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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF IN SUPPORT OF CERTIORARI

Danilo Pennacchia respectfully submits this reply to the Brief in Opposition to his Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

REPLY

1. Respondent first contends that by failing to challenge long-settled Ninth Circuit precedent before the panel below, petitioner "failed to preserve" the issue for this Court's consideration and "invited" any resulting error regarding the "appropriate framework for determining habitual residence" under the Convention. Opp'n Br. at 13-16. Respondent's argument is without merit. Petitioner neither waived nor invited any error as to the questions presented in the petition.

First, any issue "pressed or passed upon below" by a federal court is within this Court's broad discretion over the questions it chooses to take on certiorari. *Verizon Commc'ns, Inc. v. F.C.C.*, 535 U.S. 467, 530 (2002) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)); *see also Stevens v. Dep't of Treasury*, 500 U.S. 1, 8 (1991). There is no dispute that both the appellate court and district court considered and determined S.A.P.H.'s habitual residence under the Convention. Indeed, both courts below used the very same word – "*hinges*" – to describe the role of the habitual residence analysis in determining petitioner's request to return the child to Italy and the appeal of the district court's denial of that request. *See* Pet. App. 2a ("The parties' dispute hinges on S.A.P.H.'s habitual residence under the Convention."); Pet. App. 10a ("This case hinges on the determination of S.A.P.H.'s

habitual residence."). Both questions presented in the petition are, therefore, properly before this Court. *See Virginia Bankshares*, *Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

Second, contrary to respondent's assertion, acknowledgment of controlling circuit precedent does not equal advocacy for or agreement with that precedent. Although petitioner quite clearly acknowledged that *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001) and *Murphy v. Sloan*, 764 F.3d 1144 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1183 (2015), were controlling law in the Ninth Circuit, petitioner did not "advocate" or "argu[e] for application of the Ninth Circuit's habitual residence framework" as respondent contends. Opp'n Br. at 14.[1] Argument for a framework that is clearly

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[1] Respondent's reliance on petitioner's briefing in opposition of the appointment of a guardian ad litem in the district court (Opp'n Br. at 14-15) is wholly misplaced. Respondent misconstrues petitioner's papers, confusing acknowledgment of binding circuit law with advocacy for that precedent. Petitioner did in fact recognize controlling circuit precedent in opposing the guardian motion. *See* Pet'r's Resp. Opp'n Mot. Appointment of Guardian ad Litem at 5, 2016 WL 4059246 (June 2, 2016) (No. 16-cv-00173-EJL), ECF No. 18 ("Pet'r's Guardian Opp'n Br."). But, contrary to respondent's claim, petitioner did not argue that "the 'intent of the *parent*, not children, is relevant in determining the habitual residence.'" Opp'n Br. at 14-15 (citing Pet'r's Guardian Opp'n Br. at 6 n.4). The footnote in question (actually n.3, not n.4) provides, in its entirety:

> And, to the extent Respondent is suggesting that the Court should consider the *subjective* feelings or wishes of [S.A.P.H.] in determining her habitual residence, that proposition is foreclosed by *Murphy*. *See* 764 F.3d at 1150 (rejecting petitioner's suggested approach "that would focus on the subjective experience of the child"); *see also Mozes*, 239 F.3d at 1076, 1078 (finding

controlling, well-settled, and entirely undisputed would have been superfluous. And, arguing to overturn (or for the district court to disregard) the controlling habitual residence framework would have been futile. *See Murphy*, 764 F.3d at 1150-51 (refusing to reconsider habitual residence standard articulated in *Mozes*, stating that court was not "free to ignore binding circuit precedent").

In any event, petitioner was not obligated to attack squarely applicable circuit precedent in order to allow this Court to review the questions presented. *See Virginia Bankshares*, 501 U.S. at 1099 n.8 ("It suffices for our purposes that the court below passed on the issue presented"); *Williams*, 504 U.S. at 44 (recognizing the futility of asking a court of appeals to overturn recent and controlling circuit precedent). Here, the courts below passed on the issue of the appropriate habitual residence standard under the Convention and the questions presented are properly before the Court. And, the Court has the authority to identify and apply the correct legal standard, whether argued by the parties or not. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). Once "an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties." *Id.* Instead, the Court "retains the independent power to

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> that intent of *parents*, not children, is relevant in determining habitual residence).

Pet'r's Guardian Opp'n Br. at 6 n.3. The language quoted by respondent in her opposition (underlined above) is not petitioner's argument, rather, it is contained in petitioner's parenthetical explanation of a holding in *Mozes*. Respondent's attempt to transform petitioner's accurate parenthetical into affirmative advocacy is misplaced.

identify and apply the proper construction of governing law," *id*., and is free to "consider an issue antecedent to . . . and ultimately dispositive of the dispute before it, even an issue the parties fail to identify and brief." *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.,* 508 U.S. 439, 447 (1993) (quoting *Arcadia v. Ohio Power Co.,* 498 U.S. 73, 77 (1990)) (internal quotation marks omitted); *see also Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980) (holding that it is appropriate to consider issues not presented below when issue is "important" and "the parties have briefed it.").

