No. 18-935

IN THE
Supreme Court of the United States

MICHELLE MONASKY,

Petitioner,

v.

DOMENICO TAGLIERI,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Taglieri agrees that the Sixth Circuit applied the wrong legal standard in assessing A.M.T.'s habitual residence. He nevertheless seeks affirmance of the Sixth Circuit's judgment without making any effort to demonstrate that A.M.T. was habitually resident in Italy under the all-relevant-circumstances standard that he and the United States now endorse. Indeed, Taglieri goes so far as to argue (at 54) that it would be *improper* for the Court to examine the underlying facts of this case—even though neither court below did so under his preferred standard. Taglieri's unwillingness to defend the Sixth Circuit's habitual-residence standard or to engage with the facts confirms the deep flaws in the order directing A.M.T.'s return to Italy.

Despite agreeing at the certiorari stage that "[t]he test for determining habitual residence when the child is an infant turns on 'shared parental intent,'" Br. in Opp. 1, Taglieri now throws in his lot with the United States in asking the Court to apply an all-relevant-circumstances standard, Resp. Br. 23; U.S. Br. 13. But their discussion of that standard is critically incomplete. Although the foreign authorities they cite apply an all-relevant-circumstances standard to non-infants, those jurisdictions apply a *different* standard to infants—one focused exclusively on the "social and family environment" of the child's caregiver(s). *See*, *e.g.*, *A* v. *A*, [2013] UKSC 60, ¶ 54 (UK); Case C-497/10, *Mercredi* v. *Chaffe*, ¶ 55 ECLI:EU:C:2010:829 (Dec. 22, 2010).

In any event, in comparison with either of those approaches, a shared-parental-intent standard requiring that the parents actually agree on their infant's residence is more consistent with the Hague

Convention's text and purpose because it avoids equating "habitual residence" with an infant's mere "residence," facilitates the prompt resolution of Hague Convention cases, and prevents an abusive parent from establishing an infant's habitual residence based on coercion and fear.

Taglieri is equally unsuccessful in attempting to insulate the district court's habitual-residence determination through clear-error review. A legal framework that promotes divergent outcomes and makes it harder to correct erroneous habitual-residence determinations is the exact opposite of what the Hague Convention's signatories envisioned and what Congress intended when it recognized "the need for uniform international interpretation of the Convention." 22 U.S.C. § 9001(b)(3)(B). It is precisely to prevent such haphazard outcomes that both U.S. courts and Taglieri's own foreign authorities have developed "auxiliary legal principles of use in other cases," which appellate courts can effectively administer only through *de novo* review. *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC* v. *Vill. at Lakeridge LLC*, 138 S. Ct. 960, 967 (2018).

Finally, Taglieri agrees that the Court should end this protracted litigation—but asks the Court to do so without applying the law to the facts. Resp. Br. 54–55. Taglieri has good reason to run from the facts. Eight-week-old A.M.T.'s only ties to Italy were through her mother and primary caregiver Monasky, who could not speak Italian, Pet. App. 75a, had no "other family or friends in Milan," JA96, had repeatedly expressed her desire to divorce Taglieri in the weeks surrounding A.M.T.'s birth, Pet. Br. 8–9, and, as the district court found, "inten[ded] to return to the United States with A.M.T. as soon as possible," Pet.

App. 94a. Under *any* proffered habitual-residence standard and standard of review, A.M.T.'s fleeting connections to Italy were not sufficiently settled to make Italy her "usual or customary dwelling." U.S. Br. 10.

I. ALL AGREE THAT THE SIXTH CIRCUIT APPLIED THE WRONG LEGAL STANDARD.

Taglieri and the United States do not defend the Sixth Circuit's erroneous habitual-residence standard but instead urge the Court to adopt a new all-relevant-circumstances approach that even their own foreign authorities do not apply to infants. Rather than upend Hague Convention jurisprudence, the Court should make clear that shared parental intent—i.e., actual parental agreement—is the appropriate standard for assessing an infant's habitual residence.

A. Taglieri Endorses A New Standard That His Own Foreign Authorities Do Not Apply To Infants.

The Sixth Circuit defied common sense—as well as the Hague Convention's text and purpose—in holding that parental intent about where a child will reside can be "shared" when the parents "never had a 'meeting of the minds' about their child's future." Pet. App. 12a; *see also* Pet. Br. 29–44.

