24-7482 ORIGINAL

NO.



# IN THE
# Supreme Court of the United States

RAPHAEL STEIN,
ACTING ON BEHALF OF HIS MINOR CHILDREN J.S., Z.N., A.Z.,
PETITIONER-APPELLANT

v.

ADEENA KOHN,
RESPONDENT-APPELLEE

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

## PETITION FOR A WRIT OF CERTIORARI

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## I. QUESTIONS PRESENTED

The Hague Convention on the Civil Aspects of International Child Abduction requires that any child wrongfully removed from or retained outside their country of "habitual residence" be returned to that country. In Stein v. Kohn, No. 23-8078-cv (2d Cir. 2024). J.S., Z.S., and A.S. were brought from Canada to the United States during the coronavirus pandemic for their mother's medical treatment. The father, Raphael Stein, filed a petition under the Hague Convention seeking the children's return to Canada after the mother filed for divorce and restricted his access to the children. The district court found that March 6, 2021 represented the date of wrongful retention based on Ms. Kohn's communications indicating her desire and intention to remain in the US, contrary to the parties' agreement. It is undisputed that Mr. Stein maintained and exercised his full custody rights without interruption until at least January 2022, while the parties were still in the United States for Kohn's ongoing treatment. The trial court found, and the Second Circuit affirmed, that Ms. Kohn's communications constituted a breach of custody rights, triggering the Convention's "One Year" exception clock.

The questions presented are:

1. Whether an actual breach of custody rights must occur to establish wrongful retention, or if mere notice of an intended future breach suffices to start the one-year clock under the Convention; and

2. Whether the "One Year and Settled" exception should be narrowly construed with consideration of the child's ongoing strong ties to their country of habitual residence.

## II. PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

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Petitioner Raphael Stein respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## V. OPINIONS BELOW

The court of appeals' rehearing denial is offered as Appendix A, Pet. App. 1a. The court of appeals' unpublished decision is offered at Appendix B, Pet. App. 2a. The district court's unpublished opinion is provided as Appendix D, Pet. App. 9a–48a.

## VI. JURISDICTION

The judgment of the court of appeals, Appendix B, Pet. App. 2a, was entered on November 21, 2024. A petition for rehearing, Appendix A, Pet. App. 1a, was denied on January 14, 2025. Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

## VII. TREATY AND STATUTORY PROVISIONS INVOLVED

The Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention" or "the Convention"), Oct. 25, 1980, 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 as Appendix F, Pet. App. 54a. The Convention mandates prompt return of wrongfully retained children to their habitual residence, subject only to certain narrow exceptions.

## VIII. STATEMENT OF THE CASE

"WHERE'S THE BREACH?" - to paraphrase a classic 1980s fast-food personality who too searched for the substance in the matter at hand - presents one of the fundamental inquiries this Court must address regarding the Convention's operative provisions. This case confronts a critical interpretive ambiguity in the Convention's framework: what constitutes a legally cognizable breach of custody rights sufficient to trigger the Convention's remedial mechanisms? Article 3 of the Convention predicates its application on "*breach of rights of custody*," yet without judicial clarification of this threshold determination, courts are left to inconsistent interpretations. The Second Circuit has now adopted a definition that stands in marked contrast to the approaches taken by the First, Third and Eleventh Circuits, and directly contravenes the Executive Branch's longstanding interpretation of this international treaty.

SETTLED, BUT NOT UNSETTLED: The Circuit Court applied the "well-settled" exception in a broad, rather than narrow, way by treating the children's basic integration into New York life as dispositive while failing to properly weigh their substantial and ongoing connections to Canada. Although the children had established a routine in New York, they maintained strong, continuous ties to Montreal through regular visits, relationships with extended family on both sides, and access to their former schools where they could immediately re-enroll. The court overlooked the critical fact that these Canadian-born and Canadian-citizen children continued to spend significant time in Canada throughout the proceedings, and that they maintained dual connections rather than being completely settled in only one location. By focusing primarily on the children's New York ties rather than their meaningful Canadian

ones, the court undermined the Convention's fundamental purpose of returning wrongfully retained children to their habitual residence whenever possible, especially when no evidence suggested any harm would come from such return.

