No. 25-____

In the Supreme Court of the United States

SAMANTHA ESTEFANIA FRANCISCO CASTRO,
Petitioner,

v.

JOSE LEONARDO BRITO GUEVARA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Hague Convention on the Civil Aspects of International Child Abduction generally requires the return of a child to his or her country of habitual residence. But when a Hague Convention petition is brought more than a year after the child's removal, a court need not return the child if "it is demonstrated that the child is now settled in its new environment" (the "well settled" defense). Hague Convention, art. 12. In determining whether a child is sufficiently settled for the purposes of the "well settled" defense, a trial court considers the totality of the circumstances, including factors like the child's age, the stability and duration of the child's residence in the new environment, the child's school attendance, and the extent of the child's participation in his or her new community. After considering and weighing all the facts, the trial court must then decide whether the child has become sufficiently settled in the new environment.

The question presented is:

Is a trial court's determination that a child is "well settled" subject to *de novo* review, or is it reviewed for clear error?

PARTIES TO THE PROCEEDINGS

Petitioner (Defendant-Appellee below) is Samantha Estefania Francisco Castro. Respondent (Plaintiff-Appellant below) is Jose Leonardo Brito Guevara.

RELATED PROCEEDINGS

The proceedings below were:

1. *Jose Leonardo Brito Guevara v. Samantha Estefania Francisco Castro*, No. 24-10520 (5th Cir. filed June 12, 2024). On September 5, 2025, the panel majority rendered judgment in favor of Brito. App.1a.
2. *Jose Leonardo Brito Guevara, and Beatriz Zulay Guevara Flores v. Samantha Estefania Francisco Castro*, No. 3:23-cv-1726 (N.D. Tex. filed Aug. 2, 2023). On May 8, 2024, the district court denied Brito's petition. App.88a.

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OPINIONS BELOW

The September 5, 2025, decision of the Fifth Circuit is reported at 155 F.4th 353 and is reproduced at App.1a.

The May 8, 2024, findings of fact and conclusions of law of the United States District Court for the Northern District of Texas are reported at 2024 WL 2967273 and are reproduced at App.59a.

JURISDICTION

The court of appeals entered its final judgment on September 5, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, implemented through the International Child Abduction Remedies Act (ICARA), 22 U.S.C. § 9001, provides in relevant part as follows:

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

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

INTRODUCTION

This case presents an exceptionally important question under the Hague Convention that has divided the Circuits (and at least one state court of final review) and requires this Court's resolution: whether a trial court's fact-intensive determination that a child is "well settled" in a new environment should be reviewed *de novo* or deferentially for clear error.

The Hague Convention generally requires that a child removed from his or her place of habitual residence must be returned there. But the Hague Convention also recognizes that, in certain situations, sending a child back to his or her habitual residence can be detrimental to the child. Most relevant here, Article 12 of the Hague Convention does not require the return of the child if the petition is commenced more than a year after the child's removal and "it is demonstrated that the child is now settled in its new environment." Hague Convention, art. 12. This exception, known as the "well settled" defense, recognizes that, if a petitioning parent delays seeking return, and the child becomes sufficiently settled in a new environment, removing the child from that environment is not in the child's best interest.

Determining whether a child is "well settled" in a new environment is, fundamentally, a "factual determination." *Lozano v. Montoya Alvarez*, 572 U.S. 1, 17

(2014). Some courts have developed a list of seven, non-exhaustive factors to guide that determination. *See, e.g.*, *Hernandez v. Garcia Pena*, 820 F.3d 782, 787-88 (5th Cir. 2016). Others refer to it simply as a "totality of the circumstances" inquiry. *See, e.g.*, *Alcala v. Hernandez*, 826 F.3d 161, 170-71 (4th Cir. 2016). However labeled, the "well settled" inquiry is a fact-intensive, case-specific assessment, requiring a trial court to consider and weigh several factors to determine whether a child is sufficiently "well settled" within the meaning of Article 12.

That is precisely what the district court did here. Because this Hague Convention case was commenced more than a year after the child (A.F.) left Venezuela, the district court considered whether the "well settled" exception applied to her. The district court held a two-day bench trial, considered all relevant factors, weighed all the evidence, and found that A.F. is "well settled in her new environment in Texas" and "it is no longer in the best interests of A.F. to return to Venezuela, where she has minimal connections and no memories of living." App.85a; App.88a.

Under this Court's precedents, a highly factual determination like that one must be reviewed deferentially for clear error. This Court held in *Monasky v. Taglieri*, 589 U.S. 68, 83-84 (2020), that a trial court's similar determination of a child's "habitual residence" for Hague Convention purposes is primarily a factual question that must be reviewed for clear error only. The "well settled" inquiry is no less a factual inquiry than determining a child's habitual residence. Accordingly, in line with *Monasky*, at least two Circuits and one state high court have determined that clear-error review applies to a trial court's determination that a child is "well settled."

Nonetheless, in the decision below, a divided panel of the Fifth Circuit—joining with the Second, Fourth, and Ninth Circuits—concluded that *de novo*, not clear-error, review applies to a district court's "well settled" determination. Applying *de novo* review, the Fifth Circuit reassessed the facts, reweighed their significance, and reapplied those facts under its seven-factor balancing test, concluding "that A.F. is not well-settled in her new environment." App.21a.

The Fifth Circuit's decision cries out for review by this Court. The panel majority openly acknowledged that it was deepening a clear Circuit split on the appropriate appellate standard of review for a trial court's "well settled" determination. Further, the panel's decision is inconsistent with at least one state court of last resort (Maine's). And the Fifth Circuit's holding cannot be reconciled with this Court's precedents on the appropriate standard of review for mixed questions of law and fact, particularly *Monasky*.

The question presented is also exceptionally important and recurring. The appellate standard of review is a feature of *every* Hague Convention appeal involving the "well settled" exception and is often outcome-determinative. Resolving conflicts among the Circuits (and state courts) is also of particular importance in Hague Convention cases, given the treaty's express goal of uniform application. Unsurprisingly, then, this Court has seen fit to grant cert petitions in no less than four Hague Convention cases in the past decade and a half. The Court should do the same here and clarify the appropriate standard of review for a trial court's "well settled" determination.

STATEMENT OF THE CASE

I. The Hague Convention

The Hague Convention is a treaty signed by more than 100 countries "to address the problem of international child abductions during domestic disputes." *Monasky*, 589 U.S. at 71 (alteration removed) (quoting *Lozano v. Montoya Alvarez*, 572 U.S. 1, 4 (2014)). The Convention, which the United States has implemented as federal law through the International Child Abduction Remedies Act (ICARA), 22 U.S.C. § 9001 *et seq.*, "ordinarily requires the prompt return of a child wrongfully removed or retained away from the country in which she habitually resides." *Monasky*, 589 U.S. at 72. Determining a child's "habitual residence," and thus where to return the child, "depends on the particular circumstances of each case"—a "task for factfinding courts, not appellate courts, [that] should be judged on appeal by a clear-error review standard deferential to the factfinding court." *Id.* at 78-79, 84.

But the "return remedy is not absolute." *Lozano*, 572 U.S. at 5. Most relevant here, when a Hague Convention proceeding commences more than a year after the child's removal, the child need not be returned if "it is demonstrated that the child is now settled in its new environment." *Id.* (quoting Article 12). The "well settled" defense "recognize[s] that at some point a child may become so settled in a new environment that return is no longer in the child's best interests." *Hernandez v. Garcia Pena*, 820 F.3d 782, 787 (5th Cir. 2016); *see also Lozano*, 572 U.S. at 16 (explaining that "the child's interest in settlement" can "overcome the return remedy").

As this Court has recognized, determining "whether the child is settled" is a "factual determination." *Lozano*, 572 U.S. at 17. And because the well-settled defense requires "an individualized, fact-specific inquiry," *Hernandez*, 820 F.3d at 789, courts consider a multitude of factors to determine whether a child has become sufficiently settled, *id.* at 787-88 (identifying seven factors for consideration); *see also Cuenca v. Rojas*, 99 F.4th 1344, 1351 (11th Cir. 2024) (same and citing cases).

II. Factual Background

A.F. was born on May 3, 2018, in Venezuela to Castro and Brito. App.2a. Castro and Brito were not and never have been married. *Id.* In August 2021, when A.F. was three years old, Brito left Venezuela for Spain, leaving behind both A.F. and Castro. App.65a. At least as of the date of this filing, Brito has never returned to Venezuela and continues to live in Spain. App.65a.

In November 2021, when A.F. was three years old, Castro and A.F. left Venezuela and came to the United States. *Id.* Upon arrival, they immediately and voluntarily presented themselves to the U.S. Border Patrol in San Luis, Arizona, and sought asylum. App. 65a-66a. Both of their asylum applications remain pending, and they are still awaiting their asylum interviews with U.S. Citizenship and Immigration Services ("USCIS"). App.66a. In the interim, however, they were granted Temporary Protected Status under the Immigration and Nationality Act ("INA"), and the USCIS issued employment authorization documents to them both. App.68a; App.23a. n.1. While the Secretary of Homeland Security has since terminated Venezuela's designation for Temporary Protected Status,

Castro and A.F. maintain employment authorization through their pending asylum applications.

Since arriving in the United States, Castro and A.F. have lived in the Dallas area with Castro's now-husband, Otton Rodriguez, who also received Temporary Protected Status and has an asylum application pending. App.66a. As the district court found, the three have "consistently had stable housing," moving just once—in October 2022—from one location within the Dallas area to another. App.70a, App.86a.

Castro has also "been gainfully employed since arriving in the United States." App.3a. As the district court put it, she "is financially secure and amply provides for A.F., with the help of her partner, Mr. Otton Rodriguez," who "cares deeply for A.F. and acts as a father-figure in her life." App.70a.

A.F. started kindergarten in August 2023 at the George Herbert Walker Bush Elementary School in Addison, Texas, where she was nominated for the school's Gifted and Talented Program. App.68a, App.87a.[1] The district court found that she has relatives and friends in the area with whom she interacts regularly—she has playdates with classmates, attends birthday parties, plays at the local playgrounds, and spends significant time with her aunt and cousin, who attends the same school. App.87a. A.F. also has a primary care physician in Dallas whom she sees regularly, and she routinely attends church in Dallas with her mother and step-father, Rodriguez. *Id.*

III. Procedural History

A. On April 19, 2023, Brito (along with his mother) filed a petition in the United States District Court for

[1] A.F. is now in second grade and remains enrolled in the school's Gifted and Talented Program.

the Eastern District of Texas, seeking A.F.'s return to Venezuela under the Hague Convention. The action was subsequently transferred to the Northern District of Texas on August 3, 2023, and, in March 2024, the district court held a two-day bench trial. App.60a.

After hearing testimony from Castro, Brito, and Brito's mother and receiving documentary evidence, the district court denied Brito's petition. App.25a, 88a. In its detailed findings of fact and conclusions of law, the district court explained that, because Brito filed the petition more than a year after A.F. left Venezuela, A.F. should not be returned to Venezuela if the "preponderance of the evidence [shows] that A.F. is now well settled in her new environment in Texas." App.85a. The Court found that it did. "After thorough consideration" of the evidence presented at trial and applying the Fifth Circuit's seven-factor test, the district court concluded that "the evidence demonstrate[d] that A.F. has formed significant connections to her new environment in Texas," certainly "stronger than her connections to Venezuela." App.70a, App.85a.

In particular, the district court found that:

- "A.F. has lived in the Dallas area for over two years with stable housing throughout the entire duration as she was subject to just one move since her arrival in the United States";
- "A.F. has consistently attended daycare and/or school," that she was "nominat[ed] for the Gifted and Talented Program at [her] school," and that she has demonstrated "continuing academic improvement";
- "A.F. has . . . relatives and friends in the area whom she interacts with routinely," including her cousin (with whom she attends school)

and her aunt (whose house she goes to every day after school);

- "[O]verwhelming" evidence showed A.F.'s "participation in extracurricular or community activities," including that she "regularly attends church in Dallas with [Castro] and Mr. Rodriguez";
- A.F. "has a primary care physician whom she sees regularly"; and
- Castro "has been gainfully employed since arriving in the United States and provides for A.F.," crediting Castro's testimony that "if she was to ever split from Mr. Rodriguez, she and A.F. would move to a cheaper apartment," thereby rendering "her inability to split payments [with Rodriguez] . . . a non-issue."

App.86a-88a.

The district court acknowledged that two factors cut against finding that A.F. was "well settled" but were not "dispositive." App.86a. The first was A.F.'s young age—she was five at the time of trial (and is now seven). *Id.* The second was Castro's and A.F.'s immigration status, as both "do not have Lawful Permanent Residence status in the United States" and "are currently awaiting their asylum interview with USCIS." *Id.* Still, weighing all the evidence, the district court determined that those two factors did not outweigh "the other five factors [that] overwhelmingly support a finding of well settled," noting that Castro and A.F. "are in the midst of the proper procedures to achieve lawful status in the United States" and that they both "have received employment authorization documentations from the USCIS." *Id.*

The district court therefore found that "it is no longer in the best interests of A.F. to return to Venezuela, where she has minimal connections and no memories of living there." App.88a. Accordingly, the district court concluded that "it is in A.F.'s best interest to deny Petitioners' Hague Petition in support of the Convention's goal of not only protecting children from wrongful removal, but also protecting children from a second removal from a new environment to which they have become connected and settled." *Id.*

B. Brito appealed to the Fifth Circuit, and a divided panel reversed.[2] The panel first addressed the standard of review for a district court's determination that a child is "well settled." App.7a-12a. Asserting that the "well-settled inquiry is primarily legal," the panel held that *de novo*, not clear error, review applies. App.9a, App.11a-12a. The panel recognized that this Court, in *Monasky*, held that the standard of review for determining the analogous issue of a child's "habitual residence" under the Hague Convention is clear error, not *de novo*. App.12a; *see also Monasky*, 589 U.S. at 78. Despite the plain similarities between the "habitual residence" and "well settled" inquiries, *see, e.g.*, *Cuenca v. Rojas*, 99 F.4th 1344, 1350 (11th Cir. 2024), the panel brushed aside *Monasky* as "say[ing] nothing about whether the well-settled defense is primarily legal or factual," App.12a. The panel added that, in its view, prior Fifth Circuit precedent had already held that *de novo* review applies here and that, "[w]ithout clearer direction from the Supreme

[2] The Fifth Circuit issued its initial opinion—also a 2-1 decision—on June 2, 2025. *See Brito v. Castro*, 139 F.4th 422 (5th Cir. 2025). After Castro petitioned for rehearing, the Fifth Circuit panel withdrew its June 2, 2025 opinion and issued a substitute opinion on September 5, 2025. App.1a-2a.

Court, [the panel] cannot override the *de novo* standard of review set by the [prior] panel." *Id.*

The panel also expressly acknowledged that its holding split with those of the First and Eleventh Circuits, both of which have held, post-*Monasky*, that clear-error review applies to a district court's determination of whether a child is well settled under the Hague Convention. *See* App.13a. n.40 (citing *da Costa v. de Lima*, 94 F.4th 174, 181 (1st Cir. 2024) and *Cuenca*, 99 F.4th at 1350). The panel stated, however, that its approach aligns "with at least three of [its] sister circuits," citing a post-*Monasky* summary order from the Second Circuit and pre-*Monasky* decisions from the Second, Fourth, and Ninth Circuits. App.13a. & n.40.

Applying *de novo* review, the panel then reassessed the facts and concluded that "[b]alancing the relevant factors de novo, we are not persuaded that A.F. has formed such deep or enduring ties to her new environment that returning to her home in Venezuela would contravene her best interests." App.14a. The panel therefore reversed and remanded "with instructions that the district court enter an order directing A.F.'s return to Venezuela." App.21a.

Judge Douglas dissented. Judge Douglas first reasoned that *Monasky*, as well as this Court's even more recent decision in *Bufkin v. Collins*, 604 U.S. 369 (2025), "dictates that clear-error review" applies to the "well settled" analysis. App.34a; *see also* App.27a-35a. Judge Douglas explained that, just like the habitual-residence inquiry in *Monasky*, the "well settled" inquiry is also "fact-intensive." App.28a. Indeed, as Judge Douglas put it, "[i]t is difficult to imagine a more fact-driven inquiry" than "whether allowing [a] child to remain is in their 'best interests.'" *Id.* (quoting *Hernandez*, 820 F.3d at 787). Judge Douglas further

observed that "at least six" of the factual "considerations in the habitual-residence analysis" are also part of the "well settled" inquiry. App.29a. And "[i]f these considerations make the habitual-residence inquiry factual, surely they do the same to the well-settled inquiry." App.28a-29a.

Judge Douglas also explained that, if any doubt remained, this Court's recent decision in *Bufkin* only confirms that a "well settled" determination is a factual determination subject to clear-error review. App.31a-34a. Judge Douglas reasoned that, just like the question in *Bufkin*—which the Court held should be reviewed for clear error alone—the "well settled" inquiry was "one that required the district court to be 'immerse[d]' in facts and compelled to 'marshal and weigh evidence' and 'make credibility judgments.'" App.33a (quoting *Bufkin*, 604 U.S. at 382). In short, Judge Douglas explained, "[c]onsidering a child's best interests through record evidence 'is "about as factual sounding" as any question gets.'" App.34a (quoting *Bufkin*, 604 U.S. at 382). And thus "Supreme Court precedent dictates that clear-error review" applies. App.34a.

Judge Douglas further explained that, "even if the majority opinion is correct in weighing the factors de novo," she "respectfully disagree[d] with its conclusion," observing that the majority "blends [factors] together without providing proper deference to the district court." App.35a.

C. Castro then moved in the Fifth Circuit for a stay of the mandate pending her forthcoming petition for certiorari. *See* Mot. for Stay, Case No. 24-10520 (5th Cir.), ECF No. 119. Judge Willett denied Castro's motion. Order, *id.*, ECF No. 130. Judge Willett provided no reason to doubt that Castro's forthcoming petition for certiorari "will raise a substantial question

worthy of Supreme Court review." *Id.* Instead, Judge Willett concluded that Castro will not suffer irreparable harm because, in *Chafin v. Chafin*, 568 U.S. 165, 178-79 (2013), this Court "assur[ed] that appellate rights in Hague Convention cases are not extinguished upon a child's repatriation." Order, Case No. 24-10520 (5th Cir.), ECF No. 130.

Castro sought an emergency stay of the Fifth Circuit's mandate from Justice Alito. *See Castro v. Guevara*, No. 25A376 (U.S. Oct. 1, 2025). On October 2, 2025, Justice Alito stayed the Fifth Circuit's mandate, pending further order. *See* Order, *id.* (Oct. 2, 2025). On November 13, 2025, this Court denied Castro's application for a stay without opinion. *See* Order, *id.* (Nov. 13, 2025). Justice Sotomayor and Justice Jackson would have granted Castro's petition for an emergency stay. *Id.*

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's Decision Deepens a Circuit Split.

As the Fifth Circuit openly acknowledged, its decision deepened an existing Circuit split regarding the appellate standard of review of a trial court's "well settled" determination. App.13a n.40. In holding that *de novo* review applies, the Fifth Circuit panel expressly parted ways with the First and Eleventh Circuits, both of which followed this Court's holding in *Monasky* and applied clear-error review. The Fifth Circuit's holding also conflicts with the decision of at least one state court of last resort (Maine's). Instead, the Fifth Circuit aligned itself with three Circuits—the Second, Fourth, and Ninth—which have held that *de novo* review applies.

