No.

IN THE
Supreme Court of the United States

MICHELLE MONASKY,

Petitioner,

v.

DOMENICO TAGLIERI,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Hague Convention on the Civil Aspects of International Child Abduction requires that any child wrongfully removed from her country of "habitual residence" be returned to that country. A.M.T. was eight weeks old when she traveled with her mother, Michelle Monasky, from a domestic-violence safe house in Italy to her grandparents' home in Ohio. Monasky's husband, from whom she had fled, filed a petition under the Hague Convention seeking A.M.T.'s return to Italy. The district court found that A.M.T. had not acclimated to living in Italy and made no finding that her parents had ever agreed that she would be raised in Italy. The court nevertheless ruled that the existence of a "matrimonial home" presumptively established Italy as A.M.T.'s habitual residence. In a fractured 10-8 opinion, the en banc Sixth Circuit affirmed after reviewing the district court's determination of habitual residence only for clear error and holding that a "subjective agreement" between the parents to raise A.M.T. in Italy was not necessary to establish that A.M.T. was habitually resident in Italy.

The questions presented are:

1. Whether a district court's determination of habitual residence under the Hague Convention should be reviewed *de novo*, as seven circuits have held, under a deferential version of *de novo* review, as the First Circuit has held, or under clear-error review, as the Fourth and Sixth Circuits have held.

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

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michelle Monasky respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The court of appeals' en banc opinion is reported at 907 F.3d 404. Pet. App. 1a–41a. The vacated panel opinion is reported at 876 F.3d 868. Pet. App. 42a–72a. The district court's opinion is available at 2016 WL 10951269. Pet. App. 73a–107a.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 2018. 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, 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 in Appendix E to the petition. Pet. App. 110a–133a.

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. As a result of

the Sixth Circuit's sharply splintered 10-8 en banc decision in this case, this critical inquiry is now the subject of two distinct circuit splits: first, on the applicable standard for reviewing a district court's determination of habitual residence and, second, on the substantive legal standard for establishing the habitual residence of an infant.

The Sixth Circuit's decision deepened an existing circuit split on the standard of review to be applied to a district court's habitual-residence determination. The majority of circuits treat a child's habitual residence as a mixed question of law and fact because "the issue is whether the facts satisfy the statutory standard." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 n.19 (1982); *see also*, *e.g.*, *Guzzo* v. *Cristofano*, 719 F.3d 100, 109 (2d Cir. 2013). These seven circuits review historical facts for clear error but the ultimate determination of habitual residence *de novo*. In contrast, the First Circuit reviews historical facts for clear error but accords "some deference" to the district court's "application of the standard" for determining habitual residence. *Nicolson* v. *Pappalardo*, 605 F.3d 100, 105 (1st Cir. 2010). Here, the Sixth Circuit departed from both of those approaches—"put[ting] [itself] at odds with the standard of review used by [its] sister circuits," Pet. App. 30a–31a (Moore, J., dissenting)—by reviewing both the underlying historical facts and the ultimate determination of habitual residence for clear error, an approach previously applied by only the Fourth Circuit.

The Sixth Circuit then created a second circuit split by holding that, when an infant is too young to acclimate to her surroundings, a "subjective agreement" between the parents about the country where the infant will be raised is not required to establish

the infant's habitual residence. Pet. App. 12a. That conclusion directly conflicts with the holdings of four other circuits that, where the acclimatization standard cannot be used, the parents must actually have agreed at some point on where to raise the infant to establish her habitual residence in that country.

The Court should grant review to provide a definitive answer to both of these questions and to restore the uniformity essential to the proper functioning of the Hague Convention. Indeed, 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 circuits 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 Michelle Monasky, an American citizen, married respondent Domenico Taglieri, an Italian citizen, in Illinois in September 2011. Pet. App. 73a–74a. In February 2013, Taglieri moved back to Italy after being unable to find continued employment in the United States; the parties lived apart for nearly six months until Monasky joined him in July 2013. Pet. App. 74a.

Soon thereafter, Taglieri began a pattern of repeated physical and sexual assault against Monasky. Pet. App. 75a, 104a–105a. During one assault, he

climbed on top of Monasky while she was laying on the bed and told her: "'spread your legs, or I will spread them for you.'" Pet. App. 104a n.3. Despite Monasky's express unwillingness to have a child with him, Taglieri "'forced [her] to have sex that he knew [she] didn't want to have,'" Pet. App. 103a & n.3 (quoting Tr. 636), and his sexual assaults resulted in her becoming pregnant in the spring of 2014, Pet. App. 75a.