1. The Hague Convention on the Civil Aspects of International Child Abduction, adopted in 1980, is an international treaty designed to address cross-border parental child abduction cases. As explained by the U.S. State Department, the Convention's primary purpose is "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence" (Hague Conference on Private International Law, 1980, Art. 1). The treaty operates on the principle that custody disputes should be resolved in the jurisdiction of the child's habitual residence, not in the country to which the child was taken (*Abbott v. Abbott*, 560 U.S. 1, 2010). As noted by the Supreme Court, the Convention "reflects a worldwide concern about the harmful effects resulting from the wrongful international removal and retention of children" (*Lozano v. Montoya Alvarez*, 572 U.S. 1, 2014).

In 1988, the United States Congress enacted the International Child Abduction Remedies Act as the implementing legislation for the Hague Convention. This Act was established through Public Law No. 100-300, 102 Stat. 437 (1988) and later codified in 22 U.S.C. §§ 9001–9011. Congressional findings in the statute reinforced the Convention's objective "to address the issue of international child abduction and retention" and to "prevent such unlawful removals and retentions." According to 22 U.S.C. § 9001(a)(4). In alignment with the Convention's narrow scope, Congress specifically authorized "*United States courts to determine rights solely under the Convention and not to adjudicate the merits of*

*any underlying custody disputes.*" This limitation is explicitly stated in 22 U.S.C. § 9001(b)(4).

2. Petitioner Stein, Respondent Kohn, and all three of their children were born and raised in Canada, Pet App. 49a, 50a. The parties' third child was born in March 2020, just as heavy COVID-19 restrictions began in Quebec and in Canada, Pet App. 49a. Kohn experienced a postpartum mental health emergency requiring hospitalization in August 2020, Pet App. 50a. After her discharge on August 14, the family traveled to Monsey, New York on August 16, 2020, where Kohn's mother Rivka was residing. While Stein maintained this was intended as a temporary relocation of approximately one month, Kohn viewed it as the first step in permanently leaving Canada, Pet App. 17a.

Upon arrival in Monsey, Kohn began psychiatric treatment with Dr. Richard Price, who initially estimated her acute condition would resolve in one to six months, Pet App. 14a. At this time, Kohn's mother Rivka began consulting a divorce lawyer on Kohn's behalf, Pet App. 52a. As Kohn's treatment progressed, tensions emerged regarding their living situation. By March 2021, Dr. Price wrote Kohn a prescription stating she needed to "*remain in New York until completion of treatment*", Pet App. 19a. Treatment was ongoing until the time of trial, Pet App. 13a. That same month, Stein explicitly stated his objection to the children remaining in Monsey, while Kohn made it clear she had no intention of permanently returning to Canada. Despite this disagreement, the couple let their Canadian apartment lease expire in June 2021 and moved their belongings to a storage location in New York. The parties and the Children continued to make frequent trips to Montreal, Pet. App. 52a.

The relationship further deteriorated in late 2021. On October 2, Stein sent a message to family members informing them that the parties were separating and

stating *"Adeena (her mother really) has hired a very expensive lawyer to try to keep the kids in Monsey permanently."* Pet App. 23a. Two days later, on October 4, 2021, Kohn filed for divorce in New York which, among other things, demanded sole custody of the children. In November 2021, Kohn changed the locks on the shared New York apartment, and Stein began renting his own place nearby. Kohn's treatment under Dr. Price was ongoing, Pet App. 13a. By January 2022, Stein's access to the children had become restricted - when he came to the apartment to pick up the children, but was prevented, by Rivka, from seeing them, Pet App. 27a.

3. Stein filed a Hague Convention petition in the U.S. District Court for the Southern District of New York seeking an order for the return of J.S., Z.S., and A.S. to Canada, their and their parents' country of birth. Following a three-and-a-half-day bench trial, the district court denied the petition. While acknowledging that a wrongful retention had occurred, the court determined it had transpired more than one year before the petition was filed. This timing permitted the court to invoke the "settled exception" under Article 12 of the Convention, which allows wrongfully removed or retained children to remain in their current country if more than one year has elapsed and they have become "settled" within the meaning of the Convention.