There is therefore a clear split on the appropriate standard of review for a lower court's "well settled" determination. This pervasive confusion about a fundamental principle—the standard of appellate review—cannot endure. This Court should intervene now to set the legal standard straight.

A. At least two federal courts of appeals and one state court of last resort have held that clear-error review applies to "well settled" determinations.

In *da Silva v. de Aredes*, 953 F.3d 67, 72 (1st Cir. 2020) (Lynch, J.), the First Circuit held that determining whether a child is "well settled" under the Hague Convention is predominantly a factual question subject to clear-error review. In *da Silva*, the defendant appealed the denial of two affirmative defenses—the "well settled" defense and the grave-risk defense. *Id.* at 70-71. Applying this Court's decision in *Monasky*, the First Circuit recognized that both the "well settled" and grave-risk defenses involve mixed questions of law and fact and that the appropriate standard of review for such a mixed question turns on "whether answering [the question] entails primarily legal or factual work." *Id.* at 72 (quoting *Monasky*, 589 U.S. at 83-84). The First Circuit reasoned that, "[l]ike the 'habitual residence' determination at issue in *Monasky*, the 'grave risk' and '[well] settled' defenses require the court to identify a broad standard and then answer the factual questions of whether return would expose the abducted child to grave risk of harm or whether the abducted child is '[well] settled.'" *Id.* Therefore, it held that clear-error review applied. *Id.*

The First Circuit also concluded that "[r]eview for clear error . . . accords with the goals of the Convention." *Id.* "Review for clear error," the court observed, "speeds up appeals and thus serves the Convention's

premium on expedition." *Id.* (quoting *Monasky*, 589 U.S. at 84).

The Eleventh Circuit held the same in *Cuenca v. Rojas*, 99 F.4th 1344 (11th Cir. 2024) (Grant, J.). Like the First Circuit, the Eleventh Circuit looked to *Monasky* for guidance, reasoning that "[l]ike the analogous concept of a child's 'habitual residence,' the determination of whether a child is settled begins with the selection of the appropriate legal framework: a case-specific totality of the circumstances analysis." *Id.* at 1350. After identifying that standard, however, "'what remains for the court to do in applying that standard' is classic factfinding work." *Id.* (quoting *Monasky*, 589 U.S. at 84). The trial court's task is to "'marshal and weigh evidence, make credibility judgments,' and consider 'multifarious, fleeting, special, narrow facts'" specific to the child's circumstances. *Id.* (quoting *U.S. Bank, N.A. v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 396 (2018)). "The assessment of whether a child is settled 'thus presents a task for factfinding courts, not appellate courts, and should be judged on appeal by a clear-error review standard deferential to the factfinder.'" *Id.* (quoting *Monasky*, 589 U.S. at 84).

Looking beyond the federal Circuits, at least one state court of last resort has also applied clear-error review to a "well settled" determination. Persuaded by the First Circuit's decision in *da Silva*, the Supreme Judicial Court of Maine held that it would "review the court's finding that the child is well settled in her new environment for clear error." *Xamplas v. Xamplas*, -- A.3d --, 2025 WL 3034001, at *6 (Me. Oct. 30, 2025) (Stanfill, C.J.).[3]

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[3] At least two state intermediate appellate courts have concluded the same. *See De la Melena v. Panez*, 397 So. 3d 253, 258 (Fla. Dist. Ct. App. 2024) ("We thus find that Father has failed

B. The Fifth Circuit, however, aligned itself with three Circuits—the Ninth, Second, and Fourth—that, by contrast, have held that *de novo* review applies to a district court's "well settled" determination.

1. The Ninth Circuit first considered the "proper standard of review" for the "well settled" determination in *In re B. Del C.S.B.*, 559 F.3d 999, 1008 (9th Cir. 2009) (Reinhardt, J.). The Ninth Circuit observed that, in the "analogous context" of "habitual residence" determinations, it had applied *de novo* review because "[d]espite the factual focus of our inquiry, ultimately our conclusion rests on a legal determination: After scrutinizing the circumstances of a particular case, we must determine whether the discrete facts add up to a showing of habitual residence." *Id.* at 1008 (alteration in original) (quoting *Holder v. Holder*, 392 F.3d 1009, 1015 (9th Cir. 2004)). The Ninth Circuit reasoned that, "[s]imilarly, a conclusion as to whether a child is 'settled' in her new environment, though fact-specific, ultimately rests on a legal determination of 'whether the discrete facts add up to a showing' that she is 'settled' within the meaning of Article 12" of the Hague Convention. *Id.* (quoting same).

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to establish that clear error was committed by the trial court in finding that Mother met her burden of proof on this ["well settled"] exception[.]"); *Baez v. Paraskevas*, 2022 WL 3368498, at *4 (Ariz. Ct. App. Aug. 16, 2022) ("Because a court's order denying a petition for return of a minor child requires a fact-intensive inquiry, we review it for an abuse of discretion."). But at least one other appears to apply *de novo* review. *See In re Marriage of Diaz & Villalobos*, No. D070434, 2017 WL 2628438, at *5 (Cal. Ct. App. June 19, 2017) ("We review independently a trial court's . . . application of the Hague Convention to the facts in a particular case."). Confusion thus permeates state intermediate appellate courts as well.

The Ninth Circuit's reasoning in *In re B. Del C.S.B.* has since been undermined by this Court's decision in *Monasky*, which held that clear-error, not *de novo*, review applies to habitual-residence determinations. *See* 589 U.S. at 84. Nonetheless, even after *Monasky*, the Ninth Circuit has continued to apply *de novo* review to "well settled" determinations. *See Flores Castro v. Hernandez Renteria*, 971 F.3d 882, 886 (9th Cir. 2020) (citing *In re B. Del C.S.B*, 559 F.3d at 1008). And the Ninth Circuit has continued to rely on *Flores Castro* for the standard of review in other Hague Convention cases. *See, e.g.*, *Radu v. Shon*, 62 F.4th 1165, 1172 (9th Cir. 2023) ("We . . . 'review the district court's factual determinations for clear error, and the district court's application of the Convention to those facts *de novo*.'" (quoting *Flores Castro*, 62 F.4th at 886)); *In re ICJ*, 13 F.4th 753, 760-61 (9th Cir. 2021), *abrogated on other grounds by*, *Golan v. Saada*, 596 U.S. 666 (2022) (same).

2. The Second Circuit has also held that, when reviewing a district court's "well settled" determination, it reviews *de novo* the district court's "application of the Convention to the facts." *Mota v. Castillo*, 692 F.3d 108, 111 (2d Cir. 2012) (Carney, J.); *see also Broca v. Giron*, 530 F. App'x 46, 48 (2d Cir. 2013) (stating that "our review is de novo" when reviewing whether, "in the overall balancing" and on "the record as a whole," a child "is well settled in the United States"). Even after *Monasky*, the Second Circuit has continued to apply those precedents. *See Stein ex rel J.S. v. Kohn*, No. 23-8078, 2024 WL 4848986, at *1 (2d Cir. Nov. 21, 2024) (per curiam); *Lomanto v. Agbelusi*, No. 23-933, 2024 WL 3342415, at *2 (2d Cir. July 9, 2024). According to the Second Circuit, a district court's "[well]-settled analysis is a mixed question of fact and law" and the district court's application of "the relevant factors"

is reviewed *de novo*. *Lomanto*, 2024 WL 3342415, at *2.

3. The Fourth Circuit, in *Alcala v. Hernandez*, 826 F.3d 161 (4th Cir. 2016) (Floyd, J.), likewise held that *de novo* review applies to a district court's "well settled" determination. *Id.* at 171 n.7. The court reasoned that "[t]here is at bottom here a single legal question for the district court to answer, and for us to review: 'Is [the child] now settled?' We review this ultimate issue de novo." *Id.* (citing, among other cases, *In re B. Del C.S.B.*, 559 F.3d at 1008). Although this is a pre-*Monasky* decision, it remains on the books. As evidenced by the Fifth, Ninth and Second Circuits' decisions, it may continue to control absent "clearer direction from the Supreme Court." App.12a.

* * *

All told, there is a clear split in authority on the standard of appellate review for the "well-settled" defense. That split has persisted even after this Court held in *Monasky* that courts should review analogous habitual-residence determinations for clear error. Following *Monasky,* two Circuits and one state court of last resort have recognized that a district court's determination that a child is "well settled" must be reviewed for clear error only. But three Circuits—including the Fifth Circuit below—nonetheless continue to apply *de novo* review, and yet another Circuit (the Fourth) still has precedent requiring *de novo* review as well. This Court should intervene to end this legal quagmire.[4]

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[4] This confusion pervades other affirmative defenses under the Hague Convention, most notably the grave-risk defense. As explained above, the First Circuit, applying *Monasky*, held that clear-error review applies to the grave-risk defense. *da Silva*, 953 F.3d at 72. By contrast, the Sixth and Eighth Circuits—although

II. The Decision Below Contravenes This Court's Precedents

Over the past eight years, this Court has considered the appropriate appellate standard of review for mixed questions of law and fact three times, including in *Monasky*. *See* 589 U.S. at 83; *see also Bufkin v. Collins*, 604 U.S. 369 (2025); *U.S. Bank, N.A.*, 583 U.S. at 389. The decision below cannot be reconciled with those precedents.

In *U.S. Bank*, the Court explained that determining whether "historical facts" meet a legal standard is a "'mixed question' of law and fact." 583 U.S. at 393-94. And the Court explained that the appropriate standard of review for a mixed question of law and fact depends on "whether answering it entails primarily legal or factual work." 583 U.S. at 396. Some mixed questions "require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard." *Id*. For those questions, *de novo* review is appropriate. *Id.* By contrast, "other mixed questions immerse courts in case-specific factual issues." *Id.* When that's the case, "appellate courts should usually review a decision with deference." *Id.*

The mixed question in *U.S. Bank* was whether a certain person's transactions with a given debtor "were at arm's length" for Bankruptcy Code purposes. *Id.* at 389. Answering that question, the Court ex-

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discussing and citing *Monasky*—have continued to follow pre-*Monasky* precedent and apply *de novo* review. *See Rodriguez v. Molina*, 96 F.4th 1079, 1083 (8th Cir. 2024) (Wollman, J.); *Salame v. Tescari*, 29 F.4th 763, 766-67 (6th Cir. 2022) (Gibbons, J.). There is therefore a companion Circuit split on the standard of appellate review for the grave-risk defense under the Hague Convention.

plained, involved "tak[ing] a raft of case-specific historical facts, consider[ing] them as a whole, [and] balanc[ing] them one against another" to decide whether the negotiating parties "were (or were not) acting like strangers." *Id.* at 397-98 (footnote omitted). As the Court put it, "[j]ust to describe that inquiry is to indicate where it (primarily) belongs: in the court that has presided over the presentation of evidence, that has heard all the witnesses, and that has both the closest and the deepest understanding of the record." *Id.* at 397-98. "A conclusion of th[is] kind," the Court therefore held, "primarily rests with a bankruptcy court, subject only to review for clear error." *Id.* at 399.

Earlier this year, in *Bufkin v. Collins*, 604 U.S. 369 (2025), the Court applied the same framework to determine the standard of review for mixed questions of fact and law. *Bufkin* involved the standard of appellate review for a determination that "evidence on a particular material issue is [or is] not in approximate balance." *Id.* at 381. The Court concluded that such an inquiry asks "a predominantly factual question and thus [is] subject to clear-error review." *Id.* at 381. The Court explained that the "approximate-balance determination involves two steps." *Id.* First, the adjudicator—in that case the Department of Veteran's Affairs—"reviews" the evidence and "assigns weight to it." *Id.* Second, the Department "assesses the weight of the evidence as a whole" and applies it to the legal standard—*i.e.*, determining whether "there is an approximate balance of positive and negative evidence." *Id.* (quoting 38 U.S.C. § 5107(b)).

Although this second step was *partially* legal, the Court reasoned that it was *primarily* factual. "Assigning weight to evidence—whether individual pieces of evidence or collections of it—is an inherently factual

task." *Id.* at 382. The approximate-balance determination required "consider[ing] evidence of [the patient's] symptoms" and "assessing the credibility of . . . physicians." *Id.* Because "the initial decisionmaker [was] 'marshal[ing] and weigh[ing] evidence' and 'mak[ing] credibility judgments' . . . its work [was] fact intensive, and its determinations should be reviewed with deference." *Id.*

Finally, and closest to the instant case, this Court in *Monasky* applied the same analysis for a district court's determination of a child's "habitual residence" under the Hague Convention. 589 U.S. at 83. That issue, the Court explained, also presents "a 'mixed question' of law and fact—albeit barely so." *Id.* at 84. To decide the standard of appellate review for this mixed question, the Court applied the *U.S. Bank* framework and considered "whether answering [the mixed question] entails primarily legal or factual work." *Id.* (quoting *U.S. Bank, N.A.*, 583 U.S. at 396).

Once again, this Court concluded that the mixed question was primarily factual. The Court reasoned that, after first "identif[ying] the governing totality-of-the-circumstances standard," a court ultimately must apply that standard by "answer[ing] a factual question: Was the child at home in the particular country at issue?" *Id.* Accordingly, the Court held that "th[e] habitual-residence determination . . . presents a task for factfinding courts, not appellate courts, and should be judged on appeal by a clear-error review standard deferential to the factfinding court." *Id.*

The same applies to a court's determination of whether a child is well settled. Just as it does when considering a child's habitual residence, the trial court first identifies the relevant legal standard, which all Circuits agree involves weighing a non-exhaustive list of several factors, including:

> (1) the child's age; (2) the stability and duration of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child has friends and relatives in the area; (5) the child's participation in community or extracurricular activities; (6) the respondent's employment and financial stability; and (7) the immigration statues of the respondent and child.

App.7a (quoting *Hernandez v. Garcia Pena*, 820 F.3d 782, 787-88 (5th Cir. 2016)).[5] After identifying the standard, the court must then weigh the evidence to decide: "Is the child well-settled?" App.10a.

That inquiry is primarily factual, just like determining whether, under the Hague Convention, a child is "at home in the particular country at issue." *Monasky*, 589 U.S. at 84. Just as the term "habitual" is undefined and "suggest[s] a fact-sensitive inquiry," *id.* at 76-77, the term "settled" likewise is undefined

[5] The Fifth Circuit, in *Hernandez*, borrowed this list from the Second Circuit's decision in *Lozano v. Montoya Alvarez*, 697 F.3d 41 (2d Cir. 2012), *aff'd*, 572 U.S. 1 (2014). The *Lozano* court described the list of factors as "[f]actors that courts should generally include" in their analysis, suggesting the list is not exhaustive. Other Circuits describe the analysis as assessing the totality of the circumstances. *See, e.g.*, *Cuenca v. Rojas*, 99 F.4th 1344, 1350 (11th Cir. 2024); *da Silva v. de Aredes*, 953 F.3d 67, 72 (1st Cir. 2020); *Alcala v. Hernandez*, 826 F.3d 161, 170-71 (4th Cir. 2016). In practice, however, there is no difference between the two tests because the Fifth Circuit's factor test is non-exhaustive and thus is effectively a totality-of-the-circumstances test. *Cf. Alcala*, 826 F.3d at 174 (treating the Fifth Circuit's *Hernandez* decision as considering the totality of the circumstances).

and "certainly suggests a fact-intensive inquiry," App.28a. The habitual-residence and "well settled" determinations even consider many of the same factors, such as the child's age, academic activities, social engagements, and immigration status. *Compare Monasky*, 589 U.S. at 78 & n.3 (listing considerations for the habitual-residence determination), *with Hernandez*, 820 F.3d at 787-88 (listing factors for the "well settled" defense). Indeed, this Court has already described the ultimate question of "whether [a] child is settled" under the Hague Convention as a "factual determination." *Lozano*, 572 U.S. at 17.

The panel below made no serious attempt to distinguish *Monasky*, simply stating that the holding there "says nothing about whether the well-settled defense is primarily legal or factual" and that "[w]ithout clearer direction from the Supreme Court, we cannot override the *de novo* standard of review set by" a prior Fifth Circuit panel. App.12a (citing *Hernandez*). But *Monasky* in fact said quite a lot about that question—indeed, it all but decided it. As Judge Douglas observed in dissent, and as explained above, "a comparison" of the habitual-residence inquiry at issue in *Monasky* and the "well settled" defense at issue here "shows just how similar the inquiries' factual natures are." App.28a.

The Fifth Circuit's attempt to square its holding with this Court's other precedents on mixed questions of law and fact fares no better. The Fifth Circuit recognized that the standard of review for a mixed question "depends on whether answering it entails primarily legal or factual work." App.8a (quoting *Bufkin*, 604 U.S. at 382). The Fifth Circuit then reasoned that the "well-settled inquiry is primarily legal" because "the well-settled factors are a judicially crafted framework designed to inform a legal judgment: Is the child well-

settled?" *Id.* In the Fifth Circuit's view, the court's "task is to assess whether, taken together, the evidence supports the district court's legal conclusion." *Id.*

That does not make the "well settled" inquiry primarily legal in nature. "[A]ssess[ing] whether, taken together, the evidence" rises to the level of a given legal standard—as the Fifth Circuit put it, *id.*—is the same as "assess[ing] the weight of the evidence as a whole" and applying it to the legal standard, *Bufkin*. 604 U.S. at 381. As this Court has explained, that is a "fact intensive" inquiry. *Id.* It requires the initial decisionmaker to "marshal and weigh evidence" and "make credibility judgments," which "is 'about as factual sounding' as any question gets." *Bufkin*, 604 U.S. at 381) (quoting *U.S. Bank, N.A.*, 583 U.S. at 396-97).

The Fifth Circuit's analysis of the "well settled" factors confirms that it engaged in a primarily factual determination. For example, under the second factor—"the stability and duration of A.F.'s residence in the United States"—the Fifth Circuit held that it "was error" for the district court to find that "liv[ing] in two separate residences" over three years was "stable." App.15a. That is just drawing "a 'factual inference[ ] from undisputed basic facts,'" which this Court considers primarily factual. *U.S. Bank*, 583 U.S. at 397. Similarly, on the fourth factor—relationships to friends and family—the Fifth Circuit overrode the district court's finding that A.F.'s "six close relatives" and "several friends" in Texas provide her with strong relationships in that state. App.16a. The appellate court found that these connections were outweighed by A.F.'s other family and friends in Venezuela. *Id.* This kind of weighing of competing evidence, however, is a factual task. *See Bufkin*, 604 U.S. 382 ("Assigning

weight to evidence—whether individual pieces of evidence or collections of it—is an inherently factual task."); *cf. Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944) ("[The jury] weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.").

Put simply, these sorts of determinations belong "in the court that has presided over the presentation of evidence, that has heard all the witnesses, and that has both the closest and the deepest understanding of the record." *U.S. Bank*, 583 U.S. at 398. Here, that court is the district court. And its findings—including the factual inferences it drew from those findings—deserve deference.

III. The Question Presented Is Important and Recurring

Whether a trial court's "well settled" determination is subject to *de novo* or clear-error review is an exceptionally important and recurring question.