Taglieri and the United States turn their backs on that flawed reasoning. They instead advance—for the first time in this litigation—a new habitual-residence standard that requires consideration of "all of the circumstances relevant to determining where the child customarily or usually lives." Resp. Br. 23; *see also* U.S. Br. 13 ("all relevant circumstances").

This Court "ordinarily do[es] not consider claims that were neither raised nor addressed below." *Travelers Cas. & Sur. Co. of Am.* v. *Pac. Gas & Elec. Co.*, 549 U.S. 443, 455 (2007) (citation omitted). Taglieri has never previously advocated this all-relevant-circumstances standard. In fact, his brief in opposition agreed that an infant's habitual residence "turns on 'shared parental intent'" and presented as a counter-question whether "the 'shared intent' test requires proof of a subjective agreement." Br. in Opp. i, 1. Taglieri's "belatedly assert[ed]" new standard is therefore "forfeited." *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 930–31 (2011) (citing Sup. Ct. R. 15.2).

In any event, Taglieri and the United States provide no basis for this Court to reject the shared-parental-intent standard for *infants* because the foreign authorities on which they rely do not actually apply the all-relevant-circumstances standard to infants. Rather, those foreign jurisdictions uniformly apply a different habitual-residence standard when a child is too young to acclimate to her surroundings.

Tellingly, almost all of the foreign decisions invoked by Taglieri and the United States involve children who were old enough to acclimate. *See Office of the Children's Lawyer* v. *Balev*, [2018] 1 S.C.R. 398, ¶¶ 7–9 (Can.) (children aged 8 and 11); *LCYP* v. *JEK*, [2015] HKCA 407, ¶ 3.3 (H.K. C.A.) (children aged 10 and 14); *Punter* v. *Sec'y for Justice*, [2007] 1 NZLR 40, ¶¶ 31, 35 (N.Z. C.A.) (children aged 4 and 6); *In re LC*, [2014] UKSC 1, ¶ 3 (UK) (children aged 5 to 13).

As the United States recognizes, the courts of appeals already take "the correct approach" with respect to such children, U.S. Br. 26, by considering "all rele-

vant indicators" of the child's habitual residence, *Redmond* v. *Redmond*, 724 F.3d 729, 746 (7th Cir. 2013); *see also*, *e.g.*, *Whiting* v. *Krassner*, 391 F.3d 540, 546 (3d Cir. 2004) (all "'facts and circumstances'"); *Robert* v. *Tesson*, 507 F.3d 981, 989 (6th Cir. 2007) (same); *Mozes* v. *Mozes*, 239 F.3d 1067, 1071 (9th Cir. 2001) ("'all the circumstances'").

U.S. courts and Taglieri's foreign authorities apply an entirely different standard, however, when assessing the habitual residence of children too young to acclimate to their surroundings. As the Court of Justice of the European Union has emphasized, "[t]he factors to be taken into account in the case of" older children simply are "not the same as those relevant to an infant." *Mercredi*, *supra*, ¶ 53.

Recognizing the important developmental differences between infants and older children, "all of the [U.S.] courts that have addressed the issue" have treated shared parental intent as a proxy for an infant's habitual residence. Br. in Opp. 30; *see*, *e.g.*, *Whiting*, 391 F.3d at 550 ("[A]cclimatization is not nearly as important as the settled purpose and shared intent of the [very young] child's parents in choosing a particular habitual residence."); *Gitter* v. *Gitter*, 396 F.3d 124, 133 (2d Cir. 2005) (similar); *Holder* v. *Holder*, 392 F.3d 1009, 1020–21 (9th Cir. 2004) (similar).

Like U.S. courts, the foreign jurisdictions identified by Taglieri and the United States also use a proxy for an infant's habitual residence. But rather than focus on parental intent, these courts assume that "[a]n infant necessarily shares the social and family environment" of her caregiver(s). *Mercredi*, *supra*, ¶ 55. These courts have explained that, where "the infant is in fact looked after by her mother," "it is necessary to

assess the mother's integration in her social and family environment" in the relevant country to determine whether the child was habitually resident there. *Id.*; *see also A*, [2013] UKSC 60, ¶¶ 49–50, 54 ("it is necessary to assess the integration of [the primary caregiver] in the social and family environment of the country concerned"); *L.K.* v. *Dir.-Gen.*, [2009] HCA 9, ¶ 27 (Austl.) ("The younger the child, the less sensible it is to speak of the place of habitual residence of the child as distinct from the place of habitual residence of the person or persons upon whom the child is immediately dependent.").

