No. 16-1119

In The
Supreme Court of the United States

DANILO PENNACCHIA,

Petitioner,

v.

DENA MICHELLE HAYES,

Respondent.

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

BRIEF IN OPPOSITION

CHRISTINA F. GOMEZ
HOLLAND & HART LLP
555 17th Street, Suite 3200
Denver, CO 80202
(303) 295-8000

MURRAY D. FELDMAN
Counsel of Record
MARY V. YORK
ALEXANDRA S. GRANDE
HOLLAND & HART LLP
800 W. Main Street,
Suite 1750
Boise, ID 83702
(208) 342-5000
mfeldman@hollandhart.com

Counsel for Respondent

April 17, 2017

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The 1980 Hague Convention on the Civil Aspects of International Child Abduction intentionally left the term "habitual residence" undefined. The United States circuit courts, consistent with courts in other signatory nations, apply a fact-intensive, case-by-case consideration of habitual residence, evaluating all the circumstances of a particular situation. Should this Court instead adopt a fixed definition of habitual residence, dictating the specific weight that lower United States courts must give each habitual residence factor?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

UNITED STATES CASES

TABLE OF AUTHORITIES – Continued

FOREIGN CASES

TABLE OF AUTHORITIES – Continued

STATUTES, RULES, AND REGULATIONS

TREATY

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

OPINIONS BELOW

The Ninth Circuit's opinion, which was not selected for publication pursuant to 9th Cir. Rule 36-3, is available at 666 F. App'x 677 (9th Cir. 2016). The district court's decision, which was not submitted for publication, is available at 2016 WL 4059246 (D. Idaho July 28, 2016).

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on December 20, 2016. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

TREATIES AND STATUTES INVOLVED

The pertinent treaty and statute are provided in the Appendix to the Petition.

STATEMENT OF THE CASE

1. The Petition offers very little of the factual background that underlies both the district court and the Ninth Circuit decisions. The district court held an evidentiary hearing under the Hague Convention (Convention), and heard all the facts recounted below. *See* App. 5a. In its decision, the district court determined Petitioner had not met his burden of proof, cited the facts favorably for Respondent, and expressed that

it "finds the Respondent's testimony was credible and corroborated by other witnesses" but "finds the Petitioner's testimony lacks credibility and evidence to support his position" and "does not necessarily find his testimony to be credible" in some respects. App. 13a n.3, 15a, 16a; *see also* App. 5a-6a, 11a-23a.

SAPH is a now six-year-old child living in Boise, Idaho, with her mother Dena (the Respondent here) and her infant half-brother. SAPH holds United States and Italian citizenship, and was born in Seattle in August 2010. App. 5a.

Dena, an American citizen and global marketing consultant, was on a temporary work assignment, living in a company-provided apartment in Rome, Italy, in December 2008 when she met SAPH's father, Danilo Pennacchia (the Petitioner here). ER107:9-12.[1] They dated off-and-on, never for more than a few weeks at a time. ER110:24-111:3, 117:5-9. Dena has worked abroad from time-to-time while maintaining her consulting company and permanent residence in the United States. ER104:16-105:3, 107:3-108:9, 498-99. Danilo is an Italian citizen and highway patrolman who resides in Anagni, approximately 70 kilometers southeast of Rome. App. 17a; ER271.

In early January 2010, Dena's business client requested that she return to Seattle from Italy. ER112:6-13. About a month later, as Dena was preparing to

[1] "ER__" denotes the Petitioner's Excerpts of Record filed in the Ninth Circuit (Dkt. Entry 15-1, Case No. 16-35635, 9th Cir. Sept. 7, 2016). *See* Rule 12.7.

return, she learned that she was pregnant. ER112:14-17. At that time, she and Danilo were not in a relationship, and she did not tell him she was expecting. ER112:4-5, 21-22.

From February 2010 through SAPH's birth in August 2010, Dena lived in her home in Redmond, Washington, and received prenatal care there. ER739 (¶8). While Dena was in the U.S. and Danilo in Italy, the parties exchanged emails and texts. ER113:3-114:3.

Dena was uncertain about her relationship with Danilo, but ultimately decided to tell him she was pregnant. ER113:5-10, 157:11-15, 267. They had "long discussions" and "somewhat of a negotiation" about where SAPH would grow up and where they all would live. ER113:5-10. In July 2010, prior to SAPH's birth, Danilo visited Dena for a few days in the U.S. ER114:1-7. They began to discuss a proposal for SAPH and Dena to spend time in Italy while Dena was on her maternity leave year. *See* ER443-46. They discussed trying to live together as a family, and the contingencies if they failed. ER113:3-10.

Danilo came to Seattle a few days after SAPH was born. ER114:10-17, 740 (¶12). Dena and Danilo then continued to discuss whether they might have a future together and whether they could try to establish a family with SAPH. ER741-42 (¶¶16-17). Ultimately, they agreed that Dena would travel back to Italy with SAPH on a trial basis. ER114:18-115:12. As Dena credibly testified before the district court, there was "no

way" she would have taken her daughter to Italy without Danilo's agreement that SAPH's time in Italy would be conditional and temporary, with Dena and SAPH returning to the U.S. if things did not work out. ER115:8-14. In any event, the plan was for Dena and SAPH to return to the U.S. for SAPH's formal elementary school education. *See* App. 14a-15a, 18a.

In preparation for their departure at the end of October 2010, Dena took "definitive and measured steps" to ensure that SAPH's habitual residence would be in the U.S. App. 14a. She:

- Arranged for (and Danilo expressly agreed to) a guardianship agreement providing that, in the event of the deaths of both parents, a U.S. couple in Washington would become SAPH's guardians (ER115:19-116:20, 100:15-101:1, 517-18).
- Applied for and received SAPH's U.S. passport (App. 13a; ER115:20-23, 509-16).
- Obtained private U.S. medical insurance, a Social Security account, and a college savings 529 account for SAPH (App. 13a; ER118:7-8, 118:17-18, 664).
- Set up all of SAPH's well-care pediatric appointments in the U.S. and continued to use this pediatrician for basic well-care and immunizations throughout SAPH's childhood (ER118:3-8, 584-600).

