No. 18-935

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

REPLY BRIEF FOR PETITIONER

The en banc Sixth Circuit's sharply divided 10-8 decision squarely implicates two distinct circuit splits regarding a key issue in Hague Convention cases. Respondent Domenico Taglieri concedes the existence of a split on the first question presented, and he avoids a similar concession as to the second question presented only by reformulating that question into an issue starkly different from the one actually posed by the petition. Ultimately, nothing in the brief in opposition alters the fact that, in the absence of this Court's immediate review, both of these circuit splits will continue to fester and deepen.

The decision below exacerbated a 7-2-1 circuit split on the standard for reviewing habitual-residence determinations. Pet. 13–17. Conceding the existence of this split, Taglieri argues (at 16) that it does not yet warrant review because "[t]he lower courts must reexamine their conclusions" in light of *U.S. Bank National Ass'n ex rel. CWCapital Asset Management LLC* v. *Village of Lakeridge, LLC*, 138 S. Ct. 960 (2018). But *U.S. Bank* merely applied decades-old precedent to ascertain the standard for reviewing a different mixed question of law and fact; it did not announce any new governing principles. *See id.* at 966–67. That is why, seven months after that decision, none of the four en banc opinions in this case even cited *U.S. Bank*. Because lower courts already have been applying the context-specific analysis mandated by this Court's long-standing precedent and reaffirmed in *U.S. Bank*—and have disagreed whether that analysis requires *de novo* review of habitual-residence determinations—there is no reason to defer review of this direct and acknowledged circuit split.

The decision below also created a 4-1 circuit split on whether a "subjective agreement" is "a necessary . . . basis" to establish shared parental intent and hence the habitual residence of an unacclimated infant. Pet. App. 12a; *see* Pet. 21–22. Misconstruing the phrase "subjective agreement," Taglieri contends that there is no circuit split on whether an *express* agreement is required to establish shared parental intent. But that is not the question here: The circuit split presented in the petition concerns whether parental intent can truly be "shared" when the parents do not *agree* where to raise the child. The brief in opposition neither diminishes that circuit split nor makes any attempt to reconcile the decision below with the Hague Convention's language and purpose.

This Court should grant review of both questions to restore the "uniform[ity]" and predictability essential to operation of the Hague Convention. 22 U.S.C. § 9001(b)(3)(B). Indeed, this Court has previously granted certiorari three times on Hague Convention issues that arise considerably less often than the central issue of habitual residence. The frequently recurring questions presented need an immediate and definitive answer from this Court.

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED ON BOTH QUESTIONS PRESENTED.

This Court's review is necessary to resolve two intractable circuit splits.

A. The 7-2-1 Circuit Split On The Standard For Reviewing Habitual-Residence Determinations Warrants Review Now.

As Judge Moore emphasized in her dissent, the en banc Sixth Circuit "put[ ] [itself] at odds with the standard of review used by [its] sister circuits." Pet.

App. 30a–31a. Seven circuits review a district court's habitual-residence determination *de novo*, two circuits (including the Sixth Circuit) apply clear-error review, and one circuit applies a deferential form of *de novo* review. *See* Pet. 13–16. Taglieri does not dispute the authenticity of this circuit split, or that the Sixth Circuit's application of clear-error review in this case was outcome-determinative. *See id.* at 16–17. He instead contends that this split does not yet warrant review because "[t]he lower courts must reexamine their conclusions based on the guidance provided just last year in *U.S. Bank*." Opp. 16. That argument cannot withstand scrutiny.

1. Taglieri's position rests on the mistaken view that *U.S. Bank* changed the law governing the standard for reviewing mixed questions of law and fact. In reality, as the United States explained in advocating the outcome reached by the Court, that case simply required application of "well-established principles" of law to a specific mixed question that the Court had not previously considered. U.S. *Amicus* Br. 15, *U.S. Bank*, 138 S. Ct. 960 (2018) (No. 15-1509). Far from announcing any new governing framework, the Court summarized the relevant legal principles established by its existing precedent and straightforwardly applied them to determine the standard for reviewing a bankruptcy court's determination of "whether the facts found showed an arm's-length transaction" between the parties. *U.S. Bank*, 138 S. Ct. at 967–68. Because that particular mixed question bears little resemblance to a habitual-residence determination, *U.S. Bank* does not alter the analysis here.

