No. 18-935

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In The

Supreme Court of the United States

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MICHELLE MONASKY,
Petitioner,
v.
DOMENICO TAGLIERI,
Respondent.

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

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AMICUS CURIAE BRIEF OF THE
AMERICAN ACADEMY OF MATRIMONIAL
LAWYERS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued
Page

TABLE OF AUTHORITIES
Page
CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued
Page
STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued
Page

INTEREST OF THE *AMICI CURIAE*
The interest of *Amici Curiae* in this case is the

protection of children whose parents are divorced, separated or unmarried. The American Academy of Matrimonial Lawyers ("AAML") is a national organization of nearly 1,650 family law attorneys throughout the United States. The AAML was founded in 1962 by highlyregarded family law attorneys "to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be protected." The AAML has undertaken many projects and published handbooks and articles in furtherance of parenting, including the *Model Parenting Plan*, *The Voices of Children During Divorce: A Client Handbook*, and *Stepping Back from Anger: Protecting Your Children During Divorce*.

The AAML has adopted policies and resolutions formally supporting the enactment and enforcement of laws and treaties that protect children who are affected by parental disharmony, including the 1980 Hague Convention on Civil Aspects of International Child Abduction ("Convention"), the International Child Abduction Remedies Act ("ICARA"), the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") and the Uniform Deployed Parents Custody and Visitation Act.[1]

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[1] This brief was prepared entirely by the listed authors, and no counsel for any party authored any part of it; nor was any financial contribution made by any party or counsel for any party. The Petitioner filed a Blanket Consent to *Amicus Curiae* briefs on August 15, 2019. The Respondent consented on July 23, 2019.

SUMMARY OF THE ARGUMENT

When Congress enacted ICARA to implement the Hague Convention on the Civil Aspects of International Child Abduction, it declared "the need for uniform international interpretation of the Convention."[2] Thus, when the courts in the United States are called upon to determine the habitual residence of a child, all of the courts must speak with a unified voice. Neither the Convention nor ICARA define habitual residence. Nevertheless, the term is the touchstone of the remedies provided by the Convention.[3] Unless a court determines a child's habitual residence, the primary purpose of the Convention, "to secure the prompt return of children wrongfully removed or retained in any Contracting State," cannot be fulfilled.

For the last twenty-six years, the various circuits of the Federal courts of appeals have diverged[4] as to the

This brief does not necessarily reflect the views of any judge who is a member of the American Academy of Matrimonial Lawyers. No inference should be drawn that any judge who is a member of the Academy participated in the preparation of this brief or reviewed it before its submission. The American Academy of Matrimonial Lawyers does not represent a party in this matter, is receiving no compensation for acting as *amicus*, and has done so *pro bono publico*.

[2] 22 U.S.C. § 9001(b)(3)(B).

[3] *See Mozes v. Mozes*, 239 F.3d 1067, 1072 (9th Cir. 2001).

[4] *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993) was the appellate decision in the United States that determined a child's habitual residence under the Convention. Since 1993, all of the federal circuit courts of appeals, except the Tenth Circuit, have issued opinions that determine a child's habitual residence. *S ee., e.g.*, *Cartes v. Phillips*, 865 F.3d. 277, 282 (5th Cir. 2017);

meaning of habitual residence and the appellate review standard to be applied to such determinations. The Sixth Circuit joined the Fourth Circuit and held that the determination of a child's habitual residence is a question of fact. Accordingly, the Sixth and Fourth Circuits review the district court's finding of habitual residence for clear error.[5] The First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits review the trial court's factual findings for clear error and its legal conclusions, including its interpretation of the Convention and its application of relevant legal standards to the factual findings, *de novo.* Each of the circuits applies a slightly different standard to its *de novo* review, which can lead to inconsistent results in the same factual circumstances.

The ten circuit courts of appeals that have reviewed a district court case in which a child's habitual residence was determined all apply a two-prong test. One prong, which is the Sixth Circuit's primary question, is "whether the child has been physically present

Martinez v. Cahue, 826 F.3d 983, 989 (7th Cir. 2016); *Mendez v. May*, 778 F.3d 337, 344-45 (1st Cir. 2015); *Maxwell v. Maxwell*, 588 F.3d 245, 250 (4th Cir. 2009); *Tsai-Yi Yang v. Fu-Chian Tsue*, 499 F.3d 259, 271 (3d Cir. 2007); *Ruiz v. Tenoria*, 392 F.3d 1247, 1251 (11th Cir. 2004); *Silverman v. Silverman*, 338 F.3d 886, 897-98 (8th Cir. 2003); *Mozes*, 239 F.3d at 1073; *Croll v. Croll*, 229 F.3d 133, 136 (2d Cir. 2000).

[5] *Taglieri v. Monasky*, 907 F.3d 404, 408 (6th Cir. 2018); *Sundberg v. Bailey*, 765 F.App'x 910, 912 (4th Cir. 2019) (citing *Maxwell*, 588 F.3d at 250 ("On appeal, the district court's findings of fact are reviewed for clear error and its legal conclusions regarding

domestic, foreign, and international law are reviewed *de novo.*" (citations omitted))).