- Maintained her and SAPH's mailing address and residence at the Redmond home, keeping SAPH's furnished room and renting the home only to short-term guests, allowing Dena and SAPH the flexibility to return at any time (ER109:7-9, 749 (¶30)).

With the parties' agreement that the arrangement in Italy was temporary and conditional, SAPH, Dena, and Danilo traveled to Italy in late October 2010. App. 14a-15a; ER743 (¶20). Dena and SAPH stayed with Danilo at his Anagni home during Dena's maternity leave year. During this time and subsequently, Dena retained and operated her U.S.-based consulting business (ER498-99); maintained her primary and major financial accounts in the U.S. (ER108:16-20); filed tax returns – claiming SAPH as a dependent – solely in the U.S. (ER536-45, 109:22-25); was registered to and voted in U.S. federal and state elections (ER109:3-6); and retained her and SAPH's residence (ER519-26) and possessions in Redmond. *See* App. 13a-14a; *see also* ER744. While staying temporarily in Anagni – and later Rome – Dena hired an American nanny (who did not speak Italian) to help care for SAPH. ER120:5-19, 744-45 (¶2). Dena wanted SAPH to interact with another English-language speaker and reader who would cook American foods and help prepare SAPH to attend elementary school in the U.S. ER120:17-121:5.

By the end of Dena's maternity year, it was evident to both parties that the attempt to form a family and live in Anagni was not going to work. App. 17a (citing

ER54:19-21, 119:3-8). Dena and SAPH instead spent more and more time living in the U.S. App. 17a, 23a; ER118:25-119:7. During the first months of SAPH's life in 2010 she spent 65 days (or 50% of the time) in the U.S. In 2011, SAPH spent 114 days (31%) in the U.S., and in 2012, prior to their passports being stolen in December 2012, SAPH spent 67 days (20%) in the U.S. ER452, 749-54 (¶31).[2] Whenever SAPH traveled home with Dena to the United States she traveled exclusively on her U.S. passport, with only one exception (during the period when SAPH had no U.S. passport due to complications caused by Danilo). App. 17a n.5; ER749 (¶31).

At the end of her maternity leave year, Dena was offered a temporary contract, and she and SAPH relocated to Rome. App. 17a-18a; ER126:18-19. While Dena was working at her client's offices in Rome, SAPH attended an international tri-lingual preschool. ER128:24-129:4. Dena chose the school because of the available English instruction, together with French and Italian. SAPH's instructors were non-Italian native speakers. ER746 (¶24). Many students at the school were of non-Italian nationality and, like SAPH, were in Italy only temporarily for their parents' work

[2] ER452 and ER749-54 address the time SAPH spent in both countries, although there are minor errors in each document. ER452 shows that SAPH was in the U.S. from her birth through October 28, 2010. It lists the days in the U.S. as 35 – but the number of days from SAPH's birth to October 28 is 65, a calendar fact of which this Court may take judicial notice. Fed. R. Evid. 201(b). Also, in ER751, the period in the U.S. from 12/13/2011 through 1/31/2012 is 50 days, not the 41 listed there.

assignments or other reasons. ER129:7-9. SAPH was known there as the "American girl." App. 18a, 23a; ER129:4-130:24, 174:3-5. The school encouraged parents and students to share the heritage of their home countries, and so Dena and SAPH presented on Flag Day and the 4th of July. ER129:23-130:24, 173:16-20, 174:5-9, 685. Although Danilo occasionally picked SAPH up from preschool, he was not otherwise involved with her education. ER130:25-131:6, 176:24-177:7.

During this time, Dena's relationship with Danilo continued to deteriorate. Dena's increasing difficulties with Danilo, combined with the fact that her temporary contract for her Rome-based client was expiring, led her to look for work in other areas of Europe or back in the U.S. ER131:7-16. Dena discussed with Danilo that she and SAPH would soon be leaving Italy. ER131:17-18. His reaction was consistent with their previous discussions, indicating that he understood Dena might need to relocate for work and "w[ould] never be an obstacle" to her decision to relocate with SAPH. ER131:20-23, 132:13-14, 136:20-137:1, 547.

In the summer and fall of 2012, Dena further discussed with Danilo her plan to return to the U.S. with SAPH. ER132:4-133:15. Danilo's actions and communications confirm that he knew their arrangement to live in Italy was conditional. App. 15a & n.4; *see also*, *e.g.*, ER547-48, 557-61, 786. He stated in writing in September 2012, that he agreed to Dena returning with SAPH to the U.S.:

> I, DANILO PENNACCHIA, hereby agree to your request to relocate yourself and [SAPH] to America, as I am aware that you are uncomfortable living in a place where you do not feel at home and are far away from your family. I am aware that you will do your best for our daughter, bearing in mind that I am [SAPH's] one and only father and that, by consenting to your departure, I do not renounce any of my rights as a father.

ER431-34 (emphasis omitted).

In early December 2012, Dena informed Danilo of her and SAPH's arrangements to return to the United States for Christmas, after which they would remain in the U.S. *See* ER431-34. The next morning, both Dena and SAPH's U.S. passports were stolen from Dena's vehicle outside SAPH's school. App. 19a; ER134:9-16. Dena went to the U.S. Embassy in Rome to get the passports reissued, but Danilo refused to approve a replacement U.S. passport for SAPH – effectively keeping both SAPH and Dena locked in Italy and unable to travel home. ER134:22-136:1. Danilo then forced Dena into commencing legal proceedings in Italy to obtain a passport for SAPH, which in turn required the commencement of custody proceedings in Italy – all in an effort by Dena to enable her and SAPH's ultimate return home to the U.S. *See* App. 19a-20a, 22a; ER138:22-25.