Taglieri conspicuously fails to mention that every proposition he draws from *U.S. Bank* was expressly drawn, in turn, from decades-old precedent. The

Court's central inquiry—"which kind of court (bankruptcy or appellate) is better suited to resolve" the mixed question?—came from a 1985 decision. *U.S. Bank*, 138 S. Ct. at 966–67 (citing *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985)). The Court relied on a 1991 decision in explaining that *de novo* review is "typically" required "when applying the law involves developing auxiliary legal principles of use in other cases." *Id.* at 967 (citing *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 231–33 (1991)). And the Court quoted a 1988 decision to illustrate that deference is "usually" required when the mixed question involves "'narrow facts that utterly resist generalization.'" *Id.* (quoting *Pierce* v. *Underwood*, 487 U.S. 552, 561–62 (1988)).

Lower-court opinions decided after *U.S. Bank* confirm that it was hardly the jurisprudential watershed that Taglieri suggests. The decision below was decided months after *U.S. Bank*, but, as Taglieri concedes, the Sixth Circuit did not mention what he labels "the *U.S. Bank* factors in holding that habitual residence determinations are subject" to clear-error review. Opp. 22. Three other circuits have reviewed habitual-residence determinations after *U.S. Bank*, and each court relied on existing circuit precedent for the standard of review—without citing *U.S. Bank*, much less reexamining that circuit precedent. *See Pfeiffer* v. *Bachotet*, 913 F.3d 1018, 1022–24 (11th Cir. 2019) (per curiam); *Calixto* v. *Lesmes*, 909 F.3d 1079, 1089 (11th Cir. 2018); *see also Sundberg* v. *Bailey*, No. 18-1021, 2019 WL 1422631, at *1 (4th Cir. Mar. 29, 2019); *Asumadu* v. *Baffoe*, No. 18-16658, 2019 WL 1373306, at *1 (9th Cir. Mar. 20, 2019).

2. Lower courts' collective yawn in the wake of *U.S. Bank* is easy to understand: the courts of appeals

already were applying the "context-specific assessment" of the standard-of-review question that Taglieri incorrectly attributes to *U.S. Bank*. Opp. 19. Taglieri's argument (at 19–20) that the seven circuits that review habitual-residence determinations *de novo* relied "on an across-the-board rule" inconsistent with *U.S. Bank* has no footing in reality.

None of those circuits applies an across-the-board approach that subjects all mixed questions to *de novo* review. Each instead applies a different standard of review to different mixed questions, including clear-error review for some mixed questions. *See*, *e.g.*, *Tolbert* v. *Page*, 182 F.3d 677, 684–85 (9th Cir. 1999) (en banc) (prima facie *Batson* violation reviewed for clear error in the Third, Fifth, Eighth, Ninth, and Eleventh Circuits); *see also United States* v. *Thorn*, 446 F.3d 378, 387 (2d Cir. 2006) (explaining that mixed questions are reviewed "either *de novo* or under the clearly erroneous standard depending on whether the question is predominantly legal or factual"); *Krieger* v. *Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 884 (7th Cir. 2013) ("undue hardship" in bankruptcy context reviewed for clear error).

Taglieri is thus flatly wrong that "none of [the] conflicting decisions" identified in the petition "rest on the context-specific determination mandated by *U.S. Bank*" and the earlier precedent it reaffirmed. Opp. 21. Several circuits explicitly or implicitly undertook a context-specific analysis, reasoning, for example, that habitual residence is not like an "essentially factual" mixed question because it requires "uniformity of application" and "requires [a court] to consider legal concepts" and "exercise judgment about the values that animate legal principles." *Mozes* v. *Mozes*, 239 F.3d 1067, 1072–73 (9th Cir. 2001); *see also Feder* v.

Evans-Feder, 63 F.3d 217, 222 n.9 (3d Cir. 1995) (explaining that habitual-residence determinations are not "purely factual" because they require courts to "define[ ] the concept of habitual residence"); *Silverman* v. *Silverman*, 338 F.3d 886, 896 (8th Cir. 2003) (en banc) (reasoning that habitual-residence determinations, though "based on facts," are "not devoid of legal principles" and "must contain an objective standard"); *Ruiz* v. *Tenorio*, 392 F.3d 1247, 1252 (11th Cir. 2004) (per curiam) (explaining that "despite the term's primarily factual nature, courts must be able both to explain the meaning of those words and look to other cases for guidance").