The district court identified the date of retention as when Stein became fully aware of Kohn's intentions. Kohn, in her Verified Answer, had strenuously argued that there actually was no date of retention because the relocation had been permanent and consensual from the outset. The court rejected this characterization, finding that there was indeed no agreed-upon permanent relocation, but nonetheless determined that Stein had clear knowledge of Kohn's intent more than one year before initiating the action, which itself constituted a retention. Critically, no finding was made that Stein had

lost physical or legal rights, or had ceased exercising them, any time before December 19, 2021, one year before filing of the action.

4. Stein appealed to the Second Circuit, but the appeal was denied. In its Summary Order, the Circuit Court focused on Stein's awareness and understanding of the situation, and his having been alerted to Kohn's intentions regarding the children. The court affirmed the district court's finding that wrongful retention occurred on March 6, 2021, when Stein was first alerted that Kohn would not return to Montreal with the children. The Circuit Court repeated that Stein understood that Kohn would keep the children with her based on the parties' (who were married and cohabiting) understanding that Kohn would not live separately from them. The Circuit Court also noted the district court's alternative finding that Kohn's October 4, 2021 divorce filing, wherein she sought custody, "*clearly alerted Stein to her intent to remain in New York with the children*". In the Circuit Court's view, Stein was sufficiently notified of the planned wrongful retention through either of these instances, both occurring more than a year before he filed his petition on December 19, 2022, thus making the "now settled" defense available to Kohn.

5. Stein petitioned for a rehearing, or in the alternative, a rehearing en banc, but was denied.

## IX. REASONS FOR GRANTING THE PETITION

This case presents an issue of exceptional public importance affecting American families abroad and families temporarily in the United States for educational, medical, professional or other purposes. The Second Circuit's judgment on "anticipated retention", conflicts with other circuits, defies well-established legal principles, conflicts with common sense and creates uncertainty, potentially forcing premature family litigation where it otherwise may be avoided. By misapplying the "well-settled" exception when children maintain substantial connections to their prior country, the ruling penalizes accommodating parents and harms the Hague Convention's aim. This case presents an ideal opportunity to resolve two recurring questions: 1) when does "wrongful retention" actually occur, and 2) how to evaluate settlement when meaningful ties to both countries are maintained.

Over the past fifteen years, the Supreme Court has taken up the task of addressing other key questions about the application of the Hague Convention, an international treaty governing the return of children in cross-border custody disputes. In five notable cases, the Court has provided clarity on critical issues: determining custody rights in *Abbott v. Abbott* (2010), addressing mootness in *Chafin v. Chafin* (2013), evaluating equitable tolling in *Lozano v. Montoya Alvarez* (2014), defining the habitual residence of an infant in *Monasky v. Taglieri* (2020), and assessing ameliorative measures in grave risk determinations in *Golan v. Saada* (2022). These rulings have offered valuable guidance to courts nationwide, resolving complex interpretive challenges posed by the treaty.

Now, this Court is asked to resolve these two additional common questions that have surfaced across

the circuits, highlighting ongoing uncertainties in the Hague Convention's application. These issues, which have led to inconsistent approaches among lower courts, call for further direction to ensure uniform and equitable outcomes. As with its previous decisions, the Court's response to these matters will likely play a pivotal role in shaping the adjudication of international family law disputes, aligning the treaty's goals with the demands of judicial practice.

## 1. CERTIORARI IS WARRANTED TO RESOLVE WHETHER NOTICE OF INTENT TO BREACH CUSTODY RIGHTS IS AN ACTUAL BREACH OF CUSTODY RIGHTS

This Petition for Writ of Certiorari arises from the troubling implications of the Second Circuit's ruling. Unlike contract law's established doctrine of anticipatory breach - where a statute of limitations commences only upon actual breach, and not upon the anticipation of it - the Second Circuit's interpretation of the Convention compels parents to file lawsuits based merely on expressed intentions regarding future custody arrangements, before any actual breach of custody rights occurs. By equating a stated intent to retain children with an actual violation of custody rights, the Second Circuit effectively forces parents to litigate speculative conflicts, compelling families into premature legal proceedings that may ultimately prove unnecessary and harmful to all parties involved. This approach not only risks escalating familial tensions but fundamentally undermines the Convention's protective purpose by creating an incentive structure that destabilizes families rather than preserving them.