Monasky's pregnancy was a difficult one. Due to medical complications—which nearly resulted in a miscarriage—Monasky's doctors ordered her not to travel "for the entire pregnancy." Tr. 507–09; *see also* Pet. App. 45a, 76a. The difficulties facing Monasky were compounded by Taglieri's decision to move more than 165 miles away, returning only on certain weekends and leaving the pregnant Monasky—who spoke no Italian—alone. Pet. App. 75a.

When he was present, Taglieri's abuse intensified; he began "slapping [Monasky] more frequently" and "harder." Pet. App. 75a. Around August 2014, Monasky began to apply for jobs in the United States and to contact American and Italian divorce lawyers and international moving companies. Pet. App. 76a–77a. The parties had previously discussed divorce, and during this time, Monasky repeatedly informed Taglieri that she intended to return to the United States with the baby after she was born. *See* Tr. 356, 381, 388–89, 392.

In early February 2015, Taglieri again forcefully struck Monasky, who was, by then, nine months pregnant. Def. Ex. X. Monasky told Taglieri once again that she wanted a divorce and that she would take the baby back to the United States once she was born. Pet. App. 4a, 77a. This time, Taglieri agreed, saying

"f[—] you go back to the States with your mom on [February] 27th." Def. Ex. X; *see also* Tr. 381, 388–89, 392; Def. Ex. P-3.

A few days later, A.M.T was born via emergency cesarean section, after Taglieri refused to drive his wife to the hospital while she was in labor and forced her to take a taxi. Pet. App. 78a. After arriving at the hospital, Taglieri screamed at his newborn baby and threatened to "shove [formula] up her ass." Tr. 339, 553; *see also* Jt. Ex. 19 at 5.

After the birth, Monasky's physical limitations were so severe that she needed help performing basic tasks from bathing herself to changing A.M.T.'s diapers. Tr. 555–56. Monasky's mother remained in Italy for two weeks to assist her daughter. Pet. App. 78a. Taglieri, meanwhile, returned to his home more than 165 miles away. Pet. App. 78a. After Monasky's mother returned to the United States, Monasky agreed to join Taglieri temporarily so that he could help with the newborn and sign the papers necessary to obtain A.M.T.'s U.S. passport. Pet. App. 79a–80a. Throughout this time, Monasky repeated to Taglieri that she was divorcing him and returning to the United States with A.M.T. Pet. App. 78a–79a. The parties jointly applied for A.M.T.'s passport in early March, Pet. App. 80a, several days after an e-mail exchange in which Taglieri told Monasky that "you can gothe us whenever yoouwant . . . [sic]," Def. Ex. J.

Three weeks later, Monasky and Taglieri got into an argument after Taglieri refused to allow Monasky to change A.M.T.'s urine-soiled clothing because of the price of laundry. Pet. App. 81a. While screaming, Taglieri raised his hand as if to strike Monasky before going into the kitchen, where Monasky heard what sounded like Taglieri "picking up [a] knife and putting

it . . . back." Tr. 593; *see also* Pet. App. 81a. After he left for work, Monasky took A.M.T. to the police, who placed them in a social-services safe house for domestic-violence victims. Pet. App. 81a. They remained in protective care for two weeks until A.M.T.'s U.S. passport arrived—at which point they immediately left for the United States. Pet. App. 50a, 81a. On the date of their departure, A.M.T. was eight weeks old. *See* Pet. App. 82a.

3. Taglieri filed a Hague Convention petition in the U.S. District Court for the Northern District of Ohio seeking an order returning A.M.T. to Italy. *See* Pet. App. 82a. After a bench trial, the district court granted Taglieri's petition.

At the time of the trial, the Sixth Circuit had rejected consideration of parental intent in determining a child's habitual residence under the Hague Convention—focusing instead on the child's "acclimatization" to a particular country—but had left open the question whether that same standard would apply to infants, who are generally too young to acclimate to their surroundings. *Robert* v. *Tesson*, 507 F.3d 981, 992–93, 992 n.4 (6th Cir. 2007). Expressly noting the absence of binding precedent, the district court created its own legal standard and presumed that an "infant will normally be a habitual resident of the country where the [parents'] matrimonial home exists." Pet. App. 90a. No other court has ever adopted this presumption.

The court then shifted the burden to Monasky, examining whether she had proven that the marriage had "irrevocably broke[n] down" before A.M.T.'s birth. Pet. App. 92a. Although the court repeatedly stated that Monasky had a "fixed subjective intent" to leave Italy with A.M.T. "as soon as possible" and made no

finding that A.M.T.'s parents had ever agreed to raise her in Italy, it concluded that Monasky "lacked definitive plans as to how and when" to leave Italy and therefore had not "disestablish[ed]" A.M.T.'s presumptive habitual residence in the country. Pet. App. 93a, 96a–97a. Based on that reasoning, the court issued an order directing A.M.T.'s return to Italy. Pet. App. 99a, 108a.