4

in the country for an amount of time sufficient for acclimatization and whether that locale has a degree of settled purpose from the child's perspective."[6] The second prong is to find the " 'shared parental intent of the parties' and to identify the location where the parents 'intended the child to live.' "[7]

The standard used in *Taglieri*, the parents' shared intent, was applied as the sole standard only because the eight-week-old infant was too young to acclimate anywhere.[8] It is the view of the AAML that the court's determination of the child's habitual residence should have turned on the facts consistent with its definition of habitual residence rather than "shared parental intent" as a necessary factor, as opined by Judge Boggs in his concurring opinion.

The Ninth, Fifth and Third Circuits look first to the parents' shared intent or settled purpose regarding their child's residence, "giving greater weight to the parents' subjective intentions relative to the child's age."[9] The Fourth, Fifth, Seventh, Eighth, Ninth, and

[6] *Taglieri*, 907 F.3d at 408 (quoting *Ahmed v. Ahmed*, 867 F.3d 682, 687 (6th Cir. 2017)).

[7] *Id.*

[8] *Id.*

[9] *Cartes*, 865 F.3d at 282 (quoting *Delgado v. Osuna*, 837 F.3d 571, 578 (5th Cir. 2016)); *see also Mozes*, 239 F.3d at 1073; *Feder v. Evans-Feder*, 63 F.3d 217, 222 n.9 (3d Cir. 1995) ("The determination of habitual residence is not purely factual, but requires the application of a legal standard . . . to historical and narrative facts, It is, therefore, a conclusion of law or at least a determination of a mixed question of law and fact.").

5

Eleventh Circuits also look to whether the parents have a shared settled intention to abandon the prior habitual residence, which must be accompanied by "an actual change in geography" and "the passage of 'an appreciable period of time.' "[10] The Third Circuit focuses on a settled purpose and the parents' intentions.[11] The Second Circuit focuses primarily on the parents' intent at the last time it was shared.[12] There are a number of problems with these varying methods of determination. As noted by Judge Boggs in his concurrence in *Taglieri*, "under the two-part test, parents who are at odds with one another will be able to 'freely engage in a continuous game of abduction ping pong, given the

many months or even years in which they could freely abduct the child before any particular location became the child's habitual residence.' "[13]

The Ninth Circuit, and those circuit courts that were persuaded by the reasoning in the *Mozes* decision, [14] concluded that if habitual residence is treated as a purely factual matter, without a *de novo* review,

[10] *See, e.g.*, *Mozes*, 239 F.3d at 1078 (quoting *Friedrich*, 983 F.2d at 1402; *C v S*, [1990] 2 All E.R. 961, 965 (Eng H.L.)).

[11] *See, e.g.*, *Whiting v. Krassner*, 391 F.3d 540, 550-51 (3d Cir. 2004).

[12] *See, e.g.*, *Saada v. Golan*, 930 F.3d 533, 539 (2d Cir. 2019).

[13] *Taglieri*, 907 F.3d at 415 (quoting *Ovalle v. Perez*, 681 F.App'x 777, 784 (11th Cir. 2017) (per curiam)).

[14] *See, e.g.*, *Ruiz*, 392 F.3d at 1252-54.

parents will have no guidance to assess the law on habitual residence.[15] However, reviewing the habitual residence determination *de novo* flies in the face of the term's factual nature. Another concern is that different circuits give greater weight to different aspects of each of the prongs. The split among the circuit courts of appeals as to what standard should be applied and which standard should be the principal focus when a court determines a child's habitual residence further impedes the goal of a uniform international interpretation of the Convention. It also creates the risk that different outcomes could occur among each of the circuits given the same set of factual circumstances.

In the event that this Court considers whether the issue of habitual residence as a mixed question of law and fact, this Court's recent decision in *U.S. Bank N.A. v. Village at Lakeridge, LLC*[16] is determinative. That case focused on "which kind of court . . . is better suited to resolve" the mixed question of law and fact.[17] When a court is immersed in case-specific factual issues, the appellate court should review the findings with deference. [18] Given that the inquiry into habitual residence is purely factual, the trial court is in a much better position to assess the credibility of witnesses, and can best determine the basic and historical facts—those

[15] *Mozes*, 239 F.3d at 1072-73. *See also Silverman*, 338 F.3d at 896-97.

[16] *U.S. Bank Nat'l Ass'n v. Village at Lakeridge, LLC*, 138 S. Ct. 960 (2018).

[17] *Id.* at 966.

[18] *Id.* at 967.

that address "who did what, when or where, how or why."[19] Accordingly, habitual residence determinations should be reviewed under the clearly erroneous standard. By framing the determination in terms of "acclimatization, settled parental purpose, or shared parental intent," in cases such as this one, in which the child is too young to acclimate and there is no settled parental purpose or shared parental intent, the trial court would have to conclude that the child has no habitual residence. That was the mother's position in the current case, and the majority of the Sixth Circuit was concerned that if adopted, it would be "the worst possible outcome" because an infant would be left unprotected from the harm the Convention is designed to prevent.

Where, as here, a treaty does not define a term used within the text, the appropriate approach is for the court to give the phrase its ordinary meaning.[20] That well-established principle should be applied to determine, from all of the relevant evidence, the child's customary, usual, regular abode. "Residence simply requires bodily presence as an inhabitant in a given place."[21] Habitual is defined as "customary, usual, of the nature of a habit."[22] That is the meaning of the

[19] *Id.* at 966 (quoting *Thompson v. Keohane*, 516 U.S. 99, 111 (1995)).