A. As an initial matter, the appellate standard of review necessarily arises in every Hague Convention appeal involving the "well settled" defense, so it is, by definition, recurring. Moreover, as the Fifth Circuit itself has acknowledged, the difference between *de novo* and clear-error review is often outcome determinative. *See Vinson & Elkins v. Comm'r Internal Revenue*, 7 F.3d 1235, 1237 (5th Cir. 1993) ("Deciding the appropriate standard of review both begins and ends this case."). Applying clear-error review "often determines [an] issue's outcome" because it "is incredibly deferential, requiring [the appellate court] to accept

the judge's fact findings absent a strong and abiding belief that he slipped up—all while being mindful that the judge's choice between two plausible but differing fact inferences can't be clearly erroneous." *United States v. Oliveira*, 907 F.3d 88, 94 (1st Cir. 2018) (Thompson, J., concurring); *see also, e.g.*, *United States v. Porter*, 928 F.3d 947, 967 n.7 (10th Cir. 2019) ("The clear error standard of review determines our holding[.]"); *Maes v. Standard Ins. Co.*, 8 F. App'x 758, 760 (9th Cir. 2001) ("Application of the clearly erroneous standard often has real significance and, in this case, is outcome determinative.").

This Court's attention is particularly warranted in cases, like this one, where appellate courts apply *de novo* review beyond legal questions. Deferential standards of review function as an appropriate and needed check on appellate courts. *See, e.g.*, *Doe v. Kamehameha Schs.*, 596 F.3d 1036, 1046 (9th Cir. 2010) ("We also emphasize that, as an appellate court, we are *constrained* by the applicable standard of review." (emphasis added)). This limitation prevents appellate courts from substituting their own view of the evidence in place of the trial court's findings. *See Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 687 (2021) ("If the district court's view of the evidence is plausible in light of the entire record, an appellate court may not reverse even if it is convinced that it would have weighed the evidence differently in the first instance."). It also recognizes that "[t]rial judges have the 'unique opportunity to consider the evidence in the living courtroom context,' while appellate judges see only the 'cold paper record.'" *Gasperini v. Ctr. of Humanities, Inc.*, 518 U.S. 415, 438 (1996) (internal citation omitted).

Federal appellate courts thus exceed their role when they inappropriately apply *de novo* review, and

this Court should intervene to restore the proper balance between the appellate and trial courts—as it has done three times over the last eight years.

B. Clarifying the appropriate appellate standard of review is also crucial to furthering the Hague Convention's goals of speed and uniformity.

1. As the Court recognized in *Monasky*, "[c]lear-error review has a particular virtue in Hague Convention cases." 589 U.S. at 84. Because it is "a deferential standard of review, clear-error review speeds up appeals and thus serves the Convention's premium on expedition." *Id.*

2. Inconsistent application of the appropriate standard of review for "well settled" determinations also undermines the Hague Convention's express goal of "uniform international interpretation." 22 U.S.C. § 9001(b)(3)(B). Like all treaties, the Hague Convention's efficacy rests on its uniform application. An ongoing split among the Circuits (and state courts) frustrates that objective.

Indeed, in reviewing a trial court's "well settled" determination *de novo*, the Second, Fourth, Fifth, and Ninth Circuits are also out of line with other countries' courts. This Court has recognized that, in interpreting the Hague Convention, the opinions of foreign courts are "entitled to considerable weight." *Abbott v. Abbott*, 560 U.S. 1, 16 (2010) (internal quotations and alterations omitted). And appellate courts in Canada, Australia, Scotland, England, and New Zealand have all deferred to "well settled" determinations made by lower courts, absent clear error or a similar threshold.

For instance, in *J.E.A. v. C.L.M.* (2002), 200 D.L.R. (4th) 577 (N.C.S.A.), the Nova Scotia Court of Appeal considered a trial court's determination that a child was "settled in her new environment" in Canada. *Id.*

at ¶¶ 60-94. The Court of Appeal reviewed that determination for "clear . . . and overriding error." *Id.* ¶ 38. In doing so, it noted that "[a]n appeal is not a retrial of the case or an opportunity for three appellate judges to substitute their views for those of the [trial] judge of first instance." *Id.* Instead, "[t]he role of the Court of Appeal is to review the judge's findings to determine whether he or she was . . . not plainly wrong on issues of fact leading to a wrong result." *Id.* In particular, the appellate court stated that it was outside its role to "second-guess the weight to be assigned to the various items of evidence." *Id.* (internal quotation omitted). On this basis, the appellate court concluded that the trial court's decision to accord little weight to the witness's objection was supported by "the record as a whole" and made "in [its] discretion . . . in light of all of the circumstances." *Id.* ¶ 52.

Similarly, the Family Court of Australia considered an appeal from the trial court's determination that four children were "settled in their new environment" in Tasmania. *Graziano v. Daniels* (1991), 14 Fam. LR 697, (1991) F.L.C. 92-212. In affirming the trial court's ruling, the reviewing court noted that the trial court "considered the evidence very carefully" and reached a conclusion that was "open to [it]" in light of the evidence available before it. *Id.*

Several other foreign appellate bodies have made similar pronouncements in the context of the "well settled" defense. *See, e.g.*, *Perrin v. Perrin* 1994 SC 45 (Scottish Inner House) ("In any event, the [trial court] was entitled to reach the conclusion which [it] did on the factual material before him. An appeal court could not interfere with such a decision simply because a different view could be taken on the facts available."); *Re M.*, [2007] EWCA Civ 992, ¶ 22 (Lord Justice Thorpe) (U.K. Court of Appeal Civil Division)

("[V]iewed in its totality, there is a sufficient demonstration that the judge exercised his residual jurisdiction without misdirection, without attaching weight to immaterial factors, and without having disregarded, to any sufficient degree, material factors"); *Secretary for Justice v. H.J.*, [2006] NZSC 97, ¶ 135 (Supreme Court of New Zealand) ("Although the question is not in issue in the appeal, there was a substantial amount of evidence to support the Judge's finding on settlement and it is clear that it was correct.").

The Fifth Circuit's contrary holding thus diverged from the approach taken by several other signatories to the Hague Convention. This Court should intervene to ensure that the Convention is uniformly interpreted and applied.

IV. This Case Is an Ideal Vehicle

This case is an ideal vehicle to address whether *de novo* or clear-error review applies to a trial court's "well settled" determination. The "well settled" defense was fully litigated in the district court, and the district court denied Brito's petition solely on the basis of that defense. App.88a. The Fifth Circuit then issued not one but two split opinions on whether the district court's finding that A.F. was "well settled" should be reviewed *de novo* or for clear error. *See* App.2a. And applying *de novo* review, the Fifth Circuit reversed the district court. *Id.*

The "well settled" defense, and the appropriate standard of review with respect to it, is thus squarely at issue in this case. This is an excellent opportunity for this Court to resolve an acknowledged Circuit split and clarify that clear-error review is the proper standard of review for a trial court's inherently factual determination that a child is "well settled" in a new environment.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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DECEMBER 4, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER GRANTING PANEL REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 5, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-10520

JOSE LEONARDO BRITO GUEVARA,

Plaintiff-Appellant,

versus

SAMANTHA ESTEFANIA FRANCISCO CASTRO,

Defendant-Appellee.

Filed September 5, 2025

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:23-CV-1726

ON PETITION FOR REHEARING EN BANC

Before RICHMAN, WILLETT, and DOUGLAS, *Circuit Judges.*

DON R. WILLETT:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is GRANTED. No member of the panel nor judge in regular

active service of the court having requested that the court be polled on rehearing en banc (Fed. R. App. and 5th Cir. R. 35), the petition for rehearing en banc is DENIED. We withdraw our prior opinion, *Brito v. Castro*, 139 F.4th 422 (5th Cir. June 2, 2025), and substitute the following:

At just five years old, A.F. was taken by her mother, Samantha Estefania Francisco Castro, from the lawful custody of her father, Jose Leonardo Brito Guevara, in Venezuela and brought unlawfully to the United States.[1] Brito petitioned for A.F.'s return under the Hague Convention on Civil Aspects of International Child Abduction.

The district court denied relief, finding that although Brito had made a prima facie case of wrongful removal, A.F. was by then well-settled in Texas.

We REVERSE and REMAND with instructions that the district court order A.F.'s return to Venezuela.

I

A

A.F. was born May 3, 2018 to Jose Leonardo Brito Guevara and Samantha Estefania Francisco Castro. Although never married, Castro and Brito lived together with A.F. in the home of Brito's mother in Venezuela until

1. A.F. was five at the time the district court decided this case. She is now seven.

they separated in July 2019. Following their separation, Brito was granted custody rights over A.F. During this period, A.F. maintained regular contact with both parents, though the record does not clearly indicate her primary residence.

In August 2021, Brito relocated to Spain for a better-paying job. While in Spain, Brito continued to support A.F. financially, maintained regular contact through video calls and voice messages, and stayed in close contact with A.F.'s grandmother, who ensured that A.F. was cared for during Brito's absence. The district court found that Brito was exercising his custody rights throughout his time in Spain.

Until late 2021, A.F. had lived exclusively in Venezuela, and nothing in the record suggests she was not living a stable, secure life.[2] But in November 2021, Castro removed A.F. from Venezuela without Brito's consent and unlawfully entered the United States. After presenting herself and A.F. to U.S. Border Patrol in San Luis, Arizona, Castro relocated to Lewisville, Texas. There, she lived with her boyfriend, Otton Rodriguez, for eleven months. In October 2022, Castro, A.F., and Rodriguez moved to Dallas. Brito remained in contact with A.F. during this time and attempted to visit her in the United States, though his visa application was denied.

The district court found that Castro "has been gainfully employed since arriving in the United States and

2. The district court found "next to zero evidence to prove the presence of 'grave risk of harm' " if A.F. were to return to Venezuela.

provides for A.F." Since her arrival, Castro has worked for four different companies, averaging 40-45 hours a week, with hourly wages ranging from $12 to $16.

Castro and A.F. lack permanent residence status in the United States. U.S. Citizenship and Immigration Services issued them employment authorization documents, but their asylum applications remain pending.

B

Immediately upon learning that Castro had taken A.F. to the United States, Brito contacted his family's attorney, Venezuelan authorities, and both the U.S. and Venezuelan embassies in Spain. He authorized his mother to file an application under the Hague Convention seeking A.F.'s return. Venezuelan authorities received the application on January 20, 2022—just under two months after Castro took A.F. into the United States.

The application languished until November 7, 2022, when the U.S. Department of State sent a letter to Castro, advising that the request had been forwarded from Venezuela and urging her to resolve the matter amicably or voluntarily return A.F. to Venezuela. Castro did not respond.

After efforts to reach an agreement with Castro failed, Brito filed a petition in the Eastern District of Texas in April 2023. The district court issued a temporary restraining order, followed by a preliminary injunction barring Castro from leaving the jurisdiction and requiring

her to disclose her address and contact information to both the court and Brito. Despite receiving actual notice, Castro failed to appear at the preliminary injunction hearing.

A month later, in June 2023, Castro—through counsel—finally accepted service and disclosed her address, which turned out to be in the *Northern* District of Texas. By agreement of the parties, the action was transferred to the Northern District on August 1, 2023. Although Brito repeatedly requested expedited consideration, the Northern District did not hold a bench trial until March 2024—eight months after the transfer. Six weeks later, the court issued findings of fact and conclusions of law. The court denied Brito's petition, concluding that although he had established a prima facie case for A.F.'s return, Castro had sufficiently shown that A.F. was so well-settled in Dallas that remaining there was in her best interest.

Brito timely appealed.

II

The Hague Convention mandates the return of "a child wrongfully removed from her country of habitual residence . . . upon petition."[3] The Convention's two chief objectives "are to restore the pre-abduction status quo and to deter parents from crossing borders in search of a

3. *England v. England*, 234 F.3d 268, 270 (5th Cir. 2000).

more sympathetic court."[4] The Convention rests on a core principle: "the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence."[5]

Accordingly, the Convention's default rule is that the child must be returned to her country of habitual residence. But the Convention "does not pursue that goal at any cost."[6] It recognizes that, in certain cases, "the interests of the child may be better served by the child remaining" in her new environment, and it "provides 'several narrow affirmative defenses to wrongful removal.'"[7]

In the United States, the Hague Convention is implemented through the International Child Abduction Remedies Act (ICARA).[8] "Under ICARA, once a petitioner establishes by a preponderance of the evidence that the child was wrongfully removed or retained, the burden shifts to the respondent to establish an affirmative defense."[9]

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4. *Id.* at 271 (quotations omitted).

5. *Abbott v. Abbott*, 560 U.S. 1, 20, 130 S.Ct. 1983, 176 L.Ed.2d 789 (2010).

6. *Hernandez v. Pena*, 820 F.3d 782, 786 (5th Cir. 2016) (quoting *Lozano v. Montoya Alvarez*, 572 U.S. 1, 16, 134 S.Ct. 1224, 188 L.Ed.2d 200 (2014)).

7. *Id.* (quoting *Sealed Appellant v. Sealed Appellee*, 394 F.3d 338, 343 (5th Cir. 2004)) (emphasis removed).

8. *Galaviz v. Reyes*, 95 F.4th 246, 251 (5th Cir. 2024); *see also* 22 U.S.C. § 9001(b)(1).

9. *Galaviz*, 95 F.4th at 251 (citing 22 U.S.C. § 9003(e)).

This case concerns one such defense: the "well-settled" exception found in Article 12. Article 12 provides that, "when a court receives a petition for return within one year after the child's wrongful removal, the court 'shall order the return of the child forthwith.'"[10] But "where the proceedings have been commenced after the expiration of the period of one year," the court "shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."[11] "The underlying purpose of this defense is to recognize that at some point a child may become so settled in a new environment that return is no longer in the child's best interests."[12]

To assess whether the well-settled defense applies, we consider seven factors:

> (1) the child's age; (2) the stability and duration of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child has friends and relatives in the new area; (5) the child's participation in community or extracurricular activities; (6) the respondent's employment and financial stability; and (7) the immigration status of the respondent and child.[13]

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10. *Lozano*, 572 U.S. at 5, 134 S.Ct. 1224 (quoting Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, art. 12).

11. *Id.* (quoting Hague Convention, art. 12).

12. *Hernandez*, 820 F.3d at 787.

13. *Id.* at 787-88.

III

"A district court's determination of whether a child is well-settled presents a mixed question of law and fact."[14] "We review the district court's factual findings for clear error, and its legal conclusions *de novo*."[15]

Our precedent has long treated the balancing of factors under the well-settled defense as a legal question subject to de novo review.[16] The dissent contends that the Supreme Court's decisions in *Bufkin v. Collins*[17] and *Monasky v. Taglieri*[18] require clear-error review. They do not.

Bufkin addressed the standard of review the Veterans Court must apply in reviewing the Department of Veterans Affairs' (VA) application of the statutory "benefit-of-the doubt rule."[19] This "unique" rule, codified by Congress, instructs the VA to "give the benefit of the doubt to the claimant" whenever "there is an approximate balance of positive and negative evidence."[20] The Supreme Court held that the Veterans Court must review the VA's application of

14. *Id.* at 787.

15. *Id.*

16. *Id.* at 790.

17. 604 U.S. 369, 145 S.Ct. 728, 221 L.Ed.2d 192 (2025).

18. 589 U.S. 68, 140 S.Ct. 719, 206 L.Ed.2d 9 (2020).

19. *Id.* at 733.

20. *Id.*; 38 U.S.C. § 5107(b).

the rule "the same way it would any other determination—by reviewing legal issues *de novo* and factual issues for clear error."[21] It further held that determining whether the evidence is approximately balanced is a "predominantly factual determination reviewed only for clear error."[22]

Like the VA's approximate-balance test, our analysis of whether a child is well-settled presents a mixed question of fact and law. And the Supreme Court has made clear that the standard of review "depends 'on whether answering it entails primarily legal or factual work.'"[23] Here, however, is where the approximate-balance test and our well-settled test part ways. The VA's determination of whether record evidence is approximately balanced is a textbook factual inquiry. It entails categorizing each piece of evidence based on whether it supports or undermines the claim, comparing the relative strength and persuasiveness of the evidence on each side, then determining whether it is approximately balanced.[24] As the Supreme Court put it, this is "inherently a factual task."[25]

By contrast, our well-settled inquiry is primarily legal. We do not engage in a mathematical tallying of how the evidence aligns with each of the seven factors. Rather,

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21. *Bufkin*, 145 S.Ct. at 733.

22. *Id.*

23. *Id.* at 739 (quoting *U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 396, 138 S.Ct. 960, 200 L.Ed.2d 218 (2018)).

24. *Id.* at 738-39.

25. *Id.* at 738.

the well-settled factors are a judicially crafted framework designed to inform a legal judgment: Is the child well-settled? None of the factors are dispositive.[26] We do not conduct a "head-to-head weighing" of the factors favoring one party versus the other.[27] Our review is holistic and *guided*—but not dictated—by the factors.[28] Our task is to assess whether, taken together, the evidence supports the district court's legal conclusion.

Congress might well have prescribed a different review standard had it envisioned evidence-balancing akin to the VA regime. But it did not. To be sure, the well-settled defense is a "creature of statute,"[29] deriving from the Hague Convention as implemented by Congress.[30] But the balancing framework we use to assess that defense is not the product of statute. The factors are judicial constructs, not legislative commands. So we are not bound to the sort of calibrated factfinding Congress required

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26. *Hernandez*, 820 F.3d at 788.

27. *See Bufkin*, 145 S.Ct. at 749 (Jackson, J., dissenting).

28. *See Hernandez*, 820 F.3d at 787-88 (stating that "the following factors *should* be considered" and noting that immigration is "one relevant factor in a multifactor test" (emphasis added)) (citing *Lozano v. Alvarez*, 697 F.3d 41, 57 (2d Cir. 2012); *In re B. Del C.S.B.*, 559 F.3d 999, 1009 (9th Cir. 2009)); *see also Lozano*, 697 F.3d at 57 (listing factors that courts should "generally" consider); *In re B. Del C.S.B.*, 559 F.3d at 1009 (listing "a number" of non-exclusive factors courts should consider).

29. *Bufkin*, 145 S.Ct. at 740.

30. *See post*, at n.5.

under the VA's benefit-of-the-doubt rule. Indeed, if Congress mandated anything here, it is this: courts "shall . . . order the return of the child" unless the respondent proves the well-settled defense applies. The factors we consult in applying that standard are just that—factors—not formulas that impose a duty of evidentiary calibration. They remain useful aids—but they are tools of our own making, crafted not to precisely quantify the weight of each piece of evidence, but to "generate guidance for . . . future courts" wrestling with the well-settled defense.[31] Our role, then, is not to duplicate the district court's work in "compar[ing] the relative strength and persuasiveness of" the evidence.[32] Rather, we evaluate whether the district court properly applied the law—the requirements of the Hague Convention—to the facts before it. Unlike the evidentiary balancing required in *Bufkin*, this application of the factors is a legal inquiry, not a factual one.

On rehearing, Castro contends—and the dissent agrees—that the Supreme Court's decision in *Monasky v. Taglieri*[33] abrogates our de novo standard of review.[34] It

31. *Bufkin*, 145 S.Ct. at 741.

32. *See post*, at 372 (quoting *Bufkin*, 145 S.Ct. at 738).