2. Respondent next contends that certiorari is not warranted because "there is no true circuit split" regarding the questions presented. Opp'n Br. at 16. Respondent's assertion that there is no substantive division among the courts of appeals on the habitual residence issue is simply wrong. Courts and commentators readily recognize that

> [c]ourts use varying approaches to determine a child's habitual residence, each placing different emphasis on the weight given to the parents' intention. At one end of the spectrum are those jurisdictions holding that a child's habitual residence cannot be changed without the clear agreement of the nonpossessory parent. *See Mozes*, 239 F.3d at 1080-81. The Sixth Circuit takes the opposite approach, placing paramount importance on the "child's experience," as established by the child's "acclimatization" and "degree of settled purpose," to the exclusion of the parents' "subjective intent." *See Robert v. Tesson*, 507 F.3d 981, 989-95 (6th Cir. 2007).

Larbie v. Larbie, 690 F.3d 295, 310 (5th Cir. 2012) (internal parenthetical omitted). Respondent may

quibble with the details among the competing and "varying approaches," but her attempt to waive off the entrenched and mature division among federal circuits is unavailing. As petitioner demonstrated at pages 7 through 11 of the petition, the circuit split on the questions presented in this case is real, considered, and substantive.

Nor is the division apparent only to domestic courts; foreign authorities recognize the divergence, as well. For instance, the Hague Conference on Private International Law (the source of the Convention at issue) maintains the International Child Abduction Database, known as "INCADAT," which is a reliable and respected source of leading decisions arising under the Convention. According to INCADAT, the concept of habitual residence "has proved increasingly problematic in recent years with divergent interpretations emerging in different jurisdictions" and a "lack of uniformity as to whether in determining habitual residence the emphasis should be exclusively on the child, with regard paid to the intentions of the child's care givers, or primarily on the intentions of the care givers." *See* Aims & Scope of the Convention, Habitual Residence, INCADAT, http://www.incadat.com/index.cfm?act=analysis.show&sl=3&lng=1 (last accessed Apr. 26, 2017). And, as to the state of the law in the United States, the Conference explains: "United States Federal Appellate case law may be taken as an example of the full range of interpretations which exist with regard to habitual residence." *Id.*

3. Respondent argues that there is "no real inconsistency between the habitual residence frameworks applied by the foreign courts and the Ninth Circuit." Opp'n Br. at 21-25. The cases cited by petitioner, others

cited by respondent, and respondent's own briefing belie this claim.

To begin with, respondent concedes that "[a]ny distinction between foreign courts' and the Ninth Circuit's consideration of parental intent" is merely "one of degree" (Opp'n Br. at 23), and insists that "there is no meaningful, practical difference between the habitual residence approach applied by the Ninth Circuit and that applied by foreign courts." *Id.* at 24. But, as illustrated by conflicting conclusions under the Convention in two cases – one in the United States and the other in the United Kingdom – relating to the same child and parents, the "distinction" acknowledged by respondent can and does lead to dramatically different results.

The child "K.L." was the subject of return proceedings under the Convention in both the United States (Texas) and the United Kingdom. The Texas case is reported as *Larbie v. Larbie,* 690 F.3d 295 (5th Cir. 2012) and the United Kingdom matter is reported as *In re L (A Child)* [2013] UKSC 75.[2] In *Larbie*, the United States Court of Appeals for the Fifth Circuit adopted the Ninth Circuit's habitual residence approach that focuses on the parents' shared, settled intent, which can only be overcome where "the objective facts point unequivocally" to abandonment of a prior habitual residence. 690 F.3d at 310-311. Applying this parental intent-centered standard, the Fifth Circuit vacated the district court's order granting the mother's return petition. *See id.* at 310, 312. However, by the time the appellate court issued its decision in July of 2012, K.L.

[2] Respondent both cites and discusses the U.K. case in her opposition brief. *See* Opp'n Br. at 22-23 (citing and discussing "*In re L* [2013] UKSC 75").

had already returned to the United Kingdom with his mother pursuant to the district court's return order. *Id.* at 305; *In re L (A Child)* [2013] UKSC 75, ¶ 6. In late August 2012, the United States District Court for the Western District of Texas ordered the mother to return K.L. to the father in Texas. *In re L (A Child)* [2013] UKSC 75, ¶ 8. Thereafter, the father filed applications in the United Kingdom for K.L.'s return to the United States under the Hague Convention. *Id.*, ¶¶ 12-13.