[20] *De Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) (finding that undefined terms in treaty will be given their ordinary meaning).

[21] *Miller v. Hayes*, 600 N.E.2d 34, 37, 233 Ill. App. 3d 847, 850 (1992) (quoting BLACK'S LAW DICTIONARY (4th ed. 1968)).

[22] BLACK'S LAW DICTIONARY 640 (5th ed. 1979).

term "habitual residence" that the *Taglieri* court employed and this Court should adopt, without any additional analysis of shared parental intent being required as part of the determination. When the phrase "habitual residence" is given its ordinary meaning, the inquiry by the trial court must be purely factual.

Applying its customary meaning, facts can be gleaned that will allow the district courts to find an habitual residence for even a newborn child. As trial courts do when ascertaining a child's best interest, when faced with a Convention case, numerous factors are to be considered such as: whether the family sold their home and moved all of their property when relocating to a signatory state; whether a new home was purchased in the new locale; whether the family maintains financial

accounts in the prior location; what types of Visas the family traveled under; whether the parents have drivers licenses in the new country; and, whether the children have attended school, made friends, learned the language, and developed roots in the new country. Those facts are "all bound up with the case specific details of the highly factual circumstances and, accordingly, the trial court is better suited to resolve the question. As no "auxiliary legal principles" need to be developed, the question is purely factual and should be reviewed under the clearly erroneous standard.[23]

Thus, the Sixth Circuit's decision in *Taglieri* should be affirmed because, consistent with the stated

[23] *See U.S. Bank Nat'l Ass'n*, 138 S. Ct. at 967.

purposes of the Convention, it viewed the determination of habitual residence as a strictly fact driven question, and, therefore, applied the clearly erroneous standard of review. As the Sixth Circuit concluded, a highly deferential review of the district court's factual findings is consistent with the purely factual nature of the inquiry as intended by the Convention.[24] This standard is consistent with the intent of the convention as indicated in the official history Explanatory Report written by Elisa Pérez-Vera. The Explanatory Report's emphasis that habitual residence is a factual determination should be adopted by this court to provide uniformity among the United States' courts.

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ARGUMENT

I. The Determination of a Child's Habitual Residence Must Occur in Every Case Involving Implementation of the Hague Convention.

A. The Hague Convention Aims to Prevent Future International Child Abductions.

The drafters of the 1980 Hague Convention endeavored to "protect children internationally from the harmful effects of their wrongful removal or retention

[24] Habitual residence is a "well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile." Elisa Pérez-Vera, *Explanatory Report: Hague Conference on Private International Law*, 3 ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION ¶ 66 (1982) [the "Explanatory Report"].

and to establish procedures to ensure their prompt return

to the State of their habitual residence, as well as secure protection for rights of access."[25] To further those objectives, the Convention emphasizes the importance of a "uniform interpretation" by all Contracting States.[26] The Convention was incorporated into law in the United States through the International Child Abduction Remedies Act.[27]

Specifically, the Convention intended both to "secure the prompt return of children wrongfully removed to or retained in"[28] a country and to establish respect for the child custody laws of all Contracting States.[29] The Convention believed the swift return of an abducted child to his or her habitual residence would place the child in the best forum to determine any custody litigation and deter child abduction in the first

[25] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, pmbl. [hereinafter HAGUE CONVENTION].

[26] 22 U.S.C. § 9001(b)(3)(B).

[27] 22 U.S.C. §§ 9001-9011.

[28] Under the Convention, removal is wrongful where "(a) it is in breach of right 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" HAGUE CONVENTION, *supra* note 25 at art. 3.

[29] HAGUE CONVENTION, *supra* note 25, art. 1.

place.[30] The Convention "places at the head of its objectives the restoration of the *status quo*, by means of the 'prompt return of children wrongfully removed to or retained in any Contracting State.' "[31] Underlying this purpose is the thought that the promised swift return of a child would prevent "international forum shopping" by parents to gain an advantage in a custody dispute.[32] As Arenstein points out:

The purpose of the Convention is to "protect children internationally from the harmful effects of their wrongful removal and retention and to establish procedures to ensure their prompt return to the State of their habitual residence." Furthermore, the Convention is designed to "preserve the status quo" in the child's country of habitual residence and "deter parents from crossing international boundaries in search of a more sympathetic court."[33]

To achieve that purpose, the Convention prohibits any Contracting State from deciding the custodial rights of either party and creates only a mechanism for

[30] Explanatory Report, *supra* note 24, ¶¶ 18, 24.

[31] *Id.* at ¶ 16.

[32] *Berezowsky v. Ojedo*, 765 F. 3d 456, 465 (5th Cir. 2014); *Mozes*, 239 F.3d at 1079 ("The convention is designed to prevent child abduction by reducing the incentive of the would-be abductor to seek unilateral custody over a child in another country"); *Friedrich*, 983 F.2d at 1402.

[33] Robert D. Arenstein, *How to Prosecute an International Child Abduction Case under the Hague Convention*, 30 J. AMER. ACAD. MATRIMONIAL LAW. 1, 3 (2017); *Blondin v. Dubois*, 189 F.3d 240, 246 (2d Cir. 1999) (citing *Friedrich*, 983 F.2d at 1400).

a child's return.[34] This ultimate objective "places the child's habitual residence front and center" in the analysis of any Hague petition.[35]

Consistently since 1999, children under the age of five make up 35-38% of the number of return applications in the United States under the Convention.[36] Analyzing the lives of very young children who have yet to form ties to any Contracting State has required that courts grapple with the meaning of habitual residence.

