No. 24-

IN THE

Supreme Court of the United States

ANDREW CHARLES NISBET,

Petitioner,

v.

SPIRIT ROSE BRIDGER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Hague Convention on the Civil Aspects of International Child Abduction applies only when children are removed from their country of habitual residence. The question presented is:

> Whether the Convention authorizes a determination that children who have lived for several years in the same residence in the same country have no habitual residence in that country or any other country and therefore have no protection against international child abduction under the Convention.

RELATED PROCEEDINGS

United States District Court (D.Or.):

Nisbet v. Bridger, Civ. No. 23-00850 (Oct. 24, 2023)

Nisbet v. Bridger, Civ. No. 23-00850 (Nov. 20, 2023)

United States Court of Appeals (9th Cir.):

Nisbet v, Bridger, No. 23-3877 (Dec. 20, 2024)

Nisbet v, Bridger, No. 23-3877 (Jan. 28, 2025)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Andrew Charles Nisbet respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 124 F.4th 577. That opinion and Judge Bybee's dissent are attached as Appendix ("App") at 1a-55a. The opinion of the district court (App., *infra,* 56a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 2024. A petition for rehearing *en banc* was denied on January 28, 2025 (App., *infra,* 89a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATY PROVISION INVOLVED

Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention") (App., *infra,* 91a), as implemented in the United States through the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. §§ 9001–9011, provides in relevant part:

> "The removal or the retention of a child is to be considered wrongful where –

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention."

STATEMENT

This case presents a question of exceptional importance concerning the habitual residence of a child, or its purported lack thereof, under the Hague Convention. In this matter, the lower courts have misapplied the unanimous ruling of the Supreme Court in *Monasky v. Taglieri,* 589 U.S. 69, 77 (2020), and, in doing so, have violated an international treaty, two federal statutes and the international consensus.

The Hague Convention is intended to deter international child abduction, which Congress has determined is harmful to children, by ordering the return of abducted children to their habitual residence. But a child without a habitual residence is stateless and has no protection under the Convention.

Until now, courts have never held that a child who has lived in one place for more than a year has no habitual residence and can therefore be abducted by one parent without any Convention protection.

The decision in this case — that children who had lived continuously with their mother for 2½ years in the same household in Scotland — had no habitual residence anywhere in the world — contravenes the Convention,

contravenes the Supreme Court's ruling in the seminal *Monasky* case, disregards the international jurisprudence concerning habitual residence in violation of both the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. §§ 9001–9011 and the Sean and David Goldman International Child Abduction Prevention and Return Act of 2014 ("ICAPRA," 22 USCA § 9101 et seq.) and the directions of this Court. It opens the door to similar claims in future Convention cases in the United States and by sister signatories. It violates the Convention and it flouts all common sense.

A. Background

The Hague Convention is a multilateral treaty created "to protect children internationally from the harmful effects of their wrongful removal or retention." Hague Convention, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, reprinted in 51 Fed. Reg. 10,494 (Mar. 26, 1986). Congress implemented the Convention through ICARA. Under Article 3 of the Convention, the threshold inquiry is whether a child has been "wrongfully removed or retained" from the child's "habitual residence." If a court determines that the child's removal or retention was wrongful under the laws of the State in which the child was "habitually resident" immediately prior to the removal or retention, the court must order the return of the child under Article 12, unless one of the limited exceptions apply.

The Convention provides an extremely simple and relatively unambiguous remedy that is expressly designed to act as a general deterrent to prevent parents from taking their children across international borders without

the other parent's consent. That remedy is to send the child "back home" forthwith.

The fundamental idea underlying the Convention is that "we will return children to you so that in the future you will do the same for us." The Convention "is based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence." *Abbott v. Abbott*, 560 U.S. 1, 20, 130 S.Ct. 1983 (2010).

It works only because each country has agreed to trust the other "Hague partner" countries to do the same thing when similar cases come before their courts.

But if the child has no habitual residence, the protection of the Convention evaporates. The child is then stateless for abduction law purposes. If a child without a country of habitual residence is abducted to the United States, the U.S. courts have no authority under the Convention to order the child's return. Instead, as happened here, the abducting parent is rewarded by switching the forum for determining child custody to the courts in the place to which she has abducted the child.

Here, the Oregon court rewarded the mother's removal of the children from Scotland by accepting child custody jurisdiction and awarding sole custody to her.

International jurisprudence must be aligned with any U.S. application of the Convention. If American courts use restrictive interpretations of habitual residence to justify their refusal to return an abducted child, it must be expected that courts in other countries will reciprocate.

The Convention will then cease to operate effectively. The Supreme Court has ruled that, "to interpret the Convention to permit an abducting parent to avoid a return remedy . . . would run counter to the Convention's purpose of deterring child abductions by parents who attempt to find a friendlier forum for deciding custodial disputes." *Abbott* at 20.

ICARA expressly requires courts to recognize "the need for uniform international interpretation of the Convention." 22 U.S.C. § 9001(b)(3)(B). This Court has repeatedly applied — and enforced — that provision. *Abbott* at 16 ("The principle [that the opinions of our sister signatories are entitled to considerable weight] applies with special force here, for Congress has directed that "uniform international interpretation of the Convention" is part of the Convention's framework. See § 11601(b)(3)(B))"; *Lozano v. Montoya Alvarez*, 572 U.S. 1, 13, 134 S.Ct. 1224 (2014); and *Monasky* at 89, especially when habitual residence is the issue. *Id.*

Internationally, courts hold that it is fundamental that children should not be left "in limbo," without a habitual residence, except in extremely rare and exceptional circumstances. For example, the U.K. Supreme Court has held that "the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts below have placed" him, of being without any habitual residence. *Re B (Habitual Residence: Inherent Jurisdiction*, [2016] UKSC 4.

In *Monasky*, the Supreme Court followed international jurisprudence and held that the test of habitual residence

is the "totality of the circumstances," with a primary focus on where, objectively, the child was at home at the time of removal. It upheld the decision of the Court of Appeals that a requirement of shared parental consent to establish a habitual residence for an infant child, "would create a presumption of no habitual residence for infants, leaving the population most vulnerable to abduction the least protected." *Id.* at 81.

Yet, in the pending case, the Ninth Circuit upheld the position that the parties' children were not habitually resident in the place that had been their only home for over 2½ years, had no habitual residence whatsoever, and therefore that they could lawfully be abducted. That violates the Convention and weakens its efficacy. It sends a strong message to our treaty partners that American children who are abducted overseas after having long and habitually lived in the United States need not be returned to the United States if the foreign courts arbitrarily decide that the children have no habitual residence. It tells our treaty partners that the American courts cannot be trusted to return children who are abducted to America because their courts arbitrarily hold that a child's home of many years is not their habitual residence for Convention purposes. ICAPRA requires the U.S. Department of State to provide an annual report to Congress on the compliance by U.S. treaty partners with the terms of the Convention. 22 USCA § 9111; Public Law 113–150 (2014). However, it does not require the Department to review the American compliance with the Convention. But a holding that a 2½ year old child who has lived all her life in one country is not habitually resident in that country is plainly noncompliant with the Convention.

The fact — which was most inappropriately highlighted by the circuit court majority by placing it in the opening sentence of its opinion — that Nisbet was in custody in England for having killed his own mother, almost three years before the children were removed from Scotland — is of no possible relevance to the question of where the children habitually resided at the time of their removal. But the citation to that fact apparently misled both courts below. This has yielded a most dangerous precedent — that children who have long lived in one place can nonetheless be stripped of the protection of the Convention if a trial court decides that they were not habitually resident in that place. To make matters worse, and as the fierce dissent in the court below explained, if a court merely cites the language of *Monasky,* its decision about habitual residence is then immunized from any meaningful appellate review.

B. Facts and Procedural History

I. Proceedings Below

On June 17, 2022, Spirit Bridger — an American citizen who had lived exclusively in Edinburgh, Scotland for seven years, except for two brief periods when she lived in the Bailiwick of Jersey, a British Crown Dependency — took her two children, ACN and KRN, from their home in Scotland to live in Oregon, USA, without the knowledge or consent of their father, Andrew Nisbet. He and both children are British citizens. App., *infra,* 24a.

ACN was born in Jersey on February 1, 2018. He lived in Edinburgh with his mother from August 2018, returned to Jersey for a few months in early 2019, and then returned with his mother to live in Edinburgh in August 2019. KRN

was born in Scotland on February 27, 2020. She and her brother, ACN, lived there with Bridger continuously until June 17, 2022, when Bridger covertly took them to live in Oregon without the approval of any court. Neither child had ever stepped foot in the United States. ACN was then almost 4½ years old and KRN was almost 2½. *Id.*

In Edinburgh, the children and Bridger always lived in Nisbet's apartment, at his expense. ACN attended nursery school in Edinburgh continuously from January 16, 2020. KRN attended the same school continuously from September 9, 2020. App., *infra,* 34a–35a. Bridger submitted at trial a letter from a friend who had observed her and the children for two years from April 2020, stating that the children "were always happy in Scotland . . . " (1-ER-175-6). Another friend of Bridger for three years in Scotland testified that both children were "happy" there. 3-ER-394-5. The children received their regular medical and dental care in Edinburgh throughout their lives, from 2019 to June 2022. App., *infra,* 18a, 24a, 35a. In 2021, Bridger applied to the U.K. Home Office for her third long-term visa in anticipation of obtaining "settlement" in Scotland. App., *infra,* 24a.

Nisbet petitioned for the return of the children to Scotland pursuant to the Hague Convention so that the Scottish courts could determine the children's best interest.

Notwithstanding the simplicity of the basic facts, the district court concluded that the children did not habitually reside in Scotland at the time of their removal and that there was no alternative country of residence; they simply lacked "any habitual residence" at all. App., *infra,* 87a.

The district court held that the children should not be returned to Scotland because "the preponderance of the evidence compels the conclusion that, on June 17, 2022, ACN and KRN lacked a habitual residence altogether." *Id.* That decision, which had the effect of removing all Convention protections against international child abduction, was clearly erroneous.

The district court failed to address the Sixth Circuit's and the Supreme Court's express warnings in *Monasky* against any finding that children have no habitual residence.

The Sixth Circuit, sitting *en banc* in *Monasky*, ruled that habitual residence did not hinge principally on the existence of an actual parental agreement as to where their child would live. It explained that if habitual residence required an actual parental agreement there would then be a presumption of no habitual residence, which would violate the principle that internationally-abducted children should normally be returned. *Taglieri v. Monasky,* 907 F.3d 404, 415 (6th Cir 2018), *aff'd* by *Monasky.* It stressed that this was most especially so when a child had lived in only one country, in which case common sense requires that the child's habitual residence be in that country. *Id.* at 413–414.

The Supreme Court upheld that decision and adopted the same argument. It explained that,

> "An actual-agreement requirement would enable a parent, by withholding agreement, unilaterally to block any finding of habitual residence for an infant. If adopted, the

> requirement would undermine the Convention's aim to stop unilateral decisions to remove children across international borders. Moreover, when parents' relations are acrimonious, as is often the case in controversies arising under the Convention, agreement can hardly be expected. **In short, as the Court of Appeals observed below, "[Mother's] approach would create a presumption of no habitual residence for infants, leaving the population most vulnerable to abduction the least protected.**" 140 *Monasky* at 81. (emphasis added).

Yet, in the pending case, the district court paid no heed to the warnings against any finding of habitual residence, and it provided no support for such omission or explanation for it. It recited the *Monasky* principle (App., *infra,* 71a), but deemed that its mere mention was sufficient. Its opinion is devoid of any discussion on whether any finding that a child had no habitual residence was proper or appropriate.

Instead, the district court cited three pre-*Monasky* cases in which courts had found that the children had no place of habitual residency. But each of those cases concerned very young babies, whose parents were in conflict as to the country of future residency. *In re A.L.C.,* 607 F. App'x 658, 662-63 (9th Cir. 2015) concerned an infant born during the mother's temporary stay in U.S. whose parents had no shared intention to remain in the U.S. after the mother's birth recovery period. *Delvoye v. Lee*, 329 F.3d 330, 333 (3d Cir. 2003), concerned a 2-month-old baby who was born in Belgium because the mother was there only temporarily and the parents'

conflict was contemporaneous with the child's birth. Similarly, *Kijowska v. Haines*, 463 F.3d 583 (7th Cir. 2006), concerned a baby who was also just two months old when her mother, who was in the U.S illegally and was threatened by the father with deportation, took her to Poland. Each of these decisions was based on the last shared intention of the parents, which *Monasky* held is not the key factor for non-infant children. *Monasky* at 74.

In sharp contrast to those cases, each concerning infants under the age of one, ACN and KRN were 2.4 and 4.4 years old respectively when they were removed. A diligent search of U.S. caselaw has revealed no Convention case other than the pending one in which a court has ever found that a child who is more than a year old has no habitual residence. Indeed, courts have relied on *Monasky* to hold that they should not find that children have no habitual residence. See: *Grano v. Martin*, 443 F.Supp.3d 510, 535 (S.D.N.Y. 2020), *aff'd*, 821 F. App'x 26 (2d Cir. 2020): "the Supreme Court's recent decision in *Monasky* has mostly undone the no-habitual-residence line of cases stemming from a lack of parental shared intent, at least for infants."

Instead, the district court merely and inappropriately relied on the asserted fact that Bridger was not fully settled in Edinburgh and "had long intended to move to Oregon." (App., *infra,* 74a). But that is not the relevant issue. It contravenes the instruction in *Monasky* that courts should ascertain where the child, not a parent, was at home on the relevant date.

In any event, Bridger resided in Edinburgh for seven years, originally obtained an entrepreneur visa for the

U.K. so that she could open a coffee shop in Scotland, where she was living with Nisbet, applied in 2018 for a domestic partnership visa, good for 30 months, applied in 2021 for a "settlement" visa to allow her to remain indefinitely, and then in 2021 applied for a renewal of her partnership visa supported by Nisbet's letter advising the U.K. Home Office that she was his partner, that she and their two children were resident in his apartment, and asking that Bridger be granted "Indefinite Leave to Remain" in the U.K. in their "permanent home," which apparently was successful. App. *infra*, 40a.

The district court failed entirely to attach any significance to the key fact that the children had continuously attended the same preschool, in Edinburgh, since January 2020 (in the case of ACN) and since September 2020 (in the case of KRN). A child's attendance at school is one of the most significant factors in establishing that a child is at home in a particular location. *Tsuruta v. Tsuruta*, 76 F.4th at 1111; *Sanchez-Londono v. Gonzalez*, 752 F.3d 533, 542–43 (1st Cir. 2014) (the child had become "acclimatized" in Massachusetts because, *inter alia*, "she had been attending daycare in Massachusetts for nearly four months"); *Velasquez v. Funes de Velasquez*, 102 F. Supp. 3d 796, 810 (E.D. Va. 2015) ("Most importantly, the daughters have been enrolled in school in the United States for a longer period of time than their enrollment in El Salvadorian schools."); *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995) ("In Australia, Evan attended preschool and was enrolled in kindergarten for the upcoming year, participating in one of the most central activities in a child's life"); and *Karkainnen v. Kovalchuk*, 445 F.3d 280, 293 (3d Cir. 2006) ("[c]ourts have identified a number of specific factors that

are indicative of acclimatization and a degree of settled purpose from the child's perspective. In *Feder,* we noted that academic activities are among "the most central . . . in a child's life" and therefore highly suggestive of acclimatization.")

The district court also mistakenly relied on the fact that Nisbet did not live with the children in Edinburgh. App., *infra,* 86a. However, the focus should be on where the children are at home, not on whether they were in a family unit that included both parents. It is hardly surprising that a parent who lives separately from the other parent might wish to take their child overseas, but that is exactly what the Convention is intended to deter. Nevertheless, Bridger brought the children to visit Nisbet at his psychiatric facility in England on several occasions, spending several days during at least three of those visits with Nisbet, and he had frequent Skype calls with the children, which he scheduled on a daily basis. During those calls, he read stories to them and played games with them. He also talked regularly with Bridger about the children and their care, and he gave Bridger $180,000 for herself and the children in case anything happened to him. App. *infra* 41a.

The district court also relied on a claim that Nisbet had "coerced" Bridger into returning to Edinburgh from Jersey and remaining in Edinburgh for the next 2 ½ years in that he "levied many demands on Respondent in exchange for his signature and money — including daily hours-long phone calls — and he threatened her, in ways that could also harm the children." App., *infra,* 74a. This claim is absolutely refuted on both the facts and on the law. Significantly, the district court cited no authority in support of this issue.

Bridger testified that she had chosen to travel back and forth between Edinburgh and Jersey on several occasions until August 2019 when she voluntarily moved to Scotland with ACN, that she decided to stay in Scotland and give birth to KRN there because she had free medical care in Scotland, that she lived there rent-free in the Edinburgh Residence, that she stayed there during COVID, that she asked Nisbet to sign a consent for her to obtain a U.S. passport and that he did so, that she obtained the passport (Tr. 417:25-418:14), and that she then waited for an extended period of time before she finally left with the children in June 2022. She testified that she had had to stay because of COVID, that "I wasn't feeling pressed" and that she left when she was finally ready to do so. (Tr. 419:10-420-5). During all the time after August 2019, Nisbet was in custody in Jersey and then under the strict and secure supervision of the authorities in the psychiatric hospitals in England to which he was committed. He never stepped foot in Scotland during all that time.

There is nothing unusual or "rare" about the facts of this case, except for the irrelevant but shocking fact of Nisbet's act of manslaughter leading to his indefinite confinement in a psychiatric institution in England. Apart from that, this is a common garden and simple case of a foreign parent covertly and unilaterally taking her children away from the other parent to live in her country of origin. But that is exactly the conduct that the Convention is intended to deter.

The district court also found that there would be a grave risk of harm to the children if they were returned to Scotland. App., *infra,* 57a. But this was based on pure speculation by an expert who had never examined

Nisbet and disclaimed any opinion about risk in this case (4-ER-724-25[1]), that someone with some of his alleged psychological characteristics might engage in domestic violence if he were released from institutional care in England and if he were then permitted by the British authorities to have unsupervised access to the children. And the District Court rejected the evidence of several psychiatric forensic experts who had actually interviewed Nisbet, his close friends, and his therapist, and were familiar with his medical history, all of whom gave evidence to the court that he did not present any risk to his children. 1-ER-42-45; 4-ER-755-72. Moreover, the district court acknowledged "there was no evidence that [Nisbet] physically abused [Bridger] or the children." App., *infra,* 81a.