After several months, Dena obtained permission for a limited, temporary passport for SAPH. App. 20a; ER573. With this temporary passport, Dena and SAPH

were able to travel to the U.S. in August 2013. App. 20a; ER138:20-140:2, 752-53 (¶31). But another passport theft at the end of 2013 – this one occurring at Dena's apartment, a few days before she and SAPH were due to leave for the U.S. – further prevented Dena and SAPH from going home. ER143:8-16, 665-66.[3]

Starting with the initial passport thefts in 2012, Danilo began a campaign of intimidation, control, and abusive behavior toward Dena and SAPH, fitting a recognized pattern described in the 2011 Hague Domestic Violence Report:

> [A]busive spouses or partners may use legal proceedings as another way to harass, seek control of and undermine a spouse, initiating and continuing for example, drawn-out custody, access or other legal proceeding (potentially including Hague return proceedings). This dynamic of what might be called "intimidatory litigation" may be particularly damaging to one spouse or partner (and also indirectly or directly to a child) . . . .[4]

---

[3] In the proceedings below, Dena averred – and presented evidence to support – that Danilo was involved with both of the passport thefts. The district court found no need to resolve that issue. *See* App. 19a.

[4] Hague Conference on Private International Law, Domestic and Family Violence and the Article 13 "Grave Risk" Exception in the Operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*: A Reflection Paper, Preliminary Document No. 9, ¶16 (May 2011) (footnote omitted) ("Hague DV Report"), available at https://assets.hcch.net/docs/ce5327cd-aa2c-4341-b94e-6be57062d1c6.pdf.

During SAPH and Dena's remaining time in Italy, Danilo filed several criminal complaints against her (ER139:1-8; *see, e.g.*, ER606-24), pursued border blocks (ER136:5-6), and took other legal actions to keep SAPH and Dena in Italy despite previously agreeing they could return to the United States. ER136:20-137:11. SAPH continued to live with Dena, and arranging Danilo's visitation and access to SAPH was a constant point of tension and further abuse by Danilo. ER144:5-145:20.

Eventually, SAPH and Dena traveled to Boise in the summer of 2015 – where Dena had previously acquired a home so that she and SAPH could be closer to their family in the U.S. – initially intending a short stay of three or four weeks as the Italian court process was still pending. ER145:18-146:4. While in Boise, Dena – then pregnant with SAPH's half-brother – experienced pre-labor contractions and was unable to travel. ER146:7-14. Dena and SAPH stayed at their home in Boise for the remainder of the pregnancy and the birth of SAPH's half-brother, which further prevented any overseas travel given the sibling's very young age. Additionally, SAPH had acquired an ear infection that precluded air travel. ER146:15-20, 734-35 (¶13). Danilo did not accept Dena's explanations concerning her and SAPH's time in Boise. ER146:21-25. He instead filed this Hague action. App. 6a. Dena, SAPH, and the baby continue to live together in their Boise home.

2. The district court held an evidentiary hearing in June 2016 on the Hague Convention petition for return of child. App. 7a. Both parties testified and had the opportunity to present witnesses and evidence. The court later issued its decision denying the petition. App. 5a-24a. The court found that Danilo failed to establish that Italy was SAPH's habitual residence. In doing so, it cited and applied the standards for determining habitual residence under the Hague Convention established by the Ninth Circuit in *Mozes v. Mozes*, 239 F.3d 1067, 1070-72 (9th Cir. 2001), and subsequently addressed in *Murphy v. Sloan*, 764 F.3d 1144, 1150 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1183 (2015). *See* App. 10a-11a.

The district court based its habitual residence finding on "all of the evidence and materials presented." App. 14a. The court's findings were supported by its determination that Dena was "certain and credible in her testimony," which was corroborated by other witnesses. App. 14a-16a. Comparatively, "[h]aving viewed the evidence and testimony first-hand," the court found that the testimony of Danilo – who chose not to offer any witnesses other than himself and whose testimony was contradicted on key points by the written evidence – "lack[ed] credibility" as well as "evidence to support his position." App. 15a.

Ultimately, the court found that "the evidence shows the settled intention was for SAPH's habitual residence to be the United States and SAPH's initial translocation from her habitual residence in the United States to Italy was intended to be for a limited,

trial period." App. 16a. Also, "the evidence does not show that SAPH has acclimated to Italy." App. 22a.

3. The Ninth Circuit affirmed the district court's decision in an unpublished memorandum. App. 1a. The court stated that the district court had "applied the correct legal standard for determining habitual residence by focusing on the 'shared, settled intent of the parents.'" App. 3a (citing *Holder v. Holder*, 392 F.3d 1009, 1020 n.11 (9th Cir. 2004)). The appeals court also gave "heavy deference to factual determinations such as which witness to believe and which documents corroborate the most credible version of disputed testimony." App. 3a (citing Fed. R. Civ. P. 52(a)).

Additionally, the Ninth Circuit considered whether there was a change in the prior habitual residence, recognizing that "it is possible for a child's contacts standing alone to be sufficient for a change in habitual residence . . . [although a court] should be slow to infer from such contacts that an earlier habitual residence has been abandoned." App. 4a (internal quotation omitted) (citing *Holder*, 392 F.3d at 1019). The court noted that "SAPH had significant contacts in Italy, but the district court did not find a shared parental intent to abandon her habitual residence in the United States or that the objective facts point unequivocally to a change in SAPH's habitual residence." App. 4a. The court concluded that because Danilo "did not meet his burden on acclimatization . . . . [t]he district court properly denied [his] petition" for return of child. *Id.*

4. In both the district court and court of appeals, Danilo never challenged the Ninth Circuit's framework for determining habitual residence. Instead, he argued in support of that framework; urged the district court to not consider testimony from or an *in camera* meeting with SAPH, as being inconsistent with that framework; and argued to the Ninth Circuit that the district court had failed to make an explicit finding or determination of shared parental intent, as required under that framework. *See infra* at 13-15. Danilo never argued that the Ninth Circuit's habitual residence framework was inconsistent with the decisions of other circuit courts of appeals, the Convention itself, or the international case law construing the Convention; and he never expressed that a different framework should apply. Rather, he raises those arguments – central to his request for certiorari – for the very first time in his Petition.