Taglieri and the United States therefore fail to identify any authority for applying their all-relevant-circumstances standard to infants.

B. A Shared-Parental-Intent Standard Requiring Actual Agreement Is Most Consistent With The Text And Purpose Of The Hague Convention.

The Court should not adopt an all-relevant-circumstances standard for infants—or the social-and-family-environment-of-the-caregiver standard that some foreign jurisdictions have applied to infants—because a shared-parental-intent standard requiring actual agreement is more consistent with the Hague Convention's text, drafting history, and objectives.

1. All agree that, to be "habitual," a child's residence must be "sufficiently stable, lasting, or continuing in nature." U.S. Br. 24; *see also* Pet. Br. 30–31; Resp. Br. 23, 30, 45. A shared-parental-intent standard that requires actual agreement provides a reliable means for ensuring that an infant's physical presence in a country has a sufficiently stable quality to be

deemed "habitual." *See* Pet. Br. 31–32 (citing authorities). In fact, Taglieri and the United States never explain how a newborn's physical presence in a country can be settled or stable when the parents do not agree on where she should live.

In contrast, a standard that focuses on the *parents'* family and social environment does not necessarily ensure that *the infant's* connections to a country are stable. *See* Pet. Br. 33. The inquiry should "focus on the child" and the stability of the child's connections, *Feder* v. *Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995), because the Hague Convention protects "the child's relationships," not the parents', Elisa Pérez-Vera, *Explanatory Report on 1980 Hague Child Abduction Convention*, in 3 Acts and Documents of the Fourteenth Session, Child Abduction 426, ¶ 65 (1982) ("*Explanatory Report*").

A broader all-relevant-circumstances standard fares no better. Taglieri and the United States do not dispute that, when a baby is born during the parents' vacation, short-term foreign employment, or some other foreign sojourn, the parents' shared intent to raise the child elsewhere—i.e., their actual agreement—distinguishes that temporary physical presence from a habitual residence. *See* Pet. Br. 39. Nor do they dispute that the parents' shared intent accurately distinguishes the day-to-day necessities of life in a temporary location—e.g., making essential medical appointments or purchasing a car seat—from the hallmarks of a settled and stable home. *See id.* at 36–37; *see also* Sanctuary Br. 12–14. Because shared intent is the critical consideration with respect to such young children—and avoids conflating an infant's temporary location with a "habitual residence"—courts need not complicate the inquiry by undertaking

an open-ended examination of "all admissible evidence." U.S. Br. 10.

The all-relevant-circumstances standard also fails to give adequate weight to the context for the Convention's adoption. Taglieri (at 3) and the United States (at 18) acknowledge that the concept of habitual residence was "well-established" in international law when the Convention was adopted. *Explanatory Report* ¶ 66. But they ignore the crux of that established meaning: Courts had construed the term as requiring an *intent* to remain for some time. *See* Pet. Br. 31–32 (citing authorities). The shared-parental-intent standard gives effect to that understanding because it requires that "the parents actually *share* or jointly develop the intention" that the child reside there for some time by reaching a "meeting of the minds regarding [the child's] future." *Berezowsky* v. *Ojeda*, 765 F.3d 456, 468–69 (5th Cir. 2014).

By ignoring this context and the critical importance of shared intent, Taglieri and the United States endorse a standard that invariably and inaccurately equates an infant's habitual residence with wherever the infant has resided since birth. In short, their standard reads the word "habitual" out of the Convention.

2. The shared-parental-intent standard—i.e., actual agreement—also better serves the Hague Convention's objectives. Pet. Br. 33–44.

That standard facilitates prompter review of Hague Convention petitions than a free-ranging inquiry encompassing "any admissible evidence" conceivably "relevant to answering the ultimate factual inquiry." U.S. Br. 27; *see also* Pet. Br. 34–37. Taglieri makes little sense, and offers no support, when he

suggests that considering "*all* relevant facts" would somehow be less time-consuming than "[i]f 'actual agreement' were the *only* relevant factor." Resp. Br. 43 (emphases added). And it makes no difference that "*any* rigid legal requirement" would result in faster adjudications. U.S. Br. 25; Resp. Br. 43. The point is that *this* requirement—that the parents agreed about where their child would reside—not only is consistent with the text and history of the Hague Convention, but also allows courts to resolve cases more expeditiously than an amorphous all-relevant-circumstances approach. In so doing, it gives effect to the undisputed "need for prompt resolution of [return] petitions." U.S. Br. 17.