33. 589 U.S. 68, 140 S.Ct. 719, 206 L.Ed.2d 9 (2020).

34. Because Castro never raised her *Monasky* argument before our panel, it is waived. *See Hightower v. Texas Hosp. Ass'n*, 73 F.3d 43, 44 (5th Cir. 1996); *see also Browning v. Navarro*, 894 F.2d 99, 100 (5th Cir. 1990) ("Generally speaking, a party may not raise an argument for the first time in a petition for rehearing."). Nevertheless, we exercise our discretion to address it. *Est. of Lisle v. Comm'r of Internal Revenue*, 341 F.3d 364, 384 (5th Cir.

does not—no more than *Bufkin* did. *Monasky* addressed the standard of review for determining a child's habitual residence, an element of the prima facie case for return.[35] Like the well-settled defense, habitual residence is a mixed question of law and fact.[36] In resolving the proper standard of review, the Court asked whether resolving that question "entails primarily legal or factual work."[37] Observing that habitual residence is a "fact-driven inquiry," the Court applied clear-error review. That holding says nothing about whether the well-settled defense is primarily legal or factual. Without clearer direction from the Supreme Court, we cannot override the *de novo* standard of review set by the panel in *Hernandez*.[38] As we have elsewhere confirmed, *Monasky*'s clear-error standard of review is not binding in Hague Convention contexts other than the

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2003); *see also Rex Real Est. I, L.P. v. Rex Real Est. Exch., Inc.*, No. 23-50889, 2024 WL 4481850, at *3 (5th Cir. Oct. 14, 2024) ("When we determine that a party has not adequately preserved an argument for our review, we retain the discretion to overlook that deficiency and nonetheless consider the argument.").

35. *Monasky*, 589 U.S. at 70-71, 140 S.Ct. 719.

36. *Id.* at 83.

37. *Id.* at 84.

38. *See Martin v. Medtronic, Inc.*, 254 F.3d 573, 577 (5th Cir. 2001) (explaining that, under our rule of orderliness, one panel may depart from another's holding only when "such overruling is *unequivocally* directed by controlling Supreme Court precedent" (quotation omitted) (emphasis added)).

habitual-residence inquiry.[39] So, in line with at least three of our sister circuits, we continue to treat the well-settled defense as a primarily legal inquiry.[40]

We therefore adhere to our settled standard of review: factual findings are examined for clear error, and the legal question—whether, in light of the holistic balance of the seven nondispositive factors, the evidence supports the district court's conclusion—is reviewed de novo.

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39. *Galaviz v. Reyes*, 95 F.4th 246, 252, 254 (5th Cir. 2024) (concluding that the question of "whether 'the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms' would not permit return of a child entails primarily legal work" and is "quite different" from the habitual-residence question addressed in *Monasky*).

40. *See Broca v. Giron*, 530 F.App'x 46, 48 (2d Cir. 2013) (applying *de novo* review); *Lomanto v. Agbelusi*, No. 23-993, 2024 WL 3342415, at *2 (2d Cir. July 9, 2024) (applying *de novo* review post-*Monasky*); *In re B. Del C.S.B.*, 559 F.3d 999, 1008 (9th Cir. 2009) (applying *de novo* review); *Alcala v. Hernandez*, 826 F.3d 161, 171 n.7 (4th Cir. 2016) (same). *But see da Costa v. de Lima*, 94 F.4th 174, 181 (1st Cir. 2024) (applying clear-error review); *Cuenca v. Rojas*, 99 F.4th 1344, 1350 (11th Cir. 2024) (same).

The dissent suggests that our standard-of-review decision creates a circuit split. Not so. The split already exists, as the foregoing cases make clear. Our approach aligns with the circuits that apply multi-factor balancing tests—and contrasts with the First and Eleventh Circuits, which apply a totality-of-the-circumstances test akin to *Monasky*'s habitual-residence inquiry. *See da Costa*, 94 F.4th at 181 (analyzing a totality-of-the-circumstances approach to the well-settled defense); *Cuenca*, 99 F.4th at 1350 (same).

IV

The parties do not dispute the district court's finding that Brito established a prima facie case for A.F.'s return. The sole question on appeal is whether the well-settled defense bars that return.

We conclude that the district court erred in both its legal framing and its application of the well-settled exception. Balancing the relevant factors de novo, we are not persuaded that A.F. has formed such deep or enduring ties to her new environment that returning to her home in Venezuela would contravene her best interests.

The first factor is A.F.'s age. She is seven years old—and was five at the time of the bench trial. The district court acknowledged, citing our precedent in *Hernandez*, that a child of this age is "a very young child not able to form the same level of attachments and connections to a new environment as an older child."[41] Yet the district court described this factor as "lukewarm"—a characterization unsupported by the record. A.F.'s young age means it will take more time for her to become "so settled" in the United States that her best interests lie in remaining here rather than returning home to Venezuela.[42] At age seven,

41. *Hernandez*, 820 F.3d at 789.

42. *See id.*; see also *Hernandez v. Erazo*, No. 23-50281, 2023 WL 3175471, at *4 (5th Cir. May 1, 2023) (holding that young age can "discount[] the detrimental effect of being relocated" even where residential stability and daycare attendance cut against return).

A.F. is not yet capable of forming the kind of enduring attachments that the Convention deems sufficient to override its default return remedy.

The second factor considers the stability and duration of A.F.'s residence in the United States. The district court found that over the past three years, Castro and A.F. have lived in two separate residences. It characterized this arrangement as stable and weighed the factor in favor of Castro. That conclusion was error. That A.F. has already moved multiple times in her brief time here undermines any claim of residential stability.[43] So too does the fact that Castro and A.F. currently reside in the home of Castro's boyfriend. Should that relationship falter, Castro and A.F. would be forced to relocate once more. Castro conceded that if the relationship ended, she and A.F. would need to downgrade to a cheaper apartment, as they rely—at least in part—on her boyfriend's income. Even if A.F.'s present living situation appears stable, its long-term viability is far from assured.[44]

The third factor examines whether the child attends school consistently. The district court rightly found that A.F. is enrolled in kindergarten and performing well.

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43. *Cf. Belay v. Getachew*, 272 F. Supp. 2d 553 (D. Md. 2003) (holding that stability factor weighed in favor of well-settled defense where child had lived at only one address since moving to the United States).

44. *Cf. Ramirez v. Buyauskas*, 2012 WL 606746 (E.D. Pa. Feb. 24), *opinion amended on other grounds*, 2012 WL 699458 (E.D. Pa. Mar. 2, 2012) (analyzing not just whether residence was currently stable but also whether it would *remain* stable).

But that fact must be viewed in context and alongside the other factors.[45] At her young age, A.F. has ample time and opportunity to integrate into a new school community in Venezuela.[46] Moreover, A.F.'s school environment in United States is not especially secure, given the uncertainty of her immigration status, the nature and impermanence of Castro's transient employment, and their reliance on Castro's boyfriend for housing. These circumstances suggest a real possibility of future moves, which could disrupt A.F.'s schooling and undercut any sense of educational continuity.

The fourth factor considers whether the child has formed meaningful relationships with friends and family in her new environment. A.F. does have at least six close relatives in the United States, as well as several friends she sees regularly. Still, most of A.F.'s extended family—

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45. The dissent claims we impermissibly "bleed[] several factors together to circumvent the analysis of one." *Post*, at 375. But it cites no support for the notion that each factor must be hermetically sealed and analyzed in isolation before the totality is considered. Our precedent says the opposite: the well-settled factors "should not be considered in the abstract." *Hernandez*, 820 F.3d at 788. In any event, the dissent endorses the district court's treatment of the fourth factor even though that analysis "overlapped" with its assessment of the third. *Post*, at 375-76. And the dissent itself folds delay into the factor-based framework, "incorporat[ing]" it rather than treating it as distinct. *Post*, at 381-82.

46. *See Erazo*, 2023 WL 3175471, at *4 ("Although [the child] has been in a stable home for over a year and attends daycare six days a week, his young age discounts the determinantal effect of being relocated.").

including Castro's parents, two brothers, a cousin, an aunt and uncle, and Brito's mother, siblings, and additional relatives—remain in Venezuela. Most notably, A.F. cannot see her father in the United States. As discussed at oral argument, Brito attempted to visit her but was denied a visa. While the inquiry is not a numbers game, the fact that A.F. has a "large extended family" in Venezuela remains significant—particularly because her relationships in the United States are entirely derivative of her mother's.[47] In addition, Castro's boyfriend lacks lawful permanent resident status, and none of A.F.'s relatives in the United States are U.S. citizens. The unsettled immigration status of A.F.'s family here casts doubt on the durability of those relationships and weighs against a finding that they are well-settled.

The fifth factor examines A.F's participation in community activities. The district court found that A.F. regularly attends church, visits a primary care physician, goes on family vacations, has playdates with friends, uses community playgrounds, goes swimming, and attends birthday parties. The district court deemed this evidence "overwhelming" support for the well-settled defense. We disagree. Though it certainly weighs in Castro's favor, this factor on its own does not demonstrate that A.F. is "so settled" in the United States that returning to Venezuela would be contrary to her best interests—especially since she could engage in many of these same activities there.[48]

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47. *See Hernandez*, 820 F.3d at 789.

48. *See id.* at 789-90 (holding child was not well-settled despite evidence that he attended church regularly with his

The sixth factor considers Castro's economic and employment stability. The district court found that Castro "has been gainfully employed since arriving in the United States and provides for A.F." But while the court acknowledged that Castro has changed jobs four times since her arrival, it failed to give appropriate weight to other facts that cast doubt on the stability of her employment. For instance, the court found that Castro was unemployed for at least two months between jobs. Nor does the record show that any of her jobs were permanent positions offering reliable income or benefits. The court further acknowledged that Castro shares both a car and an apartment with her boyfriend but overlooked the precariousness of that arrangement—namely, that if the relationship ended, Castro and A.F. would have to relocate. The end of the relationship would also leave them without transportation, impairing A.F.'s ability to attend school and participate in community life. While Castro is currently meeting A.F.'s basic needs, her financial circumstances are not "so settled" that it would be against A.F.'s best interest to return to her life in Venezuela.[49]

The seventh and final factor concerns immigration status. The district court acknowledged that neither Castro nor A.F. has lawful permanent residence status

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mother); *Vite-Cruz v. Sanchez*, 360 F.Supp.3d 346, 358 (D.S.C. 2018) (holding child was not well-settled despite evidence that he regularly spends time with his friends and is "very active in his school's jazz ensemble").

49. *See Vite-Cruz*, 360 F.Supp.3d at 358 (considering financial dependence on mother's boyfriend evidence opposing a well-settled determination).

in the United States and that both have pending asylum applications. But the court deemed this factor merely "lukewarm." That conclusion was error. Castro presented no evidence suggesting their asylum claims are likely to succeed. Indeed, the court found no evidence that A.F. would face a "grave risk of harm" if returned to Venezuela—a finding that undercuts any suggestion that her asylum claim will succeed.[50]

We acknowledge that "immigration status is not dispositive" and that lacking lawful permanent resident status "does not necessarily prevent a child from developing significant connections in a new environment."[51] Still, "immigration status should not be analyzed in the abstract," and the Convention requires "an individualized, fact-specific inquiry."[52] The district court erred by evaluating immigration status in isolation, rather than

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50. Asylum is available only "where 1) a person is 'unwilling to return to' their home country 'because of persecution or a well-founded fear of persecution'; and 2) the applicant has demonstrated that 'race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.' " *Tamara-Gomez v. Gonzales*, 447 F.3d 343, 348 (5th Cir. 2006) (quoting 8 U.S.C. § 1101(a)(42), 1158(b)). The fact that there is no "grave risk of harm" if A.F. returned to Venezuela strongly suggests that she does not face persecution there. Of course, the immigration court will reach its own findings in adjudicating A.F.'s asylum claim. But based on the record before us, she appears unlikely to satisfy the statutory requirements for asylum.

51. *Hernandez*, 820 F.3d at 788.

52. *Id.* at 788-89.

assessing how it interacts with and undermines the other well-settled factors.[53] Here, the uncertainty surrounding Castro's and A.F.'s immigration status permeates every aspect of their life in the United States, rendering it fundamentally unstable. This factor weighs heavily against finding that A.F. is well-settled.

Overall, balancing the factors *de novo*, we disagree with the district court's assessment that factors one and seven are merely "lukewarm," and that the remaining factors "overwhelmingly" support a "well-settled" finding. The court failed to give due weight to A.F.'s young age—which favors her ability to readjust to life in Venezuela—and to her uncertain immigration status, which erodes any stability she may have developed in the United States. The district court also gave more weight to the remaining factors than is supported by the record.

Certainly, as both the dissent and the district court observe, the record reflects that A.F. has enjoyed a stable and loving life with her mother in the United States. But that is not the legal question before us. Our task is to determine whether A.F. is "*so settled* in a new environment that return is no longer in [her] best interests."[54] On

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53. Once again, the dissent contends that we improperly "bleed" our analysis of immigration status into the other factors. *Post*, at 378-79. But nothing in our precedent requires that each factor be assessed in hermetic isolation. *See supra*, at 364 n.45. A holistic inquiry necessarily contemplates how various aspects of a child's life—legal status included—interact to shape her connection to a new environment.

54. *Hernandez*, 820 F.3d at 787 (emphasis added).

balance, the answer is no. The factors do not support the conclusion that A.F. is so firmly planted in the United States that returning her to Venezuela would contravene her best interests. At most, the record shows a temporary foothold in Dallas, not the kind of enduring roots that justify overriding the Convention's default remedy of return.

This decision is not easy, nor is it without sorrow. But it accords with the Convention's core objective: "to restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court."[55] Because Brito established a prima facie case for return—and because the well-settled exception does not apply—the district court erred in denying his petition.[56]

V

Concluding that A.F. is not well-settled in her new environment, we VACATE the district court's order and RENDER judgment in favor of Brito. We REVERSE and REMAND with instructions that the district court enter an order directing A.F.'s return to Venezuela.

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55. *England*, 234 F.3d at 271 (quotations omitted).

56. Brito also argues that the district court erred in failing to consider its own delay in trying the case and Castro's previous delays in responding to his petition. Because we render judgment in Brito's favor on the grounds that the well-settled defense does not apply, we need not reach the delay issue.

Appendix A

DANA M. DOUGLAS, ***Circuit Judge, dissenting***:

The majority opinion reverses the district court's order and renders judgment in Brito's favor. In doing so, it reweighs evidence, bleeds various factors together in violation of established law, and assumes imminent failure of an undecided asylum claim. Today's decision punishes A.F.—who is well-settled in her new home—for her mother's decisions. I respectfully dissent.

I

A

Brito and Castro are Venezuelan citizens and former romantic partners. On May 3, 2018, their daughter, A.F., was born. Brito and Castro were never married, but they lived together in Brito's mother's home in Venezuela when A.F. was born. Approximately two years after the couple split up, in August 2021, Brito moved from Venezuela to Madrid, Spain, for a new job; he has not returned to Venezuela since then.

At some point after Brito moved, Castro mentioned to Brito and/or his mother that she was considering traveling to the United States, but never informed them of a desire to bring A.F. with her; accordingly, Brito never consented to A.F.'s removal from Venezuela. Nevertheless, about three months after Brito moved, Castro left Venezuela with A.F., entering the United States without documentation. They immediately presented themselves to the United States Border Patrol in San Luis, Arizona, and applied

for asylum. Both of their asylum applications remain open; although they do not have Lawful Permanent Residence status in the United States, both are awaiting asylum interviews with the U.S. Citizenship and Immigration Services ("USCIS").[1] Approximately six months before moving, Castro began a romantic relationship with Otton Rodriguez, who has Temporary Protected Status under the Immigration and Nationality Act ("INA"). Rodriguez has resided with Castro and A.F. in Texas since they arrived. They married during the pendency of this appeal.

Since moving to Texas, Castro has held positions at four companies and has earned enough money to open a bank account in the United States. While Castro worked, she either hired a caretaker for A.F. or left A.F. in the care of family. Eventually, A.F. began attending kindergarten full-time in Addison, Texas, and began seeing a primary care physician.

B

On January 20, 2022, Brito's mother filed a petition under the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or "Convention") with Venezuelan authorities, seeking A.F.'s return. That application, however, was not transferred to the U.S. Department of State until November 7, 2022, at which point the State Department attempted to contact Castro. Because Castro did not consent to return to

1. Castro's brief notes that she and A.F. were provided Temporary Protected Status under the INA during the pendency of this appeal. She again represented this fact at oral argument.

Venezuela, Brito petitioned the United States District Court for the Eastern District of Texas on April 19, 2023, for A.F.'s return under the Hague Convention, Oct. 25, 1980, T.I.A.S. No. 670, and the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. §§ 9001-9011.

The matter was ultimately transferred to the Northern District of Texas. Following the transfer, Brito repeatedly requested status conferences to schedule a trial. The court scheduled an off-the-record status conference for November 7, 2023. Brito asserts that the judge did not address his concerns at that conference, instead requesting a recitation of facts before ending the conference due to a scheduling conflict. On November 8, the court reset the conference. On November 10, the parties attended a Zoom conference at which the court allegedly indicated that trial would be set no sooner than March 2024. In a later status report, Brito requested an expedited trial setting and reserved the right to request a formal statement of delay or judicial transfer. In other filings, Brito compared the court's delay with the time other Hague Convention cases in the district took to reach trial. The court denied all requests without a hearing and scheduled the final trial.

The court held a two-day bench trial beginning on March 21, 2024. On May 8, 2024, the district court issued findings of fact and conclusions of law, finding that A.F. has stable housing in the United States, Castro is financially secure and amply provides for A.F., and Rodriguez cares deeply for and serves as a father figure to A.F. The

district court also found that A.F. has formed significant connections to her environment in Texas—stronger than those to Venezuela. Therefore, it concluded that, while Venezuela is A.F.'s country of habitual residence, Castro successfully demonstrated that A.F. is well-settled in Texas. It issued a final judgment denying Brito's complaint and petition for A.F.'s return. Brito appealed.

II

The Hague Convention addresses "the problem of international child abductions during domestic disputes." *Lozano v. Montoya Alvarez*, 572 U.S. 1, 4, 134 S.Ct. 1224, 188 L.Ed.2d 200 (2014) (quoting *Abbott v. Abbott*, 560 U.S. 1, 8, 130 S.Ct. 1983, 176 L.Ed.2d 789 (2010)). "The Convention states two primary objectives: 'to secure the prompt return of children wrongfully removed to or retained in any Contracting State,' and 'to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.'" *Id.* at 4-5, 130 S.Ct. 1983 (quoting Hague Convention, art. 1). So, the focus "is the return of the child," which lays the venue for the ultimate custody determination. *Id.* at 5, 130 S.Ct. 1983.

For a petitioner to make a prima facie showing that the child should be returned to the country of habitual residence, they must demonstrate that (1) the child was removed from the country of habitual residence; (2) the removal violated petitioner's rights of custody under the laws of the country of habitual residence; and (3) petitioner was exercising those rights at the time of removal. *Larbie*

v. Larbie, 690 F.3d 295, 307 (5th Cir. 2012). If a petitioner demonstrates these three elements, the child shall be returned to the country of habitual residence. *See id.* at 306-07.