### A. The Second Circuit's Decision Establishes a Circuit Split

The Second Circuit"s decision established a circuit split on the question whether mere intent to breach custody rights constitutes an actual breach sufficient to trigger the Convention's Article 12 "clock". It now stands in direct conflict with the First, Third and Eleventh Circuits which have squarely addressed this issue and reached contrary conclusions. Prior to this matter, the Second Circuit had avoided taking an explicit stance on the issue, leaving its position unclear, as earlier cases sidestepped the need for a clear choice.

1. In *Marks ex rel. SM v. Hochhauser*, 876 F.3d 416, 418 (2d Cir. 2017), the court tentatively selected as the retention date the time when the respondent communicated her intention not to return the children, while explicitly acknowledging it could alternatively have been the date when she actually failed to return them as originally planned. The court found it unnecessary to resolve this distinction because both dates satisfied the dispositive question of whether the retention occurred after Thailand's accession to the Convention. *Marks* thus left unresolved whether mere notice of future intent to retain children, without actual interference with custody rights, triggers the Convention's one-year filing period. In *Hofmann v. Sender*, 716 F.3d 282, 293 (2d Cir. 2013), the court's determination of wrongful retention coincided with actual interference with custody rights—the petitioner was simultaneously served with divorce papers and physically prevented from exercising his established visitation rights. The notice of intent and the actual breach of custody rights occurred contemporaneously, rendering unnecessary any distinction between communicated intent and actual deprivation of custody.

In the most recent related decision preceding this case, *Lomanto v. Agbelusi*, No. 23-993 (2d Cir. 2024), the

Second Circuit carefully avoided establishing precedent with regard to anticipated breaches by connecting communicated intent to a concrete action that effectively constituted an actual breach. In *Lomanto*, this materialized through the petitioning parent's immediate filing of a kidnapping report, representing a tangible step beyond mere expression of intent.

2. In Stein v. Kohn, the Circuit Court has now definitively adopted the position that notice of an intent to breach is just as good as an actual breach, breaking from its prior ambiguity and diverging from other circuits that require a tangible act - such as failing to return children upon the agreed-upon date, restricting parental access, and so on - to initiate wrongful retention.

3. The First Circuit has squarely held that an actual breach of custody rights - not merely expressed intent - is necessary to commence the Article 12 One-Year exception period. In *Toren v. Toren*, 191 F.3d 23, 28 (1st Cir. 1999), the petitioner asserted that service of a "Verified Complaint for Custody" constituted wrongful retention. The First Circuit rejected this theory, affirming the district court's dismissal on the grounds that no actual retention had yet occurred. The court reasoned: "*[T]he children's mere presence in the United States cannot constitute a retention because it is entirely consistent with the parties' [...] agreement. In addition, while it is conceivable that the Massachusetts court could deny the father any visitation with his children, and that this denial of access could amount to a retention, the fact remains that this turn of events has not yet occurred.*" The First Circuit thus explicitly rejected the proposition that anticipated or mere threatened interference with custody rights triggers the Convention's provisions absent actual interference. Following *Toren*, district courts within the First Circuit have faithfully applied this principle. In *Falk v. Sinclair*, 2010 WL 723744 (D. Me. 2010), the court confirmed that wrongful retention commences on the date

the child was scheduled to return home, not when the respondent had earlier communicated an intent to retain the child.

In cases where district courts establish a date of retention upon notice, they do so only when such notice is coupled with a practical inability to remedy the situation. For example, in Darin v. Olivero-Huffman, No. 12-2256 (1st Cir. 2014), when Darin was informed that Olivero would not be returning to Argentina, "*Darín had no legal way of remaining with his son*" due to visa constraints and restrictions on children traveling with a single parent. "*Once Olivero decided to stay in the United States with the child, there was nothing Darín could do to prevent a separation from his son.*". In Stein v. Kohn, nothing of the sort was accompanied by Kohn's notice.