B. The Means To Achieving the Convention's Objective of Preventing Wrongful Removal or Retention is Ensuring that the Child Remains or is Returned to His Habitual Residence, which is a Purely Factual Determination.

Determining a child's "habitual residence" is central to any analysis of a return application. Without a habitual residence, courts have no power under the Convention to consider whether a child's removal was wrongful or whether to order his or her return. As a result, courts often cite the habitual residence finding as an "outcome determinative" consideration for the

[34] HAGUE CONVENTION, *supra* note 26, at art. 19; 22 U.S.C. § 9001(b)(4).

[35] *Taglieri*, 907 F.3d at 405.

[36] Nigel Lowe & Victoria Stevens, *A Statistical Analysis of Applications Made in 2015 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, pt. II at 10 (July 2018).

court.[37] When a Federal or state court is asked to invoke the remedy of returning an abducted child to a petitioning parent under the Convention, the "often outcome-determinative concept on which the entire

system is founded" is the child's habitual residence.[38] Habitual residence is intentionally not defined by the Convention.[39] ICARA, the enacting statute, also failed to include a definition of the term "habitual residence."[40] Further, almost no discussion of the term exists in any legislative history or official legal analysis.[41] Five years after the Convention was adopted by the United States, the Sixth Circuit had the nation's first opportunity to consider what the term "habitual residence" meant.[42] That court turned to "the official history and commentary" of the Convention written by Elisa Pérez-Vera.[43] The Explanatory Report stated only that the term "habitual residence" was "a wellestablished concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile."[44]

[37] *Mozes*, 239 F.3d at 1072.
[38] *Id.*
[39] Explanatory Report, *supra* note 25, ¶ 53.
[40] *Berezowsky*, 765 F. 3d at 466.
[41] *Feder*, 63 F.3d at 228 (Sarokin, J., dissenting) (citing 51 FR 10494 (1986)).
[42] *Friedrich*, 983 F.2d at 1400-01.
[43] *Feder*, 63 F.3d at 228 (Sarokin, J., dissenting); *Friedrich*, 983 F.2d at 1401.
[44] *See* note 24, *supra.*

The courts and commentators agree that habitual residence was conceived by the drafters of the Convention as a factual question that must be determined on a case-by-case basis without resort to presumptions or the "mechanical application" of criteria.[45]

C. The Factors Employed by the Ten Circuits of the Courts of Appeals Allow for the Possibility of an Abducted or Wrongly Retained Child to have no Habitual Residence thereby Undermining the Very Protections the Convention was Created to Achieve.

As the Ninth Circuit noted in *Valenzuela v. Michel*,[46] "[d]espite the drafters' insistence that 'habitual residence' does not need defining, courts have inevitably tried. The resulting lack of uniformity across jurisdictions is unsurprising, especially in light of the variety of situations in which a dispute over habitual residence can arise."[47] It is the variety of situations in which the disputes arise that make it critical to have a

[45] Arenstein at 7, note 33, *supra* (citing *Mozes*, 239 F.3d at 1070-71); Explanatory Report, ¶ 66 ("We shall not dwell at this point upon the notion of habitual residence, a well-established concept in the Hague Conference, *which regards it as a question of pure fact*, differing in that respect from domicile." (emphasis added)).
[46] 736 F.3d 1173 (9th Cir. 2013).
[47] *Id.* at 1177.

uniform framework for deciding the crucial issue of habitual residence in Convention cases.

The Supreme Court has never defined and the United States Circuit Courts do not agree upon a uniform standard for determination a child's habitual residence. This may leave the United States in breach of Congress's directive to promote a "uniform international interpretation of the Convention."[48] In order for the Convention to achieve its objective of discouraging international child abduction, the courts of the United States must speak with a unified voice.

1. The Majority Rule Examines Shared Parental Intent and A Child's Acclimatization to the New Country.

In *Mozes v. Mozes*, the Ninth Circuit considered an Israeli father's petition to have his four children returned to Israel.[49] One year after arriving in California from Israel with the children, the mother, an Israeli citizen, filed for divorce and full custody.[50] Noting the absence of a formal definition of habitual residence, the court began its interpretation of "habitual residence" with "the ordinary and natural meaning of the two words it contains as a question of fact to be decided by reference to all the circumstances of any particular case."[51] The court held that the first step to determine

[48] *Abbott v. Abbott*, 560 U.S. 1, 16 (2010).
[49] *Id.* at 1069.
[50] *Id.*
[51] *Id.* at 1071 (quoting *C v S*, [1990] 2 All E.R. 961, 965 (Eng H.L.)).

the habitual residence is to consider whether the parents had a settled intention to abandon the residence left behind.[52]

To answer that inquiry, the Ninth Circuit established that the trial court must look to "all available evidence" in order to ascertain the intention of the parents.[53] The court held that the parents in *Mozes* agreed to send the children abroad for a temporary time frame

of fifteen months, after which they would return to Israel.[54] Therefore, affirming Israel as the habitual residence, the court found that the only shared intent was to have a temporary stay in the United States.[55]

Upon first finding the shared parental intent as to a habitual residence, the majority rule as first set forth in *Mozes*, moves to the acclimatization test. That analysis determines "whether [a court] can say with confidence that the child's relative attachments to the two countries have changed to the point where requiring return to the original forum would now be tantamount to taking the child 'out of the family and social environment in which its life has developed.' "[56] In *Mozes*,

[52] *Id.*

[53] *Id.* at 1076; *cf. Berezowsky*, 765 F.3d at 468 (stating that to establish habitual residence, "[a] shared parental intent requires . . . the parents must reach some sort of meeting of the minds regarding their child's habitual residence, so that they are making the decision together").