Taglieri's and the United States' concerns that the shared-parental-intent standard would not "prevent unilateral removal of a child to another country" are misplaced. Resp. Br. 40; *see also* U.S. Br. 25. In fact, by requiring *both* parents' agreement, the shared-parental-intent standard would deter parents from unilaterally changing an infant's habitual residence. The other two alternatives emphatically would not, which is why foreign courts have deliberately renounced any rule against unilateral changes of habitual residence. *See AR* v. *RN*, [2015] UKSC 35, ¶ 17 (UK) ("there is no 'rule' that one parent cannot unilaterally change the habitual residence of a child"); Case C-111/17, *OL* v. *PQ*, ¶ 52, ECLI:EU:C:2017:436 (June 8, 2017) (rejecting the rule that one parent could not "decide alone on the child's place of residence"); *L.K.*, [2009] HCA 9, ¶ 49 (similar); *LCYP*, [2015] 5 H.K.C. 293, ¶ 7.7 (similar).

The United States' speculation that, to preserve their ability to remove a child unilaterally, parents may "simply avoid affirmatively agreeing to anything"

is unrealistic and unsubstantiated. U.S. Br. 25; *see also* Resp. Br. 41 (similar). U.S. courts have been applying the shared-parental-intent standard for years, and there is no evidence that parents have sought to game the system in that manner. What is far more likely is that, where one parent does not affirmatively agree about the future, it is because she is in an abusive environment and cannot actually "agree" to live in such danger with her child. Sanctuary Br. 12–14.

Indeed, Taglieri and the United States make little attempt to address domestic-violence issues, even though they are a "high priority" of the Convention's signatories, Hague Conference, 2011 Special Commission Report, ¶ 37, and the inescapable context for this case. According to Taglieri (at 43), the Convention addresses domestic violence exclusively through its exception to the return remedy based on "grave risk" of "physical or psychological harm" to the child. Convention, art. 13(b). But, like the district court in this case, *see* Pet. App. 105a, "[c]ourts routinely construe the 'grave risk' standard narrowly," "disregard[ing] domestic violence . . . because the abuse in question was not specifically directed *at the child*." Sanctuary Br. 17. Nothing about the existence of this narrowly construed exception requires courts to ignore domestic violence when determining habitual residence.

Nor do Taglieri and the United States dispute that the shared-parental-intent standard more effectively prevents an abusive parent from establishing an infant's habitual residence based on coercion of the abused parent. Pet. Br. 43. An abusive relationship may create surface conditions that, under the all-relevant-circumstances approach, could be viewed as supporting the existence of a habitual residence in the country from which the abused parent ultimately fled,

including "parental employment" or "applying for driver's or professional licenses." U.S. Br. 26–27. The shared-parental-intent standard, in contrast, would properly account for those facts by looking to whether the parents "ma[de] the decision together," without coercion or fear, as to where their child would reside. *Berezowsky*, 765 F.3d at 468. Accordingly, only the shared-parental-intent standard can meaningfully protect domestic-violence victims from being forced into an untenable choice between saving their own lives and remaining with their children. *See* Sanctuary Br. 16–20; Pet. Br. 43–44.

3. None of the other objections to a properly formulated shared-parental-intent standard withstands scrutiny.

Taglieri and the United States contend that habitual residence is not supposed to be an overly "technical" or "rigid" concept. Resp. Br. 17, 28; U.S. Br. 9. But eschewing technicalities and rigidity does not mean the inquiry must be entirely unbounded and formless. Even the foreign authorities on which Taglieri and the United States rely make clear that habitual-residence determinations must be guided by meaningful legal principles, such as "whether the residence has the necessary quality of stability," *AR*, [2015] UKSC 35, ¶ 21, and the primary caregiver's "integration in her social and family environment," *Mercredi*, *supra*, ¶ 55. Focusing on the existence of parental agreement is no more "rigid" a rule than focusing exclusively on the primary caregiver's environment to the exclusion of the other parent's social and familial ties.

More fundamentally, in disclaiming hyper-technical rules, the signatories aimed not to jettison all le-

gal principles, but to ensure that the Convention recognizes a child's actual social environment, Pet. Br. 31, and to avoid "'inconsistencies as between different legal systems,'" Resp. Br. 25 (quoting J.H.C. Morris, *Dicey and Morris on the Conflict of Laws* 144 (10th ed. 1980)). Although those concerns are present with technical concepts such as domicile and nationality, *see* Pet. Br. 31, a shared-parental-intent standard that requires actual agreement reliably protects an infant's stable social environment (to the extent one existed), *see supra* 6–7, and poses little risk of inconsistent interpretations across countries, particularly when appellate courts can meaningfully review trial courts' habitual-residence determinations, *see infra* 14. In contrast, a fact-bound all-relevant-circumstances approach—especially if coupled with deferential appellate review—will inevitably foster randomness and inconsistency by allowing courts to reach divergent results even on essentially identical facts.