II. Circuit Court Opinion

On December 20, 2024, a divided Ninth Circuit panel upheld the district court's decision, applying the deferential standard of review established in *Monasky*.

In its opening sentence, the majority stated that Nisbet had previously "stabbed his mother in the throat, killing her, pleaded guilty to manslaughter based on diminished responsibility, and was sentenced to indefinite psychiatric confinement in England." App., *infra,* 2a.

But the fact that Nisbet had previously committed that terrible act in Jersey — before Bridger then returned to live in Edinburgh with ACN, and remained there after

1. Citations to "ER" refer to the Excerpts of Record filed in the Ninth Circuit.

KRN was born and for another two years and four months after his birth — has no bearing on whether the children's home — considered through their eyes, as *Monasky* requires — was in Scotland as of June 2022.

The children never lived with Nisbet after Bridger returned to Edinburgh until she removed them from Scotland. They lived safely with Bridger in Edinburgh, while Nisbet was confined in secure institutions in England.[2] App., *infra,* 41a. All their visits with Nisbet were in England and strictly supervised.

The panel upheld the district court's ruling that the children were not habitually resident in Scotland based primarily on its findings that Bridger intended to leave Scotland and had few ties to Scotland, that the children allegedly had no friends in Scotland, and had "no meaningful relationship with their father." App., *infra,* 13a. But those factors were clearly entirely insufficient to overcome the simple fact that the children's home was in Scotland, where they lived throughout in the same residence and attended the same school with the same medical and dental care.

Some of the majority's factual recitations were highly questionable. For example, the children clearly had a significant relationship with Nisbet. Bridger took them to see him in England on at least four occasions between 2019 and 2021, spending several days with him during at least three visits — in June 2021 (for four days with him), in July 2021 (for four days) and in December 2021 (for two days). 1-ER-42, 46, 103-108, App., *infra,* 40a. Between

2. He remains in such an institution in England.

visits, Nisbet spoke with them by Skype almost every day, during which he read stories and played games with them. He also talked regularly with Bridger about the children and their care. App., *infra,* 40a, 1-ER-101.

The majority panel stated that the district court had correctly cited the *Monasky* standard and that there was no clear error in its application. It stated that the mere presence of a child in one place is not necessarily dispositive, and that mere attendance at school does not prove the quality of a child's social connections.

The panel majority also stated that, "[W]hile a finding of no habitual residence is rare and should be disfavored, it is not a clear error to render such a finding if the totality of the circumstances of a judicial case so warrants." App., *infra,* 17a. That statement was made as a mere conclusion without any analysis as to the appropriateness of its application to the facts in the pending case.

In his dissent, Circuit Judge Bybee stated (App., *infra,* 26a) that,

> "The answer to the correct question — where were the children habitually resident? — should have been quick and easy. The Supreme Court has held that we should take a "common sense" approach to the Hague Convention and said that "[c]ommon sense suggests that some cases will be straightforward: Where a child has lived in one place with her family indefinitely, that place is likely to be her habitual residence."

He further stated (*id*) that,

> "These children habitually resided in Scotland, the courts of Scotland are best situated to determine the custody and access rights of the parents, and we have to trust the Scottish courts to resolve these issues appropriately. Because I believe that we have violated our obligations under the Hague Convention, I firmly dissent."

The panel majority did not address the grave risk issue. The dissent determined that the district court's determination was plainly erroneous because it was purely speculative, and represented an inappropriate custody determination. App., *infra,* 51a.

A. The Decision Below Violates an International Treaty.

The Hague Convention "was adopted in 1980 in response to the problem of international child abductions during domestic disputes." *Abbott v. Abbott*, 560 U.S. 1, 8, 130 S.Ct. 1983, 176 L.Ed.2d 789 (2010). More than one hundred countries including the United States and the United Kingdom, are signatories. Status Table, Hague Conference on Private Int'l Law, Convention of 25 Oct. 1980 on the Civil Aspects of Int'l Child Abduction, https://www.hcch.net/en/instruments/conventions/status-table/?cid=24.

The Convention's "core premise" is that "'the interests of children . . . in matters relating to their custody' are best served when custody decisions are made in the child's

country of 'habitual residence.' *Monasky* at 72 (quoting Convention Preamble, Treaty Doc., at 7).

The purpose of the reliance on the key connecting factor of the child's habitual residence is "to ensure that custody is adjudicated in what is presumptively the most appropriate forum — the country where the child is at home." *Monasky* at 79.

Accordingly, the Convention generally requires the "prompt return" of a child to the child's country of habitual residence when the child has been wrongfully removed to or retained in another country. Art. 1(a), Treaty Doc., at 7; see also Art. 12, *id.,* at 9. This requirement "ensure[s] that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Art. 1(b), id., at 7. *Golan v. Saada*, 596 U.S. 666, 670 (2022).

A finding of a child's habitual residence is essential for the Convention to apply. Without a habitual residence the Convention's protection and deterrent effect vanishes. It is fundamental that a child must invariably have a habitual residence or the Convention is a dead letter.

The courts in the United Kingdom have analyzed this issue in several cases. In *A (Children), Re (Rev 1)* [2013] UKSC 60 at Para. 56, the UK Supreme Court explained that,

> "The whole Convention, beginning with article 3, is predicated upon there being a state where the child is habitually resident immediately before the wrongful removal or retention. Can

> it be the case that the Convention would not apply if the child born to an English mother while on holiday abroad were abducted from the hospital?"

This was followed in *In Re B (A Child)* [2016] UKSC 4, 45, in which the UK Supreme Court held that, except in special and most unusual circumstances, a child should not be left "in limbo" with no habitual residence.

Specifically, Lord Wilson ruled (*Id.* at 45):

> "I conclude that the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts below have placed B.
>
> The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it."

That principle — that the Convention mandates that a finding of habitual residence be made whenever possible, in favor of a child being left unprotected by a finding of no habitual residence — has been followed by a long line of English cases and by other courts globally, as is discussed further in the next section.

However, the principle was violated in the pending case by the decision that the children — who had lived for all of their lives in Scotland (except for short periods in Jersey for only the older child), and specifically for 2½ years for both children immediately preceding their covert removal to Oregon, where they had never before stepped foot — were habitually resident nowhere.

Accordingly, the courts below have violated the treaty. Instead of returning the children to their home in Scotland they authorized the courts in Oregon, a place that was utterly foreign to the children on the relevant date, to decide the custody of the children. The courts below endorsed the mother's misconduct of unilaterally removing the children from their home country, which is conduct that the Convention was expressly designed to deter. They deprived the children and their father of their right to have the matter of the children's best interests be determined in the place where they were living and going to school. They have effectively deprived the father of his right to see his children.

The courts below have rewarded the mother's forum-shopping. They have themselves expressly violated the treaty, which in Article 12 of the Convention expressly places a duty on "the judicial or administrative authorities in the requested State" to return children pursuant to the terms of the Convention.

The Convention was drafted to secure international cooperation regarding the return of children wrongfully taken by a parent from one country to another, often in the hope of obtaining a more favorable custody decision in the second country." *Gonzalez v. Gutierrez*, 311 F.3d 942, 944 (9th Cir. 2002). ICARA recognized that, "(3)

International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem." 22 U.S.C.A. § 9001(a)(3).

The Convention seeks generally to accomplish its aim by preventing an abducting parent from benefitting from his actions by requiring that a wrongfully removed child be returned to the country of its habitual residence for custody proceedings. *In re B. Del C.S.B.*, 559 F.3d 999, 1002 (Ninth Circuit, 2009). But that entire process hinges on a sensible and predictable interpretation of the meaning of the term "habitual residence." Here, that process has completely broken down, which explains and justifies the ferocity of the dissent.

B. The Decision Below Violates the International Jurisprudence

The international jurisprudence is unanimous. International child abduction is child abuse. A finding of no habitual residence deprives a child of all protection under the Convention. It must be found in only the most unusual of cases. Children need the protection of being held to be habitually resident in the place that is their home.

The decision of the UK Supreme Court in *In Re B (A Child), supra*, was to this effect followed in *AC v NC* [2021] EWHC 946 at ¶27 (Fam), in which the court held that:

> As Lord Wilson says, it is highly unlikely (albeit conceivable) that a child can be left in limbo where he or she has lost habitual residence in state A but not gained it in state B. Although

> Lord Wilson says this scenario is "conceivable", I sense that he is saying that it is vanishingly unlikely. I would agree.
>
> Limbo must be near-impossible."

Likewise, in *Re J & H*, [2024] EWHC 1395 at ¶27 (Fam), the English High Court most recently stated that,

> "The Supreme Court in Re B [2016] UKSC 4 emphasised that it is in a child's best interests to have a habitual residence so as to avoid falling into a jurisdictional limbo.
>
> Where a set of facts might reasonably lead to a finding of habitual residence or no habitual residence the court should find a habitual residence."

And in *Re A and B (Children: Return order: Article 13(a) defence: 1980 Hague Convention)* [2024] EWHC 2473 (Fam), the court held that,

> "7. It is possible, but vanishingly rare that a child may be found not to have a habitual residence. This may arise in circumstances where the child frequently moves between jurisdictions or has lost habitual residence in one jurisdiction but the evidence of acquiring it in the new jurisdiction does not reach the requisite threshold to make a finding of habitual residence."

Likewise, courts in Canada hold that, "cases where a child has no habitual residence will be rare. Courts should not strain to find a lack of habitual residence because that finding would deprive a child of the protection of the Convention." *Jackson v. Graczyk*, 2007 ONCA 388, Para. 38.

Australian courts follow the same principle. They stress that it important for children to always have a habitual residence, in order to protect them in accordance with the provisions of the Convention. *Cooper v. Casey* (1995) FLC 92-575 at 81, 696, www.incadat.com/en/case/104, insisting that,

> " . . . the making of a finding that a child has no habitual residence could easily operate to defeat the purpose of the Convention and leave children open to the possibility of repeated abductions by both parents . . . "

Thus, in *Commonwealth Central Authority & Cavanaugh*, [2015] FamCAFC 233, www.incadat.com/en/case/1355, the Family Court of Australia overturned a ruling that a child who had lived in Finland for a year was not habitually resident there. The appeal court held that the trial judge did not give sufficient weight to the fact that the Convention favors a finding that children should have a habitual residence so that they can be protected from abduction.

Uniform international interpretation of the provisions of the Convention is essential. ICARA expressly states that,

> "(3) In enacting this chapter the Congress recognizes –
>
> (A) the international character of the Convention; and
>
> (B) the need for uniform international interpretation of the Convention." 22 U.S.C. § 9001(b)(B).

Accordingly, in Monasky, the Court stressed that,

> "ICARA expressly recognizes "the need for uniform international interpretation of the Convention." 22 U.S.C.§ 9001(b)(3)(B). See *Lozano*, 572 U.S. at 13, 134 S.Ct. 1224; *Abbott*, 560 U.S. at 16, 130 S.Ct. 1983. The understanding that the opinions of our sister signatories to a treaty are due "considerable weight," this Court has said, has "special force" in Hague Convention cases. Ibid."

It is important that the United States should not be an outlier in respect of its enforcement of the Convention. The decision in the pending case, that the children were without any habitual residence on the date of their removal, is in plain violation of common sense and the international jurisprudence.

C. The Decision Below Violates a Decision of the Supreme Court

In *Monasky*, the Supreme Court held that "[t]he place where a child is at home, at the time of removal

or retention, ranks as the child's habitual residence." *Monasky* at 77.

Here, the children were at home only in Scotland. They had no connection to any other place that could be considered to be their home.

The circuit court rendered a decision that makes no sense except for the most critical fact — which is of no possible relevance to the issue of where was home for the children — that the father had, some years earlier, committed a terrible crime for which he was in indefinite custody in nearby England. The court majority placed this fact at the very head of their analysis, but then entirely failed to connect that fact to the issue of whether the children had a home. The dissent correctly points out that this was the obvious reason for the majority opinion, and that it was because the majority could not explain the relevance of the fact that they were compelled to rely on weak factors such as the mother's wish to leave Scotland or the father's purported actions such as telephoning the children that it could label as coercive.

The problem was accentuated by the fact that courts have treated the Monasky test as dogma that, once recited, precludes all analysis of its application. While Monasky held that the application of the standard should be judged on appeal by a clear-error review standard deferential to the fact-finding court, appeal courts have failed to oversee its application by district courts. There has not been one appellate case, post-Monasky, in which a district court finding on habitual residence has been overturned, or even modified.

The Ninth Circuit approach all-too-easily finds that a child has no habitual residence. This conflicts with the fundamental purpose of the Hague Convention and is inconsistent with Monasky.

This Court's intervention is necessary to make clear that courts should not find that a child has no habitual residence except in the most exceptional cases.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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April 25, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 20, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-3877
D.C. No.
3:23-cv-00850-IM

ANDREW CHARLES NISBET,

Petitioner-Appellant,

v.

SPIRIT ROSE BRIDGER,

Respondent-Appellee.

Appeal from the United States District Court
for the District of Oregon
Karin J. Immergut, District Judge, Presiding

Argued and Submitted September 10, 2024
San Francisco, California

Before: Jay S. Bybee, Carlos T. Bea, and Salvador Mendoza, Jr., Circuit Judges.

Opinion by Judge Bea;
Dissent by Judge Bybee

Filed December 20, 2024

Appendix A

OPINION

BEA, Circuit Judge:

Andrew Nisbet—who stabbed his mother in the throat killing her, pleaded guilty to manslaughter based on diminished responsibility, and was sentenced to indefinite psychiatric confinement in England—appeals the district court's order that denied his petition under the Hague Convention for return to Scotland of his two young children,[1] ACN (born in February 2018) and KRN (born in February 2020).[2] ACN and KRN were brought to the United States from Scotland by their mother, Spirit Bridger, in June 2022. The district court found Nisbet failed to prove by a preponderance of the evidence that ACN and KRN were habitual residents of Scotland when they left with Bridger for the United States. Bridger thus did not wrongfully remove them from their habitual residence under the Hague Convention. We affirm.[3]

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1. The Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention"), implemented in the United States by the International Child Abduction Remedies Act. 22 U.S.C. § 9001 *et seq.* Both the United States and the United Kingdom are signatories of the Hague Convention.

2. ACN and KRN, both U.S. citizens, now live and attend schools in Oregon. They have social security numbers, health insurance, a pediatrician, and a dentist in the United States. Bridger is supported by her mother, stepfather, two brothers, and friends.

3. We have jurisdiction under 28 U.S.C. § 1291.

Appendix A

I.

A.

Nisbet and Bridger met in 2012 in New York City when they were both on vacation.[4] Nisbet, a British citizen, lived and worked in Scotland as a radiologist. Bridger, a United States citizen, lived in Oregon and was unemployed.[5]

Despite Bridger's desire to stay in the United States, she moved to Scotland in 2012 to be with Nisbet because he purportedly could not work in the United States as a radiologist. They lived in an apartment in Edinburgh that Nisbet owned and viewed only as temporary ("Edinburgh Residence").[6] Nisbet's long-term plan had always been to raise his family in his parents' house on the Island of Jersey ("Jersey Residence"), a British Crown Dependency. And throughout the relevant period, Bridger had and has always maintained a residence in Oregon.

Bridger wished to marry Nisbet, but they never did. In Spring 2017, Bridger became pregnant with ACN in Scotland. Adamant about the Jersey Residence, Nisbet asked to live with his parents. Bridger in the meantime

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4. Nisbet's counsel conceded at oral argument that the district court did not clearly err in finding Bridger a credible witness.

5. While Bridger lived with Nisbet, she did not have any source of income other than from Nisbet, and she needed approval from Nisbet for most of her purchases.

6. They traveled to New Zealand for one year after 2012 and returned to the Edinburgh Residence in 2015.

was thinking about returning to the United States. Nisbet told Bridger she would return to the United States if his parents turned them down.

And turn them down his parents did, albeit after extensive arguments between Nisbet and his parents. Shortly thereafter, Nisbet attempted suicide by injecting air into his veins, but he survived. Uninvited, Nisbet then took Bridger to Jersey, and they showed up on the doorstep of the Jersey Residence. Nisbet's parents relented and allowed them to stay at an annex of the Jersey Residence on a temporary basis while Bridger was pregnant with ACN.

In January 2018, Nisbet again attempted suicide, this time by throwing himself out of a twenty-foot-high window onto a concrete patio, fracturing his feet and spine. Consequently, he was bedridden for at least seven months.

In February 2018, one month after Nisbet's second suicide attempt, ACN was born in Jersey. Bridger took care of both ACN and Nisbet for six months in Jersey, with minimal assistance from Nisbet's parents. In August 2018, once Nisbet could manage his own needs, Bridger moved from Jersey to Scotland with ACN. Nisbet still lived in Jersey but commuted back and forth between Jersey and Edinburgh. During this period, Bridger prepared to leave for the United States, but Nisbet convinced her to stay for a few more months so that he could try to resolve his family strife.[7]

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7. In November 2018, Bridger was granted a partnership visa, permitting her to remain in the United Kingdom for 30

In February 2019, Bridger returned to Jersey with ACN after Nisbet assured her that he had reconciled with his parents. Despite this assurance, however, Nisbet's relationship with his parents deteriorated. Nisbet would bang his head against the wall every day, sometimes several times a day. He punched walls and broke a table. The police were called when Nisbet once cornered his father and pulled his mother's hair. Scared, Bridger told Nisbet she no longer loved him and wanted to return to the United States.

In early August 2019, Nisbet's parents served a notice of eviction on Nisbet and Bridger. On August 6, 2019, Nisbet killed his mother by stabbing her in the neck with a pocketknife. He was arrested and pleaded guilty to manslaughter on the grounds of diminished responsibility owing to mental disorder. The Royal Court of Jersey sentenced Nisbet to indefinite psychiatric confinement at Brockfield House in Essex, England. The district court found that Nisbet's family had since severed contact with Nisbet, Bridger, and ACN.[8]

Around the same time, by August 2019, Bridger had become pregnant with KRN. After Nisbet was arrested, Bridger and ACN were taken to a refuge and then to

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months. She would potentially be eligible to apply for a permanent settlement status after completing five years on that partnership visa. Before obtaining this partnership visa, Bridger was in the United Kingdom on an entrepreneurship visa.

8. Bridger reached out to Nisbet's family for help once, but they asked her not to contact them again.

a halfway house in Jersey. Bridger planned to return to the United States once she was no longer needed for the police's investigation of Nisbet. As KRN's due date neared, however, Bridger instead moved to the Edinburgh Residence in late 2019 to give birth to KRN because she did not have health insurance in the United States, she had no other place in the United Kingdom to live with her children, and she believed she needed to remain in the country while Nisbet's criminal case was pending. That said, Bridger still planned to leave for the United States shortly thereafter, if she were released by the police authorities.