REASONS FOR DENYING THE WRIT

I. Petitioner Failed To Preserve Any Challenge To, And Invited Any Error Regarding, The Appropriate Framework For Determining Habitual Residence.

In his briefing and argument below, Petitioner argued exclusively for application of the Ninth Circuit habitual residence framework from *Mozes*. *See* App. 3a ("The parties agree that to determine a child's habitual residence, we first 'look for the last shared, settled intent of the parents.'") (quoting *Valenzuela v. Michel*,

736 F.3d 1173, 1177 (9th Cir. 2013) (citing *Mozes*, 239 F.3d at 1084)). *See also* Appellant's Opening Brief at 4-9, 20-29, 666 F. App'x 677 (9th Cir. 2016) (No. 16-35635), 2016 WL 4727968 (arguing for application of Ninth Circuit's habitual residence framework from *Mozes*, *Holder*, and *Murphy*); *id*. at 6 (emphasizing inquiry into the "last shared, settled intent of the parents" and role of parental intent in habitual residence analysis "'as a surrogate for that of children who have not yet reached a stage in their development where they are deemed capable of making autonomous decisions as to their residence'") (quoting *Holder*, 392 F.3d at 1016-17).

Petitioner had followed the same approach in the district court, relying exclusively on and advocating for application of the Ninth Circuit's habitual residence framework. For instance, in the district court Dena moved for the appointment of a guardian ad litem to meet with the child and assess the child's relative ties and developmental, family, school, and other connections to the United States and Italy. Danilo opposed that motion and argued that "there is no reason to believe that a five-year-old child will be able to provide any objective facts bearing on the determination of her habitual residence (or acclimatization) that her parents cannot and will not provide in this contested case." Pet'r's Resp. Opp'n Mot. Appointment of Guardian ad Litem at 6, 2016 WL 4059246 (June 2, 2016) (No. 16-cv-00173-EJL), ECF No. 18. Similarly, Danilo argued that the "intent of the *parents*, not children, is relevant in determining the habitual residence." *Id.* at

6 n.4 (citing *Mozes*, 239 F.3d at 1078). The district court then denied the motion for a Guardian ad Litem.

Having argued strenuously below against "any" consideration of the objective facts or intent from the perspective of the child, Danilo should not be allowed to reverse his position on certiorari to ask this Court to adopt an habitual residence framework focusing "only on the child's experience" or taking "a more child-centric and fact-based approach." Pet. 8, 12; *see New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.") (internal quotation and citation omitted).

By advocating for the *Mozes* framework, and not raising an alternative consideration for determining habitual residence, Danilo also failed to preserve and invited any error with respect to that argument below and cannot properly raise it for the first time in a petition for certiorari. At a minimum, this concern counsels against reviewing this case on certiorari. *See United States v. Wells*, 519 U.S. 482, 488 (1997) (noting this Court's consideration of inconsistencies in a party's position below and before this Court as "one of several considerations bearing on whether to decide a question"); *United States v. Ortiz*, 422 U.S. 891, 898 (1975) ("We . . . decline to consider this issue, which was raised for the first time in the petition for certiorari.");

Tacon v. Arizona, 410 U.S. 351, 352 (1973) ("[I]t appears that these broad questions were not raised by the petitioner below nor passed upon by the Arizona Supreme Court. We cannot decide issues raised for the first time here.").

II. This Court Should Deny Certiorari Review, As It Has In Similar Prior Cases, Because There Is No True Circuit Conflict.

Since 2003, this Court has received at least eight petitions urging the Court to grant certiorari review on the same issue Petitioner raises here – a supposed circuit split in the application of the Hague Convention habitual residence framework. Each time, this Court has denied the petition, including once in this past month.[5]

The Court should do the same here, as there is no true circuit split on this issue. Almost all of the circuit courts, including the Ninth Circuit in this case, weigh the factors of parental intent and acclimatization

---

[5] *See* Petition for Writ of Certiorari, *Cahue v. Martinez*, 580 U.S. ___, 2017 WL 1041016, at *1 (Mar. 20, 2017) (No. 16-582); Petition for Writ of Certiorari, *Mendez v. May*, 577 U.S. ___, 136 S. Ct. 129 (2015) (No. 14-1483); Petition for Writ of Certiorari, *Berezowsky v. Ojeda*, 575 U.S. ___, 135 S. Ct. 1531 (2015) (No. 14-764); Petition for Writ of Certiorari, *Murphy v. Sloan*, 574 U.S. ___, 135 S. Ct. 1183 (2015) (No. 14-632); Petition for Writ of Certiorari, *Headifen v. Harker*, 572 U.S. ___, 134 S. Ct. 1951 (2014) (No. 13-1130); Petition for Writ of Certiorari, *Stern v. Stern*, 565 U.S. 1196 (2012) (No. 11-562); Petition for Writ of Certiorari, *Heydt-Benjamin v. Heydt-Benjamin*, 564 U.S. 1047 (2011) (No. 10-1303); Petition for Writ of Certiorari, *Delvoye v. Lee*, 540 U.S. 967 (2003) (No. 03-280).

in determining habitual residence; and all agree that it is inherently a fact-based inquiry. *See, e.g.*, App. 2a-3a. Faced with myriad fact patterns, the circuits sometimes place more or less weight on certain factors depending on the circumstances and the evidence presented.

1. The term "habitual residence" was intentionally left undefined in the Convention. *Holder*, 392 F.3d at 1015 (citing Elisa Pérez-Vera, Explanatory Report ¶53, *in* 3 Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction 441 (1982)) (Explanatory Report); *see also* Explanatory Report ¶66; *Mozes*, 239 F.3d at 1071. While the international nature of the Convention counsels for a uniformity of application across jurisdictions, it does not require an identical or rigid application of the fact-intensive habitual residence inquiry. *See, e.g.*, *Mozes*, 239 F.3d at 1072 ("To achieve the uniformity of application across countries, upon which depends the realization of the Convention's goals, courts must be able to reconcile their decisions with those reached by other courts in similar situations.").