The other circuits that apply *de novo* review did not, as Taglieri suggests, resort to an across-the-board rule. They simply followed the majority approach without analysis. *See*, *e.g.*, *Guzzo* v. *Cristofano*, 719 F.3d 100, 109 (2d Cir. 2013); *Larbie* v. *Larbie*, 690 F.3d 295, 306 (5th Cir. 2012); *Koch* v. *Koch*, 450 F.3d 703, 710 (7th Cir. 2006).

Courts of appeals have undertaken a context-specific analysis even when they have not reviewed habitual-residence determinations *de novo*. The First Circuit, for example, requires "some deference" to a district court's habitual-residence determination. *Nicolson* v. *Pappalardo*, 605 F.3d 100, 105 (1st Cir. 2010). That holding relied on earlier circuit precedent recognizing—as does *U.S. Bank*—that "the degree of deference" in mixed-question cases "tends to vary with the circumstances." *Bolton* v. *Taylor*, 367 F.3d 5, 8 n.1 (1st Cir. 2004).

Accordingly, no court of appeals is "obliged to reconsider" its standard of review after *U.S. Bank*, Opp. 21, because the circuits have long been applying the settled framework reaffirmed in that opinion. Their

conflicting conclusions about how to apply that framework to habitual-residence determinations are therefore entrenched and require resolution by this Court.

3. In light of this deep division among the circuits, Taglieri's argument that the Sixth Circuit "correctly applied a clear-error standard" is irrelevant to the cert-worthiness of this case. Opp. 22. It also is flawed on its own terms.

In applying clear-error review, *U.S. Bank* emphasized that the Court "ha[d] never tried to elaborate on the established idea of a transaction conducted as between strangers" and that appellate review of the issue "w[ould] not much clarify legal principles or provide guidance to other courts resolving other disputes." 138 S. Ct. at 968. In contrast, lower courts have repeatedly elaborated on what sort of "'settled purpose'" makes a residence habitual and have set forth "governing principle[s]"—such as on shared parental intent and acclimatization—to guide that inquiry. *Feder*, 63 F.3d at 223 (citation omitted); *see also*, *e.g.*, *Silverman*, 338 F.3d at 897–98 (summarizing the framework for ascertaining habitual residence); *Mozes*, 239 F.3d at 1073–81 (similar). Providing such guidance to other courts would not be possible if, as in *U.S. Bank*, habitual-residence determinations involved "'narrow facts that utterly resist generalization.'" 138 S. Ct. at 968 n.6 (citation omitted).

Taglieri's contrary argument (at 22–23) relies entirely on an explanatory report that states that habitual residence is a "question of pure fact." Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Convention*, *in* 3 Actes et Documents de la Quatorzième Session 426, 445 (1982). But the report goes on to explain that the Hague Conference considered habitual residence a "well-established *concept*," *id.*

(emphasis added), and Congress has since emphasized that the concept must be subject to "uniform international interpretation," 22 U.S.C. § 9001(b)(3)(B). Habitual residence thus cannot be resolved in a purely factual manner because "courts must be able both to explain the meaning of those words and look to other cases for guidance." *Ruiz*, 392 F.2d at 1252. Only *de novo* review can "achieve [that] uniformity of application across countries, upon which depends the realization of the Convention's goals." *Mozes*, 239 F.3d at 1072; *see also* Pet. 17–20.

Because *U.S. Bank* articulates no new guiding principles—let alone principles that call into question the majority approach of reviewing habitual-residence determinations *de novo*—no further percolation of the issue is necessary. This Court's review is warranted now.

B. The 4-1 Circuit Split On The Standard For Establishing An Infant's Habitual Residence Also Warrants Review Now.

Taglieri agrees that "[t]he test for determining habitual residence when the child is an infant turns on 'shared parental intent.'" Opp. 1. In his view, however, the decision below did not create a circuit split on that standard because the lower courts agree that shared parental intent "can be proven by either a subjective agreement or objective indicia" of parental intent. *Id.* at 24. But the split between the courts of appeals is not over whether an agreement must be *express* to establish shared parental intent. Rather, it is over whether there can be a "shared" intent when the parents never *agreed* on where their child should be raised. *See* Pet. 21–23.

