States, had her mail in America forwarded to another address in America (not to her new location in Mexico), and maintained her nursing license in the United States . *Ruiz v. Tenorio*, 392 F.3d 1247, 1254

(11th Cir 2004). Such objective evidence was relied on by the court in that case to support the mother's position that she never intended for the move to Mexico to be permanent. *Id.* at 1254-1255.

John and Tiffany retained all of their banking in the United States, and did not even have their mail forwarded from California to Mexico. (cite) They retained their California driver's license and never applied for a Mexican driver's license or registered their cars in Mexico. (cite)

John and Tiffany both never worked in Mexico. John supported his family by using his U.S. Social Security Disability Benefits and income from his investments, all of which he kept in the United States. (cite) He never reported any move outside the United States to the U.S. government, as was mandatory as a recipient of U.S. Social Security benefits. (cite) John only opened a bank account after Tiffany and C.M. had already left Mexico. (cite)

The continuous significant ties that John and Tiffany maintained with their American amenities is consistent with a finding that their stay was intended to be temporary.

a) **The parties took no significant steps to settle in Mexico.**

John and Tiffany took the minimal actions necessary in the context of their stay in Mexico to establish even a temporary move, in direct contradiction to the trial judge's statement. The statement of decision states, "The evidence clearly shows that ... his parents took all of the necessary steps to acquire all necessary permits and Visas for them to reside in Mexico. These actions also show the intent of the parties." (cite)

However, Tiffany did not take any steps to acquire permits or visas for residency in Mexico. She applied for 180-day tourist visas only. (cite) There were no other documents filed with the Mexican government indicating an intent to stay permanently, except for an import permit and a fishing license,

which even the trial judge expressly stated had "very little weight." (Statement of Decision, Para, 30).

Furthermore, at the time of the supposed relocation up until the time of the Hague petition, Tiffany was prohibited from staying in Mexico due to visa restrictions. (cite) She was not eligible for a Mexican rentista visa or any other opportunity for Mexican citizenship. (cite) Settling in Mexico permanently was in no way a viable option from a purely legal standpoint. It was undisputed that John knew that the family could not reside permanently in Mexico as an intact family unit, therefore it is inconceivable that they could have intended to do so. This clearly indicates a lack of any shared intent to settle in Mexico as well as a parental disagreement.

b) **C.M.'s de facto habitual residence was the United States.**

To determine a child's habitual residence, we "look for the last shared, settled intent of the parents." *Valenzuela v. Michel*, 736 F.3d 1173, 1177 (9th Cir.2013).

Where a child has a "well-established habitual residence, simple consent to [her] presence in another forum is not usually enough to shift the habitual residence to the new forum". *Mozes*, 239 F.3d at 1081. "Rather, the agreement between the parents and the circumstances surrounding it must enable the court to infer a shared intent to abandon the previous habitual residence, such as when there is effective agreement on a stay of indefinite duration." *Id.*

The Court's role is to "restore the status quo prior to" the Hague Convention petition. See *Karpenko,* 619 F.3d at 263. C.M. was born and raised in California until his parents embarked on a sail around the world, and his habitual residence was undeniably in California at least until then. (cite) *See Mozes,* 239 F.3d at 1081; *Diorinou,* 237 F.3dat 41.

Murphy v. Sloan considered the impact of a "trial period" of residence on a child's "habitual residence" under the Hague Convention, and concluded: "[I]f a child is born where the parents have their habitual residence, the child normally should be regarded as a habitual resident of that country."58 (*Murphy*, 764 F.3d at 1150 (quoting *Asvesta v. Petroutsas*, 580 F.3d 1000, 1017 (9th Cir. 2009)). The facts establish that John and Tiffany clearly did not abandon their residency in the United States and did nothing to indicate that they intended to stay in Mexico permanently.