Given the Convention's approach of not defining "habitual residence," and the courts' recognition that decisions across jurisdictions should be reconciled just to the extent that they consider "similar situations," the Petitioner's request "for this court to . . . establish clear and uniform standards for interpreting this fundamental term" (Pet. 6) is unnecessary and ill-advised. It also is inconsistent with the Convention drafters' intent to leave the term "habitual residence" undefined

"[f]ollowing a long-established tradition of the Hague Conference." Explanatory Report ¶53; *see id*. ¶66.

2. All of the circuits generally recognize that the question of habitual residence is a "practical, flexible, factual inquiry that accounts for all available relevant evidence and considers the individual circumstances of each case." *Redmond v. Redmond*, 724 F.3d 729, 732 (7th Cir. 2013). Furthermore, all of the circuits apply the same factors, and all acknowledge the highly fact-specific inquiry which, not surprisingly, at times leads courts to put more or less significance on particular factors based on the fact pattern before them.[6] *See, e.g.*, *Barzilay v. Barzilay*, 600 F.3d 912, 918 (8th Cir. 2010); *Karkkainen v. Kovalchuk*, 445 F.3d 280, 291-92 (3d Cir. 2006); *Gitter v. Gitter*, 396 F.3d 124, 133 (2d Cir. 2005); *see also Redmond*, 724 F.3d at 745 ("In substance, all circuits – ours included – consider both parental intent *and* the child's acclimatization, differing only in their emphasis."). Petitioner contends that the Ninth Circuit's unpublished opinion here conflicts with a number of other circuits, but fails to cite any cases with

[6] By way of example, the circuits give more deference to parental intent in cases with very young children, and less deference in cases with older children. *See, e.g.*, *Holder*, 392 F.3d at 1020-21 ("we recognize that it is practically impossible for a newborn child, who is entirely dependent on its parents, to acclimatize independent of the immediate home environment of the parents"); *Whiting v. Krassner*, 391 F.3d 540, 550 (3d Cir. 2004) (in cases with very young children, "acclimatization is not nearly as important as the settled purpose and shared intent of the child's parents in choosing a particular habitual residence").

similar facts that are in conflict with the Ninth's Circuit's holding. *See* Pet. 7-11.

Petitioner also asserts that the Ninth Circuit's consideration of parental intent as a factor to determine habitual residence is in conflict with the Sixth Circuit. Pet. 6, 8. But the Sixth Circuit has left open the question of whether parental intent may be relevant in factual situations such as the present one where the child is an infant at the time of the initial translocation to another country. *Robert v. Tesson*, 507 F.3d 981, 993 n.4 (6th Cir. 2007) ("We therefore express no opinion on whether the habitual residence of a child who lacks cognizance of his or her surroundings should be determined by considering the subjective intentions of his or her parents."). The Sixth Circuit, consistent with the Ninth Circuit and other circuits, also emphasizes whether there is a "settled purpose" to remain in the claimed habitat residence. *Id.* at 998; *see Mozes*, 239 F.3d at 1074, 1079. The Sixth Circuit emphasizes the factual nature of the habitual residence inquiry, resisting formulaic tests and observing that "[t]he intent is for the concept [habitual residence] to remain fluid and fact based, without becoming rigid." *In re Prevot*, 59 F.3d 556, 560 (6th Cir. 1995) (internal quotation and citation omitted); *accord Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993) (facts and circumstances of each case must be assessed to establish habitual residence). And the Sixth Circuit also evaluates acclimatization, which is similarly considered by the Ninth Circuit. *See Robert*, 507 F.3d at 993; App. 4a. At any rate, to the extent that there may be a difference

in the Sixth Circuit, applying that circuit's child-centric and objective circumstances approach to the facts here would yield the same result. *See infra* at 26-29.

While the Third and Eighth Circuits, like the Sixth Circuit, focus on aspects of the child's perspective (*see* Pet. 8-9), they agree with all the other circuits on the factors relevant to determining habitual residence: change in geography; parental intent; passage of time; and the child's perspective. *See Karkkainen*, 445 F.3d at 292 ("Though we examine acclimatization and settled purpose 'from the child's perspective,' . . . we consider parental intent as part of this inquiry . . . .") (citation omitted); *Barzilay*, 600 F.3d at 918 ("the settled purpose [of a family's move to a new country] must be from the child's perspective, although parental intent is also taken into account"). The Ninth Circuit's approach and opinion below are in accord.

The Ninth Circuit and the district court followed well-established case law in conducting the habitual residence analysis. App. 2a-4a, 5a-24a. This is particularly so because of SAPH's young age when she first traveled to Italy in 2010 (and her still-young age when she became stuck in Italy after the theft of her passport in 2012). None of the Petitioner's attempted case law distinctions undermine the core reality that the determination of habitual residence is a highly fact-intensive inquiry that is to consider all the facts and circumstances of the particular situation, as the Convention drafters contemplated. The Ninth Circuit's

opinion thus does not directly conflict with any other circuit, and certiorari is not warranted.

III. There Is No True Conflict Among International Jurisdictions On The Habitual Residence Framework.

Petitioner's claimed inconsistency with an international consensus is similarly overstated. *See* Pet. 11-13. There is no real inconsistency between the habitual residence frameworks applied by the foreign courts and the Ninth Circuit.

1. The foreign cases cited by Petitioner apply the same general approach the Ninth Circuit has applied to habitual residence. In every instance, the determination is based upon all the circumstances of the particular case. *See, e.g.*, *AR v. RN*, [2015] UKSC 35, at ¶17; *LK v. Director-General, Dep't of Cmty. Servs.*, [2009] HCA 9, at ¶44; *C v. M*, [2014] Case C-376/14 PPU All ER (D) 160, at ¶51 ("a child's habitual residence must be established by the national court, taking account of all the circumstances of fact specific to each individual case."); *Mercredi v. Chaffe*, [2010] Case C-497/10 PPU, E.C.R. I-14309, at ¶47; *A v. A*, [2013] UKSC 60, at ¶¶36, 48, 72, 80(iii); *In re LC*, [2014] UKSC 1, at ¶¶33-36; *Mozes*, 239 F.3d at 1072.