[54] *Mozes*, 239 F.3d at 1083.

[55] *Id.*

[56] *Id.* at 1081 (quoting Explanatory Report, *supra* note 24, ¶ 11).

the court examined such factors as length of stay in each country, a child's social engagement, level of educational environment, and the intention of the parents.[57] Indeed, the court found that, due to the temporary nature of the stay, any acclimatization by the children was made with that expectation in mind and was insufficient to create a change in habitual residence from Israel to the United States.[58]

The reasoning in *Mozes* has been largely followed by the First, Second, Fourth, Fifth, Seventh, Eighth and Eleventh Circuits.[59]

2. The Minority Rule

The minority rule, espoused by the Third and Sixth Circuits, turns the majority rule upside down. The minority rule prioritizes acclimatization over shared parental intent, with an exception for cases that involve very young children.[60] Habitual residence as defined by the Sixth Circuit is the place where a child has been physically present for an amount of time

[57] *Id.* at 1078-81 (finding that parental intentions will often "color [a child's] attitude toward the contacts it is making" in the new country).

[58] *Id.* at 1083.

[59] *See, e.g.*, *Mendez v. May*, 778 F.3d 337 (1st Cir. 2015);

Croll v. Croll, 229 F.3d 133, 136 (2d Cir. 2000); *Maxwell v. Maxwell*, 588 F.3d 245, 250 (4th Cir. 2009); *Cates v. Phillips*, 865 F.3d 277, 282 (5th Cir. 2017); *Martinez v. Cahue*, 826 F.3d 983, 989 (7th Cir. 2016); *Silverman v. Silverman*, 338 F.3d 886, 896-97 (8th Cir. 2003); *Ruiz v. Tenoria*, 392 F.3d 1247, 1251 (11th Cir. 2004).

[60] *Ahmed*, 867 F.3d at 688-90.

sufficient for acclimatization and which has a "degree of settled purpose from the child's perspective."[61]

a. The Minority Rule Prioritizes the Acclimatization Standard.

First, the minority examines whether "the place where [the child] has been physically present for an amount of time is sufficient for acclimatization."[62] This analysis "pertains to customary residence" and "look[s] back in time, not forward."[63] Courts can examine all facets of a child's life, such as social connections, extracurricular activities, and educational networks.[64] A different understanding of acclimatization would only serve to make "meaningless" the purpose of the Convention.[65]

For example, in *Friedrich v. Friedrich*, the Sixth Circuit held that a two-year-old boy was acclimated in Germany, where he had "resided exclusively" before he moved with his mother to the United States.[66] Affirming Germany as the habitual residence, the court expressed the importance of "a change in geography and the passage of time" over "changes in parental affection and responsibility."[67] The Court rejected the notion

[61] *Whiting*, 391 F.3d at 550 (quoting *Feder*, 63 F.3d at 224).

[62] *Feder*, 63 F.3d at 224.

[63] *Friedrich*, 983 F.2d at 1401.

[64] *Ahmed*, 867 F.3d at 689.

[65] *Friedrich*, 983 F.2d at 1401.

[66] *Id.*

[67] *Id.* at 1402.

that one parent could "alter" the habitual residence by separating from the other parent.[68] However, in *Feder*, the Third Circuit held that even a mere six months was a sufficient time frame for a five-year-old boy to acclimatize to Australia and alter his habitual residence due to his change in schooling and the family's actions when leaving the United States.[69]

b. The Minority Rule Looks to Shared Parental Intent Second.

Next, under the minority rule, a reviewing court examines the shared intent of the parents, and the "degree

of settled purpose."[70] The shared parental intent also comes into play where no acclimatization can occur due to the child's young age and inability to acclimatize.[71] Within the analysis, the court must "focus on the child" and his surrounding circumstances.[72] To find evidence of a shared intent, the minority rule has the court look to the spectrum of parental behavior, from written agreements to actions.[73] For

[68] *Id.* at 1398-99.

[69] *Feder*, 63 F.3d at 224-25.

[70] *Id.* at 224.

[71] *See*, *e.g.*, *Delvoye v. Lee*, 329 F.3d 330, 334 (3d Cir. 2003) (mother of two month old infant returned from Belgium to United States and Third Circuit held there was no "degree of common purpose" to habitually reside in Belgium).

[72] *Feder*, 63 F.3d at 224.

[73] *See Whiting*, 391 F.3d at 542 (finding that the parties' signed agreement to raise the child in Canada for two years and the parents' initial compliance controlled her habitual residence), and *Feder*, 63 F.3d at 224.

example, the Third Circuit in *Feder* found that the parents had "shared intentions" to move to Australia despite the parents' different interpretations of the move. The facts that the court reviewed to reach its conclusion of shared intentions included that the parents had no definitive return date when they left the United States, the parents had allowed the minor child to attend preschool, the parents had sought employment in Australia, and the parents had sold their home in the United States.[74]

3. Both the Majority and Minority Rules Inadequately Provide for a Method to Determine the "Habitual Residence" of a Young Child.