3.**The trial judge erroneously concluded settled intent by misconstruing two factors; six months time and burden of proof.**

a)**The passage of six months is insufficient to establish settled intent.**

A key factor cited by the trial judge to support his ruling that the parties shared an intent to live permanently in Mexico is set forth in Paragraph 5 of his written decision. The judge states, "The evidence clearly shows that the duration of habitual residence in Mexico went well beyond the minimum six month period. The Court finds the parties continuously lived in Mexico for 13 months."

However, the six-month period that the judge deemed relevant is of no significance in a Hague Convention case. Whereas a child's "home state" for a child custody case under the Uniform Child Custody Jurisdiction and Enforcement Act requires residency of six months (California Family Code Sec. 3402(g)), habitual residence under the Hague Convention is an entirely different and unrelated term. *Holder v. Holder,* 305 F.3d 854 (9th Cir. 2002).

A new habitual residence can be established after a month or less of residency, as the court in *Mozes* confirmed, or in other cases it may not exist

even if the child has resided in a country for three years, as in *Murphy v. Sloan, supra.*

C.M. never had his home in Mexico, and the record is totally devoid of any evidence of a last shared parental intent to remain in Mexico for the long-term. He was not wrongfully removed to the US. Rather, he returned home with his mother to his habitual residence where he was born and raised all his life, after their attempted cruise around the world did not materialize due to domestic dispute.

b) **The judge abused his discretion by placing the burden of proof on Tiffany instead of John to prove that Mexico was their new habitual residence.**

As the petitioner, John had the burden of proving by a preponderance of the evidence that C.M. was wrongfully removed from Mexico, and that Mexico was his habitual residence. *Shalit v. Coppe,* 182 F.3d at 1128 n.5 (9th Cir.1999); *Friedrich I,* 983 F.2d at 1400.

42 U.S.C. 11603 (e)(1) states that, "A petitioner in an action brought under subsection (b) shall establish by a preponderance of the evidence (A) in the case of an action for the return of a child, that the child had been wrongfully removed or retained within the meaning of the Convention." No court exercising jurisdiction of an 11603 action may order a child removed from a person having physical control of the child unless the applicable requirements of the law are satisfied.

Here however, prior to C.M.'s removal, the trial judge stated that, "The Court finds that the Mother's testimony, namely, that she did not intend to establish habitual residency in Ensenada, is not credible." (Statement of Decision, Paragraph 9). The judge erroneously shifted the burden of proof

from the petitioner to the respondent, and merely asserted that Tiffany did not prove a negative. (move)

In *Ramos v. Lopez*, a petitioner presented undisputed evidence that his Guatemalan child was born in Guatemala to Guatemalan parents and lived continuously in Guatemala until she was unilaterally removed to the United States, without the petitioner's knowledge or consent. Regardless, the District Court held that the petitioner failed to present sufficient evidence that his child was a habitual resident of Guatemala under the Convention, and denied his Hague petition. *Ramos v. Lopez, 2018 WL 6681687 (C.A.9), 2.*

Here, it was incumbent on John to prove that they abandoned the United States and that Mexico was their new habitual residence. The trial judge abused his discretion by erroneously placing the burden of proof on Tiffany, and when she failed to prove otherwise, ordered C.M. to be sent to Mexico.

B. **C.M. had not acclimatized to Mexico to the degree that it would establish habitual residence.**

The second part of the two pronged habitual residence test is acclimatization. "The court should inquire whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent." *Gitter v. Gitter,* 396 F.3d 124, 131–32 (2d Cir.2005).

The District Court erroneously found C.M., at his young age, had acclimatized to Mexico without the required supporting unequivocal evidence. The acclimatization prong of the habitual residence test is highly restrictive, especially when it is relied upon to override settled parental intent, which render its import negligible in this case.

1. **Acclimatization should not readily be used to supplant settled intent.**

Acclimatization is only regarded as a backup test when there is no way for the courts to infer whether or not there was settled intent. Evaluating acclimatization has no place in this case where there clearly was no settled intent.