The United Kingdom Supreme Court, aware of the Fifth Circuit's conclusion that K.L.'s habitual residence was the United States (and the Ninth Circuit's opinions as foundation for that approach),[3] nevertheless adopted the habitual residence framework of the Court of Justice of the European Union, which is a factual inquiry taking into account all of the child's circumstances. *Id.*, ¶¶ 20, 25-27. Under that approach, the United Kingdom court catalogued the child's circumstances from his "point of view" and held that the court below "was entitled to hold that [K.L.] had become habitually resident in England and Wales" by the time the district court in Texas issued its return order on remand. *Id.*, ¶¶ 26-27. Referring to the proceedings in the Fifth Circuit, the United Kingdom court specifically recognized the likely divergent determinations relating to habitual residence under the Convention, owing to the differing approaches to the analysis. *Id.*, ¶ 27.[4]

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[3] Like the *Larbie* court itself, the U.K. court noted the Fifth Circuit was joining one camp among others in adopting the parental intent-centric approach and even analyzed aspects of the Ninth Circuit's approach announced in *Mozes*. *See In re L (A Child)* [2013] UKSC 75, ¶¶ 7, 22.

[4] To be clear, although the court in the U.K. based its habitual residence determination on the factual record as of August 29, 2012 (some months after *Larbie* was briefed and argued), its

In sum, while it is true that nearly all sister signatories to the Convention apply a mixed model approach to determining habitual residence, it is also true that the growing consensus of foreign courts take a more child-centric and fact-based approach than the parental intent-focused approach adopted by the Ninth Circuit. *See, e.g.*, *A v A* [2013] UKSC 60 (2013 WL 4764942) (adopting habitual residence test that "focus[es] on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors"). Indeed, no foreign English-speaking jurisdiction requires shared, settled parental intent to abandon an existing habitual residence before acquiring a new habitual residence, and some international jurisdictions have specifically rejected such a requirement. *See*, *e.g.*, *Punter v Secretary for Justice* [2007] 1 NZLR 40.[5]

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conclusion does not turn on facts arising after *Larbie*. The conflicting outcomes result, instead, from the two courts' divergent approaches to determining K.L.'s habitual residence – whether that analysis focuses on parental intent or an inquiry into the circumstances of the child's life, from the child's point of view. *Id.*, ¶¶ 26-27.

[5] In this regard, respondent's attempt to avoid application of this Court's comity jurisprudence with respect to the Italian court's habitual residence finding (Opp'n Br. at 30-31) misses the point. Apart from failing to provide any cogent argument justifying disparate meanings of the identical term ("habitual residence") in two conventions promulgated by the same Hague Conference (*see* Pet. at 18-19, n.6), respondent does not address the real import of the Italian court proceedings and rulings, respondent's admissions and positions taken therein, and her pre- and post-retention representations to petitioner, his counsel and the United States Department of State regarding her intentions to return to Italy: collectively and in each instance, the parties, their counsel, and the Italian courts unanimously acknowledged that S.A.P.H. was habitually resident in Italy at

4. Respondent's argument that this case is "not well-suited for certiorari" because the habitual residence determination of the district court rests on "factual findings and credibility determinations" is a red herring. Opp'n Br. at 25-31. The credibility and factual findings of the district court respondent relies on relate to the parents' contest regarding their *intent* for S.A.P.H.'s habitual residence – the very aspect of the Ninth Circuit's standard that petitioner challenges in this Court. *See* Pet. App. 11a-16a (section of district court's opinion entitled "Shared Settled Intent of S.A.P.H.'s Residence"). The appellate decision correctly notes the limited (albeit nearly outcome determinative) scope of the district court's findings on shared, settled intent of the parents: "[t]he district court acknowledged that the parents' testimony differed *concerning their intentions* at the time they left the United States, but found Pennacchia's 'testimony lacks credibility and evidence to support his position.'" Pet. App. 3a (emphasis added); *see also id.* 13a n.3, 15a.

The district court made no credibility or factual determinations that were unaffected by the controlling standard challenged here, which requires an initial finding as to the parents' shared, settled intent and allows for the finding of a new or different habitual residence only if "the objective facts point unequivocally" to a place other than the intended residence. *See Mozes*, 239 F.3d at 1081; *Murphy*, 764 F.3d at 1152, *quoted in* Pet. App. 4a. Credibility and factual findings that are required by and germane only to an erroneous and challenged standard do not affect this case's suitability as a vehicle for resolving conflicting

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the time of her retention. *See* Pet'r's Excerpts of Record (Dkt.15-1, Case No. 16-35635, 9th Cir. Sept. 7, 2016) 298, 318, 347, 349, 394-97, 400-04, 421, 453-57.

circuit law or determining the correct habitual residence standard under the Convention.[6]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[6] Respondent's final argument that certiorari is not warranted because "[t]here are other grounds – apart from habitual residence – raised below but not reached by the district court or Ninth Circuit that provide a basis for affirming the judgment" is without merit. Opp'n Br. at 31. Although respondent is correct that these affirmative defenses were neither discussed nor decided below (*see* Pet. App. 8a-9a, 23a n.10), she fails to provide any support for the argument that such silence by the courts below somehow "demonstrates the unsuitability of this case" as a vehicle to address the questions presented. There is none.