Monasky appealed and sought a stay of the return order, which was denied first by the Sixth Circuit, Pet. App. 5a, and then by Justice Kagan, *see Monasky* v. *Taglieri*, No. 16A557 (U.S. Dec. 9, 2016). A.M.T. was therefore returned to Italy, where an Italian court in an ex parte proceeding had terminated Monasky's parental rights, Pet. App. 81a–82a, and made Taglieri "sole custodian with full parental rights" over A.M.T., Pl. Ex. 61 at 7.

4. On appeal, a divided panel of the Sixth Circuit affirmed after adopting an entirely different legal standard for determining habitual residence. Rejecting the district court's "matrimonial home" approach, the panel majority adopted its own novel standard, ruling that "where the child has resided exclusively in a single country, that country is the child's habitual residence." Pet. App. 53a. Because A.M.T. "spent her entire life in Italy" before her removal to the United States, the majority held that "it is appropriate to hold that her habitual residence was Italy." Pet. App. 60a.

Judge Moore dissented, emphasizing that the majority's new single-country rule conflicted with the approach of ten other circuits that determine habitual residence by looking at either (i) a child's acclimatization or (ii) the existence of a shared parental intent. Pet. App. 64a (Moore, J., dissenting).

5. The Sixth Circuit granted Monasky's petition for rehearing en banc and then affirmed again in a fractured 10-8 decision.

Applying yet another legal standard in this case, the en banc majority held that "the parents' shared intent" determines whether an infant who is too young to acclimate to her surroundings has attained a habitual residence in the country from which she was removed. Pet. App. 9a. The majority went on to hold, however, that "'shared parental intent'" does not require the parents to have a "'meeting of the minds' about their child's future home." Pet. App. 12a. According to the majority, "[a]n absence of a subjective agreement between the parents does not by itself end the inquiry" because a subjective agreement, while "sufficient," is "not a necessary . . . basis for locating an infant's habitual residence." Pet. App. 12a.

Even though the Sixth Circuit had not previously adopted a "shared parental intent" standard to determine the habitual residence of infants—and even though a remand is normally "required" when the Sixth Circuit adopts a different legal standard than that applied by the district court, Pet. App. 34a (Moore, J., dissenting) (quoting *Siding & Insulation Co.* v. *Alco Vending, Inc.*, 822 F.3d 886, 901 (6th Cir. 2016))—the en banc majority declined to remand the case for the district court to apply its new standard to the facts of this case, Pet. App. 12a.

The en banc majority also refused to undertake its own determination of A.M.T.'s habitual residence under that new standard. Pet. App. 11a. Rejecting Monasky's argument that determinations of habitual residence are subject to *de novo* review, the majority stated that Sixth Circuit precedent "treat[s] the habitual residence of a child as a question of fact." Pet. App.

9a. It therefore applied clear-error review, concluding that "[n]othing in [the district court's] habitual-residence finding leaves a definite and firm conviction that a mistake was made." Pet. App. 9a (internal quotation marks omitted). Because "no part of [the district court's] habitual-residence finding sinks to clear error," the majority upheld the return order. Pet. App. 3a.

Five of the ten judges who joined the majority opinion also joined a separate concurrence defending the panel majority's single-country approach to habitual residence. Pet. App. 15a (Boggs, J., concurring). The concurring judges made clear that they "concur[red] in [the en banc majority's] conclusion that the habitual residency inquiry is a question of fact and that the district court made no clear error in its factual findings in this case." Pet. App. 14a–15a.

All eight dissenting judges joined a principal dissent concluding that, while the "shared parental intent" standard is the correct standard where an infant is too young to acclimate to her surroundings, shared parental intent cannot properly be determined without analysis of "external indicia of the last shared agreement of the parties." Pet. App. 27a (Moore, J., dissenting). Parting ways with the majority, the principal dissent explained that, where an infant's habitual residence is "unclear" from external indicia, the petitioner "has not satisfied [his] burden." Pet. App. 29a.