4. The Third Circuit arrived at this conclusion as well, citing *Toren*. In *Karkkainen v. Kovalchuk*, 445 F.3d 280, 287 (3d Cir.2006), the Court there determined that August 10, 2003 was the date of wrongful retention, because it was the final, explicit, deadline that Petitioner Karkkainen had unequivocally demanded, in an email from Finland, for her daughter's return. It was not relevant that Karkainnen had strongly suspected, or even knew, earlier that Kovalchuk was planning not to return the child.

5. In the Eleventh Circuit case Pielage v. McConnell, 516 F.3d 1282 (11th Cir. 2008), Dutch national petitioner Pielage petitioned for the return of her child to The Netherlands. The court denied that a retention had occurred because the petitioner maintained full custodial rights and physical possession of the child, but was merely subject to a state court *ne exeat* order preventing her from removing the child from the State of Alabama during pending custody determinations. The court rejected her petition, ruling that the Hague Convention was designed to remedy situations where a child is kept

away from a rightful custodian - not where a parent who exercises complete custody simply faces legal restrictions on relocating with the child. As the court explained, "*it is impossible to return the child directly to the applicant. That is so because there has been no retention within the meaning of the Convention. There having been no retention, there can have been no wrongful retention.*" *Pielage* at 1289.

District courts in the Eleventh Circuit have consistently adhered to this approach. In *Philippopoulos v. Philippopoulou*, 461 F.Supp.2d 1321 (N.D. Ga. 2006), the court characterized such circumstances as analogous to the doctrine of "anticipatory breach", holding that while a petitioner may file immediately upon notice, they retain the option to wait until the actual breach occurs. The court reasoned: "*[B]ecause Respondent had agreed to return the parties' child to Greece on August 15, 2005, her retention of the child did not become wrongful until that date. Thus, Petitioner had until August 15, 2006, to file this action. Because he filed his petition before that date, Respondent has failed to carry her burden of showing that the petition should be dismissed for untimeliness.*" Similarly, in *Chechel v. Brignol*, 2010 WL 2510391 (M.D. Fla. 2010), the court affirmed that "*[c]ourts have uniformly held that the wrongful retention begins when the agreed date passes, not when the earlier notice of intent is given.*"

6. Other circuits have avoided squarely addressing this question but have offered instructive guidance. The D.C. Circuit confronted a unique variation of the question in *Abou-Haidar v. Sanin Vazquez*, 945 F.3d 1208, 1216 (D.C. Cir. 2019). There, the parties' dispute was the inverse of the instant case: petitioner there argued for an earlier retention date, and respondent for a later one (or really, that it had not happened yet). Petitioner Abou-Haidar received an explicit "Complaint for Custody", clearly notifying him that his custody rights

were threatened. He had also received a letter from Mother's counsel "instructing the Father not to enter the family's Woodley Park apartment", and informing him that "to enforce [the Mother's ] boundaries, [the Mother] has changed the locks on her apartment", Brief for Appellee at 15, *Abou-Haidar v. Vasquez*, No. 19-7110 (D.C. Cir. filed Nov. 25, 2019). However, the D.C. Circuit did not establish that notice date would necessarily constitute retention for calculating the "one year and settled" exception. Rather, the court merely determined that notice provided sufficient grounds for filing a petition, noting that "*the court held that [Respondent] Sanin Vazquez had retained the child on May 7, 2019 when she served Abou-Haidar with her Superior Court complaint, or at the latest on May 23, 2019, when Abou-Haidar filed his Superior Court answer and counterclaim seeking to maintain joint custody.*" The court left unresolved whether the May 7, 2019 date initiated the "one-year clock" or merely permitted filing, as in Philippopoulos.

### B. Second Circuit Court Disregarded Precedent on Executive Foreign Affairs Deference

This Court has consistently held that the Executive Branch's interpretation of a treaty "*is entitled to great weight.*" *Abbott v. Abbott*, 560 U.S. 1, 15 (2010). This Court has also written that "*[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.*" *Sanchez-Llamas v. Oregon*, 548 U.S. at 355, quoting *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961). This principle of deference is particularly salient in cases involving the Hague Convention - codified under Title 22 (Foreign Relations and Intercourse) of the U.S. Code - where the Executive Branch has specialized expertise in both international law and diplomatic considerations. The State Department's official legal analysis of the Hague