KRN was born in February 2020.[9] Then, the COVID-19 pandemic hit; country borders and airlines were closed.

From then until June 2022, and during the COVID-19 restrictions period, Bridger lived in the Edinburgh Residence with ACN and KRN. Bridger kept in contact with Nisbet because she needed Nisbet's signature to apply for KRN's U.S. passport, she needed financial support from Nisbet, and her U.K. visa was expiring.[10]

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9. Bridger's mother and her stepfather traveled from the United States to Scotland and visited her about a week before KRN's birth and stayed for about two weeks thereafter.

10. In early 2021, Bridger applied for a permanent settlement status in the United Kingdom, believing she needed to stay in the United Kingdom for additional time so that she could obtain the necessary documentation from Nisbet for KRN's U.S. passport. She was advised by the British Home Office that she was not yet eligible for a permanent settlement status, so Bridger instead

Bridger told Nisbet multiple times she needed to return to the United States and reunite with her family.

While in Edinburgh, ACN and KRN attended a nursery school, and they received regular medical and dental care. Bridger testified that ACN and KRN "didn't actually make friends when they were in Scotland at nursery." They made acquaintances elsewhere, "but they never knew anyone on a name basis."

ACN and KRN visited Nisbet several times at St. Andrew's Hospital in Northampton, England, where Nisbet has been in custody since April 2021.[11] Nisbet scheduled Skype calls with ACN and KRN from his psychiatric facility in England every day for an hour. He tried to read stories and play games with them, but often after a short period, ACN and KRN stopped paying attention to Nisbet on the screen.

Bridger never intended Scotland to be more than a temporary location for her and her children. In December 2021, Nisbet finally signed the necessary documentation for KRN's U.S. passport, knowing Bridger intended to take KRN to the United States. Bridger immediately applied for a U.S. passport for KRN. While waiting for months to receive KRN's U.S. passport, Bridger began

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applied for further leave to remain in the United Kingdom on her partnership visa.

11. Nisbet was initially confined at Brockfield House in Essex, England, but he was transferred to St. Andrew's Hospital in Northampton, England in April 2021.

packing and sent belongings to the United States. On June 17, 2022, Bridger left Scotland for the United States with ACN and KRN.

B.

On June 12, 2023, Nisbet petitioned under the Hague Convention that ACN and KRN be returned to Scotland, which he alleged was their habitual residence. Bridger responded and requested an expedited trial, which was granted. Judge Karin J. Immergut of the United States District Court for the District of Oregon presided over the expedited trial from October 16 through 18, 2023. Six days after the trial, on October 24, 2023, Judge Immergut denied Nisbet's petition, finding, *inter alia*, that Nisbet failed to prove by a preponderance of the evidence that Scotland was ACN and KRN's habitual residence. Nisbet timely appealed.

II.

A.

Under the Hague Convention, "a child wrongfully removed from her country of 'habitual residence' ordinarily must be returned to that country." *Monasky v. Taglieri*, 589 U.S. 68, 70–71, 140 S. Ct. 719, 206 L. Ed. 2d 9 (2020). If a child does not habitually reside anywhere, the Hague Convention does not apply, and a petition for return thereunder should be denied. *See id.* at 82.

In general, a child's habitual residence is "the place where he or she has been physically present for an amount

of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective." *Karkkainen v. Kovalchuk*, 445 F.3d 280, 291–92 (3d Cir. 2006) (citation omitted) (cited with approval in *Monasky*, 589 U.S. at 77, 78). "This approach considers a child's experience in and contacts with her surroundings, focusing on whether she developed a certain routine and acquired a sense of environmental normalcy by forming meaningful connections with the people and places she encountered." *Id.* at 292 (cleaned up) (citation omitted); *see also Monasky*, 589 U.S. at 77 (noting the Hague Convention's explanatory report referred to a child's habitual residence as "the family and social environment in which [the child's] life has developed" (alteration in original) (citation omitted)).

"For older children capable of acclimating to their surroundings, courts have long recognized, facts indicating acclimatization will be highly relevant." *Monasky*, 589 U.S. at 78. Such facts include "geography combined with the passage of an appreciable period of time," "age of the child," "immigration status of child and parent," "academic activities," "social engagements," "participation in sports programs and excursions," "meaningful connections with the people and places," "language proficiency," and "location of personal belongings." *Id.* at 78 n.3 (citation omitted). "Because children, especially those too young or otherwise unable to acclimate, depend on their parents as caregivers, the intentions and circumstances of caregiving parents are relevant considerations." *Id.* at 78.

"No single fact, however, is dispositive across all cases." *Id.* Courts determine a child's habitual residence

by looking at "the totality of the circumstances specific to [each] case," *id.* at 71, and they must be "sensitive to the unique circumstances of [each] case and informed by common sense," *id.* at 78 (citation omitted). "The bottom line: There are no categorical requirements for establishing a child's habitual residence." *Id.* at 80; *see also id.* at 78 (quoting *Karkkainen*, 445 F.3d at 291, for the proposition that the "inquiry into a child's habitual residence is a fact-intensive determination that cannot be reduced to a predetermined formula and necessarily varies with the circumstances of each case").

B.

A habitual-residence determination is a mixed question of law and fact—"albeit barely so." *Id.* at 84. A trial court must first correctly identify the totality-of-the-circumstances standard. *Id.* Once it has done so, what remains is a factual question that can be reviewed on appeal only for clear error. *Id.* Under this standard of review, we cannot reverse a district court's finding that is "plausible in light of the record viewed in its entirety," even if we are convinced that we would have found differently. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985). If "there are two permissible views of the evidence," the trial court's "choice between them cannot be clearly erroneous." *Id.* (citations omitted).

This standard of review is deferential, so much so that the Supreme Court has adopted it in the Hague Convention context with the goal to "speed[] up appeals."

Monasky, 589 U.S. at 84. Tellingly, we are not aware of any published opinion post-*Monasky*, including *Monasky* itself, that reversed a trial court's habitual-residence determination.[12]

III

After a three-day trial, the district court found Nisbet failed to prove by a preponderance of the evidence that ACN and KRN habitually resided in Scotland when Bridger brought them to the United States. In making this finding, the district court took into account the following facts.[13]

A.

When Bridger lived with ACN and KRN in Scotland from late 2019 through June 2022, ACN was approximately two to four years old, and KRN was less than two and a half years old.[14] Their ability to acclimatize to society was limited at the time. That said, the district court considered whether ACN and KRN could have acclimatized to

12. This of course does not prevent us from reversing a district court's habitual-residence determination wherever required, just as the rarity of courts' finding no habitual residence does not stop us from affirming such a finding where, as here, required.

13. The parties do not dispute that the district court correctly identified the governing *Monasky* standard.

14. ACN also lived with Bridger in Scotland for approximately six months from August 2018 to February 2019, when he was less than one year old.

Scotland through three likely ties: people in the societal surroundings, Nisbet's family and friends, and Nisbet.

First, the district court found ACN and KRN did not make any friends at their nursery school or elsewhere in Scotland. Second, Nisbet's family severed contact with Nisbet, Bridger, and their children. Third, the district court considered ACN and KRN's lack of connection with Nisbet. Nisbet has been incarcerated since KRN's birth; he lived with ACN only intermittently for at most a year, half of which time he was bedbound because of his second suicide attempt. In fact, Nisbet himself has not lived in Scotland since 2017—he first lived in Jersey, then he was confined at Brockfield House in Essex, England and thereafter transferred to St. Andrew's Hospital in Northampton, England. Granted, Nisbet tried to interact with ACN and KRN over Skype from his psychiatric internment in England every day for an hour. Often after a short period, however, ACN and KRN stopped paying attention to Nisbet on the screen. All told, we see no clear error when the district court concluded ACN and KRN "had no family or friends in Scotland" and "no meaningful relationship with their father."

The dissent criticizes our consideration of whether ACN and KRN had a meaningful relationship with Nisbet. Dissent at 39–40. But *Monasky* teaches that one relevant factor of the acclimatization inquiry for determining children's habitual residence is whether they have built "meaningful connections with the people" there. 589 U.S. at 78 n.3 (citation omitted). It is not a clear error, therefore, for the district court to have considered this

factor to conclude ACN and KRN did not habitually reside in Scotland. Moreover, the dissent also questions the district court's conclusion that ACN and KRN lacked a relationship with Nisbet, given the handful of visits he had with the children and the Skype calls. Dissent at 39–40. But the inquiry is not whether the children interacted with Nisbet at all, but instead whether the relationship was meaningful. Here, the district court concluded—based on the entirety of the record, including Bridger's credible testimony—that it was not. That the dissent would come to a different conclusion on this issue does not make the district court's conclusion clearly erroneous.

The dissent further contends ACN and KRN had family in Scotland simply because they lived with each other and with Bridger. Dissent at 37–38. This is too clever by half. If the dissent were right, then a child abducted by a parent would, by definition, have a "family" in the country to which he is abducted. Such a logic that categorically favors the abductor parent, of course, cannot be condoned by the Hague Convention. Tellingly, even Nisbet's counsel had to concede at oral argument that the district court did not clearly err in finding ACN and KRN had "no family or friends in Scotland," a point that the dissent ignores.

B.

Next, the district court followed the Supreme Court's teaching in *Monasky* that "the intentions and circumstances of caregiving parents are relevant considerations," when a child—like ACN, less than four

and a half years old by June 2022, and KRN, less than two and a half years old at the time—is unable to acclimate due to his very young age or other reasons. *Monasky*, 589 U.S. at 78. On the mother's side,[15] Bridger's intention and circumstances militate against finding Scotland to be ACN and KRN's habitual residence because, as the district court observed, Bridger "had been shuttled through Jersey shelters," "repeatedly contemplated moving back to Oregon," and was in the United Kingdom "on an expiring visa."

The dissent reads the record differently, concluding Bridger's precarious British visa circumstance "strongly suggests that Bridger intended to remain in Scotland." Dissent at 39. To reach this conclusion, the dissent must disregard a plethora of Bridger's credible testimony that she never intended for Scotland to be more than a temporary location for herself and her children, and that she sought to renew her U.K. visa in 2021 only because she believed she needed additional time in the United Kingdom to obtain the necessary documentation from Nisbet for KRN's U.S. passport. That the dissent disbelieves Bridger's testimony does not necessarily mean the district court was mistaken in finding it credible, which finding Nisbet's counsel conceded at oral argument was not clearly erroneous.

The dissent then argues that, in any event, Bridger's visa status tells us nothing about ACN and KRN's habitual

15. Nisbet's counsel conceded at oral argument that the district court did not clearly err in finding Bridger to be ACN and KRN's caregiver.

residence. Dissent at 39. Not so. Bridger's precarious British visa circumstance rendered it much less likely she intended Scotland to be ACN and KRN's habitual residence, and Bridger's "intention[]," "circumstance[]," and "immigration status" are all "relevant considerations" under *Monasky*, 589 U.S. at 78 & n.3 (citation omitted), especially when only Bridger was capable of being a caregiving parent for the very young ACN and KRN, since Nisbet was imprisoned.

Therefore, the district did not clearly err in placing significant weight on Bridger's lack of ties to Scotland when ascertaining ACN and KRN's habitual residence. *See Monasky*, 589 U.S. at 80 n.4 (recognizing the mother's integration to a country as a "highly relevant" factor, if a young child is "in fact looked after by her mother" (citing *Mercredi v. Chaffe*, 2010 E. C. R. I–14309, I–14379, ¶ 55)).[16]

On the father's side, the district court afforded little weight to his role as a caregiver. The district court found Nisbet arguably "raised ACN in earnest" only "for the six months between February and August 2019," and he did not raise KRN at all because he had been imprisoned before KRN's birth. Admittedly, Bridger depended on Nisbet's financial support throughout the relevant time, but that fact alone does not transform Nisbet into

16. In *Mercredi*, the Court of Justice of the European Union held that "[a]s a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of." 2010 E. C. R. I–14309, I–14379, ¶ 54.

a caregiving parent. Caregiving means "[a] parent's or caregiver's task that either involves interaction with a child or directs others' interaction with a child." *Caretaking Functions*, BLACK'S LAW DICTIONARY (12th ed. 2024). It does not mean mere financial support. Black's Law Dictionary also provides examples of caregiving functions, which include "feeding and bathing a child, guiding the child in language and motor-skills development, caring for a sick child, disciplining the child, being involved in the child's educational development, and giving the child moral instruction and guidance." *Id.* Supplying financial wherewithal is not mentioned.[17]

Accordingly, we do not find the district court committed a clear error in focusing on the intention and circumstances of Bridger, the sole caregiving parent of ACN and KRN.

C.

Nisbet assails the district court's decision on three grounds. None of them suffices as a clear error.

First, Nisbet contends the district court clearly erred simply because it found ACN and KRN lacked habitual

17. *See also Caregiver*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("A parent, foster parent, or social worker who looks after and exercises custodial responsibility for an infant or child."); *Custodial Responsibility*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("Physical child custody and supervision, usu. including overnight responsibility for the child.").

residence altogether.[18] This contention is tantamount to a categorical ban against finding no habitual residence. As the Supreme Court has made clear, the "bottom line" is "[t]here are no categorical requirements for establishing a child's habitual residence." *Monasky*, 589 U.S. at 80. While a finding of no habitual residence is rare and should be disfavored, it is not a clear error to render such a finding if the totality of the circumstances of a particular case so warrants. *See id.* at 81 (criticizing only "a presumption of no habitual residence," not the finding of no habitual residence in individual cases); *id.* at 82 (faulting only a "categorical" requirement that "would leave many infants without a habitual residence"). We agree that a finding of no habitual residence should not be made lightly, but we do not see a clear error in finding no habitual residence in the unusual circumstances of this case.[19]

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18. Nisbet cites *Grano v. Martin*, an out-of-circuit district court case, for the proposition that courts have read *Monasky* to mean a finding of no habitual residence is inappropriate. 443 F. Supp. 3d 510, 535 (S.D.N.Y.), *aff'd*, 821 F. App'x 26 (2d Cir. 2020). But *Grano* does not lend Nisbet any help. All it suggested was that *Monasky* "has mostly undone the no-habitual-residence line of cases *stemming from a lack of parental shared intent, at least for infants*." *Id.* (emphasis added).

19. The dissent invites us to consider a counterfactual in which Nisbet fled his psychiatric facility and abducted ACN and KRN to Armenia. Dissent at 43–44. In that scenario, everything else being equal, we believe it would likewise not be a clear error for an Armenian court to find ACN and KRN lacked habitual residence in Scotland, if *Monasky* also governs in Armenia. There will always be children whom the Hague Convention is incapable of protecting—the dissent acknowledges as much. *See* Dissent at 45 (citing cases in which the dissent believes a finding of no habitual residence were appropriate).

Second, Nisbet maintains the district court clearly erred in finding ACN and KRN had not habitually resided in Scotland, "where they had lived for two years and four months in the same apartment, where they had attended the same preschool, [and] where all of their medical and dental visits had occurred."[20] The Supreme Court has held a child's "mere physical presence" in a country "is not a dispositive indicator of" his habitual residence. *Monasky*, 589 U.S. at 81; *see also id.* at 78 (reasoning that a place is just "likely" to be a child's habitual residence, if the child has lived there "with her family *indefinitely*" (emphasis added)). Nor is the attendance in any preschool determinative.[21] *See id.* at 78 ("No single

20. Nisbet also asserts ACN and KRN had friends in Scotland. This assertion, however, finds little support in the record. The only supporting evidence Nisbet cites is his own conclusory testimony: "They had friends there. They had nursery. They were very well-settled and actually had a good life there. They went to school there." In contrast, Bridger testified ACN and KRN "didn't actually make friends when they were in Scotland at nursery." They had acquaintances from elsewhere, but Bridger also testified "they never knew anyone on a name basis." Nisbet's counsel conceded at oral argument that the district court did not clearly err in crediting Bridger's testimony.

21. Nisbet cited several cases from other circuits for his proposition that a child's attendance at preschool is one of the most significant factors in determining the child's habitual residence. While those cases might have regarded a child's attendance at school as one of the more pronounced factors in the circumstances of those cases, they do not suggest it to be a dispositive factor across all cases. Additionally, we note that from 2020 to 2022, ACN (roughly two to four years old) and KRN (newborn to about two years old) were so young that, to them, the preschool was more akin to a daycare center rather than an academic school.

fact" "is dispositive across all cases."). The ultimate object for evaluating a child's social engagement is to assess acclimatization. *Id.* at 78 & n.3. Where, as here, factors such as physical presence and preschool attendance did not yield any meaningful social connections for a child, they are not entitled to much salience in courts' habitual-residence determinations. Therefore, we see no clear error on the district court's part.[22]

Finally, Nisbet argues the district court clearly erred by resting its decision on Nisbet's alleged coercive behaviors toward Bridger. Not so. The district court made comments about Nisbet's coercive behaviors only after it had "resolve[d] this case in [Bridger's] favor." As such, these comments are dicta and cannot serve as a proper basis for reversal.[23]

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22. Nisbet also faults the district court for considering Bridger's intention to leave Scotland and Nisbet's confinement. He argues such consideration contravenes *Monasky*'s teaching that courts should focus on where a child—not either of his parents—is at home. This argument fails because *Monasky* expressly licensed consideration of caregiving parents' intentions and circumstances, especially when the children are of such tender age as were ACN and KRN. 589 U.S. at 78. The dissent contends a parent's intent "is most frequently relevant," when the parent's physical presence in a jurisdiction is relatively short, and when courts determine "whether there has been a *change* in the children's habitual residence." Dissent at 35–36 (emphasis in original) (citing pre-*Monasky* cases). The Supreme Court in *Monasky* did not so cabin the consideration of caregiving parents' intentions and circumstances. Nor does that factor's frequent relevance in certain contexts forecloses its consideration in others.

23. It is also not a clear error for the district court to have mentioned these coercive behaviors. Whether a caregiving parent

D.

The dissent argues a finding of habitual residence is "an inquiry into a single determinable fact," Dissent at 42 (citing *Kijowska v. Haines*, 463 F.3d 583, 587 (7th Cir. 2006), which predated *Monasky*), and must be "subject to de novo review," *id.* at 31 (praising *Silverman v. Silverman*, 338 F.3d 886, 896–97 (8th Cir. 2003), another pre-*Monasky* case, for offering "a clear-eyed view" of the proper standard of review for habitual-residence determinations). We decline the dissent's invitation to insubordination by regressing to a pre-*Monasky* world. *See Monasky*, 589 U.S. at 76 (explicitly abrogating the Ninth Circuit's holdings in *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001), that placed greater weight on shared intentions of parents than on children's acclimatization, and that subjected district courts' habitual-residence determinations to de novo review).