The Ninth Circuit in *Mozes* expressly rejected any and all reliance on a reduced standard sufficient to allow acclimatization to override the lack of a last shared parental intent to supplant a prior habitual residence both because the inquiry is fraught with difficulty, and because readily inferring abandonment would circumvent the purposes of the Convention.

The court in *Mozes* stated, "Since the Convention seeks to prevent harms thought to flow from wrenching or keeping a child from its familiar surroundings, it is tempting to regard any sign of a child's familiarity with the new country as lessening the need for return and making a finding of altered habitual residence desirable. Further, some courts regard the question whether a child is doing well in school, has friends, and so on, as more straightforward and objective than asking whether the parents share a "settled intent. Despite the superficial appeal of focusing primarily on the child's contacts in the new country, however, we conclude that, in the absence of settled parental intent, courts should be slow to infer from such contacts that an earlier habitual residence has been abandoned."

John and Tiffany clearly never planned or agreed to settle in Mexico for the long term. The immigration issues that barred Tiffany from remaining in Mexico and the family's continued significant ties to the United States, all indicate that there was no shared intent to settle in Mexico. Reliance on the acclimatization prong would not be appropriate in this case to the extent that

it warrants one parent to require that the child be retained in that country contrary to the proven expectations of the other parent.

2. The Court's standard when relying on acclimatization is significantly higher that the evidence presented in the case at hand.

The Court's standard in determining acclimatization is extremely high, and the facts in this case do not satisfy that standard. As evidenced in the Ninth Circuit *Murphy case*, although children adapted considerably to their new places of residence, the courts do not regard it as sufficient to establish habitual residence in the absence of shared settled parental intent.

In *Murphy v. Sloan*, the court pointed to "E.S.'s enrollment in an Irish school, her development of friends in Kinsale, her celebration of holidays with E.S.'s family, her participation in a dance academy, and her learning the Gaelic language as evidence of her acclimatization. There is no question that E.S. has developed ties and relationships in Kinsale." *Murphy v. Sloan*, 982 F.Supp.2d 1065, 1075 (N.D.Cal. 2013). Nonetheless, the Ninth Circuit ruled that, "E.S.'s time in Ireland, though significant, did not "unequivocally" establish that she had abandoned the United States as her habitual residence." *Murphy v. Sloan*, 764 F.3d 1144 (9th Cir. 2014).

Application of the acclimatization standard to the pending case compels the conclusion that the trial court ruling that C.M. acclimatized to the degree that his return to Mexico was warranted under the Hague convention was patently erroneous. The facts cited by the trial court, that C.M. participated in school and social events, and has photographs documenting his pleasant activities do not indicate that he acclimatized to Mexico and unequivocally point to Mexico as his habitual residence (cite).

Furthermore, in *Gitter v. Gitter*, the court found that the necessary standard has been satisfied only "in 'relatively rare circumstances' in which a child's degree of acclimatization is 'so complete that serious harm ... can be expected to result from compelling his [or her] return to the family's intended residence." *Id.*

There is no evidence that C.M. would suffer any harm whatsoever from returning to the United States. While he may have enjoyed life with his parents in the resort marina community, there is no evidence that he would suffer by being removed from that environment. Returning him to Los Angeles with his mother, where he had lived for most of his young life, where he had family, and where his primary language was spoken could hardly be deemed to be injurious or detrimental, and even the trial court made no such findings.

3. **Acculturation does not not imply acclimatization.**

The court in *Holder* cautioned against confusing "acclimatization" with "acculturation" in determining whether a child's life has become embedded in a new country. *Holder*, 392 F.3d at 1019. As the Court stated in *Mozes*, "Children can be remarkably adaptable and form intense attachments even in short periods of time -- yet this does not necessarily mean that the child expects or intends those relationships to be long-lived. It is quite possible to participate in all the activities of daily life while still retaining awareness that one has another life to go back to." In such instances one may be 'acclimatized' in the sense of being well-adjusted in one's present environment, yet not regard that environment as one's habitual residence. Id. at 1079.