Taglieri and the United States also worry that some infants may lack a habitual residence under the shared-parental-intent standard. *See* Resp. Br. 42 n.8; U.S. Br. 24. But the same is concededly true under their preferred standard, *id.*, as underscored by foreign decisions applying that approach, *see* Pet. Br. 45–46 (citing foreign authorities recognizing that some children lack a habitual residence); Cox Br. 10–14 (same).

Moreover, the absence of a habitual residence does not leave infants (or their parents) unprotected. When the Convention does not apply, other remedies are available under state, federal, and international law, and there is no dispute that those remedies provide robust protections for children and parents. *See* Pet. Br. 41 (discussing 22 U.S.C. § 9003(h) and the

Uniform Child Custody Jurisdiction & Enforcement Act).

Conversely, inventing a habitual residence where one does not exist "leads to often-devastating consequences." Sanctuary Br. 8. The district court's return order here separated A.M.T. from the only caregiver she had known and returned her to a country where her eight-week existence had been nomadic and deeply unstable. Using the Convention to forcibly remove children from "the stability which is so vital to them" perversely creates the exact situation the Convention was intended to prevent. *Explanatory Report* ¶ 72.

The United States' contention (at 24) that "courts should not *create* the need to confront" a no-habitual-residence scenario thus gets the analysis backward. The Court should not create a requirement or presumption of habitual residence that the Convention does not prescribe. "'[I]f an attachment [to a state] does not exist, it should hardly be invented.'" *Holder*, 392 F.3d at 1020 (second alteration in original) (quoting Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 112 (1999)); *see also* Cox Br. 19–20.

* * *

The Sixth Circuit's hollowed-out version of shared parental intent finds no support in the Convention or in U.S. or foreign jurisprudence. Rather than replace that flawed standard with an equally deficient approach never presented to the courts below, the Court should hold that an infant can be habitually resident only in a country where her parents agreed for her to live.

II. APPELLATE COURTS SHOULD REVIEW HABITUAL-RESIDENCE DETERMINATIONS *DE NOVO*.

Under this Court's three-part framework, habitual-residence determinations should be reviewed *de novo*. Pet. Br. 19–28 (applying *Pierce* v. *Underwood*, 487 U.S. 552, 558–60 (1988)).

First, it is undisputed that only *de novo* review "'tends to unify precedent' and 'stabilize the law.'" *Cooper Indus., Inc.* v. *Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436 (2001) (citation omitted). Thus, only *de novo* review can vindicate Congress's interest in "uniform international interpretation of the Convention." 22 U.S.C. § 9001(b)(3)(B); *see also* Pet. Br. 19–21.

Taglieri and the United States do not contest the importance of this congressional objective, but they read Congress's implementing legislation as exhorting mere "consistency" with how foreign courts *approach* concepts such as habitual residence, rather than seeking uniform *application* of those concepts. Resp. Br. 50; *see also* U.S. Br. 32 (similar). But allowing different courts to "rule in either direction" on essentially the same record—which the Sixth Circuit expressly endorsed as an acceptable outcome here, Pet. App. 11a—invites precisely the sort of "'inconsistencies as between different legal systems,'" Resp. Br. 25 (citation omitted), that both the Convention's signatories and Congress aimed to avoid. The entire point of giving "'the opinions of our sister signatories . . . considerable weight'" is to ensure uniform results. *Air France* v. *Saks*, 470 U.S. 392, 404 (1985) (citation omitted).

Concerns about "delay[ing] final determinations" of habitual residence, Resp. Br. 48–49; *see also* U.S.

Br. 31, are similarly misguided because there is no evidence that either the signatories or Congress wanted to sacrifice accuracy for expediency. "Prompt *but wrong*" is not a generally accepted legal norm and is especially pernicious when the well-being of children is at stake.

Second, there is a "long history of appellate practice"—several decades—of reviewing habitual-residence determinations *de novo*. *Pierce*, 487 U.S. at 558; *see also* Pet. Br. 21–22. Taglieri's response that those decisions erroneously applied a one-size-fits-all approach to every mixed question of law and fact is plainly wrong. Resp. Br. 51. Several circuits have undertaken the requisite context-specific analysis, while the others simply followed the majority *de novo* approach. *See* Cert. Reply 5–6.