The dissenting judges further disagreed with the en banc majority's decision to affirm the return order under its newly adopted legal standard without remanding for the district court to apply that standard in the first instance. Pet. App. 34a (Moore, J., dissent-

ing); *see also* Pet. App. 34a–35a (Gibbons, J., dissenting); Pet. App. 39a (Stranch, J., dissenting). And they expressly disagreed with the en banc majority's application of clear-error review, rather than *de novo* review, to the district court's habitual-residence determination. As the principal dissent explained, "[t]he district court's ultimate determination of habitual residence—in other words, its application of the legal standard to its findings of fact—is reviewed de novo." Pet. App. 30a (Moore, J., dissenting). The majority's contrary conclusion, the dissent emphasized, "puts [the Sixth Circuit] at odds with the standard of review used by [its] sister circuits in these cases." Pet. App. 30a–31a (citing cases).

REASONS FOR GRANTING THE PETITION

In the past decade, this Court has granted review three 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). But the Court has never addressed the meaning of "habitual residence" and the substantive standard for its determination, or the standard of review to be applied in reviewing such a determination. This case provides the Court with a valuable opportunity to address both of those important questions.

Even before the Sixth Circuit's en banc decision in this case, the courts of appeals were deeply divided on the standard for reviewing habitual-residence determinations. The Sixth Circuit's opinion exacerbated that split: there are now seven circuits that apply *de novo* review, one circuit that applies a deferential form of *de novo* review, and two circuits (including the Sixth Circuit) that apply clear-error review. *See* Pet.

App. 31a (Moore, J., dissenting). The Sixth Circuit then created a second circuit split by holding that, where a child is too young to acclimate to her surroundings, the parents need not have reached a "subjective agreement" about where to raise the child in order to establish that child's habitual residence, Pet. App. 12a—a conclusion that conflicts with the holdings of all four other circuits that have addressed the issue.

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 she 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 Hague Convention setting and to reject the Sixth Circuit's doubly flawed approach to the habitual-resi-

dence inquiry, which contravenes this Court's precedent and conflicts with the language and animating objectives of the Convention.

I. CERTIORARI IS WARRANTED TO CLARIFY THE STANDARD OF REVIEW APPLICABLE TO HABITUAL-RESIDENCE DETERMINATIONS.

As the principal dissent emphasized, the Sixth Circuit's decision to apply clear-error review to the district court's habitual-residence determination puts it "at odds with the standard of review used by [its] sister circuits," Pet. App. 30a–31a (Moore, J., dissenting), the majority of which have correctly applied this Court's precedent by undertaking *de novo* appellate review of habitual-residence determinations.

A. The Sixth Circuit's Decision Deepens A Three-Way Circuit Split.

The ten circuits that have addressed the issue apply three different standards of review to a district court's habitual-residence determination.

1. Seven circuits apply *de novo* review to a district court's ultimate determination of habitual residence, while reviewing the district court's underlying findings of historical fact for clear error. The Second Circuit, for example, has explained that "[t]he habitual residence inquiry is heavily fact dependent, but whether the relevant facts satisfy the legal standard is a question of law we review *de novo*." *Guzzo* v. *Cristofano*, 719 F.3d 100, 109 (2d Cir. 2013). The Third Circuit has likewise held that the "determination of habitual residence is not purely factual, but requires the application of a legal standard, which defines the concept of habitual residence, to historical and narrative facts." *Feder* v. *Evans-Feder*, 63 F.3d 217, 222 n.9

(3d Cir. 1995). Accordingly, the Third Circuit "employ[s] a mixed standard of review, accepting the district court's historical or narrative facts unless they are clearly erroneous, but exercising plenary review of the court's choice of and interpretation of legal precepts and its application of those precepts to the facts." *Id.* The Fifth Circuit agrees, explaining that "[a] district court's 'habitual residence' determination . . . presents a mixed question of law and fact subject to *de novo* review." *Larbie* v. *Larbie*, 690 F.3d 295, 306 (5th Cir. 2012).

The Seventh, Eighth, Ninth, and Eleventh Circuits also apply the same approach: reviewing the underlying historical facts for clear error, but the ultimate determination of habitual residence *de novo*. *See Koch* v. *Koch*, 450 F.3d 703, 710 (7th Cir. 2006) ("The ultimate determination of habitual residence is a mixed question of law and fact to which we will apply *de novo* review."); *Silverman* v. *Silverman*, 338 F.3d 886, 896 (8th Cir. 2003) (en banc) ("[A] district court's determination of habitual residence . . . is necessarily a determination subject to de novo appellate review."); *Mozes*, 239 F.3d at 1073 (Because habitual residence "requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, . . . the question should be classified as one of law and reviewed de novo."); *Ruiz* v. *Tenorio*, 392 F.3d 1247, 1252 (11th Cir. 2004) ("[W]e accept the district court's finding of historical facts unless clearly erroneous, but with regard to the ultimate issue of habitual residency, the appellate court will review *de novo*.").