Disregarding the totality-of-the-circumstances standard set by the Supreme Court in *Monasky*, the dissent faults the district court for considering "noise" in the record such as ACN and KRN's lack of meaningful ties with Scotland, for such facts, in the dissent's view, answer not the question where the children habitually resided but where their best interests lay. Dissent at 24–25, 34–35. In the same vein, the dissent accuses the district court of "broaden[ing]" the factors that bear

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is coerced into living in a country is relevant to courts' habitual-residence determinations. *Monasky*, 589 U.S. at 78. Notably, Nisbet's counsel conceded at oral argument that the district court did not clearly err in crediting Bridger's testimony, which included testimony about Nisbet's coercive behaviors.

relevance on habitual-residence determinations. Dissent at 29–30, 45. The district court here, as discussed *supra*, firmly anchored its factual considerations to factors that the Supreme Court in *Monasky* expressly espoused as relevant to habitual-residence determinations. The dissent seems to select some factors to its liking but downgrade others, contrary to *Monasky*. *See* Dissent at 31–32.

Meanwhile, the dissent inserts itself into the trial courts' province by attempting to resurrect the de novo standard of review of *Mozes v. Mozes* for habitual-residence determinations. 239 F.3d at 1073. We agree with the dissent that a selection of facts in the record of this case can be read to support the conclusion that ACN and KRN habitually resided in Scotland, especially if one credits Nisbet's testimony over Bridger's. *See* Dissent at 32–34. That, however, does not mean the district court clearly erred in finding otherwise, especially when Nisbet's counsel conceded at oral argument that it was not a clear error for the district court to have credited Bridger's testimony. The clear-error standard of review, by definition, admits the possibility that more than one inference can be drawn from any given record; when that occurs, a trial court's choice between these permissible inferences cannot be clearly erroneous. *Anderson*, 470 U.S. at 574. In the end, the habitual-residence determination "presents a task for factfinding courts"; appellate courts, once satisfied that the trial courts have considered the totality of the legally relevant factors, are not entitled to weigh these factors anew. *Monasky*, 589 U.S. at 84. The dissent's suggestion to bypass the district court flouts *Monasky*. *See* Dissent at 31–32.

As the dissent belittles *Monasky*, it brandishes the purpose of the Hague Convention, which aims to protect children from abduction. *See id.* at 44–45. But *Monasky* is no enemy to the Convention. The dissent may find the totality-of-the-circumstances test too "standardless," *id.* at 44, but the Supreme Court purposefully put "all the circumstances" "in play" so that "would-be abductors" would find it difficult to "manipulate the reality on the ground." *Monasky*, 589 U.S. at 82 (citation omitted). The dissent may find the clear-error review too inconvenient for its view to prevail, *see* Dissent at 31–32, but the Supreme Court laid down such a deferential standard of review to preserve "the Convention's premium on expedition" and to spare families from lengthy appeals. *Monasky*, 589 U.S. at 84 (citation omitted).

Defying *Monasky*, the dissent is perhaps out of its place. With respect, we cannot join the dissent's "protest" against the Supreme Court.[24] Dissent at 53.

IV.

We owe obedience to the Supreme Court, which has encouraged trial courts to make habitual-residence determinations based on "a quick impression gained on a panoramic view of the evidence." *Monasky*, 589 U.S. at 82 (citation omitted). Reviewing such determinations for clear error, we owe deference to trial courts, which enjoy the

24. As we find the district court's decision faithfully followed *Monasky*, we see no reason to respond to the dissent's speculation regarding the district court's possible underlying motivation. *See* Dissent at 25–26.

vantage point of observing witnesses' demeanor, candor, and other indicia of credibility.

In this case, as in many cases under the Hague Convention, reasonable minds can differ as to how evidence should be appraised. We must refrain from disturbing the district court's habitual-residence determination unless it clearly erred. Because we find it did not, we affirm.[25]

AFFIRMED.

BYBEE, Circuit Judge, dissenting:

The Hague Convention on the Civil Aspects of International Child Abduction is not an agreement as to the standards for determining questions of child custody that have spilled over international boundaries. Rather, like a forum selection clause, it is "a 'provisional' remedy that fixes the forum for custody proceedings." *Monasky v. Taglieri*, 589 U.S. 68, 72, 140 S. Ct. 719, 206 L. Ed. 2d 9 (2020) (citation omitted). The Hague Convention establishes the proper forum as of a particular place and time: "the State in which the child was habitually resident immediately before the removal." Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or "Convention"), Art. 3(a), Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *reprinted at* 51 Fed. Reg. 10498 (March 26, 1986). The question in this case is whether the children of Spirit Bridger and Dr. Andrew

25. We express no view as to the district court's discussions of other issues.

Nisbet had a habitual residence on June 17, 2022, the day Bridger took the children from Scotland to Oregon.

As of the day in question, Bridger had lived in Scotland (except for two brief periods when she lived on the Bailiwick of Jersey, a British Crown Dependency) for seven years, since 2015. Her children, ACN and KRN, were British citizens. ACN, about four and a half in June 2022, was born in Jersey, but had lived in Scotland with his mother since late 2018, except for part of 2019, when they returned to Jersey. KRN, about two and a half when she was abducted from Scotland, was born in Scotland and had never lived anywhere else. Scotland was their father's home, and they lived in an apartment he owned and paid for. The children attended nursery school in Scotland and received medical and dental care there. Only a year before she left, Bridger applied to the U.K. Home Office for her third long-term visa in anticipation of obtaining "settlement" in Scotland.

Notwithstanding the simplicity of these facts, the district court concluded that that the children did not habitually reside in Scotland on June 17, 2022. There is no alternative country of residence; they simply lacked "any habitual residence" at all. The majority agrees with the district court as to "Bridger's lack of ties to Scotland," which renders the children stateless for purposes of the Hague Convention, and therefore utterly without protection from parental abduction. Maj. Op. at 14–16.

That conclusion is beyond all reason. There is a lot of noise in this record.[1] And the majority starts with the noisiest fact of all: Nisbet killed his mother. Maj. Op. at 4. The majority continues with other noisy facts: ACN and KRN didn't have friends in nursery school in Scotland, Nisbet's family has cut off contact with the children, and Nisbet is a distant father. Maj. Op. at 12–14. The opinion puts a bow on the exercise by observing that ACN and KRN are now U.S. citizens and are well settled in Oregon, where they have health and dental care and the support of extended family. Maj. Op. at 4 n.2. From all of this, the majority concludes that the district court committed "[no] clear error in finding no habitual residence in the unusual circumstances of this case." Maj. Op. at 18.

The facts found by the district court and embraced by the majority are, for the most part, not *clearly erroneous*. But they are *clearly irrelevant* to the only question we are charged with answering: Did the children have a habitual residence on June 17, 2022? The majority has utterly confounded that inquiry because it has pursued, *sub silentio*, a different question—the one the district court also answered: Where is it in the best interests of the children to live now? When that becomes the question, the answer seems obvious—Oregon. And once Oregon

1. Bridger and Nisbet's relationship is long and complicated and, well before Nisbet killed his mother, not entirely conventional. Although, as I will explain, that history might be relevant to deciding questions of custody, it is not relevant to deciding questions of residence. I do not entirely agree with the way the majority has laid out the facts, but rather than complicate this opinion with irrelevant curiosities, I will supply facts as necessary.

becomes the place, our legal analysis follows logically: If Oregon is the best place for the children, they are better off in Oregon courts, not Scottish courts. And if the Scottish courts are not the best place for resolving custody questions, then Scotland cannot be the place of habitual residence. Q.E.D.

The answer to the correct question—where were the children habitually resident?—should have been quick and easy. The Supreme Court has held that we should take a "common sense" approach to the Hague Convention and said that "[c]ommon sense suggests that some cases will be straightforward: Where a child has lived in one place with her family indefinitely, that place is likely to be her habitual residence." *Monasky*, 589 U.S., at 78. We took an easy question and made it hard. The majority, understandably and like the district court, takes a sympathetic view of the plight of the children, but in the end we have done what the Hague Convention abjures: Instead of "allow[ing] the courts of the home country to decide what is in the child's best interests," we have decided for ourselves what is in the children's best interest and, not surprisingly, we "prefer [Oregon's] own society and culture" as a "friendlier forum" for resolving custody issues. *Abbott v. Abbott*, 560 U.S. 1, 20, 130 S. Ct. 1983, 176 L. Ed. 2d 789 (2010).

We are well out of our lane. I cannot follow my colleagues down that road. These children habitually resided in Scotland, the courts of Scotland are best situated to determine the custody and access rights of the parents, and we have to trust the Scottish courts to resolve

these issues appropriately. Because I believe that we have violated our obligations under the Hague Convention, I firmly dissent.

I

Adopted in 1980 in response "to the problem of international child abductions during domestic disputes," the Hague Convention "seeks to secure the prompt return of children wrongfully removed to or retained in any Contracting State and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." *Abbott*, 560 U.S. at 8 (internal citation and quotation marks omitted). The Convention addresses this problem in two ways. First, it identifies the proper forum for resolving these disputes. Second, the Convention provides for the prompt return of the "wrongfully removed" child to that forum. The Convention identifies the proper forum as a particular place at a particular time: where the child "was habitually resident . . . immediately before any breach of custody or access rights." Hague Convention Art. 4. Under Article 3 of the Convention, "[t]he removal or the retention of a child is to be considered wrongful where . . . it is in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident immediately before the removal or retention." *Id.* Art. 3(a). The removal is wrongful whether the "rights [of custody] were actually exercised . . . or would have been so exercised but for the removal or retention." *Id.* Art. 3(b). When "[a]ny person" claims that a child has been wrongfully removed, she may apply

to the State of the child's habitual residence or to any other Contracting State to secure the return of the child. *Id.* Art. 8. The International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. § 9001 *et seq.*, implements the Hague Convention. Under ICARA, state and federal courts have concurrent jurisdiction over actions arising under the Convention. 22 U.S.C. § 9003(a); *see* 22 U.S.C. § 9003(b) (providing that "[a]ny person seeking to initiate judicial proceedings under the Convention for the return of a child" may file a petition in "any court which has jurisdiction of such action").

Once a party petitions under the Convention, "Contracting States shall act expeditiously in proceedings for the return of the children." Hague Convention Art. 11. The right of return to the jurisdiction of the habitual residence is the principal remedy available under the Convention. When the proceedings are commenced within one year from the date of the wrongful return, the Contracting State where the child is present must "order the return of the child forthwith." *Id.* Art. 12. The Convention makes clear that any decision "concerning the return of the child shall not be taken to be a determination on the merits of any custody issue." *Id.* Art. 19; *see* 22 U.S.C. § 9001(b)(4) (providing that U.S. courts may "determine only rights under the Convention and not the merits of any underlying child custody claims"). The return remedy is a "provisional" one "that fixes the forum for custody proceedings." *Monasky*, 589 U.S. at 72. This is because the "Convention is based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the

country of habitual residence." *Abbott*, 560 U.S. at 20. Under ICARA, the party seeking return must establish the child's "habitual residence" by a preponderance of the evidence. 22 U.S.C. § 9003(e)(1)(A).

As relevant here, there is an exception to the right of return. A "State is not bound to order the return" if the party opposing return established that "there is a grave risk to his or her return [that] would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Hague Convention Art. 13(b). ICARA provides that the party opposing return must establish the "grave risk" by clear and convincing evidence. 22 U.S.C. § 9003(e)(2)(A).

The district court here concluded that Nisbet failed to carry his burden of proving by a preponderance of the evidence that ACN and KRN habitually resided in Scotland prior to their mother removing them to Oregon. In the alternative, the district court concluded that Bridger showed by clear and convincing evidence that the children would be subject to grave risk if they were returned to Scotland. Because I conclude in Part II below that the district court's conclusion with respect to habitual residence is erroneous as a matter of both law and fact, I will address in Part III the district court's errors with respect to the grave risk.

Appendix A

II

A

Although "'[h]abitual residence' is the central—often outcome-determinative—concept" in Hague Convention cases, *Mozes v. Mozes*, 239 F.3d 1067, 1072 (9th Cir. 2001), neither the Convention nor ICARA defines the term. But there are basic principles. "A child 'resides' where she lives," and [h]er residence in a particular country can be deemed 'habitual,' . . . when her residence there is more than transitory." *Monasky*, 589 U.S. at 76 (citations omitted). The Court has explained that the Convention's explanatory report refers to "'the family and social environment in which [the child's] life has developed'" such that "[w]hat makes a child's residence 'habitual' is therefore 'some degree of integration by the child in a social and family environment.'" *Id.* at 77(citations omitted). According to the Court, "[t]he place where a child is at home, at the time of removal or retention, ranks as the child's habitual residence." *Id.* (quoting *Karkkainen v. Kovalchuk*, 445 F.3d 280, 291 (3d Cir. 2006)). The Court has not identified any particular set of criteria for determining residence but has described the inquiry as depending on "common sense." *Id.* at 78.

The majority places great weight on *Monasky*'s charge that "[t]here are no categorical requirements for establishing a child's habitual residence," and that the inquiry is a "fact-intensive determination . . . [that] necessarily varies with the circumstances of each case." *Monasky*, 589 U.S. at 78, 80. *See* Maj. Op. at 11; *see also*

id. at 12 (noting that there is no case post-*Monasky* that reverses a trial court's habitual-residence determination). The lack of a fixed formula and a totality-of-the-circumstances inquiry does not free us from deciding what is and is not *legally* relevant. That there are "no categorical requirements" does not mean that anything goes. For example, a finding that one parent favors Real Madrid, while the other parent likes Manchester United may not be clear error, but it is legally irrelevant to determining one's residence. *Monasky* cannot be read so broadly. The Court said the habitual-residence inquiry was a mixed question of law and fact that "begins with a *legal* question: What is the appropriate standard for habitual residence?" *Monasky*, 589 U.S. at 84 (emphasis added).

A "totality-of-the-circumstances standard" is not an invitation to consider the totality of any circumstances the district court deems relevant. The majority, however, has taken *Monasky* as license for "anything goes." As the majority explains it, everything is on the table: You cannot "select some factors . . . but downgrade others[.]" *Id.* at 21. If every fact is potentially relevant and of equal value, it is hard to imagine what makes the majority think "[a] habitual-residence determination is a mixed question of law and fact." *Id.* at 11 (citing *Monasky*, 589 U.S. at 84). As Justice Scalia once colorfully observed, accepting a totality-of-the-circumstances test without knowing what is relevant may be "judge-liberating" but it is like taking the facts and "chuck[ing them] into a brown paper bag and shak[ing them] up to determine the answer." *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 128–29, 128 S. Ct. 2343, 171 L. Ed. 2d 299 (2008) (Scalia, J., dissenting); *see*

Burnham v. Sup. Ct. of Cal., 495 U.S. 604, 626, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990) (plurality op. of Scalia, J.) ("[D]espite the fact that he manages to work the word 'rule' into his formulation, Justice Brennan's approach does not establish a rule of law at all, but only a 'totality of the circumstances" test, guaranteeing what . . . rules of jurisdiction were designed precisely to avoid: uncertainty and litigation . . . .").

In my view, the Eighth Circuit has offered a clear-eyed view of the proper role for our review, one perfectly consonant with *Monasky*:

> We recognize that a habitual residence determination must be based on facts and that the facts will vary considerably in each situation. But a district court's determination of habitual residence is not devoid of legal principles. . . . If habitual residence is treated as a purely factual matter, to be decided by an individual judge in individual circumstances unique to each case, parents will never be able to guess, let alone determine, whether they are at risk of losing custody by allowing their children to visit overseas or in allowing them to make international trips with an estranged spouse. . . . [H]abitual residence [must] be a legal determination subject to de novo review . . . .

Silverman v. Silverman, 338 F.3d 886, 896–97 (8th Cir. 2003) (en banc). Although the majority states that we are not to interfere with questions that are within the trial courts' province, it appears to acknowledge that whether

the district court correctly applied the totality-of-the-circumstances test is a question that is subject to more stringent review than review for clear error. Maj. Op. at 22 (noting that appellate courts must consider whether "trial courts have considered the totality of the *legally* relevant factors") (emphasis added). Embracing a totality-of-the-circumstances test does not mean that all facts are of equal weight. Some circumstances are more relevant than others. We abandon our responsibility to the law if are not discerning in the weight we give to the various facts.

In *Monasky*, the Court boiled the "appropriate standard for habitual residence" down to a single factual question: "Was the child at home in the particular country at issue?" *Monasky*, 589 U.S. at 84. It is to the facts supporting that inquiry that I now turn.

B

This should have been a very simple case. As the Court observed in *Monasky*, if "a child has lived in one place with her family indefinitely, that place is likely to be her habitual residence."[2] *Id.* at 78. ACN and KRN were young children when they were taken to the United States. As such we can reasonably look to the residence of their mother, who had been their primary custodial parent for their entire lives. *See id.* at 80 n.4; *Delvoye v. Lee*, 329

2. Puzzlingly, despite the majority's extensive—indeed, almost exclusive—reliance on *Monasky*, it dismisses this statement. Maj. Op. at 18–19 (stating that the Court "reason[ed] that a place is just 'likely' to be a child's habitual residence, if the child has lived there 'with her family indefinitely'") (emphasis omitted).

F.3d 330, 333 (3d Cir. 2003) ("'[I]n practice it is often not possible to make a distinction between the habitual residence of a child and that of its custodian. Where a child is very young it would, under ordinary circumstances, be very difficult for [her] to have the capability or intention to acquire a separate habitual residence.'" (quoting Paul Beaumont & Peter McEleavy, *The Hague Convention on the International Child Abduction* 91 (1999))). Bridger had a stable presence in Scotland. Except for two brief periods when she lived on the isle of Jersey with Nisbet's parents, Bridger had lived in Scotland since 2015. Not only had she resided there for some seven years, she had also resided in the same apartment in Edinburgh—one belonging to Nisbet—for her entire sojourn. From at least early 2020, she attended a weekly knitting club and had at least one friend there who she confided in. D. Ct. Op. at 12 & n.7. Bridger obtained a U.K. driver's license and drove after Nisbet's father put her on his car insurance. By any ordinary meaning of "habitual residence," Bridger habitually resided in Scotland on June 17, 2022, the day she took the children to Oregon. If, as Bridger's counsel stated at oral argument, "the children's home is with their mother," then ACN and KRN's home was in Scotland.