Consistent with the Hague Convention's language and purpose, *see* Pet. 23–25, every court of appeals to address the issue, other than the Sixth Circuit, has held that *mutual* agreement is required to establish shared parental intent. *See Gitter* v. *Gitter*, 396 F.3d 124, 133 (2d Cir. 2005) (asking "where the parents mutually intended the child's habitual residence to be"); *Feder*, 63 F.3d at 223 ("the conduct and the overtly stated intentions and agreements of the parents . . . are bound to be important factors" in assessing habitual residence); *Berezowsky* v. *Ojeda*, 765 F.3d 456, 468 (5th Cir. 2014) ("the parents must reach some sort of meeting of the minds regarding their child's habitual residence"); *Murphy* v. *Sloan*, 764 F.3d 1144, 1152 (9th Cir. 2014) (requiring a "'settled mutual intent'" (citation omitted)).

Taglieri's attempt to focus on the type of evidence that can be used to establish mutual agreement ignores the Sixth Circuit's critical holding in this case that the "absence of a subjective agreement between the parents" is not a barrier to a finding of shared parental intent. Pet. App. 12a. By holding that a "'meeting of the minds'" was "not a necessary . . . basis for locating an infant's habitual residence," *id.* (citation omitted), the Sixth Circuit plainly and directly departed from the approach to shared parental intent applied by four other circuits.

Contrary to Taglieri's suggestion (at 24 n.4), the Sixth Circuit never held that "objective facts" established a mutual agreement between Monasky and Taglieri to raise A.M.T. in Italy. Nor could it have done so: Even considering both subjective and objective indicia of their intent, the district court made no finding that Monasky and Taglieri agreed to raise A.M.T. in Italy. Indeed, the district court expressly found that

Monasky's "'fixed subjective intent'" was to leave Italy with A.M.T. and to do so "as soon as possible" after her birth. Pet. App. 94a, 97a.

By rejecting a mutual-agreement requirement, the Sixth Circuit departed from the Hague Convention's language and purpose (Pet. 23) and deemed A.M.T. habitually resident in a country where she had spent only eight weeks while her mother recovered from a difficult childbirth and waited in a domestic-violence safe house for the necessary paperwork to facilitate their departure. *See* Pet. App. 81a. Tellingly, Taglieri nowhere even tries to explain how such short-lived and tenuous connections, induced by necessity, can constitute the kind of settled, "habitual" environment that the Convention's signatories intended to recognize.

II. HABITUAL RESIDENCE IS AN IMPORTANT AND FREQUENTLY RECURRING ISSUE.

Taglieri does not dispute that this case presents an ideal opportunity to resolve both questions presented. *See* Pet. 26–27. And his argument (at 22) that habitual-residence determinations do not arise with sufficient frequency to warrant review is misplaced.

Taglieri ignores that the Court has granted certiorari in *three* Hague Convention cases in the past decade—each time on an issue that arises far less frequently than habitual-residence determinations. *See Lozano* v. *Montoya Alvarez*, 572 U.S. 1 (2014) (whether the one-year period for automatic return can be equitably tolled); *Chafin* v. *Chafin*, 568 U.S. 165 (2013) (whether an appeal is moot after the child is returned pursuant to a return order); *Abbott* v. *Abbott*, 560 U.S. 1 (2010) (whether a *ne exeat* right constitutes a "right of custody"). Because habitual residence is a

threshold issue that is "the central—often outcome-determinative—concept on which the entire system is founded," *Mozes*, 239 F.3d at 1072, the questions presented here are more than sufficiently important to warrant this Court's review.

Taglieri also ignores that allowing the procedural and substantive standards that govern habitual-residence determinations to turn on the fortuity of venue threatens to undermine the efficacy of the Hague Convention. *See* Pet. 27. Congress explicitly recognized "the need for uniform . . . interpretation of the Convention." 22 U.S.C. § 9001(b)(3)(B). Absent such uniformity, "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.

As this case illustrates, the consequences of inconsistent application of the Hague Convention can be devastating. Had the Sixth Circuit applied *de novo* review or the correct legal standard for ascertaining A.M.T.'s habitual residence, A.M.T. would have remained with the only parent she had ever known, and a U.S. court would have adjudicated the parents' custody dispute. But because the Sixth Circuit applied both the wrong standard of review and the wrong substantive legal standard, A.M.T. was returned to a concededly abusive father—supposedly for a custody adjudication—in a country where the courts have altogether refused to assume jurisdiction over any custody suit. *See* Trib. per i Minorenni di Milano, 19 marzo 2019, n. 535/19 (It.); Trib. per i Minorenni dell' Emilia Romagna in Bologna, 20 novembre 2017, n. 1337/17 (It.).

This Court should grant review to prevent similar arbitrary and inequitable outcomes from further undermining the Hague Convention and disserving the very children that the Convention's signatories intended to protect.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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