2. In contrast, the Sixth Circuit held in this case—over the dissent of eight judges—that it would "treat the habitual residence of a child as a question

of fact." Pet. App. 9a. Emphasizing "the comparative advantages" of trial and appellate courts and that "clear-error review is highly deferential," the en banc majority stated that it would affirm the district court's habitual-residence determination "unless the fact findings 'strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.'" Pet. App. 9a (quoting *United States* v. *Perry*, 908 F.2d 56, 58 (6th Cir. 1990)). The majority then deferred not only to the district court's findings of historical fact but also to its determination that those facts were legally sufficient to establish A.M.T.'s habitual residence in Italy. *See* Pet. App. 11a. Recounting the record evidence, the majority concluded that the district court was "[f]aced with [a] two-sided record"—which was sufficient, in the majority's view, to uphold the district court's return order. Pet. App. 11a.

While the Sixth Circuit is decidedly in the minority in its application of clear-error review, it is not alone in applying that deferential standard. The Fourth Circuit has likewise stated that "the crux of the issue" on habitual residence is "whether the district court's determination . . . is clearly erroneous." *Maxwell* v. *Maxwell*, 588 F.3d 245, 251 (4th Cir. 2009).

3. The First Circuit has adopted a hybrid approach. Although it applies clear-error review to historical facts underlying the habitual-residence determination and *de novo* review to the district court's resolution of that question, the First Circuit affords a measure of deference to the district court's ultimate determination. According to the First Circuit, "[i]t is not easy" in Hague Convention litigation "to attach an abstract label to a complex of discrete facts, some of which push each way." *Nicolson* v. *Pappalardo*, 605 F.3d 100, 105 (1st Cir. 2010). The court therefore will

reverse a "district court's raw fact findings . . . only for clear error" and gives "some deference" to the district court's "application of the standard" in making a determination of habitual residence. *Id.*

4. The circuits' deep disagreement about the standard of review to apply to habitual-residence determinations has profound practical consequences for Hague Convention litigants and their children. If this case had been decided using the *de novo* standard of review applied by seven other circuits, it would have come out differently because the evidence demonstrates that Monasky and Taglieri never shared an intent to raise A.M.T. in Italy.

The district court made no express finding that Monasky ever intended to raise A.M.T. in Italy. To the contrary, the district court found that she had an "intent to return to the United States with A.M.T. *as soon as possible*." Pet. App. 94a (emphasis added); *see also* Pet. App. 97a (noting "[t]hat Monasky had a 'fixed subjective intent' to take A.M.T. to the United States"). Before A.M.T.'s birth, for example, Monasky took numerous concrete steps that evinced that intent, including "applying for jobs in the United States, inquiring about American health care and child care options, and looking for American divorce lawyers." Pet. App. 76a. And "shortly after A.M.T.'s birth, Monasky reiterated her desire to . . . return to the United States with [A.M.T.]," and "communicated [that] desire . . . to members of her immediate family." Pet. App. 79a, 92a–94a. In fact, although the district court assumed that the "shared intent of the [parents] is relevant," its ultimate habitual-residence determination downplayed Monasky's intent to raise A.M.T. in the United States through application of a legally

erroneous burden-shifting presumption—not recognized by any other court—that a "marital home" established before a child's birth *is* the child's habitual residence after birth. Pet. App. 97a.

A court of appeals applying *de novo* review to this record thus could not have concluded that Monasky and Taglieri shared an intent to raise A.M.T. in Italy. Because this appeal was decided in the Sixth Circuit, however, the court of appeals refused to undertake that *de novo* examination of the record. Instead, it upheld the district court's return order because "[n]othing in [the district court's] habitual residence finding . . . strikes one as wrong with 'the force of a five-week-old, unrefrigerated' aquatic animal." Pet. App. 9a.

It is fundamentally unfair and incompatible with the Convention's uniformity-enhancing objectives for a return order separating a parent from her child to be upheld on appeal based on the happenstance of the circuit in which the other parent filed suit.

B. The Sixth Circuit's Decision Conflicts With This Court's Precedent.

The Sixth Circuit's decision to apply clear-error review to the habitual-residence determination also conflicts with this Court's precedent.

The Court has defined mixed questions of law and fact as those "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 n.19 (1982). The Court has subsequently made clear that mixed questions of law and fact are subject

to *de novo* appellate review where they require application of historical facts to a statutory or constitutional standard.