Nevertheless, the Convention's remedy of return "is not absolute." *Lozano*, 572 U.S. at 5, 134 S.Ct. 1224. The Convention provides several affirmative defenses to the respondent, typically proven by a preponderance of the evidence, to refute a petitioner's prima facie showing that the child was wrongfully removed from their country of habitual residence. Many of these defenses are housed in Article 13 of the Convention, but Article 12 holds the one we consider today: "[W]hen a court receives a petition for return within one year after the child's wrongful removal, the court 'shall order the return of the child forthwith.'" *Id.* (quoting Hague Convention, art. 12). But "where the proceedings have been commenced after the expiration of the period of one year," the court "shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment." *Id.* (quoting Hague Convention, art. 12).

Courts consider the following factors for the well-settled defense:

> (1) the child's age; (2) the stability and duration of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child has friends and relatives in the new area; (5) the child's participation in community or extracurricular

> activities; (6) the respondent's employment and financial stability; and (7) the immigration status of the respondent and child.

Hernandez v. Garcia Pena, 820 F.3d 782, 787-88 (5th Cir. 2016). While "[c]ourts diverge . . . with regard to the significance of immigration status," we have concluded "that immigration status is neither dispositive nor subject to categorical rules, but instead is one relevant factor in a multifactor test." *Id.* at 788. "The underlying purpose of this defense is to recognize that at some point a child may become so settled in a new environment that return is no longer in the child's best interests." *Id.* at 787. Ultimately, even if an affirmative defense applies, "a federal court has 'and should use when appropriate' the discretion to return a child to his or her place of habitual residence 'if return would further the aims of the Convention.'" *England v. England*, 234 F.3d 268, 271 (5th Cir. 2000) (quoting *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996)).

III

Before considering the merits, we must adopt the proper standard of review. The majority opinion takes the traditional path of reviewing factual findings for clear error and legal determinations de novo. However, both *Monasky v. Taglieri*, 589 U.S. 68, 140 S.Ct. 719, 206 L.Ed.2d 9 (2020), and *Bufkin v. Collins*, 604 U.S. 369, 145 S. Ct. 728, 221 L.Ed.2d 192 (2025), demand that clear-error review cover the entire analysis.

Castro argues on rehearing that *Monasky* mandates clear-error review of the well-settled defense; today's

majority opinion wrongly labels that opinion inapplicable. In *Monasky*, the Court considered two interrelated issues: (1) whether an actual agreement between the parents is required to establish habitual residence; and (2) the standard of review of the habitual-residence inquiry. 589 U.S. at 76, 140 S.Ct. 719. The Court held that the habitual-residence inquiry is inherently factual and "should be judged on appeal by a clear-error standard deferential to the factfinding court." *Id.* at 84, 140 S.Ct. 719. And while it is true that the habitual-residence inquiry is distinct from the well-settled defense, a comparison shows just how similar the inquiries' factual natures are.

First, *Monasky* explained that the "text alone does not definitively tell us what makes a child's residence sufficiently enduring to be deemed 'habitual,'" instead stating that "the term 'habitual' . . . suggest[s] a fact-sensitive inquiry, not a categorical one." *Id.* at 76-77, 140 S.Ct. 719. Similarly, the Hague Convention's text does not define what makes a child "settled in its new environment." But the term "settled" certainly suggests a fact-intensive inquiry. After all, the well-settled defense asks whether allowing the child to remain is in their "best interests." *Hernandez*, 820 F.3d at 787. It is difficult to imagine a more fact-driven inquiry.

Second, the Court described various considerations in the habitual-residence analysis. For instance, it noted the importance of "the family and social environment in which the child's life has developed." *Monasky*, 589 U.S. at 77, 140 S.Ct. 719 (citation modified). It also identified several oft-considered facts, including a change in

geography combined with the passage of time, age of the child, immigration status of both the child and parent, the child's academic activities, the child's social engagements, any participation in sports programs or excursions, meaningful connections with people and places in the new country, language proficiency, and the location of personal belongings. *Id.* at 78 n.3, 140 S.Ct. 719 (quoting Federal Judicial Center, J. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges* 67-68 (2d ed. 2015)). These factors may sound familiar because they are: We consider at least six of them in the well-settled inquiry. And identical to our inquiry today, "[n]o single fact . . . is dispositive across all cases." *Id.* at 78, 140 S.Ct. 719; *cf. also id.* (citing with approval the statement in *Karkkainen v. Kovalchuk*, 445 F.3d 280, 291 (3d Cir. 2006), that the factor-based habitual-residence inquiry "cannot be reduced to a predetermined formula and necessarily varies with the circumstances of each case"). If these considerations make the habitual-residence inquiry factual, surely they do the same to the well-settled inquiry.

And third, as in *Monasky*, our mixed question of law and fact begins with a basic legal question: "What is the appropriate standard for [the well-settled defense]?" *Id.* at 84, 140 S.Ct. 719. After "correctly identif[ying] the governing totality-of-the-circumstances standard, . . . what remains for the court to do in applying that standard . . . is to answer a factual question"—whether remaining is in the child's best interest.[2] *Id.* Nor are we dealing with

2. We do not purport to make custody determinations, but it is telling that this circuit's state courts identify this issue as a

"'a long history of appellate practice' indicating [that] the appropriate standard" is de novo review. *Id.* (quoting *Pierce v. Underwood*, 487 U.S. 552, 558, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)). "[T]here has been no uniform, reasoned practice in this regard," certainly "nothing resembling 'a historical tradition.'" *Id.* (quoting *Pierce*, 487 U.S. at 558, 108 S.Ct. 2541). And while the majority claims that its view is "in line with at least three of our sister circuits," *ante*, at 363 & n.40, the cases it cites in support predominantly predate *Monasky.*[3] Indeed, the two published cases that do *not* fit within the majority's mold are those cases decided after *Monasky.*[4] We should not be the first to diverge.

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question of fact. *See*, *e.g.*, *In re M.J.*, 227 S.W.3d 786, 792 (Tex. App. 2006) ("The determination of what is in the best interest of the child is 'intensely fact driven.' " (quoting *Lenz v. Lenz*, 79 S.W.3d 10, 19 (Tex. 2002))); *Parrish v. Parrish*, 448 So. 2d 804, 807 (La. Ct. App. 2 Cir. 1984) ("The best interest of the child is a question of fact."); *cf. Hall v. Hall*, 134 So. 3d 822, 825 (Miss. Ct. App. 2014) (explaining that the standard of review is for clear error where the best interest of the child is the "polestar consideration").

3. The majority opinion's citation to *Lomanto v. Agbelusi*, No. 23-993, 2024 WL 3342415, at *2 (2d Cir. July 9, 2024) (summary order), as a post-*Monasky* application of the de novo standard of review is unpersuasive. In that unpublished opinion, the court did not discuss or even cite *Monasky*, instead following its previous path of de novo review in a summary order.

4. The majority opinion thus creates a circuit split between this circuit and the two circuits to have previously considered the issue of whether *Monasky* requires clear-error review of the well-settled defense. *See da Costa v. de Lima*, 94 F.4th 174, 180-81 (1st Cir. 2024); *Cuenca v. Rojas*, 99 F.4th 1344, 1349-50 (11th Cir. 2024).

Even if *Monasky* alone is unconvincing, the Court recently elucidated the standard-of-review selection criteria for similar cases. In *Bufkin*, it considered a Board of Veterans' Appeals decision denying two veterans' claims to disability benefits for PTSD. 145 S. Ct. at 736. The Court accepted that legal conclusions are subject to de novo review. "For example, if the veteran argues that the [Department of Veterans' Affairs ("VA")] misunderstood the definition of 'approximate balance,' the Veterans Court would construe the challenge as a legal one and review it de novo." *Id.* at 738. But typically, "a veteran challenges the VA's determination that the evidence on a particular material issue is not in approximate balance." *Id.* The Supreme Court concluded that this "is a predominantly factual question and thus subject to clear-error review." *Id.*

The method of weighing the factors in *Bufkin* was strikingly similar to the case at hand. "First, the VA reviews each item of evidence in the record and assigns weight to it." *Id.* The parties agreed that this was reviewed for clear error. Then, "the VA assesses the weight of the evidence as a whole," deciding whether there was an approximate balance on any material issue. *Id.* The Court noted that the second step had "both legal and factual components," considering "marshaling and weighing evidence" factual. *Id.*

"The appropriate standard of review for a mixed question depends 'on whether answering it entails primarily legal or factual work.'" *Id.* at 739 (quoting *U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 583 U.S.

387, 396, 138 S.Ct. 960, 200 L.Ed.2d 218 (2018)). "When applying the law involves developing legal principles for use in future cases, appellate courts typically review the decision de novo." *Id.* But, critically, "[w]hen the tribunal below is 'immerse[d]' in facts and compelled to 'marshal and weigh evidence' and 'make credibility judgments,' the appellate court 'should usually review a decision with deference.'" *Id.* (second alteration in original) (quoting *U.S. Bank*, 583 U.S. at 396, 138 S.Ct. 960). "Reviewing a determination whether record evidence is approximately balanced is 'about as factual sounding' as any question gets." *Id.* (quoting *U.S. Bank*, 583 U.S. at 397, 138 S.Ct. 960). Because the Board had to weigh evidence, the work was "fact intensive" and its determinations received deference. *Id.*[5]

5. The Supreme Court also distinguished between those evidence-weighing determinations that are constitutional, and those that are statutory. Constitutional standards are entitled to a presumption of de novo review that statutory standards do not receive. *See Bufkin*, 145 S. Ct. at 740. The Hague Convention undoubtedly falls in the "statutory" realm. Not only was it implemented by congressional act, but basic Supremacy Clause jurisprudence puts treaties on par with statutes. *See*, *e.g.*, *Reid v. Covert*, 354 U.S. 1, 18, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) ("This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty. . . ."); *Whitney v. Robertson*, 124 U.S. 190, 194, 8 S.Ct. 456, 31 L.Ed. 386 (1888) ("By the constitution, a treaty is placed *on the same footing*, and made of like obligation, with *an act of legislation*. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other." (emphases added)).

The inquiry before us today is one that required the district court to be "'immerse[d]' in facts and compelled to 'marshal and weigh evidence' and 'make credibility judgments.'" *Id.* (alteration in original) (quoting *U.S. Bank*, 583 U.S. at 396, 138 S.Ct. 960). The majority focuses on the fact that our analysis does not include a "head-to-head weighing" of the factors, and that "[o]ur review is holistic and *guided*—but not dictated—by the factors." *Ante*, at 362. But our court borrowed this test from the Second Circuit, which "formally adopt[ed]" this "fact-specific multi-factor test." *Lozano v. Alvarez*, 697 F.3d 41, 57 (2d Cir. 2012), *aff'd, Lozano*, 572 U.S. 1, 134 S.Ct. 1224, 188 L.Ed.2d 200; *accord Lozano*, 572 U.S. at 17, 134 S.Ct. 1224 (referring to whether a child is settled as "a factual determination"). And while the language in *Hernandez* may not be mandatory, stating that we "should" consider the seven factors we look to today, *Hernandez*, 820 F.3d at 787, the court used softer language because the determination is inherently factually driven and context dependent. *See Duarte v. Bardales*, 526 F.3d 563, 576 (9th Cir. 2008) (Bea, J., dissenting) (noting that "a court may consider any factor relevant to a child's connection to his living environment" before listing the seven factors that courts "generally" consider). But courts widely consider these same factors. *See Hernandez*, 820 F.3d at 787 ("We join the circuits that have addressed this issue and hold that the following factors should be considered. . . .").[6]

6. While the majority rightly notes that these factors are judicially created, *see ante*, at 362, nothing in *Bufkin* demands that the factors be statutorily created to compel a clear-error review. Indeed, our court conducts clear-error review in other judicially created doctrines—even ones that create exceptions

When considering the well-settled defense, the district court makes credibility judgments and considers evidence produced by each side, and, ultimately, "compares the relative strength and persuasiveness of" that evidence in determining whether a child's best interests would be served by remaining in their current environment. *Bufkin*, 145 S. Ct. at 738. Considering a child's best interests through record evidence "is 'about as factual sounding' as any question gets." *Id.* at 739 (quoting *U.S. Bank*, 583 U.S. at 397, 138 S.Ct. 960). Today we do not consider any inherently legal issue, such as whether the district court properly interpreted a statute. *See id.* at 738 ("[I]f the veteran argues that the VA misunderstood the definition of 'approximate balance,' the Veterans Court would construe the challenge as a legal one and review it *de novo.* So too if the veteran argues that the VA gave the benefit of the doubt to the wrong party."). But the "approximate balance" determination brought before the Supreme Court was "case specific and fact intensive." *Id.* at 740. The same is true of the well-settled defense as it is before us today.

Supreme Court precedent dictates that clear-error review dominates the *entire* analysis—not merely the

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to the constitutional standards that typically receive de novo review. *See United States v. Newman*, 472 F.3d 233, 237 (5th Cir. 2006) ("The district court's determination as to whether exigent circumstances existed is fact-specific, and we will not reverse it unless clearly erroneous."). Similar to our inquiry here, the exigent-circumstances test considers a "non-exhaustive" list of five factors. *See United States v. Aguirre*, 664 F.3d 606, 611 (5th Cir. 2011). That does not render the determination legal.

facts underlying each factor. Nevertheless, even if the majority opinion is correct in weighing the factors de novo, I respectfully disagree with its conclusion.

IV

The majority opinion identifies and considers the seven well-settled defense factors, but it blends them together without providing proper deference to the district court. I discuss each factor below.

A. Age

A.F. was five years old at the time of trial. I agree with the majority opinion that "A.F. is not yet capable of forming the kind of enduring attachments" that would weigh in favor of applying the well-settled defense. *Ante*, at 364.

B. Stability and Duration of Residence

The district court found that A.F. has lived with Castro and Rodriguez at two locations over the course of nearly three years. It concluded that she had stable housing during that time. The majority opinion reverses course on this, stating: "That A.F. has already moved multiple times in her brief time here undermines any claim of residential stability." *Ante*, at 364. But there is no support for this statement. First, A.F. has moved once since arriving to the United States. And second, the only cited legal support—a non-binding opinion from the District of Maryland—is inapposite. The district court in that case weighed the stability factor in favor

of a well-settled conclusion where the child had lived at only one location. *See Belay v. Getachew*, 272 F. Supp. 2d 553, 561 (D. Md. 2003). Under the majority's reading of *Belay*, the *only* way that a child may have "stability" in their new environment is if they live in one place for some indeterminate period of time.[7] But *Belay* does not stand for this restrictively narrow proposition, and the majority fails to cite to a decision of any court supporting that conclusion. It is unclear what more Castro could have done to provide A.F. with a settled home life. Moving once in three years is far from unstable, and holding otherwise creates an unrealistic hurdle.

Simultaneously, the majority opinion concludes that A.F. lacks housing stability because "Castro and A.F. currently reside in the home of Castro's boyfriend," and, "[s]hould that relationship falter, Castro and A.F.

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7. Similarly, the various cases that Brito cites in favor of his position that the home was unstable are distinguishable. Each considers a situation in which the child or children lived in several homes over a shorter period of time. *See*, *e.g.*, *Argueta v. Lemus*, No. 21-cv-209, 2022 WL 880039, at *3, 8 (N.D. Miss. Mar. 9, 2022) (finding that living in three locations in approximately eighteen months, including several months at the mother's friend's house, weighed against a well-settled finding); *In re A.V.P.G.*, 251 S.W.3d 117, 126 (Tex. App. 2008) ("The children were living in Belgium with both parents when they were suddenly uprooted, resided for a time with Guajardo's parents in Mexico, then relocated to a different home in Mexico with Guajardo; were placed in foster care in Texas; and then resided with their grandparents in Texas."); *Moretti v. Braga*, No. 23-cv-0586, 2023 WL 3590690, at *19 (N.D. Tex. May 22, 2023) (noting that the child "had no less [*sic*] than four different residences, some as temporary as a tent in a campground," over fourteen months).

would be forced to relocate once more." *Ante*, at 364.[8] But the Hague Convention does not work in theoretical possibilities. *See*, *e.g.*, *Farley v. Hill*, 150 U.S. 572, 577, 14 S.Ct. 186, 37 L.Ed. 1186 (1893) ("But a court cannot act upon such uncertain conjectures."); *DeFunis v. Odegaard*, 416 U.S. 312, 320 n.5, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (refusing to consider "speculative contingencies" (quoting *Hall v. Beals*, 396 U.S. 45, 49, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969))). Imagine the limitless possibilities that could weigh against stability if we allow speculation to creep into our analysis.

Consider, for instance, a tenant that pays rent to a landlord, with no suggestion they have violated their lease. Is it not possible that rent increases, necessitating a move? Or that the landlord chooses not to relet to the tenant at the expiration of the initial lease term, for no discernable reason? Imagine they live in a hurricane-prone region. What if a natural disaster strikes, rendering the home uninhabitable, a scenario with which this circuit is tragically familiar? More pointedly, is it not possible that *anyone* could split up with their partner and need a

8. In support of this speculative proposition, the majority cites loosely to a decision from the Eastern District of Pennsylvania, which considered whether the child's residence would remain stable in the future. *Ante*, at 364 n.44. That case notes that future stability was promising "because the rent is government-subsidized and is far less than the amount respondent receives each month in governmental assistance." *Ramirez v. Buyauskas*, No. 11-6411, 2012 WL 606778, at *, 2012 U.S. Dist. LEXIS 24899, at *53-54 (E.D. Pa. Feb. 24, 2012). This is far from the speculative reasons provided in the majority opinion for finding A.F.'s future housing *unstable.*

new home? Does that make their housing unstable? What if they have lived together for twenty years? Fifty years?

The majority opinion draws no lines as to what a "stable" environment is in the face of this hypothetical. Instead, it premises A.F.'s lack of stability on speculation, which does not further the Convention's purpose. Indeed, any of these possibilities could just as likely arise in Venezuela, where A.F.'s father has never returned since his relocation to Spain.

Nor do Brito's arguments fare any better. He claims that Castro lived in four separate locations, asserting that her housing in temporary asylum facilities should weigh against stability. But he effectively stipulated to the fact that A.F. had only resided in two locations in the United States in the unopposed statement of facts. Moreover, the record supports the district court's determinations: Castro testified that she "handed [herself] over" to border patrol agents upon her arrival, at which point they transferred Castro and A.F. "to one of the refugee camps." They were only at that "family refugee center . . . for about one day" before they were sent to another refugee center for two days. They then were transferred to a hotel in Los Angeles by bus for one night, after which she flew to Texas. The well-settled defense—with good reason—establishes a one-year bar on its applicability. It would defy logic that one week's worth of one-or two-day stops upon arrival in a new country should cut against a finding that a child has stable housing.

I would defer to the district court's well-reasoned and well-supported factfinding and weigh this factor in favor of a well-settled finding.

C. Whether A.F. Attends School or Day Care

The district court next found that A.F. received daily care from two individuals—a caretaker and a family member—from her arrival in November 2021 until August 2023, at which point she began kindergarten. She attends school each day with her cousin, and they both go to her aunt's house after school. The district court also recognized her success in school, including her nomination for the Gifted and Talented Program (through which she receives a bilingual education) and her report cards, which demonstrate continued academic improvement.