Individual courts may place more or less emphasis on certain factors depending on the specific facts and circumstances of each case. *See, e.g.*, *In re LC*, [2014] UKSC 1, at ¶62 (distinguishing *Mercredi*, [2010] Case C-497/10 PPU, due to the "very different situation"

presented and factors to be applied in cases involving adolescents versus those involving infants). But in all of these decisions, the habitual residence determination is ultimately based upon "all the circumstances of any particular case." *LK*, [2009] HCA 9, at ¶44; *accord Mercredi*, [2010] Case C-497/10 PPU, at ¶47; *Mozes*, 239 F.3d at 1072.

2. As the foreign decisions cited by Petitioner demonstrate, foreign courts consider parental intent as part of the habitual residence determination. *See, e.g.*, *Mercredi*, [2010], Case C-497/10 PPU, at ¶50 (adopting Court of Justice for the European Union (CJEU) habitual residence test that "the intention of the person with parental responsibility to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or rental of accommodation in the host Member State, may constitute an indicator of the transfer of the habitual residence"); *C v. M*, [2014] Case C-376/14 PPU All ER (D) 160, at ¶52 (stating that factors for habitual residence determination include the parents' intent to settle permanently in the Member State); *A v. A*, [2013] UKSC 60, ¶54(v) (habitual residence test should focus on "the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors"); *LK*, [2009] HCA 9, ¶44 ("the relevant criterion is a shared intention that the children live in a particular place with a sufficient degree of continuity to be properly described as settled").

Indeed, in *In re L*, the United Kingdom Supreme Court relied on the Ninth Circuit's *Mozes* decision in

expressing that parental intent can – and should – be considered. *In re L*, [2013] UKSC 75, at ¶¶22-23 ("it is clear that parental intent does play a part in establishing or changing the habitual residence of a child").

Any distinction between the foreign courts' and the Ninth Circuit's consideration of parental intent is one of degree – and depends not on the jurisdiction, but rather on the particular facts of the case. *See, e.g.*, *C v. M*, [2014] Case C-376/14 PPU All ER (D) 160, at ¶¶50-57. As the High Court of Australia explained in discussing purported differences in the relevance of parental intent, "the difference in expression of the relevant considerations may not be great." *LK*, [2009] HCA 9, at ¶45. Rather, "[a]t all events, a thread common to the leading decisions in the United States remains the need to look at all of the circumstances of the case." *Id*.

The Ninth Circuit recognized in 2014 that there was no real inconsistency in the international decisions addressing habitual residence:

> [C]ourts around the world may have somewhat varied approaches to balancing the factors relevant to the determination of a child's habitual residence, including parental intent and the child's circumstances. But even counsel for Murphy acknowledges that courts in Britain, the European Union and New Zealand, among others, look to many factors in determining a child's habitual residence, including parental intent. In this regard, our

> decision in *Mozes* . . . is not inconsistent with recent decisions of international courts. We are not persuaded that there has been a worldwide sea change since *Mozes* – let alone a new worldwide consensus – that would warrant a suggestion to reconsider our decision.

Murphy, 764 F.3d at 1150-51 (footnote omitted). Thus, there is no meaningful, practical difference between the habitual residence approach applied by the Ninth Circuit and that applied by foreign courts.

3. The degree of emphasis to be applied to the various factors in determining habitual residence – including the parental intent factor – also depends on the age of the children. Parental intent is given greater emphasis when the children are infants or very young. *AR v. RN*, [2015] UKSC 35, at ¶¶13-17 (citing *A v. A*, [2013] UKSC 60, at ¶50 (emphasizing the need to focus on the primary caregiver, rather than the child where the child is an infant)); *accord Mercredi*, [2010], Case C-497/10 PPU, at ¶¶51, 55 (stating that "[a]n infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent" and "[b]efore habitual residence can be transferred to the host state, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual center of his interests, with the intention that it should be of a lasting character"); *In re LC*, [2014] UKSC 1, at ¶61 (distinguishing *Mercredi* and noting that "the age of the child is of course relevant to the factual question being asked").

Here, SAPH was only two months old when she first traveled to Italy. "Where a young child is involved, the relevant purpose is generally considered to be that of the parents, although regard is had not only to the subjective intent of the parents but also to what have been called the 'objective manifestations of that intent.'" *Punter v. Sec'y of Justice*, [2007] 1 NZLR 40, at ¶97 (quoting *Armiliato v. Zaric-Armiliato*, 169 F. Supp. 2d 230, 237 (S.D.N.Y. 2001)). The Ninth Circuit's consideration of parental intent – particularly as applied to a young child like SAPH – therefore is consistent with the foreign courts' approach. *See Holder*, 392 F.3d at 1020-21.

IV. This Case Is Not Well-Suited For Certiorari As It Rests On The District Court's Factual Findings And Credibility Determinations.

1. Under either the established Ninth Circuit approach, or the approach advanced by Petitioner (Pet. 8, 12), habitual residence is a fact-intensive inquiry determined on a case-by-case basis. Thus, in urging certiorari based on the particular facts of this case, Petitioner is making an error correction argument. But in doing so he ignores the district court's role in finding the facts and making credibility determinations, fails to acknowledge the district court's findings here that his own testimony was not credible and not supported by the evidence, and fails to show (nor would it be an appropriate issue for certiorari review) that the district court's findings were unsupported by the record.

Petitioner himself acknowledges that "[b]y any measure and under any analysis that is tethered to the Convention and its" habitual residence factor, this case may be disposed of based on the facts developed in the district court. Pet. 19. While he takes a different view of those facts, he acknowledges that the varying emphases on certain factors in the habitual residence framework – which, as shown above, has a common basis of consideration across jurisdictions – is not outcome determinative here. Thus, this case presents a poor vehicle for certiorari.