In *Ornelas* v. *United States*, 517 U.S. 690 (1996), for example, the Court held that "independent appellate review of . . . ultimate determinations of reasonable suspicion and probable cause" is required because "the decision whether . . . historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or probable cause" is a "mixed question of law and fact." *Id.* at 696–97. "A policy of sweeping deference" to district courts, the Court reasoned, "would permit, in the absence of any significant difference in the facts, the Fourth Amendment's incidence to turn on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." *Id.* at 697 (internal quotation marks and alterations omitted). "Such varied results," the Court concluded, "would be inconsistent with the idea of a unitary system of law." *Id.*; *see also McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 355–56 (1991) (holding that although "seaman status under the Jones Act is a question of fact for the jury," interpretation of the statutory term "is a question of law," and emphasizing that "the court must not abdicate its duty to determine if there is a reasonable basis to support the jury's conclusion").

Habitual residence under the Hague Convention is a paradigmatic example of a mixed question of law and fact: it turns on whether "the historical facts" regarding the child's residence history and acclimatization to her surroundings—as well as, in cases where the child is too young to have acclimated, the parents'

intent regarding where the child will be raised—"satisfy the statutory standard" for "habitual residence" under the Hague Convention and its enabling statute. *Pullman-Standard*, 456 U.S. at 289 n.19; *see also*, *e.g.*, *Silverman*, 338 F.3d at 896 ("a district court's determination of habitual residence is not devoid of legal principles" or "a question of pure fact, to be decided without reference to statutory language and established legal precedent").

The considerations that led this Court to conclude that *de novo* appellate review is essential in the probable-cause setting apply with equal force in the habitual-residence context. As those courts that have applied *de novo* review have recognized—and Congress confirmed by its emphasis on "uniformity" in the Hague Convention's implementing legislation, 22 U. S. C. § 9001(b)(3)(B)—there is a compelling need for "consistency and predictability" when assessing a child's habitual residence that strongly militates in favor of *de novo* review. *Koch*, 450 F.3d at 712–13; *see also Silverman*, 338 F.3d at 896 (habitual residence "must contain an objective standard" and thus "is necessarily a determination subject to *de novo* appellate review" because "it is imperative that parents be able to assess the status of the law on habitual residence"). "Without intelligibility and consistency in [courts'] application" of the habitual-residence standard, "parents are deprived of crucial information they need to make decisions, and children are more likely to suffer the harms the Convention seeks to prevent." *Mozes*, 239 F.3d at 1072. That "intelligibility and consistency" can be attained only through the application of *de novo* appellate review. *Id.*

The Sixth Circuit's application of deferential clear-error review to the district court's habitual-residence determination contravenes this Court's precedent and undermines the Hague Convention's purpose of establishing a uniform, consistent, and predictable legal framework for determining a child's habitual residence. Indeed, the Sixth Circuit stated that a district court would have been free to rule either way on the habitual-residence issue based on the factual record in this case. Pet. App. 11a. Permitting two courts to reach opposite outcomes based on the same facts is flatly at odds with Congress's intention to foster "uniform[ity]" when enacting the Hague Convention's implementing legislation. 22 U.S.C. § 9001(b)(3)(B).

This Court should grant review to clarify that courts of appeals must exercise *de novo* review over district courts' habitual-residence determinations, and must reach their own independent conclusions as to whether the facts of the case meet the correct legal standard. The en banc court's decision here erroneously subsumes a primarily legal determination under the mantle of a purely factual assessment.

II. CERTIORARI IS WARRANTED TO RESOLVE WHETHER AN ACTUAL AGREEMENT BETWEEN THE PARENTS IS NECESSARY TO ESTABLISH AN INFANT'S HABITUAL RESIDENCE.

In addition to deepening the circuits' disagreement regarding the standard of review applicable to habitual-residence determinations, the Sixth Circuit also created another circuit split when it held that a subjective agreement between the parents is not necessary to establish the habitual residence of an infant who is too young to acclimate to her surroundings. The Sixth Circuit's outlier approach is incompatible

with the plain language and purposes of the Hague Convention.

A. The Sixth Circuit's Decision Creates A Circuit Split On The Necessity Of A Subjective Agreement.

1. Prior to the decision below, four circuits—the Second, Third, Fifth, and Ninth—had squarely addressed the question of how to determine habitual residence for infants too young to acclimate to their surroundings. Each concluded that habitual residence is established only if the parents shared a subjective intent—that is, if they reached a meeting of the minds—to raise the child in that country.

The Second Circuit, for example, held in *Gitter* v. *Gitter*, 396 F.3d 124 (2d Cir. 2005), that, absent evidence that a child had acclimated to her surroundings, "a child's habitual residence is consistent with the intentions of those entitled to fix the child's residence at the time those intentions were mutually shared." *Id.* at 133. Applying that standard, the court concluded that because the parents "only mutually agreed to move to Israel on a conditional basis," their child could only have attained habitual residence in Israel through acclimatization. *Id.* at 135 (internal quotation marks omitted).