The majority opinion discounts these factual findings, stating that they "must be viewed in context and alongside the other factors." *Ante*, at 364. In support, it cites only one unpublished opinion, *Hernandez v. Erazo*, which stated that, "[a]lthough [the child] ha[d] . . . been in a stable home for over a year and attend[ed] daycare six days a week, his young age discount[ed] the detrimental effect of being relocated." No. 23-50281, 2023 WL 3175471, at *4 (5th Cir. May 1, 2023). Stepping beyond the fact that *Erazo* was in a vastly distinguishable procedural posture—a motion to stay the district court order pending appeal, *id.* at *1—the court made that statement while weighing all of the factors together, *not* while individually analyzing them.[9]

9. The statement clearly credits the child's attendance at day care in favor of a well-settled finding before saying that it may be outweighed by a negative factor.

Allowing the ultimate weighing of the factors to impact the individual analyses puts the cart before the horse.

So, when the majority opinion states that A.F. "has ample time and opportunity to integrate into a new school community in Venezuela," and that her situation here "is not especially secure, given the uncertainty of her immigration status, the nature and impermanence of Castro's transient employment, and their reliance on Castro's boyfriend for housing," *ante*, at 364, it impermissibly bleeds several factors together to circumvent the analysis of one. Neither the Convention nor our case law endorses this approach, which would prevent a respondent from ever successfully invoking the defense. *See Hernandez*, 820 F.3d at 789-90 (considering each factor individually before weighing them together).[10]

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10. While the majority opinion states that there is no authority "for the notion that each factor must be hermetically sealed and analyzed in isolation before the totality is considered," *ante* at 364 n.45, *Hernandez* itself took that very approach. For instance, *Hernandez* considered stability of residence *separately* from immigration status. 820 F.3d at 789-90 ("With regard to [stability and duration of the child's new residence], although [the child's] residence is stable, he has lived in New Orleans less than a year. . . . Finally, the seventh factor we consider is immigration status. [The child and his parent] are both illegally present in the United States and involved in active removal proceedings. This involvement in active removal proceedings and categorization as new immigration violators seriously threatens their ability to remain in the United States."); *id.* at 790 ("[b]alancing the factors" against one another).

And while the majority points to the determination that delay folds into the factor-based framework, *ante* at 364 n.45, not only is that conclusion compelled by Supreme Court precedent,

For his part, Brito provides only a conclusory, threadbare challenge that the evidence was not overwhelming. But the record is replete with evidence to support the court's findings on this factor.

Thus, neither Brito nor the majority opinion shows that the district court committed clear error in reviewing this factor. I would accept its findings.

D. A.F.'s Friends and Relatives

The district court's consideration of this factor largely overlapped with its consideration of the third given the crossover of A.F.'s school and family communities. But it also noted that she "has many friends outside of her family with whom she has been photographed." Brito argues that while Castro testified that A.F. enjoys playdates and swimming, she failed to show the frequency or duration of those activities. He also complains that the court pointed to only three other schoolmates and one family member, which he considers insufficient.

The record supports the district court's findings. First, A.F. clearly has significant family ties to the area. She sees her cousin and aunt daily after school, took a family vacation to Disney World, and has several family members whom she sees "[a]lmost every day." Moreover, Rodriguez teaches her how to swim; she goes to the movies,

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as discussed below, but a parent's concealment has no individual impact on whether a child is well-settled *unless* the parent's actions directly impact the child. Those actions then fit squarely within our *Hernandez* framework. *See ante*, at 369–71.

zoo, and aquarium; and she rides bikes with her family. She also "has very tight connections with her friends" and talks about her friends every day. Castro produced photos of her with her friends Manuela and Emma at trial. Contrary to Brito's unsupported allegations, this evidence is significant.[11]

The majority opinion considers none of this evidence. Instead, despite acknowledging that "the inquiry is not a numbers game," it effectively counts the number of family members she has in both the United States and Venezuela. *Ante*, at 365. While it is certainly relevant that she has a large extended family in Venezuela, *see Hernandez*, 820 F.3d at 789, this fact alone does not conclusively demonstrate that the district court's findings were clearly erroneous. The majority opinion goes on to note that Castro's husband lacks Lawful Permanent Resident status, and that none of A.F.'s family members in the United States are citizens. First, Rodriguez has Temporary Protected Status under the INA.[12] Second,

11. Similarly, Brito's citation to an unpublished decision from the Middle District of North Carolina for the proposition that making "only a few friends" can weigh against a well-settled finding is readily distinguishable. There, the child was thirteen years old and had made significant connections in their home country before removal. *See Chambers v. Russell*, No. 20-cv-498, 2020 WL 5044036, at *1, 6 (M.D.N.C. Aug. 26, 2020).

12. Therefore, he "cannot be detained by DHS on the basis of his . . . immigration status in the United States," and he is "not removable from the United States." *Temporary Protected Status*, https://www.uscis.gov/humanitarian/temporary-protected-status (last visited April 29, 2025).

that A.F.'s family members are not citizens should not weigh against whether A.F. is well-settled. There is no evidence that any of these individuals face imminent removal, nor was any other information regarding their immigration statuses produced.[13]

This factor should weigh in favor of a finding that A.F. is well-settled.

E. Participation in Community or Extracurricular Activities

The district court labeled the evidence of A.F.'s extracurricular and community participation "overwhelming." Among other things, it found that she regularly attends church in Dallas with Castro and Rodriguez, sees a primary care physician, goes on trips with her family, has playdates with school friends, is learning English, plays at community playgrounds, swims, and attends birthday parties.

The majority opinion does not show that the district court's factual finding that this evidence is overwhelming is implausible in light of the record as a whole. Instead, after recounting the district court's findings, it simply states:

13. And, even if there was such evidence, there is no suggestion that we must consider their immigration statuses. Considering immigration statuses of the individuals with whom A.F. acquaints adds yet another formerly unrecognized consideration into the typical *Hernandez* factors.

"[w]e disagree."[14] *Ante*, at 365. Instead, the majority states that "this factor *on its own*" does not demonstrate that A.F. is well settled. *Ante*, at 365 (emphasis added). But the district court never made such a statement. And as it relates to the district court's comment that the evidence was overwhelming in favor of Castro, neither the majority nor Brito offers any evidence that clearly undermines the district court's finding. The trial testimony indicates that A.F. is involved in the community activities described above. Considering these facts, the district court correctly weighed this factor in favor of applying the well-settled defense. It is not the role of this court to conclude that the district court's finding of fact was clearly erroneous based on a belief that, "had [we] been sitting as the trier of fact, [we] would have weighed the evidence differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

F. Mother's Employment and Economic Stability

The district court found that Castro has held four jobs since arriving in the United States, "with each subsequent

14. True enough, the opinion cites two cases as demonstrating that a child may not be well-settled despite spending time with friends or attending church. But it relies on statements made during the ultimate weighing of the factors. These citations, if anything, cut against the majority opinion's statement, as they demonstrate that the extracurriculars weighed in *favor* of a well-settled finding. That factor was merely outweighed by others under the specific facts of those cases.

job having a higher salary than the one before."[15] It noted that she has been gainfully employed since she arrived and that she sufficiently provides for A.F. Additionally, Rodriguez contributes financially and splits rent and utility payments with Castro. Castro makes monthly car payments for Rodriguez's car, which they share, and she has healthcare covering both herself and A.F. Finally, Castro testified that if she and Rodriguez were to ever break up, she would move to a cheaper apartment so that she could provide for herself and A.F.

The majority opinion focuses not on her employment history, but on the fact that she "was unemployed for at least two months between jobs" and that "the record [does not] show that any of her jobs were permanent positions offering reliable income or benefits." *Ante*, at 365. As an initial matter, while Castro may have been unemployed for two months, she was employed for *twenty-seven* months, with her term of employment increasing at each company. Focusing on this two-month period is misleading. Nor does the majority opinion provide any law suggesting that "stability" in employment requires permanence or stable benefits.

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15. This finding was error. Castro's wage changed as follows: (1) $12/hour, (2) $16/hour, (3) $14/hour, and (4) $16.20/hour. She worked an estimated (1) 40 hours per week, (2) 45 hours per week, (3) 45 hours per week, and (4) 40 hours per week. Therefore, she had an approximate weekly income of: (1) $480, (2) $720, (3) $630, and (4) $648. Regardless of the metric by which the district court measured Castro's income, it did not consistently increase. Nevertheless, this error has no impact upon the analysis.

The majority then turns to the same concerns it espoused before: if Rodriguez and Castro break up, what of her economic stability? There is no support for considering hypothetical scenarios in determining that someone is not *currently* well-settled, absent some clear, imminent event. The majority cites only *Vite-Cruz v. Sanchez*, 360 F. Supp. 3d 346, 358 (D.S.C. 2018), for the proposition that economic reliance on a partner may weigh against a well-settled finding, especially if the partner ceases to provide assistance. But that case is doubly distinguishable: there, the mother "testified she [did] not work," so their economic stability was *entirely* dependent on the boyfriend, who was undocumented (with no indication that he had Temporary Protected Status). *Id.* As established above, Castro is employed. Moreover, Rodriguez has married Castro. Nothing in the majority opinion demonstrates how the district court clearly erred in this determination.

Nor do Brito's arguments carry the day. First, he claims that Castro's expenses exceed her income. But a review of the record shows that such would be the case only if Rodriguez were to move out and all expenses remained the same. The district court found that Castro would reduce her expenses under those circumstances, so this argument fails. Second, he complains that she has held four positions since moving, so her employment cannot be stable. But she has held each position for a longer time than the one directly preceding it. And while her previous position at the Great Wolf Lodge netted the highest weekly income, she has found more temporal stability at her final two jobs, including having been employed at Paycom for

approximately eleven months at the time of trial. Brito's argument finds no support, and the non-binding case law he cites is distinguishable.[16]

G. Immigration Status

As to the final factor, "it is undisputed that both [Castro] and A.F. do not have Lawful Permanent Residence status in the United States, but they both have actively pending asylum applications and are currently awaiting their asylum interview with USCIS." The district court credited Castro and A.F. with immediately surrendering themselves to border patrol upon entry to the United States and endeavoring through "the proper procedures to achieve lawful status in the United States." Finally, both Castro and A.F. have employment authorization documentation from the USCIS.

The majority opinion properly notes that immigration status is not dispositive and that a child may still develop contacts in a new environment. It also correctly states that immigration status should not be considered in the abstract, but requires "an individualized, fact-specific

16. *See*, *e.g.*, *Vite-Cruz*, 360 F. Supp. 3d at 358 (finding that if the mother's romantic partner were to lose his job, be deported, or otherwise split with the mother, she would be unable to provide for the child because she "depend[ed] *solely* on [her] boyfriend . . . to provide financial support for food, housing, clothing[,] and other necessities" (emphasis added)); *Moretti*, 2023 WL 3590690, at *20 (noting that the respondent's entrepreneurial activities were just "beginning to achieve a modicum of success," but that she did not make a paycheck the prior month and had "not held any other employment").

inquiry." *Hernandez*, 820 F.3d at 789. But it misreads this to mean that immigration status should not be considered "in isolation"; instead, it concludes that the court should consider how immigration status "interacts with and undermines the other well-settled factors." *Ante*, at 366. This contradicts *Hernandez* twice over. First, it overlooks *Hernandez*'s statement that immigration is merely "one relevant factor in a multifactor test." *Hernandez*, 820 F.3d at 788. This alone suggests that immigration does not bleed into other factors. The majority opinion, however, contrarily concludes that immigration status alone can "permeate[] every aspect of their life in the United States, rendering it fundamentally unstable," thus "weigh[ing] heavily against finding that A.F. is well-settled." *Ante*, at 366.

Second, it takes the statement that there must be an "individualized, fact-specific inquiry" out of context. *Hernandez* held that the district court should have "adequately examine[d] [the individual's] actual immigration status." *Hernandez*, 820 F.3d at 789. In other words, it should "take into account relevant, case-specific distinctions that may exist among and between different immigration statuses." *Id.* At risk of repetition, *Hernandez* requires "a proper analysis of [the individual's] specific immigration status." *Id.* Nowhere does *Hernandez* suggest that we ought to consider immigration within each other factor. Rather, it merely held that broad statements suggesting unlikelihood of removal are insufficient. *See id.*

The district court erred to the extent it failed to consider the statuses of A.F.'s and Castro's asylum

petitions. But the majority opinion does not stop here, instead pointing to the district court's conclusion Castro did not face a grave risk of harm under the Hague Convention. This, it says, "undercuts any suggestion that her asylum claim will succeed." *Ante*, at 366. This raises three concerns. First, there is no reason to believe that this is the only basis through which Castro seeks asylum. Second, it presupposes that the evidence provided in this proceeding is the same as that provided to USCIS—an assumption that the record does not unequivocally support. And third, it ignores that asylum seekers face different standards of proof and review than do those seeking to demonstrate a grave risk of harm under the Hague Convention.[17]

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17. *Compare* Hague Convention, art. 13(b) (providing that a contracting state is not bound to return a child if the person establishes that "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"), *and Soto v. Contreras*, 880 F.3d 706, 712 (5th Cir. 2018) ("[T]he Hague Convention does not require objective evidence in proving the grave-risk defense by *clear and convincing evidence*." (emphasis added) (citing 22 U.S.C. § 9003(e)(2)(A))), *with* 8 U.S.C. § 1101(a)(42) (defining "refugee" as one "who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, [their home country] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion"), 8 U.S.C. § 1158(a) (granting the Attorney General discretion in such determinations), 8 C.F.R. § 208.13(a) (placing the burden of proof on the applicant "to establish that he or she is a refugee as defined in" 8 U.S.C. § 1101(a)(42) and noting that the applicant's testimony, "if credible, may be sufficient to sustain the burden of proof without corroboration"), 8 C.F.R. § 208.13(b)(1)(i)-(ii)

Finally, after recognizing the district court's failure to fully consider immigration, the majority opinion chooses not to vacate and remand. Instead, it vacates and renders judgment in favor of Brito. This leapfrogs USCIS's review of Castro's and A.F.'s asylum claims, based solely on the conclusion—from a limited record—that it is unlikely that "her asylum claim will succeed," thus "erod[ing] any stability she may have developed in the United States." *Ante*, at 366. No law or record evidence supports these statements.

Even assuming that the outcome of Castro's asylum application is woefully uncertain—a claim we are ill-suited to make given the lack of record evidence to support it—it cannot be said that the district court clearly erred in weighing the other five factors over immigration and age. After all, "immigration status is [not] dispositive."

(requiring a preponderance of the evidence, with the burden of proof on the INS, to overcome an asylum applicant's showing of eligibility), 8 C.F.R. § 208.13(b)(1)(iii) (permitting an officer to grant asylum in their discretion if the applicant demonstrates "compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution" or they have "established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country"), *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) (noting that a well-founded fear may be proven by "less than a 50% chance of the occurrence taking place" and differentiating "well-founded fear" from "clear probability"), *and Orane v. Barr*, 919 F.3d 904, 910 n.2 (5th Cir. 2019) (stating that the likelihood "need not be 'more likely than not'" and that "a 'reasonable possibility' suffices," but declining to select a specific percentage requirement (quoting *Cardoza-Fonseca*, 480 U.S. at 440, 107 S.Ct. 1207)).

Hernandez, 820 F.3d at 788. Allowing it to seep into every other factor makes it dispositive. Even if the proper review is de novo, these factors still support a finding that A.F. is well-settled in Texas. The district court did not err in these determinations.

V

The question remains of whether the district court erred in failing to consider litigative delays in determining whether A.F. was well-settled. The Supreme Court has emphasized the importance of expeditious litigation of Hague Convention petitions. *Chafin v. Chafin*, 568 U.S. 165, 180, 133 S.Ct. 1017, 185 L.Ed.2d 1 (2013). Brito, citing this support for expeditious disposition, argues that the Fifth Circuit has endorsed a general goal of "adjudicating Hague Convention petitions 'within six weeks of the start of proceedings, or as expeditiously as possible within the context of the case.'" He further provides citations to courts from various other circuits that, at the least, properly identify the Hague Convention's procedures to protect expeditious litigation.

Brito argues that the district court improperly held that A.F. was well-settled by "ignoring the Hague Convention's central pillar of expediency." In essence, he asserts that, because Castro refused to inform him of her Texas address, and because the district court took months to try the case, it considered evidence that it would *not* have considered had the trial occurred sooner. Accordingly, he claims that the district court erred by not adequately considering the delay.

In response, Castro argues that Brito waived this argument by failing to discuss it in the Pre-Trial Order, not objecting to evidence, and failing to press that the district court should have exercised its discretion and denied the well-settled exception, and that the ICARA advocates against his reading. Finally, she argues that Brito really brings an exclusionary argument that the court should not have considered the evidence that was brought about by Castro's and the district court's delays.

As an initial matter, Castro misrepresents Brito's argument. He does not request that the court exclude all evidence that accumulated between the filing of his suit (or the six-week goal) and the trial, but that the court instead must consider the passage of time and why the delays occurred. Moreover, he could not have pressed this objection at trial. "Even though [Castro's] alleged paucity of pre-petition evidence certainly could have been fodder for [Brito's] closing argument, it was not until the court rendered its decision that the alleged error was committed, affording [Brito] something concrete to challenge." *da Costa v. de Lima*, 94 F.4th 174, 182 (1st Cir. 2024). For this reason, the First Circuit has "reject[ed] the suggestion of waiver" under these circumstances. *Id.* Although the trial transcript makes no mention of the alleged delays, the final judgment was rendered alongside the findings of fact and conclusions of law in which the district court failed to adequately consider its delays. There was no reasonable time during which Brito could raise such an argument, except on reconsideration.

Assuming, therefore, that this argument was sufficiently preserved, we ask whether the district court

needed to consider the delay. The Supreme Court provided insight in *Lozano v. Montoya Alvarez*, 572 U.S. 1, 134 S.Ct. 1224, 188 L.Ed.2d 200. There, the child's mother left the United Kingdom with her child without informing the father of her intended destination. *Id.* at 8, 134 S.Ct. 1224. Because the mother did not inform the father of her whereabouts, and because he could not locate her, he was unable to file a Petition for Return of Child for over sixteen months. *Id.* Presented with an argument that the mother's intentional concealment of the child should have equitably tolled the one-year filing timeline for the well-settled exception, the Court held that it was "unwilling to apply equitable tolling principles that would, in practice, rewrite the treaty." *Id.* at 17, 134 S.Ct. 1224. Instead, the Court expressed that, similar to the approaches of other signatory nations' courts, "concealment may be taken into account in the factual determination whether the child is settled." *Id.* After all, "steps taken to promote concealment can . . . prevent the stable attachments that make a child 'settled.'" *Id.*

Therefore, delay may be considered through the established factors. In finding that concealment could prevent a child from being well-settled, the Supreme Court cited various cases, all of which considered concealment within the *Hernandez* factors. *E.g.*, *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363-64 (M.D. Fla. 2002) (children lived in seven locations in eighteen months); *Wigley v. Hares*, 82 So. 3d 932, 942 (Fla. App. 2011) (mother intentionally kept the child from participation in community activities, sports, or church); *In re Coffield*, 96 Ohio App.3d 52, 644 N.E.2d 662, 666 (1994) (child withheld

from school and organized activity). These cases, and the Supreme Court's favorable citation thereto, do not stand for the proposition that a delay dampens post-petition evidence presented in favor of a well-settled finding. To the contrary, if an abducting parent intentionally delays proceedings through active concealment (or otherwise), those acts are considered through the lens of the well-settled factors, including the child's exposure to the environment and home stability. This interpretation tracks with *Hernandez*, our governing standard on the well-settled defense.[18] If delay were an independent consideration, it would have been listed among the several factors. It was not. To the extent that *Lozano* extended those considerations, it did so by incorporating time into the existing inquiry.[19]

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18. It also comports with the approach of the only other circuit court to consider this issue. In *da Costa*, the First Circuit faced the argument that reliance *solely* on post-petition evidence "does not align with the reasoning behind the now settled defense." 94 F.4th at 181. But the court held that "the Convention itself gives a strong indication that post-petition evidence remains important." *Id.* at 182. Specifically, it noted that "[t]he phrase 'now settled'—the wording of which itself suggests an emphasis on the present—is introduced in the context of post-petition circumstances without reference to pre-petition circumstances." *Id.* It concluded that one would have expected the drafters to have "expressed that intent more explicitly in the text" if pre-petition evidence were required. *Id.* at 183. This comports with the plain text of the treaty.