Because a "'clear statutory prescription'" and "'a historical tradition exist[ ]'" here, the Court need not address functional considerations. *McClane Co.* v. *EEOC*, 137 S. Ct. 1159, 1166 (2017) (citation omitted). Yet this third factor, too, supports *de novo* review. In order to secure the consistency and clarity sought by the Convention's signatories and Congress, appellate courts reviewing habitual-residence determinations must be able to formulate "auxiliary legal principles of use in other cases," which is the type of "primarily legal . . . work" that triggers *de novo* review. *U.S. Bank*, 138 S. Ct. at 967; *see also* Pet. Br. 22–26.

Taglieri disputes the importance of legal principles to habitual-residence determinations, Resp. Br. 51, but ignores that his own foreign authorities have articulated legal principles to guide future cases. *See supra* 5–6. And Taglieri's assertion (at 51) that habitual-residence determinations do not have substantial consequences blinks reality. The erroneous habitual-

residence determination here has dictated A.M.T.'s country of residence since December 2016, and—if not remedied—may effectively dictate custody rights, too, as it already has done given the Italian courts' *ex parte* termination of Monasky's parental rights and refusal to adjudicate custody. *See infra* 22–23. Those consequences are life-changing.

All relevant considerations therefore support *de novo* review of habitual-residence determinations.

III. A.M.T. Was Not Habitually Resident In Italy Under Any Habitual-Residence Standard.

Neither Taglieri nor the United States attempts to apply their preferred habitual-residence standard to the facts of this case. Taglieri's position is especially remarkable in light of his request that this Court affirm the judgment without a remand. And his silence on the facts speaks volumes. When the facts found by the district court are examined, it is clear that A.M.T. was not habitually resident in Italy under any proffered habitual-residence standard (or standard of review). Because a remand would only prolong this already four-year-old case, at significant risk of continued harm to A.M.T.'s development, the Court should reverse the judgment now and direct the issuance of a re-return order.

A. Under any of the competing habitual-residence standards and standards of review, A.M.T. was not habitually resident in Italy. *See* Pet. Br. 49–55.

1. Taglieri does not meaningfully dispute that the judgment must be reversed under the shared-parental-intent standard. As Monasky explained (at 50–54), the record overwhelmingly shows that Monasky

did not agree that A.M.T. would reside in Italy or otherwise manifest an intent that A.M.T. would reside anywhere other than the United States. Although Taglieri attempts to cast doubt on Monasky's position through an unelaborated-upon citation to his court of appeals briefing, Resp. Br. 54 n.11, he nowhere explains how this Court could properly reach a different conclusion given the district court's unambiguous findings that "Monasky had a 'fixed subjective intent' to take A.M.T. to the United States," Pet. App. 97a, and to leave "as soon as possible," Pet. App. 94a.

2. Nor can Taglieri prevail under the standard applied to infants by his own foreign authorities. Because A.M.T. was "in fact looked after by" Monasky while in Italy, those foreign courts would examine Monasky's "integration in her social and family environment," including the "reasons for [her] move" to Italy, "the languages known to [her]," and "her geographic and family origins." *Mercredi*, *supra*, ¶ 55. Those factors make clear that A.M.T. was not habitually resident in Italy.

Monasky was alone in Italy. Her family lived in the United States, where she had spent her entire life before following Taglieri when he left for Italy in 2013 "for career opportunities," Pet. App. 74a, 79a; JA221–22. Monasky had no "other family or friends in Milan," JA96, and Taglieri "believe[d] [she] was never happy in Italy, and that she planned to leave from the start," JA114. Because Monasky did not speak Italian, she could not communicate directly with Taglieri's family and "struggled to perform certain basic tasks." Pet. App. 75a; *see also* JA87. Even Taglieri did not live with her: Soon after she became pregnant, he moved 165 miles away, JA28, visiting only occasionally, Pet. App. 75a.

Any fragile ties that Monasky could have developed to her family and social environment in Italy were shattered by Taglieri. As he later explained, he would "'smack [Monasky] across the face'" "'because I deserve a beautiful woman, and I do it for her own good.'" JA97. Over time, his slapping got harder and more frequent, Pet. App. 75a; *see also* JA130, and escalated into sexual abuse in which he "'forced [Monasky] to have sex that he knew [she] didn't want to have,'" Pet. App. 104a n.3 (quoting JA152). The district court credited the extensive evidence of Taglieri's abuse. Pet. App. 105a. Taglieri simply whitewashes this record.