Similarly, the Third Circuit has explained that "'the conduct and the overtly stated intentions and agreement of the parents . . . are bound to be important factors'" in assessing a child's habitual residence. *Feder*, 63 F.3d at 223 (quoting *In re Bates*, [1989] 2 WLUK 293 (Fam.)). In accordance with that standard, the court held in a subsequent case that when the mother of an eight-week-old infant agreed

to give birth in Belgium but to "live there only temporarily," the infant "did not become a habitual resident" of Belgium before her mother took her to the United States. *Delvoye* v. *Lee*, 329 F.3d 330, 333–34 (3d Cir. 2003).

The Fifth Circuit likewise held in *Berezowsky* v. *Ojeda*, 765 F.3d 456 (5th Cir. 2014), that, to establish a habitual residence, "[a] shared parental intent requires that the parents actually *share* or jointly develop the intention." *Id.* at 468. "In other words," the court continued, "the parents must reach some sort of meeting of the minds regarding their child's habitual residence, so that they are making the decision together." *Id.* The court concluded that the petitioner had not met her burden of establishing that the parents "reach[ed] an agreement or meeting of the minds regarding [their child's] future" and that the petitioner therefore was not entitled to an order returning the child to Mexico. *Id.* at 469.

The Ninth Circuit follows the same approach. In *Murphy* v. *Sloan*, 764 F.3d 1144 (9th Cir. 2014), it declined to find a child habitually resident in Ireland because "there was never any discussion, *let alone agreement*, that the stay abroad would be indefinite." *Id.* at 1152 (emphasis added).

2. The Sixth Circuit took an entirely different approach to ascertaining shared parental intent in this case. According to the en banc majority, a "'meeting of the minds'" between the parents is "not a necessary . . . basis for locating an infant's habitual residence." Pet. App. 12a. "An absence of a subjective agreement between the parents," the court continued, "does not by itself end the inquiry." Pet. App. 12a. Under that aberrant approach, the en banc majority upheld the return order—even though the district court made no

finding that Monasky and Taglieri had ever agreed to raise A.M.T. in Italy. Pet. App. 11a. To the contrary, the district court expressly found that Monasky had formed a "fixed subjective intent" to leave Italy with A.M.T. and to do so "as soon as possible" after her birth. Pet. App. 94a, 97a.

Accordingly, if this case had been decided in any of the four other circuits to address the issue, the absence of any actual agreement between A.M.T.'s parents—as well as the undisputed fact that the eight-week-old had not acclimated to her surroundings in Italy—would have led the court to conclude that A.M.T. was not habitually resident in Italy and that a return order was not appropriate. But because the case was decided in the Sixth Circuit through a fluke of geography, 18-month-old A.M.T. was ordered to be removed from her home with her mother and sent to a country to which she had formed no connection.

B. The Sixth Circuit's Decision Conflicts With The Language And Purpose Of The Hague Convention.

The Sixth Circuit's conclusion that an unacclimated infant may be habitually resident in a country in the absence of her parents' mutual agreement to raise her there conflicts with the Hague Convention's language and purpose.

Although other treaties or laws may apply more broadly, the Convention was adopted to resolve jurisdiction over international custody disputes in limited circumstances. Under the terms of the Convention, a return remedy is available only where a child is wrongfully removed from the country in which she was "habitually resident immediately before the removal." Convention art. 3.

Courts have repeatedly held that the ordinary meaning of the words "habitual residence" requires something more than a child's mere physical presence in a country. To have a *habitual* residence, a child must be present in a country with "a degree of settled purpose" or "a sufficient degree of continuity to be properly described as settled." *Feder*, 63 F.3d at 223 (internal quotation marks omitted); *see also Silverman*, 338 F.3d at 898 ("Federal courts are agreed that 'habitual residence' must encompass some form of 'settled purpose.'"). In the absence of acclimatization or a mutual agreement between the parents, an infant's mere physical presence in a country does not have the "settled purpose" or "continuity" necessary to make it a *habitual* residence. *See*, *e.g.*, *Feder*, 63 F.3d at 223. Otherwise, an infant's habitual residence would simply be where she was born and initially resides, which would impermissibly render the term "habitual" superfluous. *Cf. Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 299 n.1 (2006) ("it is generally presumed that statutory language is not superfluous"). Thus, under the plain language of the Convention, the eight weeks that A.M.T. spent in Italy could not have given rise to her "habitual residence" in a country where she had developed no ties of her own and where her parents had never agreed to raise her.