19. *Lozano* works hand-in-hand with a related federal regulation, shedding light on how to consider time delays. *See* Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494, 10509 (Mar. 26, 1986) ("The reason for the passage of time, which may have made it possible for the

So, the question is whether the district court erred in failing to consider the contributions of the delays when analyzing the seven aforementioned factors. Brito asserts that some evidence would not be considered but for the delays, including that A.F. would have lived in Texas for a shorter period of time, would not have gone to school for as long, would not have participated in the community as much, and would not have seen a doctor or begun to learn English. But, for all of these arguments, Brito never mentions how the delays impacted the specific criteria that the court was to consider under *Hernandez.* None of his examples show that Castro kept A.F. from participating in the community, going to school, meeting friends, living in a stable home, or otherwise growing settled in Texas. Instead, the additional time resulted in A.F.'s schooling, at which she has excelled, her participation in community functions, and her establishment of friendships and relationships in Texas. The delay does not cut against a finding that A.F. was well-settled in Texas.

As to the expediency requirement, Brito is correct that a six-week goal exists: "Article 11 of the Hague Convention contemplates an immediate emergency hearing in international child abduction cases and a judicial decision within six weeks." *Lops v. Lops*, 140

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child to form ties to the new country, is also relevant to the ultimate disposition of the return petition. If the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating a long search for the child and thereby delayed the commencement of a return proceeding by the applicant, it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations.").

F.3d 927, 944 (11th Cir. 1998). But he makes no showing that the Convention or the ICARA *requires* a judicial determination in six weeks (or as close thereto as possible). As the Eleventh Circuit noted, Article 11 contemplates, but does not demand, an immediate emergency hearing. *Id.* The Convention states that the judicial authorities "*shall* act expeditiously in proceedings for the return of children." Hague Convention, art. 11 (emphasis added). But, as for relief, it only provides that if the judicial authority has not yet reached a decision in six weeks, the applicant "shall have the right to request a statement of the reasons for the delay." *Id.*

There is no indication in the record or the briefing that Brito sought such relief. Even if he did request a statement, the answer would have been clear. His briefing and underlying requests for reassignment demonstrate as much. He filed the petition over one year after A.F.'s removal, litigated in the improper district for part of the time, and the judge to whom he was assigned had no trial availability for months. Ultimately, if a district court is too dilatory in setting the trial, a party can follow "familiar judicial tools" and petition for a writ of mandamus; after all, "courts can and should take steps to decide these cases as expeditiously as possible." *Chafin*, 568 U.S. at 178-79, 133 S.Ct. 1017.[20]

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20. Brito did not move to expedite this appeal. While that does not impact the ultimate determination, *Chafin* advocates for prompt return of children "through the familiar judicial tools of expediting proceedings." 568 U.S. at 178, 133 S.Ct. 1017. It is true that "courts can and should take steps to decide these cases as expeditiously as possible." *Id.* at 179, 133 S.Ct. 1017. And

The district court did not err by not considering its delay, nor was it improper to set its trial date outside of the aspirational six-week time frame.

VI

Hague Convention cases are difficult and sad matters. I sympathize with Brito's inability to enter the United States to visit his child. But the Hague Convention does not permit a court to adjudicate the merits of custody disputes. *See England*, 234 F.3d at 271; 22 U.S.C. § 9001(b)(4). As difficult as it is to be separated from a child, A.F.'s relationship with Brito in Texas is no different than it was after he moved to Spain: all interactions are virtual. It is not our province to consider his ability to see A.F. She left Venezuela when she was three. Her entire life as she knows it—including the last three years—is in Texas, and she has grown well-settled.

The majority opinion today fails to provide sufficient deference to the district court and reshapes Hague Convention jurisprudence by creating a new emphasis on immigration. It relies on inferential leaps based on limited evidence to determine that a child—who lives a stable,

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"[e]xpedition will help minimize the extent to which uncertainty adds to the challenges confronting both parents and child." *Id.* at 180, 133 S.Ct. 1017. But "the Convention does not prescribe modes of, or time frames for, appellate review of first instance decisions." *Id.* at 181, 133 S.Ct. 1017 (Ginsburg, J., concurring). "It therefore rests with each Contracting State to ensure that appeals proceed with dispatch." *Id.* Brito could have—but chose not to—follow this oft-trodden, established judicial path.

happy, and enriching life in Texas—should be uprooted because of various hypothetical possibilities. This does not comport with our case law, nor does it fit within the purposes of the Hague Convention. I respectfully dissent.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, FILED MAY 8, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3 :23-CV-01726-E

JOSE LEONARDO BRITO GUEVARA, AND
BEATRIZ ZULAY GUEVARA FLORES,

Petitioners,

v.

SAMANTHA ESTEFANIA FRANCISCO CASTRO,

Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before the Court is Petitioners Jose Leonardo Brito Guevara's ("Petitioner Brito") and Beatriz Zulay Guevara Flores's ("Petitioner Guevara") Complaint and Petition for Return of Child (the "Petition") under the Hague Convention (the "Convention"), and its implementing United States legislation, the International Child Abduction Remedies Act (the "ICARA"). (ECF No. 1). Petitioners seek the return of the minor A.F., asserting that Respondent Samantha Estefania Francisco Castro ("Respondent") wrongfully removed her from Venezuela to the United States.

Appendix B

Beginning on March 21, 2024, the Court held a two-day bench trial and heard testimony from Petitioner Brito via Zoom in Spain and Petitioner Guevara via Zoom in Venezuela, and in-person testimony from Respondent. The minor subject to this suit for return—A.F.—was not present for the trial. After ample consideration of the petition, testimony, exhibits, briefing, and all arguments made, the Court now enters its Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52(a).[1]

I. BACKGROUND

A. Venue

On April 19, 2023, Petitioners filed the Petition in federal court, originally assigned to Judge Sean D. Jordan of the Eastern District of Texas. Judge Jordan held a hearing on Petitioners' motion for temporary restraining order on May 2, 2023, and subsequently granted Petitioners' motion. After granting a few motions to extend the TRO, Judge Jordan held a hearing for Petitioners' motion for preliminary injunction on June 1, 2023. As Respondent had not yet been located or served, Judge Jordan granted the preliminary injunction. On August 1, 2023, Judge Jordan concluded that A.F. was located in the Northern District of Texas, Dallas Division on April 19, 2023—the day the Petition was filed. Thus,

1. To the extent that any finding of fact is more aptly characterized as a conclusion of law, or any conclusion of law is more aptly characterized as a finding of fact, the Court adopts it as such.

this case was transferred to the Northern District of Texas—specifically this Court—on August 1, 2023, as venue is proper "where the child is located at the time the petition is filed." *See* 42 U.S.C. § 11603(b).

B. Pretrial Motions

The Court held a bench trial on March 21, 2024, and March 22, 2024, at which time there were three pending motions before the Court: (i) Respondent's motion for summary judgment, (ECF No. 75), filed on December 31, 2023, asserting that Petitioner Guevara lacked custody rights as to A.F.; (ii) Respondent's motion in limine, (ECF No. 100), filed on February 22, 2024; and (iii) Petitioners' motion to exclude expert testimony, (ECF No. 121), filed on March 15, 2024. The Court addressed all three motions during the pretrial hearing held on March 18, 2024, and will now summarize the Court's conclusions.

The Court **denied** Respondent's motion for summary judgment as to Petitioner Guevara, concluding a genuine dispute of material fact existed.[2] (ECF No. 75). After oral argument, the Court **denied** Respondent's motion in limine in its entirety, (ECF No. 100), and **granted** Petitioners' motion to exclude expert testimony, as Respondent untimely designated the witness—Nelson Leon—as an expert. (ECF No. 121).

2. The Court will more fully address the issue of whether Petitioner Guevara has custody right in the analysis below, but for clarity purposes, the motion is deemed denied.

Appendix B

C. Summary of Claims and Defenses of Each Party[3]

1. Petitioners' Claims

This action has been filed pursuant to the United Nations Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention"),T.I.A.S. No. 11670, 19 I.L.M. 1501, and the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. § 9001 et seq., seeking the immediate return to Venezuela of Petitioner Mr. Brito's minor daughter and Petitioner Ms. Guevara's minor granddaughter, A.F., who was removed from Venezuela and then wrongfully retained in the United States by Respondent. In accordance with 22 U.S.C. § 9007, Petitioners also request that this Court award all necessary expenses incurred by or on behalf of Petitioners, including court costs, legal fees, transportation costs related to the return of the Child, and any and all other reasonable and necessary fees incurred during the course of proceedings in this action.

2. Respondent's Claims

Respondent Ms. Castro generally denies Petitioners' allegations and that they are entitled to the relief sought in this action. In addition, Respondent asserts the following specific defenses: (1) Ms. Guevara has no basis for claiming a custody right with respect to A.F.; (2) the

3. The following information is taken verbatim from the Parties' Proposed First Amended Joint Pretrial Order. (ECF No. 126).

removal action was not commenced within one year of the allegedly wrongful removal of A.F., and A.F. is well-settled in her new environment; (3) Petitioners were not actually exercising any purported custody rights at the time of the alleged removal or retention, consented or acquiesced to the removal, and/or have not exercised or tried to exercise any purported custody rights after removal; and (4) there is a grave risk that A.F.'s return will expose her to physical or psychological harm or otherwise place her in an intolerable situation.

II. FINDINGS OF FACT

A. Agreed Findings of Fact[4]

The following facts are stipulated to by the Parties:

1. A.F. was born on May 3, 2018, in Yaracuy, Venezuela.

2. A.F. is a Venezuelan citizen.

3. A.F. is not a United States citizen.

4. Ms. Castro is A.F.'s biological mother.

5. Ms. Castro is a Venezuelan citizen.

6. Ms. Castro is not a United States citizen.

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4. The following "Agreed Findings of Fact" come verbatim from the Parties' Proposed First Amended Joint Pretrial Order. (ECF No. 126).

7. Ms. Castro currently lives in the United States.

8. Ms. Castro has lived in the United States since December 2021.

9. Mr. Brito is A.F.s biological father.

10. Mr. Brito is a citizen of both Venezuela and Spain.

11. Mr. Brito is not a United States citizen.

12. Mr. Brito currently lives in Spain.

13. Mr. Brito has lived in Spain since August 2021.

14. Mr. Brito visited the United States in 2018.

15. Ms. Castro and Mr. Brito were never married.

16. Ms. Guevara is Mr. Brito's mother and A.F.'s paternal grandmother.

17. Ms. Guevara is a citizen and resident of Venezuela.

18. Ms. Guevara has resided at San Jose calle 19 con Carrera 19, Yaritagua Estado Yaracuy, Venezuela since before A.F. was born.

19. After A.F. was born and until July 19, 2019, Mr. Brito, Ms. Castro, and A.F. resided in Ms. Guevara's home with Ms. Guevara in Venezuela.

20. In August 2021, Mr. Brito, alone, moved from Venezuela to Madrid, Spain.

21. Mr. Brito has not been back to Venezuela since he moved to Spain.

22. On November 27, 2021, Ms. Castro and A.F. left Venezuela.

23. On November 30, 2021, Ms. Castro and A.F. presented themselves to the United States Border Patrol in San Luis, Arizona.

24. Prior to November 2021, A.F. had lived only in Venezuela.

25. On January 20, 2022, Ms. Guevara filed with the Venezuelan Central Authority for the Discharge of the Hague Convention on Civil Aspects of the International Child Abduction of 25 October 1980 the Application Form (the "Hague Application") regarding A.F.

26. Ms. Castro does not currently have Lawful Permanent Residence status (also commonly referred to as a "Green Card") in the United States.

27. A.F. does not currently have Lawful Permanent Residence status (also commonly referred to as a "Green Card") in the United States

28. Ms. Castro and A.F. have actively pending asylum applications.

29. Ms. Castro and A.F. are currently awaiting their asylum interview with USCIS.

30. Mr. Otton Rodriguez has been Ms. Castro's romantic partner since May 2021.

31. Mr. Otton Rodriguez has an actively pending asylum application with the USCIS.

32. Ms. Castro and A.F. resided with Mr. Rodriguez at 940 W. Round Grove Road, Apt. 121, Lewisville, Texas 75067 from December 4, 2021, until October 28, 2022.

33. Ms. Castro and A.F. have resided with Mr. Rodriguez at 15480 Dallas Parkway, Apt. 3031, Dallas, Texas 75248 from October 28, 2022.

34. Ms. Castro has held the following employments in the United States:

a. Cynergy

    i. 4055 Corporate Dr., #400, Grapevine, TX 76051

    ii. Approx. December 2021 – February 2022

iii. $12/hr

iv. Est. 40 hrs/week

b. Great Wolf Lodge

i. 100 Great Wolf Dr, Grapevine, TX 76051

ii. Approx. March 2022 – July 2022

iii. $16/hr

iv. Est. 45 hrs/week

c. Residence Inn

i. 755 E Vista Ridge Mall Dr, Lewisville, TX 75067

ii. Approx. September 2022 – June 2023

iii. $14/hr

iv. Est. 45 hrs/week

d. Paycom

i. 3489 State Hwy 121, Grapevine, TX 76051

ii. Approx. June 2023 – Present

iii. $16.20/hr

iv. Est. 40 hrs/week

35. Between December 2021 and October 2022, A.F. received daily care from Maria de los Angeles de Alvarado at 1845 Chisholm Trail, Lewisville, Texas 75077.

36. On November 20, 2022, Ms. Castro opened her first bank account in the United States.

37. On February 21, 2023, the USCIS granted Mr. Otton Rodriguez Temporary Protected Status under Section 244 of the Immigration and Nationality Act.

38. On April 19, 2023, Petitioners commenced the instant proceeding.

39. On May 22, 2023, the USCIS issued employment authorization documentation for Ms. Castro.

40. On May 31, 2023, the USCIS issued employment authorization documentation for A.F.

41. On August 14, 2023, A.F. began attending kindergarten fulltime at George Herbert Walker Bush Elementary School, 3939 Spring Valley Road, Addison, Texas 75001.

42. On August 14, 2023, A.F. saw her primary care physician, Dr. Maria Harris, 8112 Spring Valley Road, Dallas, Texas 75240, for a routine health examination and immunizations.

43. From October 2022 until beginning at George Herbert Walker Bush, A.F. received daily care from Aliria Xiomaria Castro Torreyes at 15417 Preston Rd., Apt. 2157, Dallas, TX 75248.

44. Mr. Brito and Ms. Guevara did not personally inform Ms. Castro of the Lawsuit prior to filing the Lawsuit.

45. Mr. Brito and Ms. Guevara did not personally inform Ms. Castro of the Lawsuit prior to Ms. Castro accepting service through counsel.

B. Other Findings of Fact

1. A.F. continued to routinely interact with both Respondent and Petitioner Guevara after July 19, 2019, but the location of her actual residence at that time is uncertain.

2. Respondent had mentioned to Petitioners that she was considering traveling to the United States prior to November 27, 2021, but did not explicitly inform them that she was planning on taking A.F with her.

3. Petitioner Brito did not give Respondent permission to remove A.F. from Venezuela to the United States.

4. Petitioner Brito provided ample emotional and financial support to A.F. while she resided in Venezuela prior to her removal.

5. Respondent and A.F. surrendered themselves to border patrol immediately upon entry into the United States.

6. A.F. has consistently had stable housing in the United States, having only lived at two different locations since arriving in Texas.

7. Respondent is financially secure and amply provides for A.F., with the help of her partner, Mr. Otton Rodriguez.

8. Mr. Otton Rodriguez cares deeply for A.F. and acts as a father-figure in her life.

9. A.F. has formed significant connections to her environment in Texas—stronger than her connections to Venezuela.

Appendix B

III. CONCLUSIONS OF LAW

A. Agreed Conclusions of Law[5]

1. The International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. § 9001, *et seq*, is the United States' implementing legislation for the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention").

2. The Convention and ICARA are applicable in this case.

3. This Court has jurisdiction over this case under 22 U.S.C. § 9003(a) and 28 U.S.C. § 1331 because the case involves the allegedly wrongful removal of a child under the age of sixteen from her habitual residence in Venezuela to the United States.

4. A.F. was a habitual resident of Venezuela prior to her removal to the United States.

5. For purposes of the Convention, Petitioner Brito has at least some rights of custody over A.F. under Venezuelan law.

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5. The Following "Agreed Conclusions of Law' come verbatim from the Parties' Proposed Joint Pretrial Order. (ECF No. 126.

B. The Hague Convention and ICARA

The Hague Convention was specifically adopted to address "the problem of international child abductions during domestic disputes." *Abbott v. Abbott*, 560 U.S. 1, 8 (2010). "The Convention seeks to secure the prompt return of children wrongfully removed to or retained in any Contracting State, and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." *Abbott*, 560 U.S. at 8. At the core of these objectives is the return remedy: "[w]hen a child under the age of 16 has been wrongfully removed or retained, the country to which the child has been brought must order the return of the child forthwith, unless certain exceptions apply." *Abbott*, 560 U.S. at 8. A removal is "wrongful" when the removal of the child violates "rights of custody." *Abbott*, 560 U.S. at 8. "The return remedy determines the country in which the custody decision is to be made; it does not make that decision." *Sanchez v. R.G.L.*, 761 F.3d 495, 503 (5th Cir. 2014). By focusing on the return of the child, the Hague Convention seeks to "restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court." *England v. England*, 234 F.3d 268, 271 (5th Cir. 2000).

In 1988, Congress enacted ICARA—the legislation implementing the Hague Convention in the United States. *See Abbott*, 560 U.S. at 9. Under ICARA:

> Any person seeking to initiate judicial proceedings under the Convention for the return

> of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

22 U.S.C. § 9003(b). Congress has expressly declared that the provisions in ICARA "are in addition to and not in lieu of the provisions of the Convention." 22 U.S.C. § 9001(b)(2). "The petitioner bears the burden of showing, by a preponderance of the evidence, that the removal or retention was wrongful, § 11603(e)(1)(A); the respondent, of proving any affirmative defenses, § 11603(e)(2)." *Sealed Appellant v. Sealed Appellee*, 394 F.3d 338, 342 (5th Cir. 2004).