In *Holder v. Holder*, 392 F.3d 1009 (9th Cir. 2004), the Court found that the child in question "was in the process of transitioning his life to Germany:

He attended kindergarten, participated in sports programs, and accompanied his parents on various excursions both on and off the base." (cite) Nonetheless, the Court ruled that, "The Convention does not direct a court to decide whether the children were acclimatized to a country, such as Germany, on the basis of whether they can count to ten in German or whether they prefer *gummibaeren* to Hershey bars. Instead, the inquiry is, more generally, whether the children's lives have become firmly rooted in their new surroundings. Simply put, would returning the children to Germany be tantamount to sending them home?"

Furthermore, the Ninth Circuit recognized that at some point a child will have become sufficiently acclimatized to a new environment cause the habitual residence to change despite the lack of a shared parental intent, since "given enough time and positive experience, a child's life may become so firmly embedded in the new country as to make it habitually resident even though there be lingering parental intentions to the contrary." (cite) Nonetheless, that level of acclimatization is not sufficient to establish habitual residence.

In *Haimdas v. Haimdas*, the court found two years of residency in New York was insufficient to establish acclimatization, even though the children did well there, enjoyed attending school, and living with their father and other family members. The court found that the children were "eminently capable of adjusting (and readjusting) to life on either side of the pond." *Haimdas v. Haimdas*, 720 F.Supp.2d 183, 200 (E.D.N.Y. 2010).

Finally, the court in *Holder* discussed the children separately due to their five year age gap. (cite) Similarly, in *Ahmed v. Ahmed* the court noted that a child's young age forecloses consideration of acclimatization as a method to determine habitual residence. (cite)

Like in *Ahmed*, C.M. was only three years old when he settled in Mexico, and just four years old when he returned to the United States. The minimal evidence of the connections between a young child and a new country do not warrant a finding that C.M. was acclimatized to Mexico to the point where requiring return to the United States would be tantamount to taking the child "out of the family and social environment in which its life has developed." Perez-Vera Report, page 1069 supra, at ¶11."

III. The Court's Opinion Conflicts With On-Point Authority And Fosters Confusion In Habitual Residence

This Court should grant review to resolve conflicts in the case law created by the decision below, and provide a conceptual framework for understanding the Habitual Residence requirement in the ICARA statute that determines Habitual Residence.

When Congress adopted legislation implementing the Convention, it expressly underscored "the need for uniform international interpretation of the Convention." 22 U.S.C. § 9001(b)(3)(B). That uniformity will be impossible to attain as long as the courts remain divided about fundamental aspects of how the Hague Convention applies. This Court should grant review to restore the "uniform[ity]" that Congress deemed essential to the proper functioning of the Hague Convention. Inconsistent application of the Hague Convention can have dire consequences for young children who are subject to a return order that takes them away from their primary caregiver.

A. The Court's Decision Directly Conflicts with *Monasky*, the Supreme Court Authority, and relied solely on Acclimatization to determine Habitual Residence.

Just one year ago, in *Monasky v. Taglieri* 140 S.Ct. at 729, the Supreme Court addressed Habitual Residence, and determined that it turned on the

totality of the circumstances, and that the clear error standard of review applies. The Court of Appeals chose to apply *Monasky*'s higher standard of review, but not its standard of reasoning. On appeal, the court held that *Monasky*, which was decided after the trial court's statement of decision, holds that habitual residence should be judged on appeal by a clear-error review standard deferential to the fact finding court, and that Becker could not overcome this highly deferential standard of review.

However, on a substantive level, the Court of Appeals disregarded *Monasky's* holding that the determination of a child's habitual residence depends on the totality of the circumstances specific to each case. The court held that the trial court's reliance on the acclimatization standard, despite its secondary placement in all cases that set ruling precedent, is a permissible view of the evidence and cannot be clearly erroneous, "simply because we are convinced that we would have decided the case differently." (Statement of Decision 4). In addition, the court decided that reviewing the case in light of *Monasky* would result in the same decision, even though it considers an entirely additional set of compelling circumstances, and therefore no further review was warranted.