Both the minority and majority rule have noted the "difficulty, if not impossibility" of finding whether a young child has acclimatized to a country, or even has the ability to do so.[75] The Ninth Circuit recognized in *Mozes* that young children "normally lack the material and psychological wherewithal to decide where they will reside."[76] Further, despite a stated preference for the acclimatization prong, the minority has declared this entire inquiry useless when applied to a young child. The Sixth Circuit emphasized that young children fall outside the Convention's purview because

[74] *Feder*, 63 F.3d at 224 (declaring Australia the habitual residence). *See also Delvoye*, 329 F.3d at 332-34 (mother traveled under

a three month tourist visa, brought only one or two suitcases, and left her belongings in New York).

[75] *Ahmed*, 867 F.3d at 689; *Mozes*, 239 F.3d at 1076.

[76] *Mozes*, 239 F.3d at 1076.

21

they are "*unable* to acclimate, making the standard generally unworkable."[77] Similarly, the Third Circuit concluded that where "a child is born while his . . . mother is temporarily present in a country other than that of her habitual residence it does seem, however, that the child will normally have no habitual residence until living in a country on a footing of some stability."[78] Where a child is so young that he or she has not yet formed any meaningful ties to a community, regardless of where it is, the acclimatization prong is meaningless in a "habitual residence" analysis and leaves the child without the protection of the Convention.

The federal appellate courts have ruled that a child's habitual residence is where the child has acclimatized; where the family as a unit has manifested a settled purpose to change or maintain an habitual residence, and the parents have a shared intent as to where the child would live. Acclimatization is the degree to which a child has developed intimate connections with a residence, which may be measured by criteria such as school or childcare enrollment; medical treatment; or the child's age and length of stay in a country.[79] However, an infant or very young child cannot acclimatize to any place independently of where his or her parent(s) are. The Sixth, Eighth, and Ninth

[77] *Ahmed*, 867 F.3d at 689.

[78] *Delvoye*, 329 F.3d at 334 (citing E.M. Clive, *The Concept of Habitual Residence*, JURID. REV. part 3, 138, 146 (1997)).

[79] Jeff Atkinson, "The Meaning of Habitual Residence under the Hague Convention on Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children," 63 Okla. L. Rev. 647, 656-58 (2011) ("Atkinson Article").

22

Circuits have held that an infant's habitual residence is not automatically derived from her mother's location.[80] Thus, with a young child, the shared parental intent is generally expressed as the last shared intention of the parents to establish a residence for the child, and is ideally based upon empirical evidence of historical actions taken by the parents.[81] Other courts have had to consider situations where the child spends equal time with each parent in two separate signatory

States, holding that the so-called "shuttle custody cases reflect serial, or alternating habitual residence."[82] Many courts have considered both of those criteria, applying them sequentially or giving greater weight to one of them. Patterns have emerged over time, allowing the Federal circuits to be viewed as two groups: (1) the "child-centered" approach of the Third, Sixth, and Eighth Circuits, where the child's acclimatization has been the primary focus; and (2) the "mutual parental intent" approach pioneered by the Second and Ninth Circuits (and adopted to some degree by the First, Fourth, Fifth, Seventh, and Eleventh Circuits), where the courts have examined the parents' last shared intent to establish a habitual residence, which must take into account whether there is a settled intention to abandon the habitual residence left behind.[83]

[80] *See, e.g.*, *Holder v. Holder*, 392 F.3d 1009, 1020-21 (9th Cir. 2004); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 379 (8th Cir. 1995); *Friedrich*, 983 F.2d at 1396.

[81] Atkinson Article, 63 Okla. L. Rev. 647 at 654.

[82] *Valenzuela*, 736 F.3d at 1179.

[83] *Mozes*, 239 F.3d at 1075.

Those approaches are not entirely antithetical to each other, but have not been sufficiently reconciled in the twenty-six years since the Hague Convention was adopted in the United States.

The common meaning, factually-intensive standard to determine habitual residence will avoid the untenable situation of a child not having an habitual residence, and will resolve those situations where the parents are on vacation or sabbatical and travel with a child to another country, or where the parents are not married to each other. In practical terms, this Court may define the habitual residence as the last residence of the child before the abduction or retention occurred. Just as states do not define "best interest of the child" in either case law or statutes, most states have developed a jurisprudence of decisions and statutes that provide factors to be considered, none of which are dispositive.[84] In the case of an infant or child too young to have a "sufficient degree of continuity to be properly described as settled,"[85] the courts must look to whether other relevant evidence such as the child's stability in the place of birth, what actions were taken by the parents to make the locale where the infant was at the time of the alleged abduction more settled or less settled,

such as employment, including length, permanence, and
[84] *See, e.g.*, Custody of Child, O.C.G.A. § 19-9-3(3)(A)-(Q) ("In determining the best interests of the child, the judge may consider any relevant factor including, but not limited to [the following 22] factors.").
[85] *Pfeiffer v. Bachotet*, 913 F.3d 1018, 1023-24 (11th Cir. 2019).

any special licensing that was obtained by the parent(s) to become or remain employed, whether the family purchased a home, or, if not, whether they have entered into a long term lease, whether the home in the former place of residence was sold or maintained, whether financial accounts have been maintained in the former locale, whether a new language has been learned by either or both parents, whether the parents were separated at the time of the birth of the child or at the time of the alleged abduction, whether one parent had consented to the other parent moving to another signatory State for an indefinite period of time, what type of Visa did the family travel under and was the Visa renewed, and a myriad of other factors that will differ with each family based upon objective evidence rather than the self-serving statements of each parent.