2. Petitioner argues for "a more child-centric and fact-based approach" to habitual residence that "would focus on the subjective experiences of the child." Pet. 12, 16 n.4 (internal quotation and citation omitted). Yet even under such an approach, the outcome of this case would be no different. Both of the courts below considered child-centric and fact-based factors in their habitual residence evaluation, including by noting SAPH's significant contacts in Italy. App. 4a, 22a. Nonetheless, the district court determined – and the Ninth Circuit affirmed – that SAPH maintained "strong cultural ties to the United States" and "that despite her residing in Italy for large portions of the year, she retained her original habitual residence in the United States." App. 23a.

The district court's factual findings are supported by the record, and present a poor issue for this Court's review. And some of Petitioner's factual assertions are *not* supported by the record. For instance, Danilo claims SAPH "spent all of her life in Italy" but for "the

first two months." Pet. 19. To the contrary, SAPH spent considerable time in the United States, where she always maintained a permanent home with her mother (ER749 ¶30); received well-care pediatric visits (ER118:3-16); spent time with friends and family (ER49-54 ¶¶30-31); was enrolled in preschool for a time (ER757 ¶38; 625); traveled on a U.S. passport (ER749 ¶31); and in total spent over a full year there – 390 days – between August 24, 2010 and August 4, 2015 (ER452, 749-54; *supra* note 2). *See also infra* at 28-29. And in any event, there is no set formula for determining what length of stay may lead to the creation of a new habitual residence or the abandonment of an old one. *See Murphy*, 764 F.3d at 1148, 1152-53; *Mozes*, 239 F.3d at 1074.

More importantly, Danilo fails to address that after the initial passport thefts in December 2012 neither SAPH's nor Dena's stay in Italy was voluntary. Thus, their continued stay in Italy does not support habitual residence in Italy. *See, e.g.*, *Mozes*, 239 F.3d at 1078 & n.31 (citing, *inter alia*, *In re Ponath*, 829 F. Supp. 363, 367 (D. Utah 1993)). The time they spent trapped and unable to leave Italy because of passport issues and other obstacles can hardly be deemed a settled, intentional, voluntary location in Italy contributing to the child's development and integration into society, culture, and the environment there. At the least, the circumstances of this involuntary location in Italy have to be considered even under the approach now advocated by Petitioner. *See, e.g.*, *Proceedings Brought by A*, [2009] Case C-523/07, Fam 42, at ¶39 (in

addressing habitual residence, the "regularity, conditions and reasons for the stay on the territory" of a nation "and the family's move to that [nation], the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that [nation] must be taken into consideration").

3. In any event, the unequivocal facts found by the district court and reviewed by the Ninth Circuit include that SAPH was cared for and raised by either her mother or an English-speaking American nanny during the first two years in Italy (ER120:5, 744-45 ¶2); that she attended a trilingual preschool, where she was known as the "American girl" and shared American holidays like the Fourth of July and Flag Day (App. 18a, 22a-23a; ER128:24-130:24, 174:3-5); that she frequently returned to the U.S., where she stayed at her permanent residence in Redmond (where her furniture and other possessions remained) and visited with family and friends (ER109:7-9, 749 (¶30)); and that her best friend was the non-Italian son of an English-speaking United Nations agency employee stationed in Italy. ER171:25-172:7, 172:16-20, 172:24-173:6, 173:21-25, 174:10-175:6.

SAPH did not have a regular or stable household in Italy. She moved residences several times. *See, e.g.*, App. 17a-18a; ER564, 665, 679 (documenting different addresses and dwellings in Italy). Her parents were never married (ER106:2-3), and never shared even a temporary or secondary household beyond the limited attempts to see if they could live together during the

initial year in Italy. But that was agreed to be on a trial basis, and SAPH spent several months back home in the U.S. during that year because of the instability of the domestic situation in Italy. App. 14a-16a; ER119:3-8. SAPH did not spend significant time with her father, as he often refused to keep scheduled visitation appointments and would generally see her only on a limited basis every other weekend. *See, e.g.*, ER144:5-145:20, 256-57. And the economic base on which SAPH and Dena depended for their time in Italy remained firmly anchored in the U.S., including their family home to return to, all of their major financial accounts, her mother's business, and SAPH's social security and college fund accounts. App. 13a; ER108:16-20, 118:7-8, 498-99, 664.

Thus, even under a "more child-centric" and "fact-based approach" (Pet. 12), SAPH never obtained habitual residence in Italy. Petitioner's assertion that Italy was "the home always returned to" and "the locus of SAPH's life" (Pet. 19) is belied by these record facts and the factual findings of the district court.

4. The Italian court's custody ruling (*see* Pet. 17-18) is not germane to the Convention's habitual residence determination. Petitioner fails to consider (1) whether the Italian court's ruling was a determination of habitual residence for purposes of the 1980 Hague Abduction Convention, and (2) whether it considered the same factors that all of the CJEU, UK Supreme Court, and Ninth Circuit *Mozes* frameworks direct. The answer to both questions is no.

As the lower courts correctly concluded, there is no comity owed to a decision from a foreign court that did not address the issue of habitual residence – the fact-based inquiry under consideration – for purposes of the specific Hague Convention at issue here. *See* App. 4a; 20a-22a; *see also* Restatement (Third) of the Foreign Relations Law of the United States § 326(2) (Am. Law Inst. 1987) (United States courts have final authority to interpret an international agreement for the purposes of applying it as law in the United States).

In *Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895), this Court recognized "that where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings," then a judgment from such a foreign court may be accorded comity in the United States courts. The *Hilton* standard necessarily requires that it be the same issue or claim that is adjudicated in the foreign court. *See, e.g.*, *Asvesta v. Petroutsas*, 580 F.3d 1000, 1013-14 (9th Cir. 2009) (in Hague Convention cases, a decision to extend comity to a foreign court's judgment "may be guided by a more searching inquiry into the propriety of the foreign court's application of the Convention, in addition to the . . . considerations . . . outlined specifically in *Hilton*").