Convention on International Child Abduction provides authoritative guidance on when wrongful retention occurs: "*Wrongful retention refers to the act of keeping the child without the consent of the person who was actually exercising custody. The archetype of this conduct is the refusal by the noncustodial parent to return a child at the end of an authorized visitation period.*" U.S. Dep't of State, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,505 (Mar. 26, 1986) (internal quotations omitted). The Second Circuit's decision in this case - finding that retention began on the date the petitioner provided notice of objection rather than at the end of the authorized visitation period - directly contravenes the State Department's authoritative interpretation. This departure from the Executive Branch's construction undermines the uniform application of the Convention and contradicts the deference principles articulated in *Abbott*. The clear import of the Executive Branch's interpretation is that wrongful retention crystallizes on the specific date when authorized access ends - not when a party later communicates opposition or files a petition. This interpretation aligns with the Convention's purpose of promptly restoring the status quo and deterring unilateral action to establish artificial juridical links to a preferred forum.

## 2. CERTIORARI IS WARRANTED TO CLARIFY BREADTH OF "WELL-SETTLED" EXCEPTION WHEN CHILDREN MAINTAIN TIES TO HOME COUNTRY

### A. Second Circuit Decision Contravenes Narrow Application of Convention Exceptions

1. The Second Circuit applied the "one year and settled" exception to this case overly broadly, despite acknowledging that the children maintain active relationships with both locations and with both parents. The "one year and settled" exception, like all exceptions to the Convention, is defined as "*narrow*," U.S. Code § 9001(a)(4). As the court in Friedrich stated, "*a federal court retains, and should use when appropriate, the discretion to return a child, despite the existence of a defense, if return would further the aims of the Convention.*" Friedrich, 78 F.3d at 1067. 22 Returning wrongfully retained children to their country of origin, particularly when they maintain strong connections there, fulfills these aims. As author Jeremy D. Morley explains in his noteworthy work on the subject, this exception is specifically designed "*to prevent serious and long-lasting harm to a child that might result if the child is returned to the former habitual residence after the passage of a substantial period of time*", The Hague Abduction Convention, 3rd ed. 2022, pp. 170-171.

2. The narrowness of exceptions under the Convention is further illustrated by this Court's approach in *Golan v. Saada*, 142 S.Ct. 1880 (2022). In examining the "grave danger" defense—also defined as narrow per Friedrich—this Court maintained that even when presented with legitimate risk to a child, courts "should ordinarily address ameliorative measures raised by the parties or obviously suggested by the circumstances of the case", Golan *supra*. Significantly, while the Court removed the requirement to consider "all" possible measures, it emphasized that "*[T]he District Court should determine whether the measures considered are adequate to order return in light of the District Court's factual findings concerning the risk to [the child].*" This guidance powerfully demonstrates the Convention's prioritization of return remedies—courts are instructed to explore pathways toward returning children even in situations where genuine danger exists, reinforcing the fundamental

principle that exceptions must be construed narrowly to fulfill the Convention's core objectives.

Where children maintain connections to both locations and both parents, the District Court should not assume the role of a family court. The Convention's purpose is to ensure matters are heard in the proper forum - the courts of the habitual residence - not to determine optimal living arrangements. This principle is so fundamental that even when a child is fully settled, the State Department questions whether an abducting parent "*should be permitted to benefit from such conduct*," State Department Legal Analysis § III(I)(1)(c), underscoring that return may remain appropriate to prevent rewarding wrongful actions and to preserve jurisdictional integrity. When no concerns exist about the children's comfort in their country of removal - beyond mere "disruption", Fernandez v. Bailey, 909 F.3d 353, 361 (11th Cir. 2018) - courts should defer to that country's competent courts to determine their best interests. Federal courts lack the "competence and expertise in adjudicating" matters of children's best interests, Thomas v. N.Y. City, 814 F. Supp. 1139, 1146 E.D.N.Y. 1993 (citing Ankenbrandt v. Richards, 504 U.S. 689 (1992)). Inquiry into the best interest of the children, beyond the exceptional circumstances, violates the plain language of the Convention, Article 19.