Both the United States and Venezuela are signatories to the Convention, and A.F. is a child under the age of sixteen who was removed from her country of habitual residence. Thus, the Convention and ICARA are applicable to this case.[6]

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6. The Court also notes that during Pretrial on March 18, 2024, the Court took judicial notice of the following as permitted by Article 14 of the Convention: (1) the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention"); (2) the International Child Abduction Remedies Act ("ICARA"); (3) the Hague Convention on the Civil Aspects of International Child Abduction, Text and Legal Analysis; (4) the status of the United States of America and Venezuela as signatories to the

C. Petitioners' Prima Facie Case

A petitioner seeking the return of a child under ICARA has the burden of proof to establish by a preponderance of the evidence that "the child has been wrongfully removed or retained within the meaning of the Convention." 42 U.S.C. § 11603(e)(1)(A). A removal or retention is wrongful when: (1) "it is in breach of rights of custody attributed to a person . . . either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention"; and (2) "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." Convention, art. 3; *see Sealed Appellant*, 394 F.3d at 343.

Thus, to prove a prima facie entitlement to the return remedy, Petitioners must show by a preponderance of the evidence that: (1) Venezuela was A.F.'s habitual residence immediately prior to removal; (2) both Petitioner Brito and Petitioner Guevara had "rights of custody" under Venezuelan law that were violated by the removal; and (3) both Petitioner Brito and Petitioner Guevara were exercising their rights of custody at the time Respondent removed A.F. to the United States. If Petitioners meet this burden, A.F. will be returned to Venezuela as the ICARA

Hague Convention on the Civil Aspects of International Child Abduction; (5) Public Notice 957; (6) The National Assembly of the Bolivarian Republic of Venezuela G.O. 5,859 – Organic Law for the Protection of Children and Adolescents ("Organic Law"); and (7) the Venezuelan Constitution, as shown in ECF No. 22-3 in the instant matter.

requires the prompt return of a child who is wrongfully removed or retained, "unless one of the narrow exceptions set forth in the Convention applies." 22 U.S.C. § 9001(a)(4).

1. Habitual Residence

"A child's habitual residence depends on the particular circumstances of each case"—such inquiry is fact-driven. *Monasky v. Taglierei*, 589 U.S. 68, 79 (2020). Here, however, the Court need not engage in such an inquiry as the Parties stipulated that Venezuela was A.F.'s habitual residence prior to her removal to the United States. Thus, Petitioners have established the first element of their prima facie case.

2. Rights of Custody

The Convention defines "rights of custody" to "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." *Abbott*, 560 U.S. at 11 (quoting Convention, art. 5(a)). A parent is not required to have sole or exclusive custody over the child—"the Convention recognizes that custody rights can be decreed jointly or alone." *Abbott*, 560 U.S. at 11. Whether rights of custody have been breached is determined "under the law of the State in which the child was habitually resident immediately before the removal or retention." Convention, art. 3(a). Accordingly, the Court analyzes Venezuelan law to determine if the removal of A.F. from Venezuela breached Petitioners' rights of custody.

Appendix B

(i) Petitioner Brito

The Parties stipulated to the fact that Petitioner Brito had at least some rights of custody as to A.F. under Venezuelan law, thus Respondent's removal of A.F. without Petitioner Brito's explicit permission—as evidenced by testimony and exhibits at trial—violated his rights of custody. Accordingly, the Court concludes that Petitioner Brito has satisfied the second element of his prima facie case by a preponderance of the evidence.

(ii) Petitioner Guevara

The issue of whether Petitioner Guevara had rights of custody under Venezuelan law as the paternal grandmother to A.F. was hotly contested throughout these proceedings. Although disputed whether an oral custody agreement was in place, neither Petitioners nor Respondent put forth evidence of a formal custody agreement. "When there is no such agreement between parents, courts must apply the laws of the country of the child's habitual residence to determine if the non-removing parent had rights of custody within the meaning of the Convention." *Sealed Appellant*, 394 F.3d at 343. "The Court may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to specific procedures for the proof of that law or for the recognition of foreign decision which would otherwise be applicable." *Soonhee Kim v. Ferdinand*, 287 F. Supp. 3d 607, 624 (E.D. La. 2018) (quoting Hague Convention, art. 14); *see also* Fed. R. Civ. P. 44. Further, "[t]he Court may consider

affidavits of foreign law to establish rights of custody." *Soonhee Kim*, 287 F. Supp. 3d at 624 (quoting *Whallon v. Lynn*, 230 F.3d 450, 455 (1st Cir. 2000)).

Under Venezuelan law,[7] grandparents are not given rights of custody, nor has Petitioner Brito or Respondent relinquished their custody rights. Thus, in order for Petitioner Guevara to have rights of custody over A.F., one of the special circumstances awarding a third-party custody would have to apply. Article 400 of *Ley Orgemica* titled "Delivery by parents to a third party" states:

> When a boy, girl or adolescent has been handed over for upbringing by his or her father or mother, or by both, to a third party capable of exercising Parenting Responsibility, the judge, prior to the respective report, will consider this as the first option for granting family placement for that child or adolescent.

Petitioners' point to a few different judicial rulings to support their conclusion that Petitioner Guevara did indeed have rights of custody over A.F. The first is the Protective Measure for Family Placement ("Protective Measure") granted to Petitioner Guevara after A.F.'s removal from Venezuela. However, because this was petitioned for and granted after A.F.'s removal—specifically a month after—it is irrelevant to the custody determination at *the time of removal.* Thus, it cannot suffice to establish Petitioner Guevara had custody rights.

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7. The applicable Venezuelan law is *Ley Orgánica para la Protection del Niño, Niñas y Adolescentes of 1998* ("*Ley Orgánica*").

Second, Petitioners contend that Petitioner Guevara possessed a power of attorney—authorized by Petitioner Brito—entitling her to make decisions on behalf of A.F., including travel authorizations. The Court notes that the document referenced to allegedly convey such power of attorney as to Petitioner Guevara was in Spanish and an English translation was not provided. It is not the Court's duty to translate pertinent documents for the parties. Thus, Petitioners provide no evidentiary support to this proposition, and such bare legal conclusion cannot suffice to bestow custody rights upon an individual.

Further, Petitioners offered evidence of a Certificate from the Council for Protection of Children and Adolescents in Venezuela, presented to Petitioner Guevara. However, all such certificate stated is that Respondent did not have the authority to "undertake any journey inside or outside the Country." Petitioners also introduced another document from the same Council, but it merely conveyed notice for Respondent to appear for a hearing. Neither of these documents give Petitioner Guevara rights of custody under Venezuelan law.

It is a petitioner's burden to prove each element of her prima facie case by a preponderance of the evidence, and here, Petitioner Guevara fails to meet that burden. Thus, as Petitioner Guevara cannot prove she had rights of custody as to A.F. under Venezuelan law, her prima facie case must fail. The Court pretermits discussion of the third element—exercising rights of custody—as to Petitioner Guevara as she had no custody rights to exercise.

3. Exercising Custody at Time of Removal

The Convention does not define the term "exercise," but courts have construed the term broadly to avoid courts charged with deciding "exercise" from crossing the line into "consideration of the underlying custody dispute." *Sealed Appellant*, 394 F.3d at 344. "If a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to exercise those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child." *Sealed Appellant*, 394 F.3d at 345. "Accordingly, in the absence of a ruling from a court in the child's country of habitual residence, when a parent has custody rights under the laws of that country, even occasional contact with the child constitutes exercise of those rights." *Sealed Appellant*, 394 F.3d at 345. "To show failure to exercise custody rights, the removing parent must show the other parent has abandoned the child." *Sealed Appellant*, 394 F.3d at 345.

(i) Petitioner Brito

Although Petitioners and Respondent disagree on the amount of involvement Petitioner Brito had with A.F., the Court concludes Petitioner Brito did not "clearly and unequivocally" abandon A.F. Petitioner Brito both testified and presented evidence demonstrating that he financially supported A.F. after he left for Spain, but before Respondent removed A.F. to the United States. Petitioner Brito also communicated with A.F. via video calls and voice messages through Petitioner Guevara's

phone and Petitioner Brito's sisters' phones during this time. Petitioner Brito was in constant contact with his mother, Petitioner Guevara, who spent much time with A.F., ensuring she was provided and cared for. Furthermore, Respondent contended that Petitioner Brito made a limited effort to maintain a relationship with A.F. and provided minimum financial support over the last four years. Such evidence constitutes at minimum "occasional contact." Thus, Petitioner Brito did not "clearly and unequivocally" abandon A.F. Therefore, Petitioner Brito was exercising his custody rights at the time of removal.

In sum, Petitioner Brito has successfully proven by a preponderance of evidence all three elements necessary to make a prima facie case for the return of A.F. to Venezuela.

D. Affirmative Defenses

Even when a court concludes a wrongful removal has occurred, "a return order is not automatic." *Abbott*, 560 U.S. at 22. After a petitioner has established by a preponderance of the evidence that the removal of a child was wrongful, the burden shifts to the respondent to prove that one of the five narrow exceptions—or affirmative defenses—apply. § 9003(e)(2). If the respondent prevails on any of these defenses or exceptions, a court may decline to order the return of the child to the country of his habitual residence. *See Sealed Appellant*, 394 F.3d at 343.

Respondent asserts three affirmative defenses: (1) Petitioners consented to or acquiesced in the removal of A.F; (2) returning A.F. to Venezuela would expose her

to a grave risk of physical or psychological harm; and (3) Petitioners waited over a year to file suit and A.F. is well-settled in her new environment in Texas. The first and third defenses asserted by Respondent must be proven by a preponderance of the evidence, while the second defense requires proof of clear and convincing evidence.

1. Consent/Acquiescence

The Convention provides that a child may not be ordered to return to their country of habitual residence if the removing parent establishes that the petitioner "consented to or subsequently acquiesced in the removal or retention." Convention, art. 13(a). "Under Article 13(a), the consent defense involves the petitioner's conduct prior to the contested removal or retention, while acquiescence addresses whether the petitioner subsequently agreed to or accepted the removal or retention." *Larbie v. Larbie*, 690 F.3d 295, 308 (5th Cir. 2012). For the consent defense, the focus of the inquiry is what the "petitioner actually contemplated and agreed to in allowing the child to travel outside the home." *Larbie*, 609 F.3d at 309. On the other hand, "acquiescence generally requires a more formal type of evidence, such as a custody order or other convincing renunciation of rights." *Larbie*, 609 F.3d at 309.

Respondent asserts that Petitioner Brito shared Respondent's desire to bring A.F. to the United States. Although that desire might have once been shared, at the time of removal, Petitioner Brito did not consent to A.F.'s removal. Petitioners presented evidence of text conversations between Petitioner Brito and Respondent

prior to the removal in which Petitioner Brito—repeatedly and emphatically—stated that he disagreed with Respondent taking A.F. to the United States with her. Petitioners further emphasize that—at most—Petitioner Brito shared the desire to bring A.F. to the United States *legally in the future.* Thus, Petitioner Brito's conduct prior to A.F.'s removal fully supports a finding that he did not consent to removal.

As to acquiescence, the bar is slightly higher, as it has been held to require "an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time." *Munoz v. Ramirez*, 923 F. Supp. 2d 931, 957 (W.D. Tex. 2013). When examining an acquiescence defense, "each of the words and actions of a parent during the separation are not to be scrutinized for a possible waiver of custody rights." *Munoz*, 923 F. Supp. 2d at 957. Respondent asserts this defense mainly to Petitioner Guevara as she contends Petitioner Brito "consented" to the removal. The Court agrees with Respondent that acquiescence as to Petitioner Guevara is irrelevant as she has no custody rights of A.F. But, as to Petitioner Brito, Respondent argues that his lack of efforts to facilitate the return of A.F. to Venezuela constitutes acquiescence. However, there is no evidence of such: Petitioner Brito has not renounced his rights, there is no testimony of such in a judicial proceeding, and he has not displayed a consistent attitude of acquiescence over a significant period of time. The lack of formal evidence is detrimental to Respondent's defense—she fails to prove

Petitioner Brito consented or acquiesced to the removal of A.F. from Venezuela by a preponderance of the evidence.

2. Grave Risk

Under Article 13(b) of the Convention, a court may decline to return a child to her habitual residence if there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Convention, art. 13(b). Findings of grave risk are rare—the respondent must "show that the risk to the child is grave, not merely serious." *Soto v. Contreras*, 880 F.3d 706, 710 (5th Cir. 2018). "The principles underlying the Hague Convention require the grave risk must be narrowly construed; otherwise, a broad interpretation would cause the exception to swallow the rule and transform the Convention into an arena for custody disputes." *Soto*, 880 F.3d at 710–11.

There is no evidence before the Court of physical or psychological abuse present in Venezuela that A.F. would be subjected to if returned. In fact, Respondent could not point the Court to any pertinent evidence demonstrating any risk of harm. Respondent merely offered that the return of A.F. would place A.F. in an "intolerable situation" as she is only five years old and no one with any custody rights of her has been to Venezuela since 2021. As the burden for this defense is extremely high—clear and convincing evidence—and Respondent offered next to zero evidence to prove the presence of "grave risk of harm," the Court concludes Respondent has failed to establish this defense.

3. Well-Settled

When a petition for return of a child is commenced in a court more than one year from the date of removal, the respondent can assert an affirmative defense and prevent removal back to the country of habitual residence if respondent proves by a preponderance of the evidence that "the child is now settled into the new environment." Convention, art. 12. "The underlying purpose of this defense is to recognize that at some point a child may become so settled in a new environment that return is no longer in the child's best interests." *Hernandez v. Garcia Pena*, 820 F.3d 782, 787 (5th Cir. 2016). As the term "settled" is not defined in the Convention or implementing legislation, "[t]he State Department has explained that the term requires 'nothing less than substantial evidence of the child's significant connections to the new country,' and that claims should 'be considered in light of evidence . . . concerning the child's contacts with and ties to his or her State of habitual residence.'" *Hernandez*, 820 F.3d at 787 (quoting Hague International Child Abduction Convention; Text and Legal Analysis (State Legal Analysis), 51 Fed. Reg. 10,494, 10,509 (1986)).

The Fifth Circuit has held that the following factors should be considered when analyzing the applicability of this defense:

> (1) the child's age; (2) the stability and duration of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child has friends

> and relatives in the new area; (5) the child's participation in community or extracurricular activities; (6) the respondent's employment and financial stability; and (7) the immigration status of the respondent and child.

Hernandez, 820 F.3d at 787–88. In particular, the Fifth Circuit has emphasized that "immigration status is neither dispositive nor subject to categorical rules, but instead is one relevant factor in a multifactor test." *Hernandez*, 820 F.3d at 788. Analysis of the well-settled defense is an "individualized, fact-specific inquiry"—unique to every case. *Hernandez*, 820 F.3d at 789.

It is undisputed that Respondent and A.F. left Venezuela on November 27, 2021. It is also undisputed that Petitioners filed the Petition on April 19, 2023. Thus, the Petition for the return of A.F. was filed more than one year after the date of the removal of A.F. from Venezuela. Accordingly, the question here becomes whether Respondent has proven by a preponderance of the evidence that A.F. is now well settled in her new environment in Texas.

After thorough consideration of the factors listed above, the Court concludes the evidence demonstrates that A.F. has formed significant connections to her new environment in Texas. The only two factors that do not support Respondent's defense are the first and seventh—neither of which are dispositive. Here, as A.F. is only five years old, she is a "very young child not able to form the same level of attachments and connections to a new

environment as an older child." *Hernandez*, 820 F.3d at 789. Thus, the first factor—the child's age—does not support a finding of well settled. As to the seventh factor, it is undisputed that both Respondent and A.F. do not have Lawful Permanent Residence status in the United States, but they both have actively pending asylum applications and are currently awaiting their asylum interview with USCIS. In fact, Respondent and A.F. surrendered themselves to border patrol immediately upon entry into the United States. Thus, even though they have not achieved "Green Card" status, Respondent and A.F. are in the midst of the proper procedures to achieve lawful status in the United States. Further, both Respondent and A.F. have received employment authorization documentations from the USCIS. Aside from those two non-dispositive, lukewarm factors, the other five factors overwhelmingly support a finding of well settled.

As to factor two, A.F. has lived in Texas—specifically the Dallas area—since arriving in the United States. A.F. has lived with Respondent and Respondent's partner, Mr. Otton Rodriguez, at two locations during this period of time. Thus, A.F. has lived in the Dallas area for over two years with stable housing throughout the entire duration as she was subject to just one move since her arrival in the United States. The third and fourth factors the Court must consider are whether the child attends school or daycare consistently, and whether she has friends or relatives in the new area. A.F. received daily care from one individual from the time she arrived in the United States until October 2022, and then from a family member from October 2022 until she started kindergarten in August

2023, which she presently attends. A.F. attends school with her cousin and they both go to her aunt's house for two hours after school every day. A.F. has many friends outside of her family with whom she has been photographed. Evidence was also presented of A.F.'s nomination for the Gifted and Talented Program at school—where she receives bilingual education—as well as evidence of her report cards, which displayed continuing academic improvement. Thus, A.F. has consistently attended daycare and/or school, and has relatives and friends in the area whom she interacts with routinely.

The fifth factor pertains to the child's participation in extracurricular or community activities. The evidence presented to support this factor was overwhelming: A.F. regularly attends church in Dallas with Respondent and Mr. Rodriguez; she has a primary care physician whom she sees regularly; she goes on trips with her family, such as to Disney World; she has playdates with friends from school; she is learning English; she plays at community playgrounds; she goes swimming and attends birthday parties, to state a few. Lastly, factor six pertains to the respondent's financial and employment status. Here, Respondent has held four different jobs since arriving in the United States, with each subsequent job having a higher salary than the one before. She has been gainfully employed since arriving in the United States and provides for A.F. As mentioned above, A.F. and Respondent live with Mr. Rodriguez who contributes financially. Respondent and Mr. Rodriguez split their rent payment, Respondent makes monthly car payments for Mr. Rodriguez's car that they share, Respondent has

healthcare for herself and A.F., and Respondent and Mr. Rodriguez share the cost of utilities. On questioning from Petitioners, Respondent further asserted that if she was to ever split from Mr. Rodriguez, she and A.F. would move to a cheaper apartment so their cost of living was lower and her inability to split payments would be a non-issue.

Viewing each factor as part of a very fact-specific, multi-factor test, the Court concludes Respondent has met her burden of proving by a preponderance of the evidence that A.F. is well settled in her new environment in Texas. Thus, it is no longer in the best interests of A.F. to return to Venezuela, where she has minimal connections and no memories of living there. The Court Orders that the minor, A.F., remain in the United States with Respondent.

IV. JUDGMENT

Although Petitioner Brito successfully established his prima facie case, the Court finds Respondent sufficiently established that A.F. is well-settled in Dallas. Thus, the Court finds it is in A.F.'s best interest to deny Petitioners' Hague Petition in support of the Convention's goal of not only protecting children from wrongful removal, but also protecting children from a second removal from a new environment to which they have become connected and settled. Accordingly, the Court hereby DENIES Petitioners' Petition for Return of Child under the Hague Convention. (ECF No. 1).

Appendix B

SO ORDERED: May 8, 2024.

/s/ Ada Brown
ADA BROWN
UNITED STATES DISTRICT JUDGE