In *Monasky*, the court reasoned that habitual residence be decided based on the "totality of the circumstances". The court plainly erred when it failed to take into consideration the nature of the family's excursion to Mexico. The trial court explicitly stated that when Petitioner and Respondent embarked on their tour around the world they did not intend to settle in Mexico. As stated in *Papakosmas v. Papakosmas,* to change "children's habitual residence requires a mutual settled intention on part of the [both] parents". 483 F.3d 617 (9th Cir. 2007). To acquiesce to Respondent's assertion, above Petitioner's protests, that they changed their mind during

those 13 months, with no concrete substantial evidence to back that claim is an affront to any objective of stability the Hague Convention purports to support.

The Hague Convention serves as an important deterrent to, and remedy for, wrongful parental kidnapping. But in this case, it was applied beyond its intended scope to remove a toddler from the only parent he had ever known, and to return him to an absentee father in a country to which he lacked any meaningful ties. That troubling outcome was the product of the court of appeals' inappropriate deference to the district court's habitual-residence determination and both courts' flawed legal standards for ascertaining C.M.'s habitual residence. This Court should grant review before any more parents and children are forcibly separated by judicial orders that the Hague Convention's signatories never intended to authorize.

Not only should this Court reverse the decision below, it should take this opportunity to make clear that Habitual Residence is the unequivocally established home base of the child, where the child has the most substantial ties due to the totality of the circumstances, as proscribed by *Monasky*, and not where the moving parent chooses to make his or her case in their own best interests.

B. The Court's Decision Squarely Conflicts with *Mozes*, and other Hague Convention Cases.

In *Mozes*, the Ninth Circuit announced a series of questions to be answered in determining whether a removal or retention is "wrongful" under the Hague Convention. 239 F.3d at 1070. The second of those questions is especially important in this case: "Immediately prior to the removal or retention, in which state was the child habitually resident?" Answering that question here is straightforward. At the time of the retention, C.M. was

plainly habitual resident in the United States. But for a 13 month delay in a Mexican harbor, he spent all of his life in the United States. By any measure and under any analysis that is tethered to the Convention and its principal "connecting factor" – habitual residence – California was the locus of C.M.'s life, the home always returned to, the environment in which his life developed and depended on. The decision below cannot be squared with this fundamental and indisputable facts.

When they went to Mexico, Petitioner and Respondent clearly had no intent to settle there. Nevertheless, the court concluded that Mexico was the Habitual Residence because they inadvertently spent 13 months there, due to a number of unforeseeable delays as they journeyed around the world. This highly attenuated and indirect chain of reasoning has been repeatedly rejected by other appellate courts, most notable in *Murphy v. Sloan*, where three years was not sufficient to establish habitual residence because "there was never any discussion, let alone agreement, that the stay abroad would be indefinite." Id. at 1152.

In *Mozes*, and in almost all relevant cases that followed, the Court consistently held that habitual residence is based on the mutual, settled, intent of both parents. To ignore this crucial factor, or to allow it malleability and flexibility, jeopardizes the intention of the Hague Convention by allowing a petitioning parent to interpret it according to their own best interests.

As stated in *Kline v. Kline* 10-15127 (9th Cir. 2011), "The 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. The greater the ease with which habitual residence may be shifted without the consent of both parents, the greater the incentive to try."

C. The Court Erroneously Relied On The Distinguishable Case Of Friedrich.

Both the trial court and the Court of Appeal erred in extending the analysis of *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993) to the facts here. *Friedrich* takes into account only the acclimatization of a child to the new country the exclusion of all other factors. It does not take into account the intention of the parents or address the myriad additional circumstances that indicate a child's Habitual Residence.