This approach protects both children's and parents' rights, a key concern of the framers. As Justice Scalia emphasized during *Lozano* arguments, "*They [the framers] had it in mind, not just the interest of children, but the interest of parents... Parents have rights. And that is one of the things that this treaty considers.*" Transcript of Oral Argument at 27, Lozano v. Alvarez, 572 U.S. 1 (2014) (No. 12-820). Justice Alito's concurrence in *Lozano* further articulated essential factors courts should weigh: "*the child's interest in returning to his or her original country of residence (with which he or she may still have*

*close ties, despite having become settled in the new country); the child's need for contact with the non-abducting parent, who was exercising custody when the abduction occurred; the non-abducting parent's interest in exercising the custody to which he or she is legally entitled; the need to discourage inequitable conduct (such as concealment) by abducting parents; and the need to deter international abductions generally*" at 1237 (Alito, J., concurring).

3. District courts across the nation have consistently acknowledged these principles when applying the "well-settled" exception. In *Monzon v. De La Roca*, 910 F.3d 92 (3rd Cir. 2018), the Third Circuit formally recognized the importance of considering "*to what extent the child has maintained ties to the country of habitual residence*" and "*the level of parental involvement in the child's life*", at no. 88, when surveying relevant case law. As noted, Eleventh Circuit in *Fernandez* 909 F.3d 353, 361 (11th Cir. 2018) established a high threshold, instructing that the "settled" exception requires the child to be so permanently settled in their new environment "*that return would be to the child's detriment*". This standard implies that where children maintain substantial connections to and regularly visit their home country, return cannot reasonably be considered detrimental absent extraordinary circumstances. District courts have embraced a broader analytical framework, as seen in Wtulich v. Filipkowska (No. 16-CV-2941 (JO) E.D.N.Y. Mar. 20, 2019), where the court recognized that the "*assessment [of] 'settled' [...] must take into account the fact that her parents have been involved in a legal dispute*". Other examples include *Medina Lugo v. Ramirez Padilla*, No. 6:23-cv-232 WWB-DCI (M.D. Fla. Mar. 28, 2023), (considering the child's ongoing ties to Venezuela), and Castillo v. Castillo, 597 F.Supp.2d 432 (D. Del. 2009), (weighing whether the child "*would not be taught regarding her Argentine heritage, and would be living*

*with respondent's husband, who was a convicted felon.*") 597 F.Supp.2d 432 (D. Del. 2009).

### B. The Circuit Court Disregarded Precedent on Executive Foreign Affairs Deference

1. As previously noted in Section IX(1)(B), the Second Circuit's determination regarding the date of retention directly conflicts with the Executive Branch's authoritative interpretation of the Hague Convention. The Supreme Court has consistently held that such interpretations warrant substantial judicial deference, *Abbott*, 560 U.S. at 15; *Sanchez-Llamas*, 548 U.S. at 337.

This departure from the State Department's guidance extends to the Circuit's application of the "well-settled" exception. The State Department's Legal Analysis of the Convention explicitly instructs courts that "*any claims made [about the children's settlement in the United States] by the person resisting the child's return will be considered in light of evidence presented by the applicant concerning the child's contacts with and ties to his or her State of habitual residence.*" U.S. Dep't of State, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, § III(I)(1)(c) (Mar. 26, 1986). By failing to adequately weigh evidence of the children's ongoing connections to their home country, as directed by the Executive Branch, the Second Circuit has again departed from the Executive's interpretive framework, undermining the consistent application of treaty provisions that this Court sought to protect through its deference doctrine in *Abbott*. The proper analysis, as directed by the State Department, requires a full evaluation that balances evidence of settlement in the new location against continuing ties to the State of habitual residence. It is important that this Court address these significant departures to ensure uniform application of this crucial international treaty.

## X. CONCLUSION

For the foregoing reasons, this Court should grant certiorari to resolve the circuit split on whether anticipatory retention triggers the Hague Convention's provisions and to clarify the proper scope of the "well-settled" exception when children maintain ties to both countries. These issues are of great importance to families and children involved in cross-border custody disputes. The inconsistent approaches among circuits and departure from State Department guidance create uncertainty that only this Court can resolve.

Date: April 9, 2025

Respectfully Submitted

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