The sexual and physical abuse resulted in Monasky's pregnancy and prompted her, in August 2014, to begin "applying for jobs in the United States, inquiring about American health care and child care options, and looking for American divorce lawyers." Pet. App. 75a–76a. As she told her mother, she "want[ed] to go home." JA189–90 (Aug. 6, 2014 e-mail).

Monasky could not go home, however, because she was under doctors' orders not to travel due to a risk of premature labor. Pet. App. 76a; *see also* JA 132–33. Even after giving birth, she could not leave Italy until she was physically able to travel and A.M.T. "b[ore] a valid United States passport," 8 U.S.C. § 1185(b), which required Taglieri's consent and presence for the application, *see* JA30. In the interim, Monasky continued with necessary day-to-day practicalities, *see* Pet. Br. 53–54, but, as the district court found, her "intent" remained "to return to the United States with A.M.T. as soon as possible," Pet. App. 94a.

Monasky's intentions were neither hidden nor inchoate. Both before and after giving birth, she repeatedly told Taglieri she "wanted to divorce and return to the United States with [A.M.T.]." Pet. App. 92a; *see also* Pet. Br. 50 (citing record). Taglieri helped her apply for A.M.T.'s U.S. passport, JA30, and told her, "you can gothe us whenever yoouwant [sic]," JA188 (Mar. 7, 2015 e-mail). Monasky followed through on that intention the day A.M.T.'s passport arrived. Pet. App. 50a, 81a.

In these circumstances, Monasky's own ties to her husband and social environment in Italy plainly were not sufficiently settled and stable for A.M.T. to be habitually resident there under a social-and-family-environment-of-the-caregiver standard. *See* Cox Br. 22–25 (citing analogous foreign authorities).

3. Taglieri's all-relevant-circumstances standard yields the same conclusion. Under that standard, the Court would consider—in addition to the absence of shared parental intent and Monasky's absence of settled ties to Italy—the inherently unsettled and unstable conditions in which "A.M.T. resided [in Italy] from her birth." Resp. Br. 55.

A.M.T. never had a stable home in Italy, much less one with both parents. She initially spent two weeks with Monasky and Monasky's mother in Milan while Monasky recovered from a difficult birth. JA29; Pet. App. 78a. A.M.T. then traveled with Monasky on an undisputedly "temporar[y]" visit to Lugo, JA30, so that Taglieri could help care for A.M.T. and complete the application for her U.S. passport, *see* Pet. App. 80a; JA100–01. During that visit, Monasky lived out of "'a couple of suitcases,'" Pet. App. 79a, while A.M.T.'s makeshift bed was a stroller, JA144. After another serious altercation with Taglieri, Monasky

fled with A.M.T., remaining in a series of safe houses for two weeks until the day A.M.T.'s U.S. passport arrived. Pet. App. 81a.

Far from being "irrelevant," Resp. Br. 55 n.12, the fact that A.M.T. lived in six different places during the first eight weeks of her life confirms that her fleeting presence in Italy was "so unsettled that it could not be said" that she was habitually resident there, *Hollis* v. *O'Driscoll*, 739 F.3d 108, 112 n.5 (2d Cir. 2014).

Taglieri nevertheless contends that A.M.T. was habitually resident in Italy because she "'resided exclusively in an established, albeit inharmonious, living arrangement with . . . her parents in a single country.'" Resp. Br. 55 (citation omitted). But that rigid approach—indistinguishable from the unprecedented "one country" rule adopted by the Sixth Circuit panel and rejected by the en banc Sixth Circuit, Pet. App. 52a—collapses any distinction between "residence" and "habitual residence." Regardless, A.M.T. had no "established" living arrangement, and certainly not with both parents.

Accordingly, under any of the competing standards, A.M.T.'s short-lived, tenuous connections to Italy, induced by necessity, did not make her habitually resident in Italy.