This case is equally easy if we focus exclusively on the children. ACN was born in Jersey and lived there briefly with both of his parents. When he was less than a year old, he moved to Scotland with his mother for six months, then moved back to Jersey, where he again lived with both of his parents at his grandparents' home until Nisbet was taken into custody. Shortly thereafter, ACN moved back to Scotland, where he lived with his mother

(and, later, his younger sister) in the apartment owned by his father. Money to live on came from his father. By the time his mother took him to the United States when he was about four-and-a-half years old, he had lived in Scotland for most of his life and continuously since he was a year and a half old. He attended nursery school there, he received medical and dental care there, and Bridger's family visited him there. Scotland was clearly the location of "the family and social environment in which [ACN's] life ha[d] developed" until June 17, 2022. *Mozes*, 239 F.3d at 1081 (citation omitted).

For KRN, this case is even simpler. She was born in Scotland and lived there with her mother and older brother in her father's apartment and at her father's expense for her entire life, until the time her mother took her to the United States. Except for a period of time during COVID lockdowns, she went to nursery school there. She received medical care there. Her mother's family from the United States visited KRN there. She had personal belongings there that were important enough that her mother chose to delay leaving Scotland so that she could send those belongings to the United States. Her two and a half years in Scotland, with all of the surrounding circumstances, easily suffice to establish that her presence in Scotland was "more than transitory." *Monasky*, 589 U.S. at 76; *cf.* 28 U.S.C. § 1738A(b)(4) (defining "home State" for full faith and credit purposes in domestic custody cases as the place where the "the child lived with his parents . . . for at least six consecutive months"). A more complete picture of a "customary" or "usual" place where one "lives" is hard to imagine. *Id.*

C

Notwithstanding the clarity of the facts and principles, the district court concluded that Nisbet failed to show by a preponderance of the evidence that ACN and KRN habitually resided in Scotland. The court pointed to several facts: (1) Bridger "repeatedly contemplated moving back to Oregon," (2) "[t]he children had no family or friends in Scotland," (3) Bridger was in the United Kingdom on an expiring visa, (4) the children had "no meaningful relationship with their father," who lived in England, not Scotland, and (5) Nisbet "used his children as leverage to force [Bridger] to stay." D. Ct. Op. at 14–15; *see* Maj. Op. at 12–14. With respect to the question of where the children habitually resided, the first four of these findings are clearly erroneous, clearly irrelevant, or both. I will address each one.

(1) *Bridger's intent.* Bridger's intent to leave Scotland at some future time and return to Oregon did not prevent the children from becoming habitually resident in Scotland. *Norinder v. Fuentes*, 657 F.3d 526, 534 (7th Cir. 2011); *Mozes*, 239 F.3d at 1077 & n.26. Although "the intentions and circumstances of caregiving parents are relevant considerations," *Monasky*, 589 U.S. at 78, when "a child has no clearly established habitual residence elsewhere, [the child] may become habitually resident even in a place where [the child] was intended to live only for a limited time," *Mozes*, 239 F.3d at 1082. The Hague Convention deliberately chose the phrase "habitual residence," which is "not equivalent to the American legal concept of 'domicile,' which relies principally on intent."

Guzzo v. Cristofano, 719 F.3d 100, 103 (2d Cir. 2013). Accordingly, "a family need not intend to remain in a given location indefinitely before establishing habitual residency there." *Watts v. Watts*, 935 F.3d 1138, 1144 (10th Cir. 2019).

The cases bear out that a parent's intent is most frequently relevant to determining habitual residence in two circumstances. First, it may be relevant when the parent's physical presence in the jurisdiction was relatively short. *See Kijowska v. Haines*, 463 F.3d 583, 587–88 (7th Cir. 2006); *Delvoye*, 329 F.3d at 332.[3] Second, parental intent may be relevant when we are determining whether there has been a *change* in the children's habitual residence. *See Pfeiffer v. Bachotet*, 913 F.3d 1018, 1024 (11th Cir. 2019) (per curiam) ("We have set forth two requirements to alter a child's habitual residence: (1) the parents must share a 'settled intention' to leave the old habitual residence behind; and (2) an 'actual change in

3. Bridger's situation bears little resemblance to the facts of *Kijowska v. Haines*, which is the case relied on by the district court to conclude that Bridger's intent and immigration status were relevant to the children's habitual residence. D. Ct. Order at 14. In that case, the mother, a Polish citizen, had overstayed her student visa. Notwithstanding her immigration status, the mother gave birth in the United States to a daughter and two months later took her to Poland, where the child also had citizenship. The court held that the child had never established residence in the United States and that Poland was the child's habitual residence: "[I]t is impossible to reconcile [the father's] initial disavowal of custody over [the child], and [the mother's] expectation (based on her immigration status . . .) that she would be returning with [the child] to Poland, with [the child's] having acquired a habitual residence in the United States." 463 F.3d at 588.

geography and the passage of a sufficient length of time for the child to have become acclimatized' must occur." (citation omitted)). So, if for example, we were trying to decide which of two countries was the habitual residence, we might consider the parents' intent. *See Silverman*, 338 F.3d at 898–99; *Mozes*, 239 F.3d at 1076–77; *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995). Outside of these circumstances, a parent's unilateral intent to return to another country—especially one that the child has never lived in—is not relevant to determining habitual residence.[4] Neither of these two circumstances applies

4. *See Norinder*, 657 F.3d at 534 (finding that the child's habitual residence was in Sweden even though he lived there for less than two years and his parents "thought that they might one day return to the United States"); *Barzilay v. Barzilay*, 600 F.3d 912, 918–19 (8th Cir. 2010) (explaining that even though parents may not have intended to remain in the United States permanently, the children habitually resided in the United States because the children lived here "most or all of their young lives"); *Sorenson v. Sorenson*, 559 F.3d 871, 874 (8th Cir. 2009) (concluding that the child habitually resided in Australia after living there for three years); *Robert v. Tesson*, 507 F.3d 981, 996–97 (6th Cir. 2007) (determining that less than one year in the United States was enough to acquire habitual residence because the children enrolled in school, traveled to Yellowstone, and visited their grandmother); *Koch v. Koch*, 450 F.3d 703, 717–19 (7th Cir. 2005) (concluding that "the objective facts point[ed] unequivocally" to habitual residence in Germany, even though the parents intended to return to the United States at some point) (citation omitted); *Whiting v. Krassner*, 391 F.3d 540, 550 (3d Cir. 2004) (concluding that the child was habitually resident in Canada even though the parents agreed the stay would be "of a limited duration"); *Miller v. Miller*, 240 F.3d 392, 400 (4th Cir. 2001) (finding that the children's habitual residence was Canada because they were born there and

here. Bridger lived in Scotland for seven years, there has not been any change in ACN's residence since before KRN was born, and no change whatsoever in KRN's residence. There is no alternative habitual residence. In this case, the question of habitual residence is "Scotland or nothing."

(2) *Family and friends in Scotland*. The district court's finding that the children "had no family or friends" in Scotland is just plain error. Of course the children had family in Scotland. The children lived with their mother. ACN lived with his sister, KRN; KRN lived with her brother. That the children had extended family living elsewhere doesn't change their habitual place of residence.

The majority misunderstands the point: ACN and KRN had well-settled family in Scotland, and that makes the district court's finding that they had no family there clear error. The majority claims this is "too clever by half" because "a child abducted by a parent would, by definition, have a 'family' in the country to which he is abducted." Maj. Op. at 14. From this the majority concludes that "such a logic that categorically favors the abductor parent, of course, cannot be condoned by the Hague Convention." *Id.*

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lived there "with their mother for a substantial portion of their lives"); *Feder*, 63 F.3d at 224 & n.13 (explaining that a four-year-old child's habitual residence was Australia after he lived there for six months and attended preschool there because the United States was the country of his "relatively distant past and [his mother's] unilaterally chosen future"); *Friedrich v. Friedrich* (*Friedrich I*), 983 F.2d 1396, 1402 (6th Cir. 1993) (concluding that the child habitually resided in Germany where he was born and lived until his mother took him to the United States).

But this fundamentally misunderstands how the Hague Convention works. Having family (especially immediate family that a child lives with) in Scotland is highly relevant to whether Scotland is the child's habitual residence; that a child has family (immediate or otherwise) in a far-off jurisdiction where the child has never resided has nothing to do with the child's habitual residence. The majority has mistaken the merits of the underlying custody determination for the only question the Hague Convention answers: Where is the proper forum for addressing the merits?

(3) *Bridger's visa status*. The finding that Bridger was in Scotland on an expiring visa is irrelevant, at best. Bridger testified that she originally obtained an entrepreneur visa for the U.K. so that she could open a coffee shop in Scotland, where she was living with Nisbet. When that didn't materialize, she applied in 2018 for a domestic partnership visa, good for 30 months. In 2021, she applied for a "settlement" visa, which would allow her to remain indefinitely. The U.K. Home Office advised her that her application would be denied because she could not satisfy the residency requirement by combining her time in Scotland under the two different visas. Told of this in April 2021, Bridger wrote the U.K. Home Office and changed her application to seek renewal of her 30-month partnership visa. The following day Nisbet wrote a letter in support of Bridger's application, advising the U.K. Home Office that she was his partner, that she and their two children were resident in his apartment, and asking that Bridger be granted "Indefinite Leave to Remain" in the U.K. in their "permanent home." The record does not

indicate whether Bridger's partnership visa was renewed a second time, but the district court's finding that her visa was expiring—rather than expired—suggests that Bridger's 2021 renewal was successful. *See* Maj. Op. at 6 n.7, 8 n.10. All of this strongly suggests that Bridger intended to remain in Scotland. In any event, given her seven-year residency in Scotland, Bridger's immigration status tells us nothing relevant about where she or her children habitually resided before Bridger decided to return to the United States.

(4) *The children's relationship with their father.* The district court gave us precious few details, but when Bridger has been the primary caregiver, the quality of the children's relationship with their father, and whether their father lived in Scotland or England, has nothing to do with where the children habitually resided on June 17, 2022. *Compare Monasky*, 589 U.S. at 78 n.3 (discussing the relevance of "meaningful connections with the people and places in the child's *new* country"; emphasis added) *with id.* at 80 n.4 (stating that a "caregiving parent's ties to the country at issue are highly relevant"). Those questions might be relevant to a court deciding rights of custody and access, but not to the Convention's antecedent question of which court has the right to jurisdiction.

Even if relevant, the district court's findings on the children's lack of a relationship with their father are highly questionable. Bridger took the children to see their father in England on at least four occasions between 2019 and 2021, spending several days during at least three of those visits with Nisbet. When they visited in June 2021,

for example, they spent four days with Nisbet. They returned the following month for an additional four days. In December 2021, Bridger took the children to see their father for two days. Between visits, Nisbet spoke with his children by Skype almost every day. During those calls, he read them stories and played games with them. He also talked regularly with Bridger about the children and their care, and he gave Bridger $180,000 for herself and the children in case anything happened to him. The majority seems to place great weight on the fact that, over time, the children took less interest in their father's calls. Maj. Op. at 8–9, 13. That the relationship was imperfect does not mean that they had "no meaningful relationship." The district court offered no explanation for its finding.

(5) *Coercion*. The one factor that the district court cited that might overcome Bridger's obvious residence in Scotland is whether Bridger was coerced into staying in Scotland.[5] In *Monasky*, immediately after observing that "[w]here a child has lived in one place with her family . . . that place is likely to be her habitual residence," the Court offered a qualification: A court should consider whether "an infant lived in a country only because a caregiving parent had been coerced into remaining there." *Monasky*, 589 U.S. at 78. The Court has provided little guidance on what qualifies as coercion, thereby nullifying a finding of habitual residence. The district court's findings on Nisbet's "coercive behavior" are maddeningly thin. Here is the complete discussion:

5. Curiously, the majority dismisses the court's findings on coercion as "dicta [that] cannot serve as a proper basis for reversal." Maj. Op. at 20.

> [Nisbet] levied many demands on [Bridger] in exchange for his signature and money—including daily hours-long phone calls—and he threatened her, in ways that could also harm the children when she did not meet his demands. On this evidence, [Nisbet] used his children as leverage to force [Bridger] to stay.

D. Ct. Op. at 15. The court has provided no evidence as to how Nisbet was coercing Bridger into remaining in Scotland or how Nisbet could "harm" the children.[6] Bridger had lived in Nisbet's apartment in Edinburgh since 2015, long before they had children. At the time that she took the children to the United States, she was alone in the apartment because Nisbet was institutionalized. Nevertheless, Bridger testified that she took the children to Nisbet's mental health institution in England multiple times to see their father. The record contains family photos of Bridger, Nisbet, and ACN and KRN at Nisbet's facility. Bridger scheduled daily video calls, up to an hour, so that Nisbet could talk with his children and read them stories. D. Ct. Op. at 10. Bridger applied to Scotland for a domestic partnership visa in 2018 and a renewal in 2021. And then there is the money. Bridger said that, after Nisbet was institutionalized, he gave her $180,000 to care for herself and the kids in case anything happened to him and because he didn't want all of his money to going to his mounting legal fees. This is not the stuff of coercion. *See Mauvais v. Herisse*, 772 F.3d 6, 12–13 (1st Cir. 2014)

6. Bridger bears the burden of proving coercion, because it is a defense to a finding of habitual residence.

(finding no clear error in the district court's conclusion that the mother was not coerced to remain in Canada because she chose to stay in Canada even after she moved out of the father's household). I do not see how the record supports any inference that Bridger was restrained in Scotland against her will. She may have been anxious to leave Scotland, she may have worried about her visa status, she may have been concerned that she could not lawfully leave with the children, or she may have worried that she was still needed as a witness in any criminal case against Nisbet, but none of this suggests that Scotland was not and had not been her—and the children's—regular residence.

D

Two final observations are in order here. First, determining the habitual residence of the children should be a neutral inquiry. The Convention fixes the forum at a particular place ("habitual residence") and time ("immediately before any breach of custody or access rights."). It is not a balancing test, but an inquiry into a single determinable fact. *See Kijowska*, 463 F.3d at 587 ("'habitual residence' should bear a uniform meaning, independent of any jurisdiction's notion of domicile"). The Convention's forum-fixing inquiry is neutral in two senses: The habitual residence of the children does not change depending on what court is deciding the question, and the habitual residence inquiry does not turn on whether the mother, the father, or some other person absconded with the children. Determining habitual residence should yield a single answer. *See* 22 U.S.C. § 9001(b)(3)(B) (recognizing

"the need for uniform international interpretation of the Convention").

Let's test the district court's analysis with a simple counterfactual. Let's suppose that Nisbet left the confines of his mental health institution and secreted ACN and RKN to a far-flung country, say Armenia. (Although we could use Brazil, Mauritius, Burkina Faso, Seychelles, or a hundred other countries which, like Armenia, are all signatories to the Convention.) That would have forced Bridger to "apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for securing the return of the child." Hague Convention Art. 8. In this situation, Bridger has no argument that Oregon is the children's habitual residence. It is Scotland or nothing, which means that her choice of fora would be either Scotland, as the habitual residence of the children, or Armenia, where the children are physically present with their father. Is it plausible that the Armenian courts would deny return of the children because they "lacked a habitual residence altogether" because—despite the fact that their mother had lived in Scotland for seven years and the children were U.K. citizens and had lived in Scotland for most of their lives—the children had few friends in Scotland, they had no meaningful relationship with their father (who lived in England), and their mother's U.K. visa was about to expire? D. Ct. Order at 14–15. To state the problem in this way is to recognize how preposterous the court's conclusion is. The consequence of our hypothetical Armenian court's determination would be that Bridger would have to litigate her custody and access rights in Armenia, likely under Armenian law. It is obvious that in this hypothetical that Bridger would have every right

to protest the unfairness of allowing Nisbet to choose a hostile foreign forum, and in these circumstances, she would surely claim that the children were habitually resident in Scotland. The majority's "Scotland for me, but not for thee" analysis cannot withstand scrutiny.[7]

Second, and relatedly, the majority's nearly standardless review will only encourage parents to choose their own forum. Children who have no habitual residence are "outside the Convention's domain" and therefore unprotected from abduction. *See Monasky*, 589 U.S. at 82. And the most vulnerable children, the ones most likely to have no habitual residence, are generally young infants. Infants and young children deserve our special consideration under the Convention because they are the least able to understand what is happening to them, and the least able to voice any opposition. *See* Hague Convention Art. 13(b) (providing that a State may refuse to return a child "if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views"); *Monasky*, 589 U.S. at 80–81. A judgment that children have no habitual residence effectively makes them stateless; they are not only subject to the whims of the parent who first abducts them, but they may be subject to competing efforts by their parents to find a favorable forum.[8]

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7. The majority does not disagree with my counterfactual. The majority comments that "[t]here will always be children whom the Hague Convention is incapable of protecting." Maj. Op. at 18 n.19. This is not reassuring.

8. These concerns are far from theoretical. In *In re A.L.C.*, 607 Fed. Appx. 658 (9th Cir. 2015), we held that the district court

I agree with the majority's statement that "a finding of no habitual residence is rare and should be disfavored," nor should it "be made lightly[.]" I emphatically disagree that the "unusual circumstances of this case" warrant such a finding. Maj. Op. at 18. What the majority does here is *broaden* the relevant factors from which courts may conclude that a child has no habitual residence, and that makes it more likely that children will be successfully kidnaped by one parent in search of a friendly forum. Instead of limiting a finding of no habitual residence to young infants whose situation was genuinely transitory, *see, e.g., Kijowska*, 463 F.3d at 587 (two months old); *Delvoye*, 329 F.3d at 333 (two months old), the majority now creates precedent that I fear will remove the Convention's protections for children in a wider range of circumstances.

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clearly erred when it concluded that E.R.S.C. was a habitual resident of Sweden, a country that she never lived in. *Id.* at 662. But we also agreed that the nine months E.R.S.C. lived in Los Angeles immediately following her birth did not make her a habitual resident of the United States, either. *Id.* at 662–63. Because E.R.S.C. had no habitual residence, she had not been wrongfully retained by her mother in the United States. *Id.* at 663. Nor was she wrongfully retained in Sweden by her father, after she was returned to Sweden because the district court—erroneously, as it turned out—determined that was her country of habitual residence and ordered her return. *Id.* E.R.S.C., a nine-month-old infant, was left without protection under the Hague Convention, and both parents were left without a remedy. The winning parent was whoever grabbed the child last. *See Taglieri v. Monasky*, 907 F.3d 404, 415 n.4 (6th Cir. 2018) (en banc) (Boggs, J., concurring) ("[A] finding of no habitual residence means that *either* parent, regardless of gender, is free to abduct the child . . . and the Hague Convention would have nothing to say about it."), *aff'd*, 589 U.S. 68, 140 S. Ct. 719, 206 L. Ed. 2d 9 (2020).