4. Both the Majority and Minority Rules Fail to Account for Cases Without Parental Shared Intent.

In cases involving infants and toddlers, both the majority and minority decisions abandon the acclimatization test, and default to the shared parental intent test. However, that standard of inquiry thwarts the purposes of the Convention: where no such intent can be proven, a child is left with no habitual residence, which leaves very young children without protection from wrongful abduction. That was the mother's position in the present case, and it was rejected by the Sixth Circuit as being " . . . the worst of all possible worlds" because it would create a presumption of no

habitual residence in cases involving infants, and thereby encourage the very self-help, forum shopping the Convention was designed to prevent.[86]

Outside the purview of the Convention, very young children are left without any of the protections from international abductions that the drafters sought to put in place.[87] The predictable swift return to a country for adjudication of custodial rights is thus eliminated

for the youngest of children, leading to competing custody orders and international confusion.[88] A would-be abductor may feel emboldened, rather than deterred, to make a quick getaway before the child is of age to acclimatize. That gap in both rules leaves very young children outside the protections of the Convention designed to prevent child abduction.

The concurring opinion in *Taglieri* criticized both the majority and minority rules for requiring a shared parental intent in order to determine a child's habitual residence. The concurring opinion recognizes that in multiple situations, where "the inter-family tension is so great that one parent has abducted a young child, it is very likely that the parents will have quarreled about many things, most especially about their hopes and plans for where the child will be raised."[89] Without

[86] *Taglieri*, 907 F.3d at 411.

[87] *See* HAGUE CONVENTION, *supra* note 27, pmbl.

[88] *See, e.g.*, *Berezowsky*, 765 F.3d at 459 (refusing to find a habitual residence for three-year-old whose parents had litigated his custody in "at least 12 different courts").

[89] *Id.* at 412 (Boggs, J., concurring).

a shared parental intent, those young children and their parents will have no stability in adjudication of their custodial and access rights.

The strict two-part test of the minority and majority rules provide no real protection under the Convention to very young children who have not acclimatized to a locale and whose parents do not share a mutual intent to raise them in a particular locale.

II. The Phrase "Habitual Residence" Must Be Consistent with the Dictionary Definitions of the Terms "Residence" and "Habitual."

A. Why "Habitual Residence" Must be Defined.

When a term is not defined, it should be given its ordinary and natural meaning.[90] The Federal and state courts have struggled, in the context of each case presented to them under the Convention, to reach a consensus on meaning of the phrase "habitual residence." The Convention deliberately provides no definition or standard for determining a child's habitual residence, while the Explanatory Report unequivocally states that it is a pure question of fact, distinguishing it from domicile. Black's Law Dictionary, under the definition of "residence," states:

[90] *De Geofroy*, 133 U.S. at 271; *Ruiz*, 392 F.3d at 1252.

27
As "domicile" and "residence" are usually in the same place, they are frequently used as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and country, but only one domicile. Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

The Black's Dictionary definition of "residence" is consistent with the one provided in Webster's International Dictionary, as relied upon by the Sixth Circuit in *Taglieri*.

Thus, if the definitions in Websters and Blacks' Dictionaries are adopted by this Court to determine a child's habitual residence, a court is confronted only with the case-specific facts of the child's family to reach a conclusion as to whether the child was living in a particular locality. The trial court can determine whether the facts presented show that a particular locale is the child's habitual residence as that phrase is commonly used. That inquiry entails factual work and it should be reviewed under the clear error standard. The trial court's factual findings under the deference afforded by the clear error standard of review is better suited to the "court that has presided over the presentation of the evidence, that has heard all the witnesses, and that
28
has both the closest and deepest understanding of the record."[91]

B. The Sixth Circuit's Definition of Habitual Residence Must Be Adopted To Ensure that the Hague Convention Will Apply in Every Wrongful Removal Case of a Child Under the Convention.

The Sixth Circuit held in *Taglieri* that "[h]abitual residence marks the place where a person customarily lives."[92] To answer the question of where a person customarily lives, a court must examine the specific facts of the case. Factual inquiries are those that question who did what, when, where, why and how.[93]

The Ninth Circuit in *Mozes* concluded that parents need to know under what circumstances a child's habitual residence is likely to be changed and would find no comfort in being told that it is a question of fact to be decided by reference to all of the circumstances of any particular case.[94] For that reason, *Mozes* turned on a question of law as to the meaning of habitual residence even though it arises only in a preliminary stage in the process of determining a question of fact. *Mozes* held that the proper standard of review of essentially

[91] *U.S. Bank Nat'l Ass'n*, 138 S. Ct. at 968.

[92] *Taglieri*, 907 F.3d at 407 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1122, 2119 (2d ed. 1942)).

[93] *U.S. Bank Nat'l Ass'n*, 138 S. Ct. at 966.