That case is readily distinguishable and a far cry from the few months this four year old boy spent on a boat in a Mexican harbor. In the recent case of *Farr v. Kendrick*, the court found that seven return trips to the United States over three years, proved that the United States and not Mexico remained the Habitual Residence. Over here, the parties returned to their home base of Marina del Rey on 20 or 30 separate occasions during the 13 months of their stay in Mexico. These trips were for the purposes of essential medical care for C.M.'s precarious health, his parents' own medical treatment and to handle other matters at their home-base in Marina del Rey. (1 RT 103) (2 RT 222). In no way did C.M. acclimate to the Mexico to the extent where requiring return to the original forum would now be tantamount to taking the child 'out of the family and social environment in which its life has developed.' *Id.* at 1081 citing the *Perez-Vera Explanatory Report,* page 1069 supra, at ¶11.

The Court of Appeal's extension of *Friedrich* and dismissal of *Monasky* would effectively eliminate parental intent and relevant factors on Habitual Residence in California. The court's opinion below blurs that critical distinction. Instead of relying on factually similar cases, the court erroneously hitched its wagon to cases that involved acclimatization, to the

exclusion of all other factors, and on a significantly lower level than on all cases of precedent.

California state courts have regularly applied the *Mozes* test to determine habitual residence in Convention cases and have chosen not to apply or equate the *Friedrich* standard. *In re Marriage of Forrest & Eaddy*, 144 Cal.App.4th 1202, 1210 (2006). Furthermore, applying the *Friedrich* standard to the facts of this case yields a result that does not comport with the goal of the Hague Convention.

In *Mozes*, the Court held that by applying a *Friedrich* approach the Court had committed the "fatal flaw" of focusing on the child's presence in a specific location for a certain period of time instead of looking primarily at the reason, purpose and intention of the child's presence in that location. The Court explained that, "A child who spends two months at Camp Chippewah, if observed only during that period, would appear to be habitually resident there... [and yet] no one would seriously contend that the summer camp is the child's habitual residence." 239 F.3d at 1074.

The *Friedrich* approach to determine habitual residence has been rejected by most federal circuits because it undermines the role of both parents to make decisions about their children. Other appellate courts have not subscribed to the broad reading given to *Friedrich* by the Court of Appeal here. Two other published appellate opinions identify *Friedrich* as potentially relevant to the determination of Habitual Residence, yet both chose to apply the *Mozes* test. Other published opinions, and several unpublished decisions, including decisions from other divisions within the Second District, have addressed this question without any mention of *Friedrich* at all. *Nicolson v. Pappalardo*, 605 F.3d 100 (1st Cir. 2010); *Gitter v. Gitter*, 396 F.3d 124, 131–32 (2d Cir.2005); *Maxwell v. Maxwell*, 588 F.3d 245, 251 (4th Cir.2009);

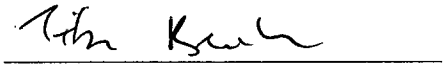
Larbie v. Larbie, 690 F.3d 295, 309 (5th Cir.2012); *Koch v. Koch*, 450 F.3d 703, 715 (7th Cir.2006); *Barzilay v.Barzilay*, 600 F.3d 912, 918 (8th Cir. 2010); *Mozes v. Mozes*, 239 F.3d 1067, 1076–81 (9th Cir.2001); *Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir. 2004).

This Court's intervention is necessary to secure uniformity of decision regarding Habitual Residence in Hague Abduction cases. The issue raised by this Petition has wide application to every Hague Abduction case in California. The mutual settled intent test followed in *Mozes* and the totality of the circumstances standard established by *Monasky* should continue to define Habitual Residence for purposes of Hague Abduction cases.

CONCLUSION

The Hague Convention serves as an important deterrent to, and remedy for, wrongful parental kidnapping. But in this case, it was applied beyond its intended scope to remove a child from the only parent he had ever known, and to return him to an absentee father in a country to which he lacked any meaningful ties. That troubling outcome was the product of the court of appeals' inappropriate deference to the district court's habitual-residence determination and both courts' flawed legal standards for ascertaining C.M.'s habitual residence. This Court should grant review before any more parents and children are forcibly separated by judicial orders that the Hague Convention's signatories never intended to authorize.

Respectfully submitted.



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