Here, the Italian court was not deciding a Hague Convention application for return, and was not addressing habitual residence in the context of that Convention. *See* ER296-304; *see also* App. 21a-22a. Moreover, its habitual residence determination did not consider all of the relevant facts and circumstances as

both the United States and foreign jurisdiction cases direct. Instead, the court's determination was based solely on the physical presence of the child in Italy at that time. ER298. That basis is one even the European courts recognize as insufficient standing alone to support a habitual residence determination. *See, e.g.*, *Proceedings Brought By A*, [2009] Case C-523/07, Fam 42, at ¶38 (other factors must be present in addition to physical presence of the child in a member state to establish habitual residence under European Council Regulation Article 8). Thus, no comity is due the Italian court's decision.

V. Independent Grounds Support The Judgment Below.

There are other grounds – apart from habitual residence – raised below but not reached by the district court or Ninth Circuit that provide an independent basis for affirming the judgment. These independent grounds further demonstrate the unsuitability of this case as a vehicle for reshaping the established habitual residence framework.

1. A Hague Convention petitioner's right of return is extinguished if he consented to the removal or retention. Convention, art. 13a; *see* 22 U.S.C. § 9003(e)(2)(B); *Gonzalez-Caballero v. Mena*, 251 F.3d 789, 793 (9th Cir. 2001). Here, Danilo gave Dena his express, written consent for SAPH's removal to and retention in the United States in a September 2012 letter, in which he stated: "I hereby agree to your

request to relocate yourself and [SAPH] to America . . . and that by consenting to your departure, I do not renounce any of my rights as a father." ER559 (emphasis omitted); *see also* ER558-59, 565.[7] Thus, Danilo consented to SAPH's and Dena's return to and SAPH's retention in the United States, and that consent extinguished any right of return. *See Mena*, 251 F.3d at 793-94.

Nor does the passage of time from Danilo's grant of consent to SAPH's departure and stay in the U.S. vitiate his consent. From September to December 2012, Dena was wrapping up her affairs in Italy to prepare for her and SAPH's return to the U.S. *See* ER559-60 (¶¶3-4), 564. After that point, Danilo actively thwarted their return by, among other things, refusing to authorize the re-issuance of a replacement U.S. passport for SAPH and initiating a series of police, criminal, and border block complaints against Dena. Thus, Dena and SAPH's presence in Italy was no longer voluntary and cannot be used as a basis for claiming the consent had expired. *See* ER134:9-135:23, 136:2-7, 138:3-11, 139:1-8, 143:13-16, 143:23-144:4, 754-57 (¶¶32-37).

2. Under Convention article 13b, a court "is not bound to order the return of the child" where "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." *See* 22

[7] Danilo's assertion of his "rights as a father" cannot be read to preclude the consent granted in the same document, but must refer to his right to request access and visitation with SAPH in the United States.

U.S.C. § 9003(e)(2)(A). The abusive behavior may be psychological, emotional, verbal, or physical, or may result from a combination of behaviors, and may encompass conduct directed toward the child as well as other family members. *See, e.g.*, Hague DV Report, *supra*, at 6.

At trial, Dena presented the testimony of Dr. Stephenson, a child psychologist with post-doctoral fellowship training in pediatric psychology at Harvard Medical School and a practicing career as a U.S. Navy medical officer and then in private practice. ER189:20-23, 190:1-22, 194:9-195:25, 640-41, 760-67. Dr. Stephenson opined that a grave risk of harm would result to SAPH if she were to be returned to Italy. ER198:13-15, 206:19-23. He reviewed hundreds of pages of documents (ER642-45, 760-67), watched dozens of hours of recorded Skype videos (*id*.; ER198:16-17), reviewed transcripts of Skype videos (ER202:1-11), and interviewed or met with a dozen individuals, including SAPH (ER761 (¶7)).

Based upon this review, Dr. Stephenson concluded that Danilo is verbally and emotionally abusive in a manner that is damaging to SAPH. ER198:7, 199:6-8. Dr. Stephenson described in detail Danilo's actions and abusive treatment of SAPH and Dena, including Danilo's criticisms of SAPH that go "right to the core of her identity"; his use of obscene gestures and references to his genitalia in video conversations with her; his actions demeaning her and her baby brother; and his manipulative and coercive actions and his emotional swings that create instability, uncertainty, and

emotional unpredictability for her. ER198:4-199:1, 199:6-22, 200:14-22, 201:9-11, 919; *see also* ER149:14-151:7 (Dena's testimony).

Dr. Stephenson further described the effects Danilo's actions have on SAPH, resulting in her engaging in "escape/avoidance behavior" during her Skype interactions to try to avoid this abuse, including closing the notebook computer lid on him when she could not endure the abuse any longer. ER203:2-7, 204-06. SAPH is afraid of Danilo when he becomes abusive, and is distressed and emotionally cognitively overwhelmed by his behaviors. ER206:11-22.[8]

In Dr. Stephenson's expert opinion, if SAPH were returned to Italy she would be continually subjected to this abuse, which she then would not be able to physically escape as she can now. ER222:4-7, 764-65 (¶¶16-17). These abusive behaviors constitute a grave risk of harm. *See, e.g.*, *Blondin v. Dubois*, 238 F.3d 153, 162 (2d Cir. 2001). The social science research literature supports Dr. Stephenson's conclusions. Hague DV Report, *supra*, at 9 (citing studies and papers).

Dena thus established a grave risk of psychological harm to SAPH or otherwise placing her in an intolerable situation if she is returned to Italy, providing an independent basis for affirming the judgment.

---

[8] Other record evidence corroborates these conclusions. *E.g.*, ER768-76, 735 (¶14), 125:11-126:2, 178:2-179:5.

These additional bases for affirmance further show that certiorari review is inappropriate here.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MURRAY D. FELDMAN
Counsel of Record
MARY V. YORK
ALEXANDRA S. GRANDE
HOLLAND & HART LLP
800 W. Main Street, Suite 1750
Boise, ID 83702
(208) 342-5000
mfeldman@hollandhart.com

CHRISTINA F. GOMEZ
HOLLAND & HART LLP
555 17th Street, Suite 3200
Denver, CO 80202
(303) 295-8000

Counsel for Respondent

April 17, 2017