These consequences are precisely what the Hague Convention was designed to avoid. The Convention provides a neutral rule for forum selection. Our judgment has undone the careful work of the Convention in this case.

III

I now turn to the district court's alternative holding that, even if Scotland is the children's habitual residence, "there is a grave risk that [their] return would expose [them] to physical or psychological harm or otherwise place [them] in an intolerable situation." Hague Convention Art. 13(b).[9]

The Convention provides little guidance as to what counts as a grave risk to the physical or psychological harm of the child. The grave risk standard presents a particular dilemma, because unlike the inquiry into habitual residence, grave risk of harm may overlap with the "best interest of the child" standard that courts often use to judge the merits of battles over parental custody and access. And, as I have pointed out, both the Convention and ICARA make clear that their purpose is not to make any "determination on the merits of any custody issue." Hague Convention Art. 19; *see* 22 U.S.C. § 9001(b)(4); *Gaudin v. Remis*, 415 F.3d 1028, 1035 (9th Cir. 2005) ("the exception for grave harm to the child is not license for a court in the abducted-to country to speculate on where the child would be happiest"; citation omitted). Acknowledging that a grave risk inquiry may overlap with the merits of a

9. The majority does not reach this issue. Maj. Op. at 23 n.25.

dispute, the courts have held that the grave-risk exception must "be interpreted narrowly, lest it swallow the rule." *Simcox v. Simcox*, 511 F.3d 594, 604 (6th Cir. 2007). Thus, we have said that it only applies to prevent a child's return to the country of habitual residence in "extreme cases." *Cuellar v. Joyce*, 596 F.3d 505, 508 (9th Cir. 2010). "The potential harm to the child must be severe, and the level of risk and danger required to trigger this exception has consistently been held to be very high." *Souratgar v. Lee*, 720 F.3d 96, 103 (2d Cir. 2013) (cleaned up).

We have expressly narrowed the scope of the grave risk inquiry. In order to avoid opining on the fitness of the parents, we have made clear that

> the district court must be mindful that it is not deciding the ultimate question of custody, or even permanent return of the child to [the State of their habitual residence]. *That* decision will be made by the appropriate . . . tribunal [in the State of their habitual residence]. The district court must determine only whether returning the children . . . *for long enough for the . . . courts to make the custody determination will be physically or psychologically risky to them.*

Mozes, 239 F.3d at 1086 n.58 (second emphasis added). As we recently explained, "The question, then, 'is not whether the child would face a risk of grave harm should she *permanently* reside in [France], but rather whether she would face such a risk while courts in [France] make a custody determination.'" *In re ICJ*, 13 F.4th 754, 765

(9th Cir. 2021) (citation omitted); *see Gaudin*, 415 F.3d at 1037 ("[T]he grave-risk inquiry should be concerned only with the degree of harm that could occur . . . during the period necessary to obtain a custody determination."); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 377 (8th Cir. 1995) ("The Article 13(b) inquiry . . . only requires an assessment of whether the child will face immediate and substantial risk of an intolerable situation . . . pending final determination of [the] custody dispute.").

Here, the district court concluded that there is a grave risk of harm to the children if they are returned to Scotland. The district court again made several supporting findings of fact: (1) "sending the children alone to Scotland while [Nisbet] is confined is facially an intolerable situation," D. Ct. Order at 18; (2) Nisbet "meets the major risk factors for domestic violence," *id.* at 16; (3) Nisbet "has given inconsistent testimony to those meant to diagnose him," *id.* at 18; (4) Nisbet has shown "coercive, manipulable, violent, and threatening behavior" towards Bridger and their children, *id.* at 20; and (5) "the grave risk of displacing the children is starker still when juxtaposed with depriving the children of their mother and their support network in Oregon" because they have an "especially strong bond with their mother. And in Oregon, the children have family, friends, and social benefits that, if returned to Scotland, they would lose in an extremely short time frame," *id.* at 20–21.

As with the district court's habitual residence findings, these findings, even if not clearly erroneous, are clearly irrelevant to the question whether the children were

returned to Scotland "for long enough for the [Scottish] courts to make the custody determination." *Mozes*, 239 F.3d at 1086 n.58. Whether considered individually or collectively, these findings do not establish by "clear and convincing evidence" that ACN and KRN would be subject to grave risk if returned to Scotland for custody proceedings. Let's look at each finding.

(1) *"Facially intolerable."* The district court's finding that sending the children back to Scotland is "facially . . . intolerable" is a conclusion, not a finding of fact. We have no standards for judging this as a finding of fact.

(2) *Risk for domestic violence.* The finding that Nisbet shows "major risk for domestic violence" is pure speculation, based on a broad profile supplied by Dr. Poppleton, Bridger's expert, who repeatedly testified that he was discussing general risks to children and would not offer any opinions on whether Nisbet was a risk. The district court's finding is not based on any historical evidence, because, as the district court acknowledged "there was no evidence that [Nisbet] physically abused [Bridger] or the children." D. Ct. Order at 20. In any event, it is not clear what this finding shows, because no one has suggested that Nisbet would have physical custody of the children during any court proceedings in Scotland.

(3) *Inconsistent information to medical providers.* The court's finding that Nisbet gave inconsistent information to medical personnel treating him, without knowing the particulars, is apropos of nothing. The district court's finding that Nisbet gave misleading

information, especially in the absence of a finding of how it related to the risk of harm to the children if they are returned to Scotland for court proceedings, is irrelevant to the grave risk of harm.

(4) *Coercion*. The district court's finding on coercion has no more basis in the grave risk analysis that it did in the habitual residence inquiry—Nisbet is institutionalized in England, he was as attentive to Bridger and the children as his circumstances would permit, and he was financially supporting Bridger and the children in Scotland. He willingly signed the papers for ACN and KRN to obtain American passports. Where is the duress? Where is the grave risk? The district court had no answers beyond its bare assertion of coercion and manipulation.

(5) *The children's support network in Oregon*. Finally, the district court's finding that the children would lose their bonds with family and friends in Oregon, even if returned to Scotland for "an extremely short time frame," turns the Hague Convention on its head. It is not only a merits-based inquiry; it rewards Bridger for taking the children to Oregon and for every day that the proceedings in this case were extended. We have said, in no uncertain terms, that relying on this kind of evidence is "a very serious error. The fact that a child has grown accustomed to her new home is *never* a valid concern under the grave risk exception, as 'it is the *abduction* that causes the pangs of subsequent return.'" *Cuellar*, 596 F.3d at 511 (first emphasis added) (quoting *Friedrich v. Friedrich* (*Friedrich II*), 78 F.3d 1060, 1068 (6th Cir. 1996)). We have reminded district courts that the grave risk exception

"is not license for a court in the abducted-to country to speculate on where the child would be happiest," but rather, "[o]nce the child is born, the remote parent must accept the country where the child is habitually resident and its legal system as given." *Id.* 509, 510 (quotation marks and citations omitted).

The real problem is that the district court began its grave risk analysis from the wrong premise. The court failed to follow our holdings on the proper scope of the grave risk inquiry—indeed, it showed no awareness of the limited inquiry we require—and instead asked a different question: What might happen to the children if Nisbet were given permanent custody? The district court was quite explicit in this. It announced that in assessing the grave risk it would consider "the probable consequences if [Nisbet] is released in the future." D. Ct. Order at 16; *see id.* at 25 (stating that "[a] return to Scotland would either leave the children unsupervised or under the supervision of their father"). There is nothing in the record that remotely suggests that Nisbet will be released any time soon, that Nisbet will get custody of the children, or that the Scottish courts are not capable of protecting the children during custody proceedings. And the district court knew this. *See* D. Ct. Order at 24 ("[I]t is unclear when or if the authorities in England and Jersey will relax [Nisbet's] restrictions. And . . . the Government of Scotland would need to independently permit [Nisbet] to enter the country even if he were permitted unescorted leave by other authorities."). The court's speculation was all based on its what-if-Nisbet-gets-full-custody inquiry.[10]

10. Many of these findings were based on the report of Bridger's expert witness, psychologist Landon Poppleton. But Dr.

That speculation is not a substitute for real proof, and the burden of showing grave risk by clear and convincing evidence was Bridger's.

The district court's concern with Nisbet getting custody is misplaced for a second reason. In the end, the district court simply decided the merits for itself: The district court concluded that it would be unthinkable that Nisbet could get custody over his children, that the children are better off with their mother, and that Oregon is a better place for the children to be raised. Yet, we have explained that "[t]he function of a court applying the Convention is not to determine whether a child is happy where it currently is, but whether one parent is seeking unilaterally to alter the status quo with regard to the primary locus of the child's life." *Mozes*, 239 F.3d at 1079 (footnote omitted); *see Gaudin*, 415 F.3d at 1035; *Blondin v. Dubois*, 238 F.3d 153, 162 (2d Cir. 2001); *see also Silverman*, 338 F.3d at 901 ("[T]he district court erred in taking into account the fact that [the children] are settled in their new environment."); *Nunez-Escudero*, 58 F.3d at 377 ("The district court incorrectly factored the possible separation of the child from his mother in assessing whether the return of the child to Mexico constitutes a grave risk . . . ."). For the district court, the grave risk was not about any physical harm that might come to the children during custody proceedings in Scotland, but the possibility that the Scottish courts would reach the wrong conclusion. To the district court that conclusion posed

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Poppleton made the same mistake as the district court—"that the children would be put at significant risk of harm *if returned to the UK to live under their father's care*."

an "intolerable situation," *id.* at 25, and, accordingly, the courts of Scotland were not to be trusted with the decision in the first place. The court treated the grave risk inquiry as an opportunity to issue a pre-emptive appeal from any decision the Scottish courts might make.

IV

We have made an egregious error here. There may be very good reasons for the Scottish courts to question whether Nisbet is a fit to be primary custodian of his children. He may or may not be a candidate to exercise continued custody over his children, including the right to have some say in where they are raised. If Scottish courts determine that Bridger is the proper custodial parent, she may plead for permission to remove the children to the Oregon, where she has the support of extended family. But these determinations must be made in the Scottish courts, not the courts of Oregon. Under any standard—indeed, beyond any reasonable doubt—the children were habitually resident in Scotland. The district court's failure to grasp that fundamental fact tainted the remainder of its opinion, which concluded that ACN and KRN are better off with their mother in Oregon than in Scotland, and that any other conclusion would pose a grave risk to their well-being. The district court's conclusion is well-intentioned, but this was a straightforward inquiry. We have compounded the district court's error, making it more likely that children will be abducted by parents in search of a friendly forum in the Ninth Circuit.

I protest. Respectfully.

APPENDIX B — OPINION AND ORDER DENYING PETITION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, FILED OCTOBER 24, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. 3:23-cv-00850-IM

ANDREW CHARLES NISBET,

Petitioner,

v.

SPIRIT ROSE BRIDGER,

Respondent.

Filed October 24, 2023

OPINION AND ORDER DENYING THE PETITION FOR RETURN OF CHILDREN UNDER THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

IMMERGUT, District Judge.

This matter arises out of an international dispute over two children, five-year-old ACN and three-year-old KRN. In June 2022, the children and their mother, Respondent Spirit Rose Bridger, left Scotland for the United States, and have lived in Oregon ever since. The children's father, Petitioner Andrew Nisbet, argues that Respondent took their children in violation of the Hague

Convention on the Civil Aspects of International Child Abduction ("Convention"). The Convention mandates that a child wrongfully removed from her country of "habitual residence" must be returned to that country unless a return poses a grave risk of harm to the child or otherwise places the child in an intolerable situation. Invoking the Convention, Petitioner has filed a petition requesting that the children be returned to Scotland. Petition for Return, ECF 1.

This Court held a three-day expedited court trial in this matter beginning on October 16, 2023. ECF 39. Based on the evidence presented through witnesses and exhibits, and considering the arguments presented in the pleadings and written closing arguments, this Court DENIES the Petition for Return.

The evidence compels two conclusions. First, Petitioner has failed to prove by a preponderance of the evidence that the children's habitual residence was Scotland. The evidence shows that the children did not have a settled permanent home in Scotland before arriving in the United States. They were unsettled largely because Petitioner killed his mother in August 2019 and then was detained and committed to a secure psychiatric facility in England. Indeed, one of the children was not yet born at the time of those events. Second, even assuming the children's habitual residence was Scotland before they moved to Oregon, the Convention does not require a return of the children because Respondent has shown by clear and convincing evidence that a return to Scotland would present a grave risk of harm or otherwise place the children in an intolerable situation. The children have no familial support network there. Their father, Petitioner,

remains indefinitely committed to a secure in-patient psychiatric health facility. And Petitioner has a history of violent and coercive behaviors that constitute major risk factors for domestic abuse.

PROCEDURAL BACKGROUND

On June 12, 2023, Petitioner filed his Hague Convention petition requesting that his children be returned to Scotland, which he asserts is their habitual residence. Petition for Return, ECF 1. The Petition was served on August 9, 2023. ECF 9. Respondent entered appearance on August 23, 2023. ECF 8. Six days later, Respondent filed her response, ECF 10, and on September 5, she requested that an expedited trial be held the next week, citing the Hague Convention's aspiration for every petition to be resolved within six weeks, ECF 11 at 1–2. *See Chafin v. Chafin*, 568 U.S. 165, 179–80, 133 S. Ct. 1017, 185 L. Ed. 2d 1 (2013) (urging district courts to expedite Convention cases); *Holder v. Holder*, 392 F.3d 1009, 1023 (9th Cir. 2004) (same). On September 13, 2023, this Court held a telephonic status conference to set an expedited case management schedule and a two-and-a-half-day trial for October 16–18, 2023. ECF 13. Both Parties agreed to this schedule, which was proposed by Petitioner in writing. This Court presided over a trial on those dates.[1] ECF 35, 38, 39.

1. During trial, this Court at times permitted Petitioner to interject, to confer with his attorney over the courtroom's videocall system, and to ask witnesses questions because Petitioner is abroad in a secure facility and seemingly had greater access to documents.

Appendix B

FINDINGS OF FACT

This Court makes the findings of fact below based on the exhibits submitted and the testimony presented at trial. Both Parties agreed to substantially relax the rules of evidence, and this Court accepted all exhibits that were submitted or read into evidence. *See Farr v. Kendrick*, No. CV-19-08127-PCT-DWL, 2019 U.S. Dist. LEXIS 104011, 2019 WL 2568843, at *2 (D. Ariz. June 21, 2019) ("Rule 1101(d)(3) of the Federal Rules of Evidence provides that the Rules of Evidence 'do not apply' to 'miscellaneous proceedings such as . . . extradition and rendition,' and [a Hague Convention] proceeding is—in the Court's view—similar to an extradition proceeding."), *aff'd*, 824 F. App'x 480 (9th Cir. 2020). Like the *Farr* Court, this Court concluded that the most expeditious procedure, particularly given Petitioner's confinement abroad, would be "to apply a relaxed admissibility standard during the hearing and then discount the evidentiary value of any dubious evidence during the fact-finding process." *Id.*[2]

A. Events Preceding Petitioner Killing His Mother

1. Beginning of Petitioner and Respondent's Relationship

Petitioner and Respondent met in 2012 through a video game that they both played. Ex. 108A ¶ 4.3; Ex 108B at

2. Because of the expedited nature of this case, this Court's opinion cites exhibits but not a trial transcript because an official transcript would not have been available within an expeditious timeline. Even so, the findings here reflect this Court's consideration of *all* evidence including exhibits and trial testimony and this Court's credibility determinations.

11, ¶ 37. They first met in person in New York City, and after Petitioner completed his medical studies in 2013, they traveled together to New Zealand. Ex. 108A ¶ 4.3; Ex. 108B at 11, ¶ 37. Following the trip to New Zealand, Petitioner and Respondent moved to Edinburgh, Scotland in 2015.

Respondent Bridger presented testimony, which this Court found credible, about her relationship with Petitioner. Respondent testified that as the relationship developed, Petitioner exerted increasing control over Respondent. Respondent had no say in where they would live. Petitioner strictly budgeted Respondent's spending, and Respondent needed to seek approval if she sought to make purchases above ten British pounds. He refused to let her buy clothes above a certain size. He would give her extra money if she performed "sexual chores," such as using certain sex toys on herself that she would not have used otherwise. He wanted her to get multiple plastic surgeries, which she did not want. Petitioner expected that Respondent be there to greet him when he got home every day; he would not accept any excuse, even that she was out to buy groceries. Respondent wished to finish her college degree, but Petitioner would not support this unless it was a degree he approved. Because she was afraid of the consequences of noncompliance, Respondent rarely disobeyed Petitioner's directions.

2. Moving to Jersey and the Deterioration of Petitioner's Mental State

In the Spring of 2017, Respondent became pregnant with their son, ACN, in Scotland. Ex. 108A ¶ 4.8. Around

this time, Petitioner's lifelong attachment to his parents' home on the Island of Jersey, a small country outside the U.K., grew into an obsession. *Id.* ¶¶ 4.8, 5.3.5–5.3.6.

In the Summer of 2017, Petitioner's parents informed him that they wished to sell their home in Jersey. *Id.* ¶ 4.9. Petitioner did not take this news well. He offered to put money into the property so that he, Respondent, their coming son, and his parents could live together as a family. *Id.* His parents refused.

This refusal led to Petitioner's first suicide attempt. In November 2017, when Petitioner and Respondent still resided in Scotland, Petitioner tried to commit suicide by injecting air into his veins to cause an embolism. Ex. 108B at 13, ¶ 43; Ex. 108A ¶ 5.4.1. This attempt failed. The same month, following the suicide attempt, Petitioner and Respondent arrived unannounced at his parents' home in Jersey, intending to move in. 108A ¶¶ 5.3.8, 5.4.2. Petitioner's parents reluctantly allowed Petitioner and Respondent to stay in the annex to the house, *id.*; Ex. 108B at 64, ¶ 106—a small one bedroom apartment with a kitchenette. After a couple of months, Petitioner's parents asked Petitioner and Respondent to leave. Ex. 108A ¶¶ 5.3.8, 5.4.2.