Moreover, by rejecting the requirement of actual parental agreement in infant cases, the Sixth Circuit's decision gave controlling weight to Taglieri's unilateral, eleventh-hour decision that A.M.T. should stay in Italy—the exact opposite of the Convention's goal to prevent forum selection for custody disputes. *See 1980 Conference de La Haye de droit international prive, Enlévement d'enfants*, Elisa Pérez-Vera, *Explanatory Report* ("Explanatory Report"), *in* 3 Actes et

Documents de la Quatorzième Session 426, 429 (1982) ("the problem with which the Convention deals . . . derives . . . from the possibility of individuals establishing legal and jurisdictional links which are more or less artificial").[1]

Especially in the context of domestic violence, a legal standard that does not require actual agreement between the parents opens the door to manipulation and forum-shopping by abusive parents and spouses. That is precisely what transpired in this case. Confronted with both an abusive spouse who forced her pregnancy and serious medical complications during that pregnancy, Monasky had no choice but to give birth in Italy. But the Convention does not turn on random circumstances of birthplace or the temporary home of a parent: it turns on the *habitual residence of a child*. The circumstances of A.M.T.'s eight weeks in Italy—while her mother recovered from a difficult birth and waited in a domestic-violence safe house for A.M.T.'s U.S. passport so that the two could escape Taglieri's continued abuse—do not constitute the kind of settled environment the Convention was intended to recognize.

* * *

Absent this Court's intervention, there will be one standard for determining the habitual residence of

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[1] The Explanatory Report is the "official history" of the Convention and "a source of background on the meaning of the provisions of the Convention." U.S. Dep't of State, *Hague International Child Abduction Convention; Text and Legal Analysis*, 51 Fed. Reg. 10,494, 10,503, 10,506 (Mar. 26, 1986). Nearly every federal court of appeals has treated this report as "an authoritative source for interpreting the Convention's provisions." *Robert* v. *Tesson*, 507 F.3d 981, 988 n.3 (6th Cir. 2007) (citing cases).

unacclimated infants in the Sixth Circuit and a different standard in four other circuits, while the standard in the remaining circuits will be anyone's guess. That is not the uniformity required by the Convention and Congress. Indeed, that disparity serves no one: not parents seeking legal certainty, not children seeking stability, and not district courts seeking clear appellate guidance. This Court should grant review to make clear that, no matter the jurisdiction in which a Hague Convention case is tried, an infant's habitual residence cannot be established in a particular country unless the parents actually reach an agreement that she be raised there.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO ADDRESS THESE TWO IMPORTANT QUESTIONS.

The Court should seize this valuable opportunity to resolve these two separate circuit splits regarding the Hague Convention's habitual-residence requirement and to establish the clarity and uniformity that are essential to the effective operation of the Convention.

The United States receives hundreds of applications under the Hague Convention every year. *See* Nigel Lowe & Victoria Stephens, *A Statistical Analysis of Applications Made in 2015 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, pt. III, at 143 (July 2018) (the United States received 254, 345, 329, and 379 Convention petitions in 1999, 2003, 2008, and 2015, respectively). In fact, the United States has "received more applications than any other [country]" every year the Hague Conference has conducted a survey. *Id.* at 142. In each case arising out of those applications, the habitual residence of the child is a critical—

and "often outcome-determinative"—inquiry. *Mozes*, 239 F.3d at 1072.

Courts and litigants alike need certainty about the procedural and substantive standards that will govern the habitual-residence determination. As things stand now, however, the standard of review that will be applied to a district court's habitual-residence determination—and the legal standard that will be utilized in determining whether an unacclimated infant possesses a habitual residence—will turn on the fortuity of venue. As a result, a child who would have been permitted to remain in the United States in some jurisdictions may be the subject of a return order in other jurisdictions. Such arbitrary, inconsistent, and inequitable outcomes are anathema to the "uniform[ity]" and predictability that Congress sought to achieve when it enacted the Hague Convention's enabling legislation. 22 U.S.C. § 9001(b)(3)(B).

This case—thoroughly litigated with a complete record, multiple reasoned opinions by the lower courts, and no vehicle problems—presents an excellent opportunity for the Court to decide both questions presented and, in so doing, to provide essential guidance to the lower courts so that parents and children involved in the trying ordeal of an international child custody dispute receive fair, predictable, and even-handed treatment from U.S. courts.

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 toddler from the only parent she had ever known, and to return her to an abusive

father in a country to which she 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 A.M.T.'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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January 15, 2019