[94] *Mozes*, 239 F.3d at 1072-73.

factual questions is clear error and the ultimate issue of habitual residence is reviewed *de novo.*[95]

Following the opinion in *Mozes*, the majority of the federal circuit courts of appeal have concluded that the determination of a child's habitual residence is a mixed question of law and fact.[96] In those circuits, the appellate court will accept the district court's findings of fact unless they are clearly erroneous, but exercise plenary review of the court's choice of and interpretation of legal precept and its application of those precepts to the facts.[97]

As a factual inquiry, the circuit courts agree that the district court's findings of fact are the decisive determination. The identification of a place where a child habitually resided prior to the child's removal or retention is necessarily a pure factual question. It cannot be answered by referring to treaties, statutes or case law.

[95] *Id.* at 1073.

[96] The First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits review the district court's determination of a child's habitual residence as a mixed question of fact and law, reviewing the factual findings for clear error and its legal determinations and application of the law to the facts *de novo. See, e.g.*, *Mendez v. May*, 778 F.3d 337 (1st Cir. 2015); *Croll v. Croll*, 229 F.3d 133, 136 (2d Cir. 2000); *Tsai-Yi Yang v. Fu-Chian Tsue*, 499 F.3d 259 (3d Cir. 2007); *Maxwell v. Maxwell*, 588 F.3d 245, 250 (4th Cir. 2009); *Cates v. Phillips*, 865 F.3d 277, 282 (5th Cir. 2017); *Martinez v. Cahue*, 826 F.3d 983, 989 (7th Cir. 2016); *Silverman v. Silverman*, 338 F.3d 886, 896-97 (8th Cir. 2003); *Mozes v. Mozes*, 239 F.3d 1067, 1073 (9th Cir. 2001); *Ruiz v. Tenoria*, 392 F.3d 1247, 1251 (11th Cir. 2004). But each of the circuits applies a slightly different standard to its *de novo* review.

[97] *See, e.g.*, *Ruiz*, 392 F.3d at 1251.

It can be answered only by studying empirical phenomena, such as the place where the child has been sheltered, where the child has attended school or child care, where the child's parents and relatives reside, and other objective evidence.

In American jurisprudence, factual questions are reviewed under the "clear error" standard of review, and mixed questions of law and fact are reviewed under the "clear error" standard when they entail primarily case-specific factual issues.[98] In *U.S. Bank*, this Court granted certiorari specifically to articulate the standard of appellate review applicable to mixed questions of law and fact, in the context of deciding whether a person constitutes a non-statutory insider under the Bankruptcy Code.[99] Writing for the Court, Justice Kagan initially recounted the appellate standards for reviewing pure legal (*de novo*) and pure fact questions (clear error).[100] As previously held by the Court, a mixed question of law and fact "asks whether 'the historical facts . . . satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.' "[101]

When mixed questions of law and fact are presented, the standard of review depends upon the

[98] *U.S. Bank Nat'l Ass'n*, 138 S. Ct. at 962.
[99] *Id.* at 965.
[100] *Id*. at 966.
[101] *Id*. at 966 (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289, n.19 (1982)).

predominant nature of the question, and which court (trial or appellate) is better suited to make the decision.[102] Mixed questions involving primarily casespecific factual issues—"requiring [the courts] to marshal and weigh evidence, make credibility judgments, and otherwise address . . . 'special, narrow facts that utterly resist generalization' "—are reviewed under the same clear error standard as factual questions.[103] "In short, the standard of review for a mixed question depends on whether answering it entails primarily legal or factual work."[104] "[A]n abuse of discretion standard does not mean a mistake of law is beyond appellate correction."[105] Therefore, reviewing the trial court's factual determination of a child's habitual residence

under the clear error standard will not prevent the appellate courts from rectifying errors of law made in the decision.

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CONCLUSION

This Court can promote a uniform application of the term habitual residence among all of the courts in the United States. For those children who are the most

[102] *Id*. at 967.

[103] *Id*. (citing *Pierce v. Underwood*, 487 U.S. 552, 561-62 (1988)).

[104] *Id.*

[105] *Koon v. United States*, 518 U.S. 81, 100 (1996), *superseded by statute on other grounds as recognized in United States v. Mandhai*, 375 F.3d 1243, 1249 (11th Cir. 2004).

vulnerable to wrongful removals or retentions, infants and toddlers, this Court can do so by holding that in every case involving the Convention, the child's habitual residence must be determined and define what that term means. To promote the goals of the Hague Convention and the United States Congress to have custody litigation determined by the court of the children's habitual residence, to prevent them from being wrongfully uprooted, and to prevent forum shopping, this Court should do the following:

It should hold that in every case under the Hague Convention, the courts have the obligation to determine that the child or children involved have an habitual residence. It should define the term "habitual residence" as the last place the child lived before the wrongful removal. It should articulate factors for the courts to consider in coming to that factual determination. Among those factors should be considerations of whether the child has acclimatized to a particular location and whether the parents agreed on a different location based upon objective evidence, not the selfserving statements of the parties, which may be relevant but not necessarily outcome determinative. Those factual findings should be reviewed using a clear error standard. That will provide an effective, uniform framework for determining a child's habitual residence, regardless of the child's age, and will promote

the objections of the Convention in deterring child abduction.

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Respectfully submitted,

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