In response, Petitioner again attempted suicide. In January 2018, at his parents' home in Jersey, Petitioner threw himself out of a window twenty feet above the ground. Ex. 108B at 13–14, ¶¶ 43–44; *id.* at 52, ¶ 33; Ex. 108A ¶¶ 5.3.8, 5.4.3. Petitioner severely fractured his feet and his spine. He was bedridden for nine-and-a-half

months. Ex. 108B at 14, ¶ 45. Petitioner has reported at times that he felt no choice but to jump. Ex. 108A ¶ 5.4.4; Ex. 108B at 13–14, ¶ 44. On other occasions, he has said that his suicide attempts were not serious attempts and were a method to have people follow his demands.[3] Ex. 114 ¶ 9.7; *see also* Ex. 108B at 71, ¶ 150.

At the time of the second suicide attempt, Respondent was eight months pregnant, and her caesarean section had been scheduled to occur in two weeks. Respondent gave birth to ACN on February 1, 2018 in Jersey. *See* Ex. 2d. Petitioner was not present. For the first eight months of ACN's life, Respondent cared for ACN with little involvement from Petitioner due to his injuries. And because Petitioner was bedridden and refused to put Respondent on car insurance, Respondent could not drive, further hampering her ability to take care of herself and her child.

Respondent moved back to Scotland with ACN—without Petitioner—in August 2018. Six months later, she returned to Jersey, to the home of Petitioner's parents,

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3. Petitioner contests the relevance and reliability of Ex. 114, a Domestic Homicide Review conducted by an independent investigator appointed by the Jersey Government. Petitioner's protests are unpersuasive. The document's sources are Jersey Government agencies, Ex. 114 ¶¶ 4.7-4.8, and the investigation was conducted according to guidelines established by the United Kingdom Home Office, *id.* at 5. The Review's purpose was to understand the circumstances leading to the death of Petitioner's mother. This Court thus views the Review's fact-finding as reliable, though this Court does not rely on its conclusions or opinions.

after Petitioner assured her that the family issues had been resolved.

From February to August 2019 the situation in Jersey deteriorated further. During these months, the police and psychiatric services were called on multiple occasions to the home in Jersey. Petitioner's parents continually refused to accept Petitioner and Respondent's family there. In response, Petitioner would become extremely upset, frustrated, and angry and would express those feelings through acts of violence. Ex. 108A ¶ 5.2.5. It is unrefuted that Petitioner would often smash his head into a wall or banister, sometimes several times a day. *See, e.g., id.* He broke a plastic table by smashing it with his hands. *Id.* Petitioner would throw furniture around. Ex. 114 ¶¶ 10.6–10.14. Various responders noted Petitioner's suicide threats, explosive behavior, refusals of treatment, and unceasing belief that his parents, not he, needed to change their stance concerning the house in Jersey.[4] *Id.* ¶¶ 9.17–9.21; Ex. 108B at 25–30, ¶ 88. Petitioner's father told responders that Petitioner consistently tried to manipulate him. Ex. 108B at 20, ¶ 67. Petitioner's brother described Petitioner as controlling in his relationships, *id.* at 22, ¶ 77, and he denied Petitioner any contact with the brother's children, Ex. 108A ¶ 5.2.6. Petitioner pulled his mother's hair and would harass his parents for hours at a time. *See, e.g.*, Ex. 114 ¶ 9.17. Petitioner sometimes

4. A psychiatric report from May 5, 2020, commissioned by the Attorney General of Jersey, corroborates these reports with considerable first-hand quotes from various sources, particularly medical reporters, who interacted with Petitioner in the events leading up to the killing. *See* Ex. 108B at 50-72, ¶¶ 25-159.

cornered his father and Respondent. Petitioner would demand to know everything occurring in Respondent's life and would instruct her to seek his permission to do anything. In that vein, Petitioner told Respondent not to inform anyone else in her life about the situation in Jersey. He told her to get rid of her daily journals because they cast him in a bad light.

During this period, in the Summer of 2019, Respondent became pregnant with her second child, KRN.[5] Respondent packed her bags to prepare for a move back to Oregon with ACN and discussed a potential move with Petitioner several times. *See, e.g.*, Ex. 108B at 57, ¶ 66 (Petitioner writing in March 2019 that Respondent might leave for the United States); *id.* at 58, ¶ 76 (same observation in April 2019); *id.* at 65, ¶ 118 (Petitioner observing in July 2019 that Respondent would likely be deported from Jersey).

Petitioner's parents issued a notice of eviction to the Parties on August 2, 2019. Ex. 108A ¶ 9.4. Petitioner threatened to commit suicide if his parents followed through with the eviction. Ex. 108B at 71, ¶ 154.

3. Petitioner Kills His Mother

On August 6, 2019, Petitioner approached his mother in the kitchen to dissuade her from evicting him and his family. Respondent and infant ACN were present for the beginning of the encounter, but they departed the room

5. There is no dispute that Petitioner is KRN's biological father.

because the argument between Petitioner and his mother grew more rancorous. Ex. 108B at 16–17, ¶ 53. Minutes later, Petitioner, who had a Leatherman pocketknife in his pocket, stabbed his mother in the neck. *Id.* at 17, ¶¶ 54–55; Ex. 108A ¶¶ 9.5, 9.8. He says he cannot remember the act.

Petitioner was soon arrested. A pregnant Respondent and eighteen-month-old ACN were taken to a refuge in Jersey. Petitioner's family severed all contact with the Parties and ACN.

B. Events After Petitioner's Arrest

After his arrest, Petitioner pleaded guilty to manslaughter on the basis of diminished responsibility. Ex. 102 at 2 (Judgment of Jersey Royal Court). Petitioner was ordered to serve an indefinite term in a secure psychiatric facility. *Id.* at 4, ¶¶ 2–3. The Royal Court likewise ordered that a medical examiner provide a report every nine months on Petitioner's health and progress. *Id.* The Royal Court issued a restraining order that, among other things, bars Petitioner from contacting his father, brother, or his brother's family. *Id.* at 4, ¶ 4(i)-(viii).

After two weeks in the Jersey refuge, Respondent and ACN moved to a halfway house in Jersey. During their stays at the refuge and halfway house, Respondent contemplated moving back to Oregon, but she decided against doing so because she was pregnant and lacked health insurance in the United States. *See* Ex. 118 at 1 (Petitioner writing that Respondent was seriously considering a move back to the United States in Fall

2019). In late 2019, Respondent and ACN moved back to Scotland for her to give birth.

On February 27, 2020, KRN was born. Ex. 2e. At that time, the COVID-19 pandemic had begun and borders between countries were closing to contain the disease. Before Respondent could make an appointment at the United States Consulate in Edinburgh to apply for KRN's Passport and Consular Report of Birth Abroad, the Consulate closed.

Respondent maintained a civil relationship with Petitioner. She did so because she knew that she would need Petitioner's signature to obtain KRN's paperwork. She also needed funds as she was unemployed. *See* Ex. 124 (email exchange showing that Respondent asked for needed funds and that Petitioner responded with a budget he set). And her U.K. visa was expiring.[6] *See* Exs. 20–22. She had to call him five or six times a day, spending an hour per call. Petitioner told Respondent to drink alcohol before their calls so that she would be "happy." Petitioner ghostwrote letters to tribunals and medical care providers as if they had been written by Respondent and had Respondent send those letters. *See* Exs. 121–22. He gave her scripts to follow when calling individuals on his behalf. *See* Exs. 112, 123. He forced Respondent to provide him with a PDF of her signature so that he could sign letters under her name. If she ever refused to engage or pushed back, Petitioner would get angry and harass

6. The uncertainty over KRN's paperwork and the visa meant that Respondent explored the possibility of permanent residence in Scotland to stay with her children.

Respondent. In one instance, after Respondent did not respond to a call from Petitioner, he repeatedly called and messaged Respondent, demanding to know where she was. When she did not respond, he threatened to call the police to break her door down—with no regard for the safety of the children. Following this threat, Respondent complied with Petitioner's demands and called him back. Petitioner made similar threats several times, such that Respondent discretely sought help from a member of her weekly knitting club.[7]

The children lived in Petitioner's apartment in Scotland. Although they attended nursery in Scotland, they did not have any friends or family there. Petitioner communicated with the children over Skype from the psychiatric facility every day for an hour. Petitioner read stories and played games with them, but often, after a short period, the children stopped paying attention to Petitioner on the screen. Petitioner would get upset and demand that Respondent direct the children back to the screen.

After the killing, Petitioner saw ACN four times and KRN three times. Respondent and ACN first visited Petitioner in person in November 2019. Respondent visited Petitioner with both children in June, July, and December 2021. At the December 2021 visit, Petitioner signed the paperwork Respondent needed to acquire KRN's

7. This individual, Rayya Ghul, testified at trial and corroborated Respondent's testimony. She is a therapist with decades of experience, and Respondent confided in her for that reason.

U.S. passport and Consular Report of Birth Abroad. It is unrefuted that Respondent told Petitioner that she intended to move to the United States once KRN had her passport—a possibility Petitioner acknowledged, *see* Ex. 110 ¶ 3(c). In 2022, Petitioner appealed to a tribunal for his release. Respondent expressed great anxiety to Rayya Ghul over Petitioner's potential release. The appeal was ultimately denied.

On June 17, 2022, Respondent departed Scotland for the United States with ACN and KRN. In the months before departing Scotland, Respondent sent several boxes of her and her children's possessions to her current home in Portland, Oregon.

C. Events Since the Children's Arrival in the United States

The children have resided in Oregon for 15 months at the time of this Opinion's issuance. The children are U.S. citizens; ACN also has a Jersey passport, and KRN a Scottish passport. The children have Social Security Numbers. Ex. 106 (ACN letter); Ex. 107 (KRN letter). They both have health insurance. Ex. 105. They have a wide network of friends and family including Respondent's two brothers, mother, and stepfather, as well as close friends to Respondent and her family—all of whom testified. There has been minimal contact between Respondent and Petitioner since the removal. In Oregon, the children have never mentioned their father—who has never lived in the same home as KRN and lived for a total of a year, on and off, with ACN.

D. Petitioner's Indefinite Confinement

Petitioner has been sentenced to an indefinite period of psychiatric confinement. After the killing, he was first held at Brockfield House. Ex. 102 at 2; Ex. 127 at 2. In April 2021, Petitioner was transferred to a facility called St. Andrew's. Ex. 127 at 2. There, Petitioner may roam the grounds unescorted. *Id.* Petitioner was not discharged after a request for release was heard in September 2023.[8] Both Brockfield House and St. Andrew's are in England; Petitioner has not lived in Scotland since 2017.

At St. Andrew's, Petitioner has continued to display behaviors like those he showed in Jersey. On May 18, 2023, a month before filing his Hague Petition, Petitioner threatened to attack staff when he was moved between wards. Petitioner has refused treatment recommended by St. Andrew's, insisting that he receive therapy from his personal therapist, Jane Pointon, whom he has seen since 2017. Petitioner has also decided that mindfulness methods, not intensive therapy, suffice as treatment. *See* Ex. 31 at 2. This is so despite the fact that even Petitioner's own expert did not see any document recommending Petitioner go without therapeutic treatment. Finally, in confinement, Petitioner has apparently at times barricaded himself from hospital staff, punched walls, banged his

8. Petitioner provided no documents on the tribunal hearing despite several requests by Respondent and orders by this Court. Petitioner insists that this is because of U.K. laws requiring permission to provide documents. But Petitioner launched this suit in June—he had an independent obligation to begin seeking permission in advance of the trial he sought.

head against a window, and had physical altercations with the staff. *See, e.g.*, Ex. 120 at 1.

CONCLUSIONS OF LAW

A. General Framework of the Convention

In 1980, the Hague Convention was adopted "to address the problem of international child abductions during domestic disputes." *Monasky v. Taglieri*, 140 S. Ct. 719, 723, 206 L. Ed. 2d 9 (2020) (brackets and citation omitted). Both the United States and the United Kingdom are signatories. *Chafin*, 568 U.S. at 170. The United States has ratified the treaty and enacted implementing legislation, the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. §§ 9001–9011. Under ICARA, federal courts have jurisdiction over Convention petitions and must decide cases "in accordance with the Convention." *Id.* § 9003(a), (d).

The Convention "seeks 'to secure the prompt return of children wrongfully removed to or retained in any Contracting State.'" *Chafin*, 568 U.S. at 168 (quoting Hague Convention, art. 1, 19 I.L.M. at 1501). To that end, Article 3 provides that the removal of a child is wrongful when it breaches a person's rights of custody "under the law of the State in which the child was habitually resident immediately before the removal." Hague Convention, art. 3, 19 I.L.M. at 1501. When a child's removal violates Article 3, "the judicial . . . authority of the Contracting State where the child is . . . shall order the return of the child." Art. 12, *id.* at 1502. But a court need not order a child's

return to her habitual residence if "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Art. 13(b), *id.*

B. Petitioner Has Failed to Establish that the Children Were Habitually Resident in Scotland

Petitioner must show by a preponderance of the evidence that the children's habitual residence on June 17, 2022 was Scotland. 22 U.S.C. § 9003(e). "[A] child's habitual residence," the Supreme Court has instructed, "depends on the specific circumstances of the particular case." *Monasky*, 140 S. Ct. at 727. "No single fact . . . is dispositive across all cases." *Id.* Highly relevant are "facts indicating that the parents have made their home in a particular place," *id.* at 729, and the "child's conduct and experiences," which must show that the child was "'firmly rooted' in her . . . surroundings, not merely . . . acculturated to a country's language or customs." *Karkkainen v. Kovalchuk*, 445 F.3d 280, 292 (3d Cir. 2006) (quoting *Holder*, 392 F.3d at 1019). At bottom, "this factual inquiry is guided by common sense." *Kenny v. Davis*, No. 21-35417, 2022 U.S. App. LEXIS 4466, 2022 WL 501625, at *1 (9th Cir. Feb. 18, 2022).

This Court agrees with Respondent that Petitioner has failed to meet his burden. Rather, the preponderance of the evidence compels the conclusion that, on June 17, 2022, ACN and KRN lacked a habitual residence altogether.

ACN was born in Jersey in February 2018, only a month after Petitioner had thrown himself out a window and suffered serious foot and spinal injuries. Soon after, ACN left for Scotland with his mother, who was trying to escape the discord in the Jersey home wrought by Petitioner's behavior. *See Douglas v. Douglas*, No. 21-1335, 2021 U.S. App. LEXIS 28909, 2021 WL 4286555, at *6 (6th Cir. Sept. 21, 2021) (Sutton, C.J., White & McKeague, J.J.) (reasoning that a child's stay in a place was "merely transitory" when he consistently moved between "temporary housing"). Because Petitioner was bedridden for most of ACN's early life, Petitioner only raised ACN in earnest for the six months between February and August 2019. During those months, moreover, Respondent repeatedly contemplated moving back to Oregon because of the situation in Jersey, and Petitioner knew this.

KRN was born in February 2020. When she was born, Petitioner was in custody, and Respondent and ACN had been shuttled through Jersey shelters before finding housing in Scotland. Even before Respondent had given birth to KRN, she had contemplated moving back to Oregon, but decided against it because she lacked health insurance in the United States. She told Petitioner multiple times that she intended to leave Scotland with the children, and he signed KRN's passport paperwork. *See Monasky*, 140 S. Ct. at 727 (explaining that "intentions and circumstances of *caregiving* parents are relevant considerations" (emphasis added)).

The children had no family or friends in Scotland and no meaningful relationship with their father. Petitioner

has never lived with KRN and met her in person only three times. Petitioner lived with ACN for a total of a year, on and off, and for a substantial amount of that time, he was bedridden from his second suicide attempt. And Respondent was in the U.K. on an expiring visa. *See Kijowska v. Haines*, 463 F.3d 583, 587–88 (7th Cir. 2006) (Posner, J.) (placing great weight on the mother's immigration status and the fact that the child had been raised solely by the mother). Petitioner himself has not lived in Scotland for several years.

It follows from the children's lack of connection to Scotland and Respondent's clear intent (which Petitioner understood) that the children's habitual residence was not Scotland. As the Ninth Circuit has explained:

> When a child is born under a cloud of disagreement between parents over the child's habitual residence, and a child remains of a tender age in which contacts outside the immediate home cannot practically develop into deep-rooted ties, a child remains without a habitual residence because "if an attachment to a State does not exist, it should hardly be invented."

In re A.L.C., 607 F. App'x 658, 662 (9th Cir. 2015) (quoting *Holder*, 392 F.3d at 1020) (holding that a child born in the United States was not habitually resident there because she was too young to form roots and the parents disagreed about where to settle down). Or as the Third Circuit has explained, "where [parental] conflict is contemporaneous

with the birth of the child, no habitual residence may ever come into existence." *Delvoye v. Lee*, 329 F.3d 330, 333 (3d Cir. 2003) (Alito, McKee & Schwarzer, J.J.) (holding that a child's habitual residence could not be Belgium even though the child was born there because the child had no clear roots in Belgium and the mother did not intend to live there). This reasoning resolves this case in Respondent's favor.

Moreover, evidence of Petitioner's coercive behavior also supports this outcome. Petitioner levied many demands on Respondent in exchange for his signature and money—including daily hours-long phone calls—and he threatened her, in ways that could also harm the children, when she did not meet his demands. *See Monasky*, 140 S. Ct. at 727 (explaining that whether a "caregiving parent had been coerced into remaining" in a country is a relevant factor). On the evidence, Petitioner used his children as leverage to force Respondent to stay.

In sum, the facts here amply prove that the children lacked meaningful connection to Scotland, that their caregiving parent had long intended to move to Oregon, and that their absentee parent had coerced their caregiver into remaining longer than she wished. The children did not have a habitual residence on June 17, 2022; this Court therefore denies the Petition.[9]

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9. This Court thus need not decide whether Petitioner had custodial rights over his children at the time of removal, whether he exercised those rights, or whether he consented to the children's removal.

C. Respondent Has Proven by Clear and Convincing Evidence that Returning the Children to Scotland Poses a Grave Risk of Harm and Intolerable Situation to the Children

Even assuming the children's habitual residence was Scotland at the time of removal, this Court also denies the Petition because Respondent has proven by clear and convincing evidence that the children face a grave risk of harm or an intolerable situation if returned to Scotland. *See* 22 U.S.C. § 9003(e)(2). Under Article 13(b)'s grave risk inquiry, "the question is whether the child [if returned] would suffer serious abuse that is a great deal more than minimal." *Gaudin v. Remis*, 415 F.3d 1028, 1035 (9th Cir. 2005) (quotation marks and citations omitted), *abrogated on other grounds by Golan v. Saada*, 142 S. Ct. 1880, 213 L. Ed. 2d 203 (2022). On the grave risk inquiry, Respondent presented the testimony of Dr. Landon Poppleton, who discussed the risk factors for domestic violence. Petitioner presented the testimony of Dr. James McGuire, who considered whether Petitioner has a personality disorder.