B. The attempts by Taglieri and the United States to thwart this Court's consideration of the merits are unpersuasive.

Despite conceding that the Sixth Circuit applied the wrong habitual-residence standard, Taglieri makes the extraordinary request that the Court affirm the judgment—*without* applying the correct standard. *See* Resp. Br. 54–55. But the two decisions on which he relies did just the opposite. They applied

the correct legal standard to the facts before affirming (or reversing) the judgment. *See Fisher* v. *Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2209 (2016) (reviewing race-conscious admissions program under new legal standard); *Consolo* v. *Fed. Mar. Comm'n*, 383 U.S. 607, 621 (1966) (reviewing agency decision under new legal standard).*

Taglieri's assertion (at 53) that application of the correct habitual-residence standard is not "fairly encompassed" within the questions presented is incorrect. In similar circumstances, this Court has seen no obstacle to providing guidance to lower courts by applying a newly announced standard to the factual record, even though the petition did not include a question expressly addressing application of the law to the facts. *See*, *e.g.*, *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1727–28 (2019) (First Amendment retaliatory arrest); *Alice Corp. Pty. Ltd.* v. *CLS Bank Int'l*, 573 U.S. 208, 224–27 (2014) (patent eligibility of computer-implemented inventions); *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 564–70 (2007) (sufficiency of pleadings).

Tellingly, the United States takes a different tack, asking the Court to vacate and remand. U.S. Br. 28.

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* Taglieri's assertion (at 53–54) that the district court "proper[ly]" applied an all-relevant-circumstances standard flatly contradicts his prior statements that the district court "appl[ied] a 'shared intent' standard." Br. in Opp. 30; *see also* C.A. Dkt. 80 at 15 ("The District Court Applied Shared Parental Intent"). It is also incorrect, *see* U.S. Br. 28, because it ignores that the district court applied a legally erroneous marital-home presumption, *see* Pet. App. 97a. And, contrary to Taglieri's contention (at 53), Monasky did challenge the district court's erroneous standard in her petition. *See* Pet. 16–17 (discussing the district court's "application of a legally erroneous burden-shifting presumption").

As even Taglieri agrees, however, this protracted litigation—which was filed nearly *four and a half years* ago—has gone on long enough and requires no "further factual development." Resp. Br. 52–54. Adding months or even years to this litigation would make a mockery of the "prompt" resolution of petitions that the Hague Convention seeks to ensure and would needlessly extend A.M.T.'s legal limbo. *See id.* at 54–55.

Because "a remand would do nothing more than prolong a suit" that has already lasted years, the Court should decide the merits and put an end to this litigation. *Fisher*, 136 S. Ct. at 2209; *see also*, *e.g.*, *Abbott* v. *Perez*, 138 S. Ct. 2305, 2327 (2018) (reaching the merits to avoid "further prolongation of this already protracted litigation").

* * *

The Court also should remedy the district court's erroneous return order by directing entry of a re-return order. Taglieri's suggestion (at 56 n.13) that a re-return order "could not issue" is directly at odds with this Court's recognition that a "'re-return'" order is "typical appellate relief" where a return petition has been granted erroneously. *Chafin* v. *Chafin*, 568 U.S. 165, 173 (2013). "[T]he law cannot be applied so as automatically to 'reward those'"—like Taglieri—"'who obtain custody'" through an erroneous order in the wrong forum. *Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 53–54 (1989) (citation omitted).

A re-return order would be especially appropriate equitable relief given Taglieri's role in stripping Monasky of her parental rights and the Italian courts' repeated refusal to adjudicate custody rights. After

Monasky fled with A.M.T. from Taglieri's abuse, Taglieri brought suit to terminate Monasky's parental rights in Italy. Pet. App. 81a. Because Taglieri gave the court Monasky's address in Milan (despite knowing she was in Ohio), the Italian court terminated her parental rights in an *ex parte* proceeding—without providing her notice and based on the flawed premise that A.M.T.'s removal was wrongful. *See* Pet. App. 81a–82a; Pl.'s Ex. 61. The December 2018 Italian court order that Taglieri cites did not reinstate Monasky's parental rights but merely gave social services interim authority to arrange limited mother-daughter visits. *See* Resp. Br. 56 n.13.

Since the district court's erroneous return order, no Italian court has conducted a custody adjudication, even though that is the sole purpose of the Convention's return remedy. *See* Pet. Br. 55. Nor after all this time has any Italian court decided whether to reinstate Monasky's parental rights. *See*, *e.g.*, Trib. per i Minorenni di Milano, 19 marzo 2019, n. 535/19 (It.).

Because the Italian courts have not adjudicated custody rights—and are not the appropriate venue for doing so under the Hague Convention—A.M.T. should be returned to the United States for a full and fair custody adjudication.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to order A.M.T.'s return to the United States.

Respectfully submitted.

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