The facts here compellingly show that a return to Scotland poses ACN and KRN a grave risk of harm and intolerable situation. Because sending the children alone to Scotland while Petitioner is confined is facially an intolerable situation, *see Neumann v. Neumann*, 310 F. Supp. 3d 823, 828–30 (E.D. Mich. 2018), this Court considers the probable circumstances if Petitioner is released in the future.

Appendix B

Petitioner has an extended record of violence that meets the major risk factors for domestic violence. Domestic violence is crucially relevant to the grave risk defense. As the Ninth Circuit has recounted, "[t]he case law reflects that 'domestic violence is a common inciter to "abduction"—the abused spouse flees and takes her children with her.'" *Colchester v. Lazaro*, 16 F.4th 712, 717 (9th Cir. 2021) (quoting *Khan v. Fatima*, 680 F.3d 781, 784 (7th Cir. 2012)). "Th[e] 'grave risk' defense thus reflects the proposition that 'the remedy of return . . . is inappropriate when the abductor is a primary caretaker who is seeking to protect herself and the children from the other parent's violence." *Id.* (quoting *Khan*, 680 F.3d at 784); *see Morales v. Sarmiento*, Civil Action No. 4:23-CV-00281, 2023 U.S. Dist. LEXIS 99734, 2023 WL 3886075, at *11–13 (S.D. Tex. June 8, 2023) (Ellison, J.) (gathering cases). So courts may consider evidence of a parent's history of abuse, or threats of abuse, to determine the probability and magnitude of risk to the child. *See, e.g., Gomez v. Fuenmayor*, 812 F.3d 1005, 1012–14 (11th Cir. 2016) (gathering cases and considering petitioning parent's prior violent acts toward others).

Dr. Poppleton identified several risk factors for domestic violence. These include the history of how one has handled conflict; instances of violence; financial control; attempts at isolating a romantic partner; gender-based control; suicidal ideation; denying a romantic partner's perception of reality; and negative attitudes toward authority. Dr. Poppleton also emphasized that a risk assessment must focus on who an individual is "behind

closed doors." *Cf. Van De Sande v. Van De Sande*, 431 F.3d 567, 570 (7th Cir. 2005) ("Because of the privacy of the family and parental control of children, most abuse of children by a parent goes undetected.").

All risk factors are present here. Petitioner has attempted suicide twice, once by throwing himself out a window. He routinely threatened suicide when his parents did not give him what he wanted. He destroyed furniture, screamed, pulled his mother's hair, and cornered people. He routinely smashed his head against walls in front of others. He killed his mother because she would not comply with his demands. While in confinement, he forced Respondent to call him for many hours at a time every day, and when she refused to comply, he threatened her. He harassed her at all times of the day. He periodically refused treatment, barricading himself, banging his head against windows, and fighting with nurses. He capitalized on Respondent's reliance on him—for financial support and for KRN's travel paperwork—to force her to perform tasks on his behalf. Indeed, Petitioner has controlled Respondent since early in their relationship. In total, the clear and convincing evidence here shows that Petitioner poses a grave risk of harm to his children.

Petitioner has given inconsistent testimony to those meant to diagnose him. For one, he has stated at times that his suicide threats were genuine and other times that they were tools to manipulate his parents. And he misinformed his own expert, Dr. McGuire, about his intentions for his children, telling Dr. McGuire that he desisted from seeking custody of his children—in an interview held

two weeks after Petitioner began this suit, *see* Ex. 6a ¶¶ 2, 11.[10] This means that Petitioner has deliberately made it more difficult for his caretakers to properly treat him. Indeed, evidence was presented that Petitioner has threatened his caretakers and has refused treatment. Petitioner's apparent lack of self-awareness and insight, lack of candor, and resistance to treatment buttress this Court's conclusion that Petitioner poses a grave risk and intolerable situation to his children.[11]

This Court's conclusion is consistent with the holdings of various courts across this country. In *Baran v. Beaty*, 526 F.3d 1340 (11th Cir. 2008), the Eleventh Circuit affirmed the denial of a petition for return where the district court found that the petitioning father "was emotionally unstable and prone to uncontrolled destructive outbursts of rage, was physically and verbally abusive towards the child's mother in the child's presence, and physically endangered the child, both intentionally and unintentionally." *Silva v. Dos Santos*, 68 F.4th 1247, 1255 (11th Cir. 2023) (citing 526 F.3d at 1345–46). The Eleventh Circuit was explicit:

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10. Petitioner testified that there must have been a misunderstanding, but this Court finds Dr. McGuire's perception to be more credible on this point.

11. There are more independent reasons why this Court accords little weight to Petitioner's testimony. First, Petitioner was ordered to provide documents expressly reviewed by his expert, but under the guise of doing so, Petitioner instead produced non-responsive, self-serving documents that he then entered as exhibits for his own case. Second, during the trial, Petitioner repeatedly interrupted witnesses and displayed a lack of impulse control.

the district court "was not required to find [the child] had previously been physically or psychologically harmed" to deny return. *Baran*, 526 F.3d at 1346. Rather, it just needed to find that return to the father posed a grave risk of harm to the child. *Id.* And in *Gomez v. Fuenmayor*, the Eleventh Circuit explained that threats made against a parent could be credibly seen as presaging a risk of harm to the child because "it requires no stretch of the imagination to conclude that serious, violent domestic abuse repeatedly directed at a parent can easily be turned against a child" or to foresee "the powerful effect that a pattern of serious violence directed at a parent may have on [a] child[]." 812 F.3d at 1014.

Similarly, in *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000), the First Circuit reversed the district court for failing to properly consider a petitioning father's history of violence and temperamental behavior. *Id.* at 219–20. As the Court summarized:

> In our view, the district court committed several fundamental errors: it inappropriately discounted the grave risk of physical and psychological harm to children in cases of spousal abuse; it failed to credit John's more generalized pattern of violence, including violence directed at his own children; and it gave insufficient weight to John's chronic disobedience of court orders. The quantum here of risked harm, both physical and psychological, is high. There is ample evidence that John has been and can be extremely violent and that he

> cannot control his temper. There is a clear and long history of spousal abuse, and of fights with and threats against persons other than his wife. These include John's threat to kill his neighbor in Malden, for which he was criminally charged, and his fight with his son Michael.

Id. The First Circuit held that the district court's cardinal error was failing to understand the implications of the above facts for the children's safety. *Id.* at 220. The First Circuit reasoned that "both state and federal law have recognized that children are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser." *Id.*

Acosta v. Acosta, 725 F.3d 868 (8th Cir. 2013), is also instructive. There, the Eighth Circuit affirmed a district court's denial of a return petition. The district court catalogued the petitioning father's long history of "inability to control his temper outbursts," including threatening others, threatening suicide, assaulting a taxi driver, and engaging in verbal abuse. *Id.* at 876. The Eighth Circuit held that it did not matter that "there [was] little evidence that [the petitioning father] physically abused the children," because what mattered was whether the father's history proved that a return to him would pose a grave risk of harm. *Id.*

And in *Van de Sande*, the Seventh Circuit, speaking through Judge Posner, reversed a district court for failing to find a grave risk of harm. 431 F.3d 567. Judge Posner reasoned that a petitioning parent's threat of violence

toward his children—understood in the context of his "propensity for violence, and the grotesque disregard for the children's welfare that he displayed by beating his wife severely and repeatedly in their presence and hurling obscene epithets at her also in their presence"—amounted to a grave risk of harm to the children. *Id.* at 570.

In the instant matter, although there was no evidence that Petitioner physically abused Respondent or the children, there was evidence of coercive, manipulative, violent, and threatening behavior directed at Respondent and Petitioner's family. Such long-standing behavior constitutes a grave risk of harm to ACN and KRN if they are returned. Moreover, while the above cases focus largely on spousal abuse, Petitioner here has a broader history of familial abuse against his mother, father, and brother as well as Respondent. Thus, the circumstances here are even more concerning than the already severe facts of the cases above.

Finally, the grave risk of displacing the children is starker still when juxtaposed with depriving the children of their mother and their support network in Oregon. As the Second Circuit has explained, "the fact that a child is settled may form part of a broader analysis of whether repatriation will create a grave risk of harm," though it cannot be categorically dispositive. *Blondin v. Dubois*, 238 F.3d 153, 164 (2d Cir. 2001), *abrogated on other grounds by Golan*, 142 S. Ct. 1880.[12] Because of the isolation of

12. Courts, however, must be "careful to establish the connection between the fact that [the children] were settled and the grave risk of harm" in returning the children, *Blondin*, 238

COVID-19 and Petitioner's absence from the children's lives, they developed an especially strong bond with their mother. And in Oregon, the children have family, friends, and social benefits that, if returned to Scotland, they would lose in an extremely short time frame. As Dr. Poppleton testified, losing their mother, family, and support network so quickly could have cascading effects on the children's development and health. Coupled with the risk posed by Petitioner, this clearly presents an intolerable situation and grave risk to the children.

Petitioner resists this conclusion, pointing to isolated statements in various reports about his risk to the general public, but these statements are unavailing. As Dr. Poppleton testified, statements about an individual's risk to the general public cannot be abstracted to apply to whether an individual is a risk to his children behind closed doors. And these statements largely rest on interviews with Petitioner, when as Dr. Poppleton noted, assessing an individual's risk behind closed doors requires interviews with a wide range of individuals who have interacted with Petitioner in such situations.

Petitioner also heavily relies on the testimony of Dr. McGuire, but this Court accords Dr. McGuire's testimony little probative weight. To start, Dr. McGuire relied on over 1,400 pages of documents that Petitioner failed to produce for Respondent despite multiple

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F.3d at 165, since the exception "is not a license for a court in the abducted-to country to speculate on where the child would be happiest." *Gaudin*, 415 F.3d at 1035 (quoting *Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996)).

requests and multiple orders by this Court. Without those documents, Respondent could not properly cross-examine Dr. McGuire, and this Court could not properly evaluate the probative value of Dr. McGuire's testimony about Petitioner. Although this Court did not strike Dr. McGuire's testimony, it cannot give Dr. McGuire's testimony much weight given Petitioner's failures in discovery. *See* Fed. R. Civ. P. 37(c).

And even putting these discovery issues aside, Dr. McGuire's expert opinion lacks credibility. To start, Dr. McGuire testified that he was asked by Petitioner only to determine if Petitioner had a personality disorder, not to assess the risk he poses to his children. Moreover, Dr. McGuire states that Petitioner does not require any treatment—rather, in Dr. McGuire's view, Petitioner's killing his mother, attempting suicide, and threatening suicide, resulted from a unique combination of stress, anxiety, and depression that is no longer extant. This diagnosis is simply not believable in light of all of the facts. Dr. McGuire did not believe it was "optimistic" to have children returned to a father locked in a psychiatric facility, and he did not view killing one's mother as an "anti-social behavior." Dr. McGuire also knew that clinicians at St. Andrew's had a "very negative view of [Petitioner]," but discounted these views altogether. And Dr. McGuire could not name a single report he had reviewed concerning Petitioner that "cast [Petitioner] in a good light." Dr. McGuire testified that it was a "conflict" between Petitioner and his parents that led to the circumstances around the killing, but he at no point

addressed the fact that Petitioner himself created those circumstances by forcing his parents to let him live with them in Jersey beginning in Fall 2017.

What is more, Dr. McGuire's analysis hinges largely on questionable sources of information: interviews with Petitioner, Petitioner's close friend Mr. Nick Harper, and Petitioner's personal therapist Jane Pointon, whom Petitioner saw during the time that Petitioner imperiled his family and eventually killed his mother. Dr. McGuire did not speak to anyone else; he did not even talk to Petitioner's father or brother, who have restraining orders against Petitioner. He did not interview Petitioner's former employers or colleagues. His understanding of Petitioner's family history and history of violence is exclusively based on Petitioner's testimony. He did not know that Petitioner had thrown objects, nor did he know that police had been called to Petitioner's parents' home in Jersey several times—despite his claim that he had reviewed "past reports."

Further, as noted above, Petitioner seemingly misled Dr. McGuire about his intentions for the children. Dr. McGuire did not know at the time of the interview that Petitioner had filed a Hague Convention petition. And Dr. McGuire's only means of verifying Petitioner's representations, which he admitted could be self-serving, was to compare them with the representations of Mr. Harper and Ms. Pointon, and with "past reports." But it is unclear how Dr. McGuire performed this verification or weighed the veracity of different interviews. For all these

reasons, Dr. McGuire's testimony lacks the credibility to overcome Respondent's evidence.

Petitioner also offered a letter by Dr. Jane Radley, a consultant psychiatrist at the St. Andrew's facility, but her letter also lacks probative value. She wrote that Petitioner has shown no intention to threaten or harm his children. But she relies exclusively on seeing Petitioner interact with the children on four occasions in a heavily monitored facility—wholly inadequate in this Court's view and Dr. Poppleton's. Dr. Radley's letter moreover does not address Petitioner's history of violent, controlling, and obsessive behavior, nor does it address the fact that Petitioner did not intend to kill his mother or cause extraordinary stress for his family but did so anyway. Dr. Radley's letter therefore holds no weight.

* * *

In sum, the children's return to Scotland poses a grave risk of harm and intolerable situation to them. For this reason, as well as the children's lack of a habitual residence on June 17, 2022, this Court will not order that the children be returned to Scotland.

D. Petitioner's Proposed Ameliorative Measures Are Unworkable

Petitioner argues that this Court should order the children's return to Scotland so that he can visit them while they live under the supervision of either a live-in nanny or Petitioner's friend, Mr. Harper (who testified).

This Court finds these ameliorative measures unworkable. *Golan*, 142 S. Ct. at 1892–94 (giving district courts broad discretion to consider such measures).

Because Petitioner is indefinitely detained and because the evidence, from even his own expert, overwhelmingly shows that Petitioner's confinement will only be relaxed over time, this Court holds that any ameliorative measures would require this Court to meddle with long-term arrangements abroad that this Court has no authority over. *See id.* at 1894 (instructing district courts to avoid "weighing in on permanent arrangements"). For instance, Petitioner states that he would visit his home in Edinburgh, progressing from escorted to unescorted visits. But it is unclear when or if the authorities in England and Jersey will relax Petitioner's restrictions. And Advocate David Steenson, an expert on U.K. law, testified that the Government of Scotland would need to independently permit Petitioner to enter the country even if he were permitted unescorted leave by other authorities. This Court cannot interfere in that process.

As for Petitioner's proposal of supervision by a nanny or Mr. Harper, this Court has no jurisdiction over either individual.[13] Nor is there any evidence that either individual is under the supervision of a government agency in the U.K. *See Van De Sande*, 431 F.3d at 571 ("The rendering court must satisfy itself that the children will in fact, and

13. Mr. Harper has met the children twice. He does not know their ages or dates of birth. He knows virtually nothing about the children. The children do not know him.

not just in legal theory, be protected if returned . . . ."). Given Petitioner's indefinite confinement, this Court opining on the involvement of child protective services to assure a safe return would also result in "weighing in on permanent arrangements" that the U.K. authorities must resolve. And it is highly questionable that Petitioner can afford a nanny at all: a single year (42,000 pounds) would deplete seventy percent of what Petitioner believes are his current savings (60,000 pounds). This Court thus finds such proposed ameliorative measures are unworkable. *See Golan*, 142 S. Ct. at 1894.

CONCLUSION

In sum, this Court DENIES the Petition for Return for two independent reasons.

First, as to whether ACN and KRN's habitual residence is Scotland, Petitioner has not met his burden. Instead, a preponderance of the evidence shows that the children, ages four and two at the time of removal, lacked any habitual residence at all. Accordingly, his Petition for Return must be denied because ACN and KRN were not removed from their habitual residence.

Second, as to whether a return to Scotland poses a grave risk of harm and intolerable situation to the children, Respondent has met her burden by clear and convincing evidence. A return to Scotland would either leave the children unsupervised or under the supervision of their father who has a severe history of violence toward his

own family. And this Court will not consider ameliorative measures that ultimately fall under the ambit of U.K. authorities in separate proceedings. For these reasons, too, the Petition must be denied.

IT IS SO ORDERED.

DATED this 24th day of October, 2023.

/s/ Karin J. Immergut
Karin J. Immergut
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 28, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-3877
D.C. No. 3:23-cv-00850-IM
District of Oregon, Portland

ANDREW CHARLES NISBET,

Petitioner-Appellant,

v.

SPIRIT ROSE BRIDGER,

Respondent-Appellee.

INTERNATIONAL ACADEMY
OF FAMILY LAWYERS,

Amicus Curiae-Pending.

Filed January 28, 2025

ORDER

Before: BYBEE, BEA, and MENDOZA, Circuit Judges.

The full court has been advised of Petitioner-Appellant's petition for rehearing en banc ("Petition")

[Dkt. 50], filed on January 2, 2025, and no judge of the court has requested a vote on it. Fed. R. App. P. 40. The Petition is therefore DENIED. The motion of the International Academy of Family Lawyers for leave to file an amicus curiae brief in support of granting the Petition ("Motion") [Dkt. 51], filed on Janumy 13, 2025, is DENIED as moot.

In consideration of the Petition, Judge Bybee has recommended granting the Petition. Judge Bea has recommended denying the Petition, and Judge Mendoza has so voted. In consideration of the Motion, Judge Bybee has voted to grant the Motion, and Judge Bea and Judge Mendoza have voted to deny the Motion as moot.

APPENDIX D — HAGUE ABDUCTION CONVENTION, ARTICLES 1-20

HCCH
Connecter Protéger Coopérer Depuis 1893
Connecting Protecting Cooperating Since 1893
Conectando Protegiendo Cooperando Desde el 1893

28. CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION[1]

(Concluded 25 October 1980)

The States signatory to the present Convention,
Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,
Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions—

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1. This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under "Conventions" or under the "Child Abduction Section". For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Quatorzième session (1980),* Tome III, *Child abduction* (ISBN 90 12 03616 X, 481 pp.).

Appendix D

CHAPTER I—SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are—

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where—

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention—

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Appendix D

CHAPTER II—CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures—

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

Appendix D

CHAPTER III—RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain—

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b) where available, the date of birth of the child;

c) the grounds on which the applicant's claim for return of the child is based;

d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by—

e) an authenticated copy of any relevant decision or agreement;

f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant

or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Appendix D

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Appendix D

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody

until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.